SOUTH BUCKS DISTRICT COUNCIL v. PORTER [2001] EWCA Civ 1549 (12th October, 2001)

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IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
(1) ON APPEAL FROM THE QUEEN'S BENCH
Mr Justice Burton
(2) ON APPEAL FROM CHICHESTER COUNTY COURT
H.H. Judge Barratt QC
ON APPEAL FROM THE QUEEN'S BENCH
(3) Mr Justice McCombe
(4) H.H. Judge Brunning (sitting as a High Court Judge)

Royal Courts of Justice
Strand,
London, WC2A 2LL
12 October 2001

B e f o r e :

LORD JUSTICE SIMON BROWN
LORD JUSTICE PETER GIBSON
and
LORD JUSTICE TUCKEY

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(1) SOUTH BUCKS DISTRICT COUNCIL	**Respondent**
and	
PORTER	**Appellant**
(2) CHICHESTER DISTRICT COUNCIL	**Respondent**
and	
SEARLE AND OTHERS	**Appellants**
(3) WREXHAM COUNTY BOROUGH COUNCIL	**Respondent**
and	
BERRY	**Appellant**
(4) HERTSMERE BOROUGH COUNCIL	**Respondent**
and	
HARTY	**Appellant**

**(Transcript of the Handed Down Judgment of
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(1) Mr Timothy Straker QC & Mr Ian Albutt (instructed by Sharpe Pritchard of London WC1V 6HG) for the Respondent
Mr Charles George QC & Mr Stephen Cottle (instructed by Mr Christopher Johnson of the Community Law Partnership of Birmingham B4 6RP) for the Appellant
(2) Mr Timothy Straker QC & Mr Robin Green (instructed by Sharpe Pritchard of London WC1V 6HG) for the Respondent
Mr David Watkinson (instructed by Mr Christopher Johnson of the Community Law Partnership of Birmingham B4 6RP) for the Appellants
(3) Mr Timothy Straker QC & Mr Robin Green (instructed by Sharpe Pritchard of London WC1V 6HG) for the Respondent
Mr Richard Drabble QC & Mr Stephen Cottle (instructed by Mr Christopher Johnson of the Community Law Partnership of Birmingham B4 6RP) for the Appellant
(4) Mr Robert McCracken & Mr Gregory Jones (instructed by Beryl Foster, Head of Legal Services, Hertsmere BC) for the Respondent
Mr Richard Drabble QC & Mr Murray Hunt (instructed by Lance Kent & Co. of Chesham HP5 1EG) for the Appellant

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Judgment
As Approved by the Court

LORD JUSTICE SIMON BROWN:

1. These four appeals raise difficult questions of some general application as to how a court should approach the exercise of its power under s.187B of the Town and Country Planning Act 1990, the power on application by a local planning authority to grant an injunction to restrain a breach of planning control. S.187B provides by subsections (1) and (2):

> "(1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part.
> (2) On an application under sub-section (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach."

2. The appellants in each case are gipsies, living in mobile homes on land which they occupy in breach of planning control. In all four cases the court granted injunctive relief requiring them (whether immediately or otherwise) to move off site. At the heart of these appeals lies article 8 of the ECHR. It is not disputed that such removals constitute an interference with the gipsies' right to respect for their private life, family life and home within the meaning of article 8(1). But nor is it in dispute that the interference is "in accordance with the law" and is pursued "for the protection of the rights … of others" within the meaning of article 8(2), namely through the preservation of the environment.

3. The question ultimately arising in these cases is, therefore, whether the interference is "necessary in a democratic society", i.e. whether it answers to a "pressing social need" and in particular is proportionate to

the legitimate aim pursued. That, however, as all parties agree, is not in these cases a question for us: rather the question for us is whether the judges below correctly directed themselves. If they did, the appeals fail. If they did not, then, whether or not injunctions should properly be granted will have to be decided afresh at first instance on up-to-date facts.

4. The central issue for determination on the appeals is the extent to which the court itself on a s.187B application should exercise an independent judgment in deciding whether or not to grant an injunction. Five different counsel addressed us on the point. Their contentions as to the correct approach spanned a very wide spectrum. At one extreme Mr Watkinson submits that the court is bound to consider afresh all facts and matters including, indeed, all issues of policy as to whether planning permission should be granted and all questions of hardship were the gipsy to be removed. At the opposite end of the spectrum Mr Straker QC for three of the respondent authorities contends that, providing only that the planning authority has considered and struck the balance between the interests of the gipsy and those of the wider community and not reached a manifestly erroneous conclusion, an injunction should be granted unless there has been a material change in circumstances since the application was made. That, however, is not the approach contended for by Mr McCracken on behalf of the other respondent authority; such an approach, indeed, he himself describes as "uncompromising". But nor is Mr Watkinson's approach that contended for by Mr George QC and Mr Drabble QC on behalf of the other appellants; rather they accept that some deference must be paid to the planning judgments arrived at by the local planning authorities although, they submit, very considerably less deference than has hitherto been thought appropriate. Two of the judgments under appeal were given before the Human Rights Act 1998 came into force on 2 October 2000, two after that date. It is not now contended by the respondent authorities, however, that anything (save perhaps as to costs) should turn on that distinction. The question, therefore, arises in all four cases as to whether the hitherto established approach to s.187B is compliant with the 1998 Act. Mr Straker submits that it is. The appellants submit the contrary; indeed, they submit that even before the 1998 Act came into play the courts were taking too narrow a view of their discretion to withhold relief under the section.

5. Against that background it will readily be seen that the detailed facts of these cases are of secondary importance only on the appeals. True, "[i]n law context is everything," as Lord Steyn said in *Daly v Home Secretary* [2001] 2 WLR 1622, 1636. Whereas, however, the substantive decision whether to grant injunctive relief against these individual appellants will certainly depend upon their particular facts, the question whether the judges below directed themselves correctly upon the approach to the exercise of their discretion does not. The following very brief summary of the circumstance of each case will, therefore, suffice.

Porter v South Bucks District Council

6. Mr and Mrs Porter live in a caravan on a site known as Willow Tree Farm lying within the Green Belt at Iver in Buckinghamshire. The site was purchased by Mrs Porter in 1985 and since then has been occupied and used in breach of planning control. Mr Porter uses the land for horse dealing and breeding. Enforcement notices were first served in 1987. Planning permission for a detached dwellinghouse was refused in 1988. In November 1988 the appellant pleaded guilty to non-compliance with the enforcement notices and was fined £600. In 1992 planning permission for retention of a mobile home was refused and an appeal to the Secretary of State withdrawn. In 1993 planning permission for change of use from agricultural to mixed use including use as a private gipsy caravan site for 5 mobile homes was refused and again an appeal to the Secretary of State was withdrawn. Further enforcement notices were served in September 1993 requiring the destruction of various outbuildings and in July 1994 the appeal against these was dismissed although the inspector allowed 12 months for compliance. A fourth application for residential use of the site including retention of the mobile home and buildings was refused in November 1997 and in October 1998 the appeal against that refusal was dismissed by the inspector. A yet further application for planning permission was refused and the appeal against that refusal was due to be heard in September this year. The appellants' principal arguments for remaining on the land include the impossibility of finding suitable alternative accommodation, the suitability (as they contend) of horse-breeding for countryside use, and Mrs Porter's health problems: chronic asthma, severe generalised osteoarthritis and chronic urinary tract infection.

7. On 27 January 2000 Burton J granted the respondent Council injunctive relief requiring the appellants within one year to cease using the land for stationing caravans and storage and business purposes, to demolish the relevant outbuildings, and to remove the hardstanding.

Searle v Chichester District Council

8. This is the only one of the four appeal sites not in the Green Belt. It is, however, in an area of countryside where development is closely controlled. In May 2000 the appellants purchased the plot for £14,000 from a Mrs Collins, her prior application for outline planning permission for a detached bungalow and garage having been refused and her appeal against that refusal dismissed by the inspector in June 1999. Shortly after acquiring the land the appellants were advised by two of the respondent's enforcement officers that planning permission was needed to move a mobile home onto the land. The appellants agreed not to do this without permission and later repeated their assurance. These assurances notwithstanding, the appellants in mid-June 2000 brought two double unit mobile homes onto the land and took up residence. Within days the respondent's Area Development Control Committee resolved to apply for injunctive relief under s.187B(1). On 30 June 2000 Judge Barratt QC granted an injunction with immediate effect prohibiting the residential use of the land and ordering within 28 days the removal of the mobile homes, certain other structures and the hardcore base.

Berry v Wrexham County Borough Council

9. The appellant is a traditional gipsy traveller living with his wife and six children (variously aged between 4 and 20) in mobile caravans. For some years the family lived in poor conditions on an unofficial site owned by the respondent Council at Croessnewydd but in September 1999 that site was closed and they were evicted. They then reluctantly moved to another site owned by the respondents at Ruthin Road. Meantime, in August 1994, the appellant had acquired the appeal site, land lying within the Green Barrier (the Welsh equivalent of the Green Belt) near Wrexham, and had applied for planning permission to put a residential caravan on it. That application was refused by the Council in October 1994 as was a second such application in December 1995 and a third in July 1999. In September 2000, however, notwithstanding those earlier refusals of planning permission, the appellant left the Council's Ruthin Road site and moved his caravans and vehicles onto the appeal site. He did this because of a number of incidents of violence suffered by his family at the hands of other residents at the Ruthin Road site. In October 2000 the respondent authority resolved both to issue an enforcement notice and to apply for injunctive relief against the appellant under s.187B. In the event, no enforcement notice was issued until 31 July 2001. The s.187B application, however, was made immediately following the October resolution albeit its hearing was stayed by Astill J in November 2000 pending the decision of the ECtHR in *Chapman* (an authority to which I shall come later). The judgment in *Chapman* having been delivered on 18 January 2001, the application came before McCombe J on 12 February 2001 when an injunction was given requiring the appellant to remove all caravans and vehicles off the land by 20 April 2001.

Harty v Hertsmere Borough Council

10. The appellants are two of a group comprising six related gipsy families whose wish is to settle down rather than lead a travelling life so that their children can benefit from a conventional education. Many of the children attend local schools. In addition, several of the family group have health problems. The land they occupy is known as The Pylon Site within the Green Belt bordering Barnet Road at Potters Bar in Hertfordshire. The site has a long planning history. In 1990 enforcement notices were served against previous occupiers for changing its use to a caravan site and the appeals against those notices were dismissed by an inspector in December 1991 although the period for compliance was extended to 12 months. The site was then vacated. In 1994 the site was acquired by Mr Harty and again occupied, this time by families within the appellant group. After service upon Mr Harty of a fresh enforcement notice and a stop notice to prevent further operations including the removal of soil and the laying of hardcore, the site was again vacated. In January 1995 the site was reoccupied by the appellant families notwithstanding that planning permission for its use as a gipsy caravan site for six families had been refused in November 1994. Following the prosecution of Mr Harty under s.179(2) of the 1999 Act for breach of the enforcement notice

and a s.187B application for injunctive relief against the other appellants, a consent order was made on 28 June 1995 whereby the appellants undertook that in the event of Mr Harty's outstanding appeal against the refusal of planning permission being dismissed they would within 28 days of such dismissal remove all caravans, mobile homes and vehicles and would not return to the site. The appeal against the refusal of planning permission was dismissed on 18 September 1995 and the site was once again vacated. However, despite the appellants' undertaking not to return, they yet again re-occupied the site, arriving in stages between about August and October 2000. On 21 September 2000 an application was made for planning permission for change of use of the site to residential use for six mobile homes (each measuring 36 feet by 20 feet) and six touring caravans (for use while travelling). It was refused by the respondent authority on 13 February 2001 and the appellants' appeal against that refusal, due to have been heard by an inspector on 6 June 2001, was withdrawn. On 24 October 2000 the respondents had resolved to seek an injunction subject to counsel's advice about the implications of the Human Rights Act 1998. On 28 February 2001, following the respondent's refusal of planning permission, the s.187B application was made. On 13 March 2001 Judge Brunning ordered the appellants to cease using the land as a caravan or mobile home site and to remove from it all caravans, mobile homes and vehicles by 5 April 2001.

11. Against that broad factual background I now turn to the court's injunctive power under s.187B. The section was introduced into the 1990 Act by amendment in 1991. This followed a 1989 Report by Mr Robert Carnwath QC (as he then was) entitled Enforcing Planning Control which recommended a new power to grant injunctions against planning offenders as "a useful back-up to the statutory system in difficult cases", not least given the doubts then existing as to the circumstances in which injunctive relief was available under s.222 of the Local Government Act 1972.

12. It is convenient at this stage to see how the courts approached the exercise of these injunctive powers before the Human Rights Act was enacted. This approach is to be found in three decisions of the Court of Appeal. I start with *Mole Valley District Council v Smith* [1992] 3 PLR 22 which concerned the grant of injunctions against gipsies under s.222 and addressed the respective powers and duties of planning authorities and the courts. Lord Donaldson MR quoted with approval Hoffmann J's judgment in the court below:

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

13. Lord Donaldson then observed:

> "No doubt there are potential disadvantages for the public in moving the appellants off their existing sites if no other site is available, but where the balance of the public interest lies is for the respondent councils to determine and not for this court."

14. Noting the submission that the injunction should be refused on the ground that the councils were themselves in breach of their duty under s.6 of the Caravan Sites Act 1968 to provide adequate sites for gipsies residing in or resorting to their area (since repealed and replaced by a series of government circulars strongly encouraging local planning authorities to help meet the need for gipsy accommodation) Lord Donaldson said:

> "Suffice it to say that it is not for the courts to usurp the policy decision-making functions of the Secretary of State as it were by a side-wind."

15. Balcombe LJ agreed, adding:

> "The argument is that no injunction should be granted, or the operation of any injunction granted should be suspended, until the county council provides sufficient caravan sites for the use of gipsies. This is equivalent to saying that the appellants should be granted temporary planning permission for the use of their land pending the availability of sufficient authorised sites. That is a policy decision for the planning authorities and … even temporary planning permission was considered and rejected by the Secretary of State. Thus, the court is being asked to reverse the

decisions of the authorities to whom Parliament has entrusted the relevant decision, not on grounds of illegality, but on grounds of policy. This is not something which, in my judgment, the court should do."

16. The next case was *Guildford Borough Council v Smith* (1994) JPL 734 in which the court rejected Mr Straker's invitation on behalf of the planning authority to overturn Sedley J's refusal to make even a suspended committal order against gipsies for breach of a s.187B injunction requiring them to cease the unlawful use of land as a residential caravan site. Having noted that the gipsies were in contempt, albeit a contempt brought about by the council's failure to fulfil its duty to provide sufficient sites for gipsies, Staughton LJ said [the case is reported in indirect speech]:

> "There were three possible solutions which the law might provide in such a case. The first would be to refuse any injunction; the second to grant an injunction but impose no penalty if it is broken; and the third to grant an injunction and if it were broken to impose a penalty of imprisonment, perhaps suspended for a time.
> As to the first solution to refuse an injunction altogether it was his view that the court should not make orders which it did not contemplate enforcing. In the rules of nursery and discipline, 'No' means 'No' and was usually followed by sanctions if disobeyed. Those who make orders but do not enforce them may tend to be regarded with contempt, not an inappropriate word in this context. But the case of *Mole Valley D.C. v Smith* (1992) 24 H.L.R. 442, (1992) 64 P. & C.R.491, shows that it would have been wrong to take that course. It was not for the courts to refuse an injunction because there were no other sites available. We were bound by that decision. Furthermore, there had been no application to discharge the injunction, and no appeal against the order granting it.
> The second possible solution was to grant an injunction but impose no penalty if it was broken. That was a poor substitute. The order had been broken. It would remain in force and would presumably continue to be broken, and no sanctions will be imposed unless circumstances change. There was a position which the law ought to avoid if it could.
> The third solution was that the court was required to grant an injunction and required to enforce it by imprisonment without regard to the personal circumstances of the defendants (whoever they may be) or to any other circumstances of the case. That, it seems is even worse than the second solution."

The court adopted the second solution.

17. I come next to what for some years has been regarded as the leading authority on the correct approach to s.187B, *Hambleton District Council v Bird* [1995] 3 PLR 8, another case concerned with unlawfully stationed gipsy caravans. Pill LJ, having cited at length from the *Mole Valley* case, said this:

> "The granting of an injunction in any particular case is dependent on the court's discretion. This does not however entitle a judge in the present context to act as a court of appeal against a planning decision or to base a refusal to grant an injunction upon his view of the overall public interest. While disclaiming any such role it is, in my view, clear from his reasoning that the learned judge assumed it. The judge referred to the rehousing that would follow an injunction and he referred to public interest in a general way, weighing the considerations that affect this family alone and to the lack, as he saw it, of public benefit which would result from an injunction. To take upon himself the role of assessing the benefits and disbenefits to the public as a whole was erroneous. The learned judge was taking upon himself the policy function of the planning authorities and housing authorities and their powers and duties.
> The existence of the court's discretion to refuse to enforce an injunction by imprisonment was confirmed by this court in *Guildford Borough Council v Smith* [1994] JPL 734. It does not empower a court to approach an application for an injunction in the way the judge did."

18. Finally under this head I must consider two first instance decisions given within days of each other, respectively by Burton J on 30 July 1999 in *Aylesbury Vale DC v Miller* (unreported) and by Mr Robin Purchas QC sitting as a deputy judge of the Queen's Bench Division on 3 August 1999 in *Tandridge DC v Delaney* [2000] 1 PLR 11. Two arguments were advanced on behalf of the defendant gipsies in the *Aylesbury Vale* case: first, that the council's decision to seek a s.187B injunction was unlawful on a

Wednesbury basis; secondly, that there is in any event a residual discretion in the court not to make an order. It is that second argument with which we are now concerned. Burton J recorded and rejected the submission as follows:

> "[The] submission is that the court can, and should, even though upholding the lawfulness and the validity of the council's decisions, nevertheless reintroduce and reconsider questions of hardship at the injunction stage. This submission is, in my view, entirely foreclosed by two Court of Appeal authorities which are binding upon me. [These were *Mole Valley District Council v Smith* and *Hambleton District Council v Bird*, from both of which the judge then cited yet more extensively than I have done]. [I]t is quite clear both from the *Guildford* case and from the way *Hambleton* deals with it that the decision on whether to enforce the injunction by imprisonment is an entirely separate question from whether to grant an injunction to start with. … The effect thus appears to be that s.187B certainly allows for a challenge to the decision made by the claimant, including the decision to seek an injunction, and it may be that evidence of hardship falling for consideration on such an application to the court will be so strong that it could support a case … that the decision by the council is *Wednesbury* unreasonable, as indeed is the primary submission in this case … . It is plain that questions of hardship, questions of policy, questions of alternative accommodation, are all matters which are previously considered by the council, at least if they are not acting *Wednesbury* unreasonably, and do not fall for reconsideration by the court."

19. In the *Tandridge* case Mr Purchas too cited from Pill LJ's judgment in *Hambleton District Council v Bird* and expressly accepted and applied those principles. He then set out the approach he believed should be taken and the considerations he considered to be particularly relevant:

> "1. The starting point must be the existence and the nature of the breach or breaches to be restrained. It is not for this court to reassess or act as a court of appeal from the decisions that have already been made on the part of the authorities through the relevant planning procedures in determining whether or not planning permission should be granted or the enforcement notices confirmed: see *Hambleton District Council v Bird (supra), per* Pill LJ at p677.
> 2. The defendants' rights under Article 8 of the Convention are a highly material consideration. Those rights are not, however, unqualified. Again, it seems to me that it is not for this court to act as a reviewing chamber for the decisions that have been made in the planning process as to the appropriate balance to be struck between those private rights and the public necessity: see *Buckley v United Kingdom (supra)* [(1997) 23 EHRR 101] and *R v Beard (supra)* [[1997] 1 PCR 64] *per* Hobhouse LJ (as he then was) at p72.
> 3. The same approach applies to the consideration of other humanitarian aspects affecting the personal circumstances of the defendants, as referred to by Sedley J (as he then was) in *ex parte Atkinson (supra)* [[1997] JPL65] and Latham J in *ex parte Uzell (supra)* [(1995) 71 P & CR566].
> 4. However, in respect of both the last two considerations, it is for this court carefully to examine any change in circumstances since the matter was previously considered as part of the planning process, not to revisit the decisions then taken but to see what effect any changes may have on the conclusions then reached.
> 5. Finally, to reach a conclusion whether, in all the circumstances, the grant of an injunction would be just and proportionate."

20. It should be noted that in the *Tandridge* case, although not in *Aylesbury Vale*, the article 8 point was taken – both cases, of course, being decided in the period between the enactment and the coming into full force of the 1998 Act. *Buckley v United Kingdom*, one of the two cases mentioned in paragraph 2 of Mr Purchas' analysis, was the first of these gipsy cases to be considered by the ECtHR. These appeals, however, have focused much more closely on the more recent decision of the ECtHR in *Chapman v United Kingdom* 10 BHRC 48, and I shall not therefore consider *Buckley* further. *Beard*, I should observe, the other case mentioned in paragraph 2, was a decision of the Criminal Division of the Court of Appeal dismissing a gipsy's appeal against his conviction for failing to comply with an enforcement notice contrary to s.179 of the 1990 Act. Hobhouse LJ, having referred to *Buckley v United Kingdom* and *Guildford Borough Council v Smith* said this:

> "There is no inconsistency between the scheme of the United Kingdom planning legislation and the Convention. The legislative scheme allows for the legitimate rights and expectations of gipsies to be taken into account at the appropriate stages of the procedure, including at the stage of deciding whether or not an enforcement notice should be upheld. Once an appropriate decision has been made in accordance with the law to uphold the enforcement notice, its enforcement involves no conflict with article 8. The subject matter of s.179 is failure to comply with a lawful enforcement notice. There is no ambiguity, the resolution of which requires recourse to the Convention … "

21. Let me indicate briefly at this stage the importance of those earlier decisions when it comes to determining the present four appeals. Eventually I shall have to return to the judgments in rather more detail. For present purposes, however, it is sufficient to note the following:

i) Burton J, deciding the *South Bucks* case on 22 January 2000, simply applied his own earlier decision in *Aylesbury Vale*. Although on this occasion article 8 was touched on, he remarked that it was not yet "enshrined in English law" and that it did not enable him to reconsider the decisions of the Court of Appeal in *Mole Valley* or *Hambleton*.

ii) Judge Barratt QC, giving judgment in the *Chichester* case on 30 June 2000, directed himself substantially in accordance with *Hambleton* (in which he had acted as counsel for the successful appellant authority). He was not persuaded to a different approach by the ECtHR's judgment in *Buckley*.

iii) McCombe J, deciding the *Wrexham* case on 12 February 2001, appears to have regarded the ECtHR's judgment in *Chapman* as decisive of the application before him.

iv) Judge Brunning's judgment, given on 13 March 2001, gives rise to greater difficulty in determining just what approach he took to the application before him, the form of his judgment appearing to be to some extent dictated by the need to deal with the submissions which the appellants then advanced but which are put somewhat differently before us. Certainly, however, he was provided with a press release issued by the Registrar of the ECtHR of the Court's judgment in *Chapman* (decided together with four other gipsy cases against the United Kingdom on 18 January 2001) which summarised the decision of the majority of the Court on article 8 as follows:

> "In all five cases, the Court considered that the applicants' occupation of their caravans was an integral part of their ethnic identity as gipsies and that the enforcement measures and planning decisions in each case interfered with the applicants' rights to respect for their private and family life.
> However, the Court found that the measures were 'in accordance with the law' and pursued the legitimate aim of protecting the 'rights of others' through preservation of the environment.
> As regards the necessity of the measures taken in pursuit of that legitimate aim, the Court considered that a wide margin of appreciation had to be accorded to the domestic authorities who were far better placed to reach decisions concerning the planning considerations attaching to a particular site. In these cases, the Court found that the planning inspectors had identified strong environmental objections to the applicants' use of their land which outweighed the applicants' individual interests.
> The Court also noted that gipsies were at liberty to camp on any caravan site with planning permission. Although there were insufficient sites which gipsies found acceptable and affordable and on which they could lawfully place their caravans, the Court was not persuaded that there were no alternatives available to the applicants besides occupying land without planning permission, in some cases on a Green Belt or Special Landscape area.
> The Court did not accept that, because statistically the number of gipsies was greater than the number of places available in authorised gipsy sites, decisions not to allow the applicants to occupy land where they wished to install their caravans constituted a violation of article 8. Neither was the Court convinced that article 8 could be interpreted to impose on the United Kingdom, as on all the other contracting states to the European Convention on Human Rights, an obligation to make available to the gipsy community an adequate number of suitably equipped sites. Article 8 did not give a right to be provided with a home, nor did any of the Court's jurisprudence

> acknowledge such a right. Whether the state provided funds to enable everyone to have a home was a matter for political not judicial decision. Finding: no violation."

22. Having been taken in very considerable detail through much of the court's long judgment in *Chapman* (including several passages in the dissenting minority judgment), I would say that that summary by the Court Registrar seems to me both entirely accurate and for present purposes in large part sufficient.

23. Both sides in these appeals seek to rely on *Chapman*. The appellants point to the court's reference, in paragraph 73 of the majority judgment, to the "applicant's occupation of her caravan [as] an integral part of her ethnic identity as a gipsy" (and that notwithstanding that "many gipsies 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"). Similarly they stress the "positive obligation imposed … [by] article 8 … to facilitate the gipsy way of life" referred to in paragraph 96 of the judgment, and the court's recognition in paragraph 103 that it is a consideration relevant to the question of proportionality "if no alternative accommodation is available" because "the interference is more serious than where such accommodation is available".

24. The respondents for their part draw attention to paragraph 99 of the judgment which recalls that article 8 does not in terms give a right to be provided with a home, and paragraph 102 on which they place particular emphasis:

> "… When considering whether a requirement that the individual leave his or her home is proportionate to the legitimate aim pursued, it is highly relevant whether or not the home was established unlawfully. If the home was lawfully established, this factor would self-evidently be something which would weigh against the legitimacy of requiring the individual to move. Conversely, if the establishment of a home in a particular place was unlawful, the position of the individual objecting to an order to move is less strong. The court will be slow to grant protection to those who, in conscious defiance of the prohibitions of the law, establish a home on an environmentally protected site. For the court to do otherwise would be to encourage illegal action to the detriment of the protection of the environmental rights of other people in the community."

25. Important though all these various points are when it comes to deciding whether or not gipsies should in the first place be granted planning permission and, if not, whether they should be removed from the site, the real point to make about *Chapman* is that it is a decision by an international court which by its nature is exercising a supervisory and *supra*-national jurisdiction. To my mind it casts very little light on the relatively narrow point now arising as to the extent of the court's discretion on a s.187B application for coercive relief.

26. Paragraph 92 of the court's judgment reads:

> "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 on. 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* … 'insofar 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. In these circumstances, the procedural safeguards available to the individual applicant will be especially material in determining whether the respondent state has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, it must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by article 8 (see *Buckley* …)."

27. The essential contrast being struck there is between the ECtHR and "the national authorities", not between the domestic planning authorities and the domestic courts. True, paragraph 92 stresses the opportunities

enjoyed by planning inspectors in "the choice and implementation of planning policies" which is why the ECtHR's role is confined principally to examining the domestic "procedural safeguards" and deciding whether there has been "a manifest error of appreciation". Whilst, however, this approach clearly supports the view that the recent House of Lords' decision in *R(Alconbury Ltd) v Environment Secretary* [2001] 2 WLR 1389, rejecting article 6 challenges to the legislative scheme for statutory appeals and applications in planning cases which affords the court only a limited review jurisdiction over inspectors' decisions, applies equally in article 8 cases - see, indeed, the reference to *Chapman* in paragraph 63 of Lord Nolan's speech in *Alconbury* - to my mind it cannot resolve the present issue arising under s.187B. *Chapman*, be it noted, was concerned with enforcement action and failed appeals rather than with the grant of an injunction. True, in *Beard* (one of the four linked cases), the gipsies had vacated the land pursuant to a suspended three month committal order imposed for breach of a s.187B injunction. The court did not, however, address the question as to what, if any, deference should be shown by the judge to the views of the planning authorities in deciding whether to grant an injunction.

28. Let me, therefore, now turn directly to this issue. Counsel's arguments upon it ranged far and wide and encompassed a large number of authorities. Joining together four separate appeals brings with it, I fear, real problems of manageability. The principal submissions, however, I understood to be these:

The Appellants' Case

29. S.187B(2) affords the judge a clear discretion: the court "may", not must, grant an injunction, even though by definition it will be concerned with an actual or apprehended breach of planning control. True it is that in paragraph 10.3 of his Report Mr Carnwath said: "What is required is its recognition [i.e. the recognition of injunctive relief] in the Act as a normal back-up to the other remedies, and acceptance that it is for the authority to judge (subject to the ordinary judicial review criteria of reasonableness) when its use is appropriate." Circular 21/91, however, which explained the new powers being introduced into the 1990 Act, in paragraph 7 of Annexe 4 said this:

> "The decision whether to grant an injunction is always solely a matter for the Court, in its absolute discretion in the circumstances of any case. Nevertheless, it is unlikely that the Court will grant an injunction unless all the following criteria are satisfied: … (3) injunctive relief is a commensurate remedy in the circumstances of the particular case … "

30. It is further to be noted that Mr Carnwath's recommendation, in the case of residential caravans, for the repeal of the provision that stop notices cannot issue to prohibit the use of any building as a dwelling-house, was rejected.

31. Injunctions are likely to prove the most effective way of remedying breaches of planning control because they are attended by the most severe sanctions, including imprisonment. Breaches of enforcement notices, by contrast, are punishable only by fines. By the same token, submit the appellants, this more draconian remedy should only be granted when plainly appropriate and when, moreover, the court granting it is prepared to contemplate that its breach should attract these severe penalties. If the court is unwilling to commit it should be unwilling to enjoin. As already indicated, the appellants contend that even before article 8 fell to be considered, the courts took too narrow a view of their discretion: Staughton LJ's evident preference for the first of the three possible solutions he identified in the *Guildford* case was to be preferred to the approach earlier dictated by *Mole Valley* and later reaffirmed in *Hambleton.* Courts should not grant injunctions unless they propose to enforce them if necessary by imprisonment. On this approach, of course, the court would only be prepared to grant injunctive relief in cases which the court itself regarded as clear, cases where it was quite satisfied first that the planning authority (whether the district council or the Secretary of State/inspector on appeal) had properly reached a final conclusion that the gipsies' continuing occupation of the site could no longer be tolerated in the public interest, and secondly that it was appropriate to enforce their removal by injunction even though, in a case where no alternative sites were available, that would drive the gipsies either onto the roads, into homelessness accommodation (see paragraph 54 of *Chapman*) or, on non-compliance with the injunction, into prison.

32. S.187B does not confer on the court merely a review power. Rather the court is exercising an original jurisdiction. Whatever may have been the position before the Human Rights Act came into force, moreover, now certainly it is for the court itself to address the issues arising under article 8(2) and it must accordingly reach its own decision upon whether the gipsies' removal from site is proportionate to the public interest in preserving the environment. The court must decide that removal on pain of imprisonment is necessary for that end and that this would not impose an excessive burden on the gipsy. In all these gipsy cases, submit the appellants, the court should ask itself whether an immediate (or even, indeed, a postponed) order dispossessing them is really necessary to protect the environment. May it not be preferable to allow the breach of planning control to continue and, certainly for the present, to await the outcome of the more conventional enforcement process – the service of an enforcement notice and, if necessary, prosecution for its breach?

33. That is not to say, however, Mr George and Mr Drabble (if not Mr Watkinson) accept, that the judge will pay no heed to decisions taken by the planning authorities in the case. On the contrary, counsel recognise that the issue as to whether or not planning permission should be granted is exclusively a matter for them and that the planning history of the site, and in particular any recent decisions about it, will be highly relevant. Decisions by the Secretary of State and his inspectors are, of course, independent and so carry particular weight. Even decisions taken by the local planning authority, whether with regard to planning permission or enforcement, are taken by them as a democratically accountable body and, provided they approach the matter correctly, are on that account to be accorded respect. But in either case, of course, it would be necessary for the planning authority on a s.187B application to show that the gipsy's article 8 rights were properly considered and, in the case of pre-1998 Act decisions, that would be unlikely to be so.

34. As stated, the appellants' principal argument is that the court is itself making the primary decision under s.187B(2) rather merely than reviewing the local authority's decision under s.187B(1) to apply for injunctive relief. But, they submit, even assuming that to be wrong, it would nevertheless still be for the court to reach its own independent conclusion on the proportionality of the relief sought to the object to be obtained. In this regard the appellants point particularly to the decision of the House of Lords in *R(Daly) v Home Secretary* [2001] 2 WLR 1622 where, at p.1634, Lord Bingham said this:

> "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."

The Respondents' Case

35. The essential argument put by Mr Straker – and, I think he recognises, the argument that must prevail if all three of the respondent authorities he represents are successfully to resist these appeals – is that the judge exercising his s.187B jurisdiction is more or less bound to grant an injunction unless the local planning authority's application can be shown to be flawed on *Wednesbury* grounds. This, he submits, was always how the section fell to be applied and it remains so today. The exercise of the power, he submits, is "a public law exercise". S. 187B was deliberately inserted by Parliament into the Town and Country Planning Act and that Act was itself described by Lord Scarman in *Pioneer Aggregates Limited v Environment Secretary* [1985] 1 AC 132, 141 as providing "a comprehensive code imposed in the public interest". Mr Straker relies on various passages in Mr Carnwath's report (including paragraph 10.3 to which I have already referred) to contend that the court's function is essentially supervisory only. He suggests that as a matter of interpretation the words "such an injunction as the court thinks appropriate for the purpose of restraining the breach" themselves demonstrate that the power should be used in support of planning control. *Mole Valley* and *Hambleton*, he submits, were correctly decided. It is not until the committal stage is reached (for breach of the injunction) that the court steps outside the planning code and is entitled to reach an independent view on proportionality. At the injunction stage itself the court is to consider only whether the gipsies should leave the site, not whether they should suffer serious penalty if they fail to do so. Nor, runs the argument, is any of this affected by the Human Rights Act. In this regard Mr Straker relies heavily upon *Alconbury*, there being many passages in the speeches to which he drew our attention.

36. Those, I repeat, are arguments which Mr McCracken on behalf of Hertsmere Borough Council does not adopt. He accepts that s.187B(2) gives the court a discretion whether or not to grant an injunction and accepts too that the judge should do so only on the basis of a preparedness to fine or if necessary imprison the defendant gipsy on breach. He does, however, submit that the court in exercising its discretion should not arrogate to itself the power to decide whether or not planning permission should be granted, that question being exclusively one for the planning authorities subject only to ss.288 and 289 of the 1990 Act. He further submits that, the planning status of the land having already been determined, the judge must therefore recognise, when he comes to carry out the proportionality test, that no lesser interference with the gipsies' rights than their removal from site will achieve the legitimate aim of preserving the environment.

37. I propose now to state first my conclusions on the general point arising – the proper approach to the exercise of the court's power under s.187B – and secondly, how in my judgment that conclusion falls to be applied in each of the four appeals before us.

The approach to s.187B

38. I would unhesitatingly reject the more extreme submissions made on either side. It seems to me perfectly clear that the judge on a s.187B application is not required, nor even entitled, to reach his own independent view of the planning merits of the case. These he is required to take as decided within the planning process, the actual or anticipated breach of planning control being a given when he comes to exercise his discretion. But it seems to me no less plain that the judge should not grant injunctive relief unless he would be prepared if necessary to contemplate committing the defendant to prison for breach of the order, and that he would not be of this mind unless he had considered for himself all questions of hardship for the defendant and his family if required to move, necessarily including, therefore, the availability of suitable alternative sites. I cannot accept that the consideration of those matters is, as Burton J suggested was the case in the pre-1998 Act era, "entirely foreclosed" at the injunction stage. Questions of the family's health and education will inevitably be of relevance. But so too, of course, will countervailing considerations such as the need to enforce planning control in the general interest and, importantly therefore, the planning history of the site. The degree and flagrancy of the postulated breach of planning control may well prove critical. If conventional enforcement measures have failed over a prolonged period of time to remedy the breach, then the court would obviously be the readier to use its own, more coercive powers. Conversely, however, the court might well be reluctant to use its powers in a case where enforcement action had never been taken. On the other hand, there might be some urgency in the situation sufficient to justify the pre-emptive avoidance of an anticipated breach of planning control. Considerations of health and safety might arise. Preventing a gipsy moving onto the site might, indeed, involve him in less hardship than moving him out after a long period of occupation. Previous planning decisions will always be relevant; how relevant, however, will inevitably depend on a variety of matters, including not least how recent they are, the extent to which considerations of hardship and availability of alternative sites were taken into account, the strength of the conclusions reached on land use and environmental issues, and whether the defendant had and properly took the opportunity to make his case for at least a temporary personal planning permission.

39. Relevant too will be the local authority's decision under s.187B(1) to seek injunctive relief. They, after all, are the democratically elected and accountable body principally responsible for planning control in their area. Again, however, the relevance and weight of their decision will depend above all on the extent to which they can be shown to have had regard to all the material considerations and to have properly posed and approached the article 8(2) questions as to necessity and proportionality.

40. Whilst it is not for the court to question the correctness of the existing planning status of the land, the court in deciding whether or not to grant an injunction (and, if so, whether and for how long to suspend it) is bound to come to some broad view as to the degree of environmental damage resulting from the breach and the urgency or otherwise of bringing it to an end. In this regard the court need not shut its mind to the possibility of the planning authority itself coming to reach a different planning judgment in the case.

41. True it is, as Mr McCracken points out, that, once the planning decision is taken as final, the legitimate aim of preserving the environment is only achievable by removing the gipsies from site. That is not to say,

however, that the achievement of that aim must always be accepted by the court to outweigh whatever countervailing rights the gipsies may have, still less that the court is bound to grant injunctive (least of all immediate injunctive) relief. Rather I prefer the approach suggested by the 1991 Circular: the court's discretion is absolute and injunctive relief is unlikely unless properly thought to be "commensurate" – in today's language, proportionate. The *Hambleton* approach seems to me difficult to reconcile with that Circular. However, whatever view one takes of the correctness of the *Hambleton* approach in the period prior to the coming into force of the Human Rights Act 1998, to my mind it cannot be thought consistent with the court's duty under s. 6(1) to act compatibly with convention rights. Proportionality requires not only that the injunction be appropriate and necessary for the attainment of the public interest objective sought – here the safeguarding of the environment – but also that it does not impose an excessive burden on the individual whose private interests – here the gipsy's private life and home and the retention of his ethnic identity – are at stake.

42. I do not pretend that it will always be easy in any particular case to strike the necessary balance between these competing interests, interests of so different a character that weighing one against the other must inevitably be problematic. This, however, is the task to be undertaken by the court and, provided it is undertaken in a structured and articulated way, the appropriate conclusion should emerge.

The four appeals

1.Porter v South Bucks District Council

43. This decision plainly cannot stand following the coming into force of the Human Rights Act. Burton J may well have been right to regard all questions of hardship as "entirely foreclosed" by the decisions in *Mole Valley* and *Hambleton*. That, for present purposes, it is unnecessary to decide. Such an approach, however, is no longer open to the court.

2.Searle v Chichester District Council

44. This decision too seems to me unsustainable. Judge Barratt QC referred to the decisions in *Mole Valley* and *Hambleton* and decided that he "should apply the law as it currently is". Ultimately, in the determinative passages of his judgment, he made it plain that his essential concern was with the legality of the respondent Council's decision to seek injunctive relief. He expressed himself "satisfied in all the circumstances that the Council were entitled to reach the decision that they did" and said that he could "find no other factors in this case such that justify me in taking an exceptional course having regard to the planning policies applicable to this site …" I recognise that he referred also to "the particular personal needs of the defendants". Taking the judgment as a whole, however, he appears to have regarded himself as having only the barest residual discretion to withhold relief. The main part of the injunction, that for the removal of the mobile homes, was not even suspended.

3.Berry v Wrexham County Borough Council

45. McCombe J's very full judgment in this case extends to twenty-five pages of transcript and addresses the ECtHR's judgment in *Chapman* in considerable detail. Having noted the appellant's submission, in part based on *Tandridge*, that "the court can no longer adopt … a 'hands-off approach' to the underlying planning considerations … ", the judge said this:

> "On this issue, I do not think I have to decide the extent to which in any individual case the court may have to investigate planning considerations in deciding whether a proper approach to article 8 has been adopted. For my part, I believe that the case on this issue can adequately be resolved by the decision in *Chapman* itself, where the facts were not at all dissimilar to those, in my view, in issue here. … It must, of course, be noticed that other relevant considerations have to be taken into account by the national authorities, and those include the availability or otherwise of alternative accommodation. [The appellant] urges upon me that in reality there is no alternative accommodation because of the Berry family's difficulty at the Ruthin Road site. In my view,

> however, the *Chapman* case also provides an answer to this point by reference to its own facts, which again are not dissimilar to those which confront me in the present matter."

46. The judge then quoted at length from the judgment in *Chapman* including this passage from paragraph 113:

> "The court is therefore not persuaded that there were no alternatives available to the applicant besides remaining in occupation on land without planning permission in a Green Belt area."

47. McCombe J then continued:

> "In my view, those statements apply equally to this case. I am not persuaded that there is any material distinction in the factor that in *Chapman* the planning issues had been considered by a planning inspector. Mr Berry has had ample opportunity to invoke the appeal processes open to him under the law to contest the previous decisions of the planning authority and he has chosen not to take them. Neither has he made any further application for permission since September 2000. He cannot, in my view, now be heard to contend that this court should itself now undertake a planning review which Mr Berry has consciously eschewed on more than one previous occasion and seems disinclined to seek in any proper way even now."

48. The appellant advances two main criticisms of that paragraph. First and most importantly he points out that, unlike in *Chapman* where in terms the court expressed itself unsatisfied that there were no alternative sites available, here the judge appears to have accepted that the appellant was in effect forced off the Ruthin Road site and unable to return there, there being no other gipsy caravan sites provided by the Council. Secondly it is submitted that the judge was too critical of the appellant's failure to appeal the respondent's earlier refusals of planning permission: these planning applications, Mr Drabble points out, had been made at a time when the appellant was not resident on the site and when, accordingly, the humanitarian considerations which arose when he was forced to leave the Ruthin Road site were lacking. Finally, in contrasting the facts of this case with those of *Chapman*, Mr Drabble points to the protracted enforcement process in *Chapman*, including a fifteen month period for compliance given by the inspector hearing the second enforcement notice appeal, whereas the respondent Council here immediately adopted the s.187B route as a deliberate alternative to enforcement action, thereby precluding any right of appeal to an independent inspector against the enforcement notice.

49. In my judgment there is substance in these arguments and I am persuaded that the judge erred in regarding *Chapman* as effectively determinative of the application before him.

4.Harty v Hertsmere Borough Council

50. The two main authorities by which Judge Brunning appears to have directed himself were *Tandridge* and *Chapman*. *Chapman* in particular looms large in the judgment where it is accurately summarised save for a reference to the wide margin of appreciation left to "local authorities" (instead of "national authorities"). As to the local authority's approach in that case, the judge considered in some detail the Council Officers' report to the planning committee on 13 February 2001, the report which led the committee to refuse even a temporary planning permission, and continued:

> "The whole tenor of the considerations put before the local authority therefore was that there had to be a balance between the various needs of the defendants as applicants for planning permission and the various planning considerations that were set out. … [The judgment then explained that the appellants were represented by an experienced firm of solicitors who had been able to put all the relevant considerations before the Council.] It may well be that there are circumstances which arise where a local authority will not satisfactorily have carried out a balancing exercise by reason of its failure to make factual enquiries. This, however, was not such a case. Accordingly, I am satisfied that this local authority did carry out the process which the law requires it to carry out and has demonstrated in striking the balance it did that it has given full weight to the considerations it is required to give under the Human Rights Act. … I am aware of the needs of the individuals concerned and some of the particularly difficult circumstances that prevail. On the other hand, I am required in the exercise of discretion to strike a balance, and whilst I have those humanitarian

matters in mind, I must at the same time look at the wider picture and other interests. I am satisfied that this is an appropriate case for an injunction. It is [the fourth unlawful occupation of this site over a period of some years] … which in its own way is of some significance when coming to consider the exercise of discretion.uHuman ”

51. Mr Drabble criticises those conclusions from two standpoints in particular: first, by reference to the Officers' report to the planning committee, and second on the basis that, by directing himself in accordance with the *Tandridge* approach, the judge failed to recognise the proper width of his discretion.

52. As to the Officers' report, although much of it is relevant I shall confine myself to three paragraphs only:

> "2. … Members may recall that they passed a resolution on the 24th October last year for the Council to apply for injunctive relief following the occupation of the site. Instructions have been given and the papers settled but proceedings have not been issued in order that the members have the opportunity to consider all of the arguments now put forward on behalf of the applicants for this development. In the event that the members were to refuse planning permission proceedings would be issued forthwith for interim and full injunctive relief.
> …
> 6.21 It is legitimate … for Members to balance Green Belt and other land use objectives against the rights in article 8. In the absence of any compelling case of 'very special circumstances', it is clear that the proposal would be inappropriate development which, by definition, is harmful to the Green Belt. The applicant's agent acknowledges the *Buckley* case. He also argues that the applicant and the other families have no alternative site and that to refuse planning permission in this instance would be a breach of their rights under article 8. He adds that the site is of poor landscape quality and that the applicant is prepared to landscape the site, in collaboration with the local planning authority.
> 6.22 The need for the protection of the Green Belt is a serious public interest and objections in this respect cannot be overcome by the use of conditions on a planning permission. The public interest can therefore only be protected by the refusal of planning permission. It is considered that the refusal of planning permission is necessary having regard to the important and legitimate aim of protecting the Green Belt. It is considered that such a decision would not place a disproportionate burden on the appellants and would not result in a violation of their rights under article 8 of the Convention."

53. The minutes of the committee meeting on 13 February record:

> "Some Members of Committee were minded to support the grant of a temporary permission for one year only. However, the Officers reported that if the sub-committee was minded to reverse the Officers' recommendation and to grant such a permission the application would have to be reported to the environment committee as a departure from the local plan. The sub-committee would also have to be satisfied that very special circumstances existed even if the application to be granted was a temporary one. As stated in their report, the Officers were of the opinion that those very special circumstances did not exist."

54. Mr Drabble's criticism of paragraph 6.22 of the report was finally formulated in writing as follows:

> "The basic approach at para 6.22 cannot be regarded as a proper exercise that recognises the need to protect the gipsies' particular rights under article 8 unless the environmental harm <u>in the individual case</u> justifies the interference. Its logic is that protection of the Green Belt is 'a serious public interest'; conditions do not avoid conflict; 'the public interest can therefore only be protected by the refusal of planning permission'. This approach could be repeated, in identical words, whether the damage to the Green Belt is great or small and whether the humanitarian considerations, including abandonment of the traditional lifestyle, are great or small."

55. Mr Drabble further criticises the Council's approach of applying forthwith for injunctive relief upon the refusal of planning permission (as foreshadowed in paragraph 2 of the report) without, therefore, awaiting any appeal against the refusal.

56. As to the judge's reliance on *Tandridge*, Mr Drabble argues that, on true analysis, *Hambleton* is central to *Tandridge* and that although paragraph 5 of Mr Purchas' summary suggests that the court itself should reach "a conclusion whether, in all the circumstances, the grant of an injunction would be just and proportionate", this is required to be done on the basis of the balance between the interests of the gipsies and those of the public previously struck by the planning authority.

57. My views on this fourth appeal have, I confess, shifted more than once during the course of the hearing. At various stages I was inclined to accept Mr Drabble's criticisms of the all-important Officers' report and of the Council's decision in reliance upon it not merely to refuse planning permission but immediately to apply for an injunction. The critical question, however, is whether in the end the judge when granting injunctive relief deferred excessively to the respondent's own views as to how the balance between the competing interests fell to be struck. Looking at that question as a matter of substance rather than form I am not ultimately persuaded that he did. Rather I have reached the conclusion that he recognised the true width of his discretion and exercised his own independent judgment in deciding that the time had finally come to bring the unlawful use of this site to an end. That was, I have to say, an entirely understandable judgment given the quite remarkable planning history of this site.

58. There are, of course, factors even in the first three cases which will undoubtedly present the appellants with real difficulty if and when the respondent authorities seek fresh injunctive relief. Such difficulties, however, are for the future. Our judgments today merely indicate how courts should henceforth approach the exercise of their s.187B power.

59. In the result I would allow the appeals in the first three cases but dismiss that of Mr Harty and others against Hertsmere Borough Council in the fourth case.

LORD JUSTICE PETER GIBSON:

60. I agree.

LORD JUSTICE TUCKEY:

61. I also agree.

ORDER

Appeal dismissed in the case of Hertsmere Borough Council v Harty and others. Appeals allowed in the cases of South Buckinghamshire District Council v Porter, Chichester District v Searle and Wrexham County Borough Council v Berry. Each of those cases will be remitted either to the Queen's Bench Division or the Chichester County Court for the underlying applications for injuctions to be determined in the light of these judgments and such evidence as the parties seek to put before the respective Courts.
In the case of South Buckinghamshire District Council v Porter the order for costs below stands, that the defendant pay the applicant's costs (ie the appellant in this court pay the respondent council's costs) subject to legal aid provisions. The appellant to have the costs of the appeal. In the case of Chichester District Council v Searle the order below stands, of no order for costs. The appellant to have the costs of the appeal. In the case of Wrexham County Borough Council v Berry, the appellant is to have the costs both here and below. In the case of Hertsmere Borough Council v Harty and others the appellants Casey and Jones to pay the respondent's costs of the appeal, including those of the hearing of 21 June, subject of course to the protection of section 11 of the Access to Justice Act. Detailed assessment of costs on community legal services funding certificates.
Permission to appeal to the House of Lords refused.
(Order not part of approved judgment)