

**The Impact of Discourses of Authenticity on the  
Development and Application of Statutory  
Definitions of Gypsies and Travellers; A Study of  
their Legal Access to Accommodation in England  
and Wales since 1959**

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# Abstract

The research investigates the impact of discourses of authenticity on the development and application of statutory definitions of Gypsies and Travellers in England and Wales since 1959, and the subsequent consequences for access to accommodation for these communities. These definitions are concerned with land use, equalities, housing, and homelessness legislation. The basis of these definitions is found in statute and policy and decision makers ranging from local authorities through to the European Court of Human Rights (ECtHR) are responsible for their development and application. Each of these definitions has different consequences with regard to access to accommodation. The research examines a chronological analytical narrative of the development and application of these definitions over a 53 year period, which consists of an examination of relevant case law, policy, law and other useful sources. Interviews with key informants involved in the development and application of statutory definitions serve to reinforce the interpretation of the evidence. The evidence is assessed using the notions of discourses of authenticity, which are constructed as the discourse regarding the authenticity of an individual or group as Gypsies or Travellers as prescribed by other individuals, groups or institutions and the implications of this ascription. There has not been a comprehensive analysis of the relationship between the discourse around the authenticity of Gypsies and Travellers and statutory definitions in modern times. This research bridges the gap in the existing literature by undertaking a comprehensive analysis of the development, application and consequences of statutory definitions in the light of the existing knowledge on discourses of authenticity with regard to Gypsies and Travellers.

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# Glossary

BC – Borough Council

CC – Country Council

CJPOA 1994 – Criminal Justice and Public Order Act 1994

CRE – Commission for Racial Equality

DC – District Council

DCLG – Department for Communities and Local Government

DGLG – Derbyshire Gypsy Liaison Group

EA 2010 – Equality Act 2010

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

HHJ – His / Her Honour Judge

HRA 1998 – Human Rights Act 1998

J – Judge

LJ – Lord Justice

MHLG – Ministry of Housing and Local Government

NFGLG – National Federation of Gypsy Liaison Groups

ODPM – Office of the Deputy Prime Minister

PPFTS – Planning Policy for Traveller Sites

QC – Queen’s Council

RRA 1976 – Race Relations Act 1976

UNESCO – United Nations Educational, Scientific and Cultural Organisation

WO – Welsh Office

# Chapter 1 - Discourses of authenticity and statutory definitions of Gypsies and Travellers

## 1.1 Introduction: the purpose of the research

The purpose of this research is to investigate the impact of discourses of authenticity on the development and application of statutory definitions of Gypsies and Travellers in England and Wales since 1959, and the subsequent consequences for legal access to accommodation for these communities. This opening chapter presents the research question and addresses the different elements in it. It then goes on to state the research objectives, outline the rationale for the research and state its geographical and time constraints.

### 1.1.1 Gypsies and Travellers

In contemporary society in England and Wales the population of Gypsies and Travellers is diverse in nature. In the main, it consists of four different groups, Romani Gypsies, Irish Travellers, New Travellers and Showpeople. Romani Gypsies and Irish Travellers have had a presence in the UK for at least 500 years (Clark, 2006b, p.11), whereas New Travellers are a relatively recent phenomenon which began in the 1960s when settled people seeking an alternative lifestyle became nomadic. Showpeople are commercial nomads who move around holding fun fairs and circuses. Whilst they have not been afforded ethnic minority status, they have their own long shared history, which has its own language and culture (Clark, 2006b, p.17). It should be noted that the primary focus of this research is Gypsies and Travellers as Showpeople have, up until 2004, been the subject of separate law and policy. There is scope for further academic work on the position of Showpeople with regard to the legal and planning systems.

### **1.1.2 Discourses of authenticity**

Discourses of authenticity are constructed as the discourse regarding the authenticity of an individual or group as Gypsies or Travellers as prescribed by other individuals, groups or institutions and the implications of this ascription. Such discourse must be placed in a dynamic historical context as the debate regarding who can be classified as a Gypsy or Traveller has been in existence for centuries in the UK (Mayall, 2004). Further to this, such discourses regarding authenticity and associated entitlement are not only applicable to Gypsies and Travellers, as the work of Sales (2002) and Lynn & Lea (2003) regarding the perceived authenticity of asylum seekers in the UK has demonstrated.

### **1.1.3 Statutory definitions, their development, application and consequences for access to accommodation for Gypsies and Travellers**

It is the purpose of the research to discover if discourses of authenticity have had an impact on the development and application of statutory definitions of Gypsies and Travellers, and consequently access to accommodation. Clark believes they do, stating, “terms and labels can also be imposed by non-Gypsies or Travellers in order to discuss or make laws about those they think of as being Gypsies or Travellers. Such important tussles are not abstract or just a question of semantics. They strike right at the heart of Gypsy and Traveller identity politics and can have...social, cultural, economic and legal implications” (Clark, 2006b, p.12).

There are four key definitions which are the subject of consideration. These are definitions related to land use, equalities, housing, and homelessness legislation. The basis of these definitions can be found in statute and policy. Furthermore, the application of such definitions by decision makers ranging from local authorities through to the European Court of Human Rights (ECtHR) allows for their development. The most significant decision makers are the High Court, the Court of Appeal, the Supreme Court (whose functions were formally undertaken by the House of Lords), and the ECtHR. This is because decision makers below these courts (for example, local authorities and planning inspectors) are bound by the courts’ decisions on specific issues such as a particular interpretation of a point of law (this is known as case law). In addition to this, case law

goes on to inform the development of newer definitions as part of policy or statute. The mechanism by which such definitions are both developed and applied can be seen to be circular in nature, with each process informing the next.

Each of the definitions currently applicable to Gypsies and Travellers in England and Wales has different consequences. A person who can prove a nomadic habit of life may be able to gain planning consent for a change of use of land (for example, from agricultural to residential use) that others might not be able to, or have their welfare needs taken into account when being evicted from an unauthorised encampment. A person who has never lived in a caravan, but can prove that they are a Romani Gypsy or Irish Traveller has protection from racial discrimination but no right to live on a Gypsy or Traveller site. However, a decision maker when faced with a Romani Gypsy or Irish Traveller who can also prove a nomadic habit of life has a statutory duty to have due regard to their protected ethnic minority status when considering planning matters. A person who can prove a 'cultural tradition of nomadism or living in a caravan' but has never done so has the right to have their housing needs assessed as part of a Gypsy and Traveller accommodation assessment but no right to live on a Gypsy or Traveller site. Finally, in order to be considered as a homeless Gypsy or Traveller who requires suitable accommodation in the form of a site, a person must prove an aversion to bricks and mortar, which requires a detailed psychiatric assessment.

As can be seen from the multiplicity of interconnected definitions and consequences this is a complex area of law, policy and practice, which is spread out over a range of government functions. The difficulty of application inherent in these definitions has led to many instances of litigation, where the courts have provided their own 'gloss'<sup>1</sup>. This complexity and difficulty of application is what renders the development, application and consequences of these definitions of particular interest to this research. Hence this research has the following objectives:

## **1.2 The research objectives**

- To outline and discuss the concept of discourses of authenticity with regard to Gypsies and Travellers

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<sup>1</sup> 'Gloss' is a term frequently used in legal discourse to describe the interpretation of statute and case law

- To outline the relevant legal framework which the statutory definitions of Gypsies and Travellers are part of
- To chart and analyse the development of statutory definitions since 1959 through the creation of law, policy and case law and the subsequent consequences with regard to accommodation for Gypsies and Travellers
- To identify and examine significant applications of statutory definitions since 1959 and their consequences with regard to the impact on legal access to accommodation for Gypsies and Travellers

### **1.3 The rationale for research**

The research aims to establish the links between discourses of authenticity and statutory definitions. Whilst there has been work on such notions in case law (Geary and O'shea, 1995, Sandland, 1996), the nature of “scapegoating” of specific groups of Travellers in the 1960s (Acton, 1974), and historical and modern notions of Gypsy identity (Mayall, 2004, Willems, 1997), there has not been a comprehensive analysis of the relationship between the discourse around the authenticity of Gypsies and Travellers and statutory definitions in modern times. This research bridges the gap in the existing literature by undertaking a comprehensive analysis of the development, application and consequences of statutory definitions in the light of the existing knowledge on discourses of authenticity with regard to Gypsies and Travellers.

### **1.4 Geographical and time constraints of the research**

The scope of the empirical work examined here is limited to England and Wales as the statutory definitions of Gypsies and Travellers used in both countries are the same, and the legal framework of which they are a part of is analogous. Where appropriate, reference is made to other parts of the UK and further afield, specifically Europe and Canada.

The empirical work covers the period from 1959 to the present day. This is due to the identification of the Highways Act (1959) being the starting point for the development of the statutory definitions. However, the literature review considers a much larger historical time period, as this is necessary to understand the origins of different discourses around Gypsies and Travellers.

## **1.5 Structure of the thesis**

Following this chapter, Chapter Two defines Gypsies and Travellers and the inequalities faced by these communities. It goes onto detail their interactions with the state with particular regard to the use of land. Finally, the notion of substantive equality is addressed and the literature around race and planning is acknowledged.

Chapter Three sets out the theoretical foundation for the research by outlining the basis for discourses of authenticity. This begins with a discussion of the relevance of Foucault's work on discourse, power and historical narratives to the research. A number of theoretical issues directly concerned with Gypsies and Travellers are discussed. These include the notion of the 'genuine gypsy', origins, ethnicity, and the relevance of hierarchy. Finally, the notion and relevance of 'the other' is discussed with a particular focus on the work of Said.

Chapter Four sets out the methodological approach to the research. First, the theoretical justification for the research approach is set out with particular reference to Foucault and Said. Second, the methods chosen are described and then reflected upon. Finally, the personal position of the researcher is reflected upon.

Chapters Five to Eight contain the empirical work in the form of a chronological narrative. This goes through the period between 1959 and 2012 highlighting court cases, policy, statute and reports. It examines each piece of evidence individually, but relates them to the literature review, interview quotes and other pieces of evidence where appropriate. Chapter Eight concludes with a summary of the current state of the law with regard to statutory definitions.

Chapter Nine, brings together the various themes identified in both the literature review and the empirical work. It also highlights some new findings with regard to



discourses of authenticity and their impact on statutory definitions. Finally, the significance of the research and the contribution to knowledge are outlined.

# **Chapter 2 - Gypsies and Travellers in England and Wales, inequalities they encounter and points of interaction with the state with regard to legal access to accommodation**

This chapter sets out the key information with regard to the Gypsy and Traveller communities which are the subject of the research, and their interactions with the state. Importantly, it deals with the inequalities faced by these communities, which forms the rationale for the research. It begins by noting some general points on demographic considerations. It then goes onto provide profiles of the main communities of Gypsies and Travellers in England and Wales. The inequalities encountered by these groups are then discussed, with particular reference to the lack of suitable accommodation. Intrinsically related to this is the notion of substantive equality, which is a key part of the findings of the thesis. The chapter then concludes by explaining the function of the planning and legal systems with regard to Gypsies and Travellers, with particular reference to legal concepts and processes relevant to the understanding of the empirical work.

## **2.1 Different communities of Gypsies and Travellers in England and Wales**

### **2.1.1 Note on statistics**

Before turning to the different categorisations it is useful to first note some general demographic facts. First, precise demographic data is unknown due to a lack of census information on Gypsies and Travellers in the UK (Clark, 2006b, p.15). This may alter due to

the inclusion of Romani Gypsies and Irish Travellers as ethnic categorisations in the 2011 census. However, in England the government estimates that there are about 300,000 Romani Gypsies and Irish Travellers (DCLGa, 2011, p.10). The majority of these live in bricks and mortar accommodation. With regard to those living on sites, the July 2010 caravan count recorded 18,146 caravans occupied by Gypsies and Travellers (DCLG, 2011a, p.10), although it should be noted that this exercise only records numbers of caravans as opposed to individuals and / or families. Furthermore, the caravan count has been discredited by Niner (2004) due to its propensity for inaccuracies. In Wales, the Welsh Assembly estimates that there are 2,000 Romani Gypsies and Irish Travellers living on sites, and 1,800 in bricks and mortar accommodation (Welsh Government, 2011, pp10-11). Figures with regard to New Travellers are even more uncertain, Clark, (2006b, p.17) estimated anywhere between 5,000 and 50,000 in the UK.

### **2.1.2 Romani Gypsies**

Romani Gypsies form the largest group of Gypsies and Travellers in the UK (Murdoch and Johnson, 2007, p.2). The origins of Romani Gypsies are disputed, and this debate forms part of the theoretical framework regarding discourses of authenticity (see section 3.4 below). Romani Gypsies are recognised as an ethnic minority for the purposes of the Race Relations Act 1967 (RRA 1967) and the Equality Act 2010 (EA 2010) (see *CRE v Dutton*, section 6.7.2). They have a distinct culture with specific cultural practices and customs and speak a mixture of English and Romani (Clark, 2006b. p.15). There is a considerable body of academic work on Romani Gypsies. Amongst this work, Okely (1983) provides an anthropological perspective on the community in 'The Traveller-Gypsies'. Okely (1983) sets out why the Gypsies have been found to be problematic by sedentary society: "The Gypsies have been classed as problematic because they have refused to be proletarianised, and have instead chosen to exploit self-employment and occupational and geographical flexibility. Within the larger economy they provide a variety of goods and services, many of which other persons or groups cannot or do not wish to provide. Using kinship and descent to restrict entry into the group, Gypsies express and maintain their separateness through ideas of purity or pollution (*ibid*, p.231)".

It is also important to note that this work is concerned with issues with regard to Romani Gypsies in England and Wales, and not wider issues with regard to Roma migrants from mainland Europe. Whilst the Roma community are often discussed in the same forums as Romani Gypsies<sup>2</sup>, their needs with regard to accommodation are different, and the legal discourse around them is often concerned with matters of immigration law (see Lloyd and Willers, 2011).

### **2.1.3 Irish Travellers**

Irish Travellers refer to themselves as “Pavees or Minceir” (Power, 2004, p.5), and are thought to be the second largest of the Gypsy and Traveller communities in England and Wales. There is evidence to suggest they have existed as an indigenous minority in Ireland for many hundreds of years (Fraser, 1995). Irish Travellers are recognised as an ethnic minority for the purposes of the Race Relations Act 1967 (RRA 1967) and the Equality Act 2010 (EA 2010) (see the O’Leary case, section 7.5.1). Their sense of common identity, their history, their nomadism sets them apart from those they call ‘buffers’ (non-Travellers) (Clark, 2006b, p.15). They speak their own language known as Gammon / Cant, which is a combination of disguised Irish words and English (Power, 2004, p.5). The body of academic work on Irish Travellers is not as vast as that with regard to Romani Gypsies, but is still more substantial than that which focuses on New Travellers or Showpeople. It includes anthropological work undertaken by Crawford and Gmelch, (1974), Gmelch and Gmelch, (1974, 1976), Gmelch, (1975), and Gmelch (1977a, 1977b). Scholars such as Acton (1994) and Okely (1994), whose work has predominantly focused on Romani Gypsies, have also published work on Irish Traveller communities. McVeigh (2007a, 2007b) has published work specifically concerned with questions of the ethnic status of Irish Travellers in the Republic of Ireland. Power (2004) has produced a comprehensive report on the situation for Irish Travellers in the UK.

### **2.1.4 New Travellers**

New Travellers are a cultural phenomenon which began in the 1960s with the free festival movement (Clark, 2006b, p.16). They are sometimes referred to as ‘New Age Travellers’

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<sup>2</sup> For example, in Parliament there is an all-party group on Gypsy, Roma, Traveller issues.

due to the spiritual practices of some of the older generation. They are not classified as an ethnic minority and as such are not accorded the same protection as ethnic Gypsies and Travellers under the RRA 1976 and the EA 2010. There are now 2-3 generations of New Travellers in the UK and abroad. It is a community which has established itself, and has been recognised by the both the government and the courts (see sections 8.4.1 and 8.5.2). This is in contrast to the controversy evident in the media in the early nineties noted by Halfacree, (1996) where New 'age' Travellers were seen as a threat to the moral well being of society, and something which the state should act against. The discourse in the media was also reflected in the statutory and judicial discourse of the time, and the Criminal Justice and Public Order Act 1994 (CJPOA 1994) and the case of *Ex Parte Gibb* (see sections 7.1.2 and 7.1.1) are representative of this. Further to this, the majority of the academic work with regard to New Travellers was produced around this time. Hetherington's (2000) work on 'New Age Travellers' in the UK carried out between 1990 and 1993 provides a romanticised and arguably naïve account of the culture, which failed to take into consideration some of the realities faced by the community with regard to living conditions and other social factors. This account is later discredited by Martin (1998, 2002), who argues that there are in effect two generations of New Traveller, the second of which were forced onto the road through the economic circumstances of the time (for example, mass unemployment) as opposed to the account of Hetherington, which suggested that people took to the road for more idealistic reasons. James (2005, 2006, and 2007) has produced a number of articles detailing the interactions of New Travellers and the Police with regard to the provisions of the CJPOA 1994. Halfacree (1996), has produced work on the place of New Travellers in rural areas and has subsequently updated this focus in 2010. The contrast between these two articles reflects the changing discourse with regard to this community. In 1994, New Travellers were said to be "out of place in the country", whereas in 2010, there is a different view which in part acknowledges the acceptance that New Travellers sometimes receive in rural communities. Beyond this article, there has been almost no mention of New Travellers in academic discourse in recent years. This reflects the point made above with regard to the acceptance of New Travellers in policy and judicial discourse. It is suggested that the lack of academic interest in New Travellers is due to the lack of wider societal discourse on the

community. New Travellers are no longer perceived to be the ‘folk devils’ noted by Halfacree (1996). Further to this, anecdotal evidence would suggest that many of the New Travellers in the 1990s have moved into conventional housing, whilst Clark notes that many moved to mainland Europe following the enactment of the CJPOA 1994 (1997, p.17).

### **2.1.5 The use for the word ‘gypsy’**

One additional point which needs to be made to allow understanding of the analytical narrative following the detailing of the three different communities is with regard to the terminology used. The word ‘gypsy’, as will become apparent in the analytical narrative, has multiple meanings with regard to legal matters. In addition, it is sometimes spelt ‘gipsy’, which is thought to be offensive by Gypsies. As Romani Gypsies are an ethnic minority, it is appropriate to capitalise the letter ‘G’. However, many of the documents examined in the literature use the offensive spelling, or fail to capitalise the ‘g’ of Gypsy or use the word to refer to groups who are not ethnically Romani Gypsies. In view of these points the following approach has been taken in this research.

- Where the spelling ‘gipsy’ appears in the analytical narrative, it is a direct quote from a document.
- Where referring to ethnic Romani Gypsies, the correct capitalisation is used.
- Where referring to the notion of ‘gypsy status’ inverted commas are used to highlight this.

## **2.2 Inequalities, including access to accommodation**

One key theme identified in the literature is that of the inequalities encountered by Gypsy and Traveller communities. The government has identified the following points as issues for the Gypsy and Traveller community:

- poor health outcomes
- poor performance at school

- high unemployment and lack of engagement with employment support provided by the Department for Work and Pensions
- unmet accommodation needs
- lack of access to financial products and services
- hate crime and discrimination (DCLGa, 2011, para 2.15).

There is no significant academic disagreement on the nature or scale of the inequalities faced by Gypsy and Traveller communities, although it is important to note that the experience of New Travellers is different to that of ethnic Gypsies and Travellers, due to factors such as higher levels of literacy amongst New Travellers allowing for better engagement with services.

Studies have identified a number of different areas of inequality. The problematic nature of the education of Gypsy and Traveller children is examined by Clark, (2006a). Cemlyn has written extensively with regard to social work and Gypsies and Travellers (1998, 2000, 2008). Parry *et al* (2004) have examined the health of Gypsies and Travellers in England whilst Goward *et al* (2006) has examined mental health issues within the communities. The common finding of all these studies is that Gypsies and Travellers experience severe inequalities when compared to the rest of the population.

### **2.2.1 Legal access to accommodation**

It is argued that the lack of suitable and secure accommodation underpins many of the inequalities that Gypsies and Travellers encounter (Cemlyn *et al*, 2009). For the purposes of the research, suitable accommodation for Gypsies and Travellers should be taken to mean sites upon which caravans can be stationed as opposed to bricks and mortar. This is arguably the critical issue in the research: the severe lack of suitable accommodation for Gypsies and Travellers. This has been one of the main focuses of the majority of UK Gypsy and Traveller academic literature in the late part of the 20<sup>th</sup> century until the present day. As the empirical work notes, the provisions of the Caravan Sites and Control of Development Act 1960 (see section 5.2.1) ensured that there was no longer access to common land for Gypsies and Travellers. The Caravan Sites Act 1968 introduced a duty on

local authorities to provide sites and a definition to determine who could be found to be a Gypsy or Traveller for the purposes of access to accommodation (see section 5.5.1). It is at this point onwards that modern Gypsy and Traveller academic attention begins to focus on the issue of access to accommodation.

Adams et al (1975) provide an analysis of issues facing the Gypsy and Traveller community after the inception of the 1968 Act. The text notes the difficulties of life on the road for Gypsies and Travellers and examines the success of the 1968 Act. The common theme that emerges is that there is an under provision of sites which is problematic. This is a theme which has run through a significant proportion of the literature since this point.

Judith Okely, one of the co-authors of the Adams et al (1975) volume then went on to publish an anthropological study of Gypsy culture (1983). With regard to legal access to accommodation, the book sets out the period since the 1960 Act until 1983. Again, the common theme is the curtailing of the ability to travel, and the lack of suitable accommodation.

Hawes and Perez (1995) set out the period between the enactment of the Caravan Sites and Control of Development Act 1960 and 1993. However, the introduction of the Criminal Justice and Public Order Act in 1994 meant that the legal landscape for Gypsies and Travellers had radically altered (see section 7.1.2). The work notes the removal of the duty of local authorities to provide sites and the introduction of 'draconian' powers for the Police and local authorities when enforcing against unauthorised encampments. Again, the common theme is the difficulty of nomadism and the lack of suitable accommodation for Gypsies and Travellers.

Turning to more recent literature, Niner's (2003) examination of the accommodation of nomadism in England finds that the main barrier to the provision of Gypsy and Traveller sites is the planning system, and the opposition of the settled community. Niner also highlights the problematic nature of nomadism, in so far as the planning system is a sedentary system which struggles to accommodate Gypsies and Travellers. Crawley's (2004) study on behalf of the Institute for Public Policy Research made the case for the guiding notion of substantive equality in addressing the accommodation needs of Gypsies and Travellers. A substantial amount of the study



focuses on the role of the planning system in achieving this. Similarly, Home (2006) notes that the “key event in achieving land-use rights and secure accommodation for Gypsies and Travellers is not the purchase of land, but the grant of planning permission” (p.107). Work by Richardson (2007) focuses on how the provision of Gypsy and Traveller sites in reducing conflict between Gypsy and Traveller communities and the settled community. A year later, Ellis and McWhirter (2008) note that: “The planning system provides a critical interface for Traveller-Gypsies in their dealing with the State and the wider settled community, acting as a key ‘gatekeeper’ to secure family life and access to vital welfare services” (p.82). Finally, Richardson and Smith Bendell (2012) examine the very recent Gypsy and Traveller planning policy (including the coalition government’s). Again the theme is clear: there is a lack of suitable accommodation. It is also noted that: “Just because planning policy is universal – it applies to us all – does not mean that the effects of its implementation are felt equally. It is well documented, for example, that planning applications from Gypsies and Travellers are refused in proportionally far greater numbers than applications from the settled community” (*ibid*, p. 22). This point is discussed in further detail immediately below.

The common theme throughout all the literature cited is the lack of accommodation for Gypsies and Travellers, and the difficulties in maintaining a nomadic existence. It is notable that this is a theme that has been present in the literature over a period of 38 years. The present research takes this theme and examines how discourses of authenticity impacts upon it through the means of the various legal and policy definitions of Gypsies and Travellers.

### **2.2.2 Substantive equality**

Turning to the rationale behind the various definitions it is useful to frame their intentions in the context of the principle of ‘substantive equality’. In the context of Gypsy and Traveller accommodation, this effectively means that Gypsies and Travellers start in an inequitable position due to a number of factors. Therefore, there needs to be provision made for addressing this. The use of a definition in order to control access to accommodation is one such means of achieving substantive equality.

### **2.2.3 Race and planning literature**

Before considering the interactions of Gypsies and Travellers and the state it is useful to acknowledge the existence of literature with regard to notions of race and, specifically, its relationship to planning. This includes work by social geographers such as Jackson et al (1987) with regard to race and racism and (amongst other work) Sandercock (2000) discusses how planning can deal with cultural difference. Krishnarayan and Thomas (1993) found that there was a great deal of ignorance of the existence and nature of racial/ethnic disadvantage in planning, and they recommended creating an institutional framework which would give greater priority to the issue. It would seem that such a literature might be of specific interest to the present research, and indeed work such as that of Sibley (1987) in the social geography field has had a specific focus on Gypsies and Travellers and racism. The race and planning literature is, however, almost silent on Gypsy and Traveller issues with the notable exception of Thomas (2000) who acknowledges the silence and offers some explanation for it noting that Gypsies and Travellers “are a racialised minority, but the manner in which this occurs differs markedly from other minorities because social relations with the rest of society are so different, based as they are on economic peripherality and nomadism” (p.110). The difficulty of New Travellers on the construction of the nomadic population in the context of ethnic difference is also noted. The point is that Gypsies and Travellers have an added nomadic / caravan dwelling dimension to contend with and this is directly related to land use. This is unique in the provision of accommodation within the planning system in England and Wales. Therefore, whilst it is important to note the wider literature on race and planning, it is not of specific relevance to the matters under consideration in the present research.

### **2.3 Points of interaction with the state**

This research is focused on the operation of the planning and legal systems. This section aims to outline the relevant mechanisms of state which govern the operation of these systems. This can be broadly divided into the formulation of statute and guidance / policy which informs the functions of state inherent within the operation of the planning and legal system. The functions of the state are highly complex in nature, so the following only covers the parts considered relevant to the understanding of the present research. It is

also worth noting that the relevant areas of law and guidance / policy are those of planning, unauthorised encampments<sup>3</sup>, equalities and homelessness. As statutory definitions are matters of national level policy, it is unnecessary to consider the structure of planning, unauthorised encampments, equalities, or homelessness policy at a local level. In the course of the analytical narrative local level procedures are explained where necessary.

### **2.3.1 Statute, regulations, policy and guidance**

The analytical narrative contains a number of references to various pieces of legislation or government guidance. Statute is the law formulated by the Parliamentary process, and is the prime consideration for decision makers. Examples of this in the analytical narrative include the Highways Act 1959, the Caravan Sites Act 1968 and the Human Rights Act 1998 (see sections 5.1.1, 5.5.1 and 7.3.1). Further to this, delegated legislation occurs when Parliament provides a particular body (normally local authorities or Ministers) with the ability to make law. In the case of the period studied, this occurs once with the Housing Regulations definition 2006 (see section 8.4.1). Further to this, national guidance and policy on specific matters such as planning for Gypsy and Traveller sites or unauthorised encampments in practice informs much of the decision making on such issues. Such documents are referred to as circulars or policy statements.

### **2.3.2 The courts**

The prime focus of the empirical work is the application of law and policy by the judiciary. Slapper and Kelly (2011) make the following observations with regard to this: “The way that the words written in the sections of statutes are interpreted by judges in law courts is very important. It is the law brought to life. Flicking through the music manuscript of an opera, or a concerto, and trying to imagine what it would sound like is a very different experience from sitting in an auditorium and hearing the music played by an orchestra. Judges animate the law in the way that musicians animate a manuscript” (p.35). It is this animation of statutory definitions of Gypsies and Travellers which is the pivotal issue for the present research. It is, in turn, useful to provide a brief overview of the hierarchy of

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<sup>3</sup> These are sites where the Gypsies and Travellers are parked on land which they do not own or have permission to reside on

the relevant judicial bodies, and how the processes detailed in the analytical narrative feed into this system.

**County Courts** – County Courts are regional, and with regard to the present research deal in the first instance with cases regarding the review of homeless application decisions and offences under the Race Relations Act 1967. Cases in the County Courts are heard by a single judge, in the main referred to in transcripts of judgments as ‘His / Her Honour Judge [name of judge]’ (HHJ), although there are other titles given to those who sit as County Court judges. The decisions of the County Courts do not bind lower courts, but may be influential in other proceedings.

**High Court** – The branch of the High Court relevant to the present research is the Queen’s Bench Division, also known as the administrative court, which deals in the first instance with applications for judicial review (see below). With regard to the research this is primarily reviews of the decisions of inspectors in planning appeals, local authorities in cases regarding security of tenure on local authority Gypsy and Traveller sites, or decisions by public authorities to evict unauthorised encampments (including local authorities). Cases in the High Court are heard by one judge, referred to as ‘Justice [name of judge]’ (J). The decision of the High Court binds all lower courts but it does not bind itself. However, in practice judges will take into account the previous decisions of the Court on particular points.

**Court of Appeal** – The Court of Appeal hears cases on appeal from the County Courts or High Court. Cases are heard by three judges, referred to as ‘Lord Justice [name of judge]’ (LJ). The decisions of the Court of Appeal bind all Courts below it, and it also binds itself.

**Supreme Court (formally the House of Lords)** – The Supreme Court assumed the jurisdiction of the Appellate Committee of the House of Lords in October 2009. It is presided over by 12 independently appointed judges known as the Justices of the Supreme Court. It is the highest court in England and Wales and its decisions bind all

those below it. As the Supreme Court is relatively new, it has not yet heard any cases of relevance to the present research. Instead, it is the decisions of the House of Lords which feature in the study.

**European Court of Human Rights (ECtHR)** – the ECtHR is concerned with the application of the European Convention on Human Rights (ECHR), which was incorporated into UK law by the Human Rights Act 1998 (HRA 1998). Such cases are concerned with the protection of individuals’ basic human rights. The ECtHR is based in Strasbourg. Cases such as *Chapman v UK* or *Connors v UK* concerned with UK planning control with regard to Gypsy and Traveller sites and security of tenure respectively bind all UK courts below it (see sections 7.6.1 and 8.1.3). The decision of the ECtHR with regard to matters in other contracting states do not bind lower courts, but the House of Lords in *R. (on the application of Alconbury) v Secretary of State for the Environment, Transport and the Regions*<sup>4</sup> held that domestic courts should try to ensure that ECtHR decisions were followed wherever possible, as this would prevent a decision being referred on to Strasbourg.

### **2.3.3 Judicial review**

The cases which are examined in the analytical narrative are almost all judicial reviews of the decision of a public body, be it the Planning Inspectorate in planning matters, local authorities in cases of eviction from unauthorised encampments cases, or housing authorities in cases concerning homelessness applications. The exception in the analytical narrative is cases concerning the ethnic status of Sikhs, Romani Gypsies and Irish Travellers, which were made against individuals or companies believed to be acting in a discriminatory manner (see sections 6.3.1, 6.7.2 and 7.5.1).

There are legal principles which govern the process of judicial review, and it is important to note these in order to understand fully the cases examined in the analytical narrative. Of particular relevance are the points set out by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*<sup>5</sup>. The *Wednesbury* case

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<sup>4</sup> [2001] UKHL 23

<sup>5</sup> [1947] 2 All ER 680

concerned an application for review of the decisions of the Wednesbury Corporation, a public authority with regard to conditions applied to the showing of certain films on Sundays in a cinematograph theatre. The principle which became known as ‘Wednesbury unreasonableness’ is set out in the final paragraph of the judgement at 685:

...it might be useful to summarise once again the principle, which seems to me to be that the court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account or neglected to take into account matters which it ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that the local authority, nevertheless, have come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in it.

In essence this means that the court undertaking such a review may only examine the process at which a decision was reached, as opposed to making a value judgment on whether a decision was unreasonable or not. The implication for the cases examined in the analytical narrative is that the conclusions reached by the courts are often based on a strict interpretation of the law as opposed to what might be termed ‘principles of justice’.

## 2.4 Conclusion

This chapter has set out the context for the research. There are three nomadic communities whom are the subject of the discourse examined by the empirical work. Two of these are legally classified as ethnic minorities (Romani Gypsies and Irish Travellers), whilst the other is a cultural grouping which has established itself over three generations (New Travellers). These groups are often subject to inequalities, the primary of these being access to accommodation. The notion of substantive equality is useful in

understanding attempts to address these inequalities. Access to accommodation involves complex interactions between Gypsies and Travellers and the state, primarily through the planning and legal systems. It is the courts which are the primary subject of the analytical narrative, and this chapter concluded by setting out the relevant courts and the process of judicial review. The next chapter goes onto to outline the theoretical framework that the research uses to examine the interactions of Gypsies and Travellers and the state with regard to access to accommodation.

## **Chapter 3 - Theoretical framework – Discourses of Authenticity**

This chapter establishes the theoretical framework which situates the empirical work presented in Chapters Five to Eight. The theoretical framework is built around the notion of ‘discourses of authenticity’. These are constructed as the discourse regarding the authenticity of an individual or group as Gypsies or Travellers as prescribed by other individuals, groups or institutions and the implications of this ascription. The review of the relevant literature below provides the theoretical foundation for this proposition. To begin with, the relevance of the French philosopher Michel Foucault (1969, 1977, and 1994) with regard to the conceptions of power, control and discourse is highlighted. This forms a key part of the theoretical foundation of the research. Having regard to the historical approach of Foucault, the presence of discourses of authenticity within the legal framework of England in the 1500s is noted. Following this, the concept of the ‘genuine gypsy’ which is present in both the academic and political discourse is discussed. The relevance of the origins of Gypsies and Travellers to their perceived authenticity is highlighted, and the intrinsically connected notion of ethnic authenticity. Following this, the often hierarchical nature of discourses of authenticity is set out. Finally, both the specific Gypsy and Traveller literature, and the wider literature on the concept of the ‘other’ are discussed with particular reference to the work of Edward Said (1979).

### **3.1 Power, control, discourse and Gypsies and Travellers**

#### **3.1.1 Power, control and gaze**

It is important first to set out the relevance of notions of power and control, with reference to the work of Foucault. Such notions are useful as they provide a framework from which to examine discourse from. In essence, this is the idea that discourse is a manifestation of the operation of power and control within society.

Foucault (1975) sets out the history of the exercise of power and control in *Discipline and Punish*. This begins with crude methods such as torture and then



progresses onto more generalised methods of punishment, and subsequent control. Following this, Foucault turns to the notion of discipline, which he describes as “the means of correct training”. He suggests that: “Discipline ‘makes’ individuals; it is the specific technique of power that regards individuals as both objects and instruments of its exercise.” (*ibid*, p.170). This notion of correct training can be applied to educational systems and institutions. Whilst it is not of direct relevance to the present research, it is interesting to note the lengths gone to by Traveller Education Services to encourage / coerce Gypsy and Traveller children to attend mainstream education. A Foucauldian perspective might suggest that this is a means by which to exercise a form of control over such children. This could potentially be an interesting area for educational research.

Having examined discipline as a means of coercion, Foucault then turns to the notion of surveillance, which is of significance to the present research. This begins with the ‘Panopticon’, a creation of Jeremy Bentham. Foucault describes the Panopticon: “at the periphery, an annular building; at the centre, a tower; this tower is pierced with wide windows that open onto the inner side of the ring; the peripheric building is divided into cells, each of which extends the whole width of the building; they have two windows, one on the inside, corresponding to the windows of the tower; the other, on the outside, allows the light to cross the cell from one end to the other. All that is needed, then, is to place a supervisor in a central tower and to shut in each cell a madman, a patient, a condemned man, a worker or a schoolboy. By the effect of backlighting, one can observe from the tower, standing out precisely against the light, the small captive shadows in the cells of the periphery. They are like so many cages, so many small theatres, in which each actor is alone, perfectly individualised and constantly visible. The panoptic mechanism arranges spatial unities that make it possible to see constantly and to recognise immediately. In short, it reverses the principle of the dungeon; or rather of its three functions – to enclose, to deprive of light and to hide – it preserves only the first and eliminates the other two. Full lighting and the eye of a supervisor capture better than darkness, which is ultimately protected. Visibility is a trap” (Foucault, 1977, p.200). So the operator of the Panopticon is not only observing those in front of them, they are also exercising a power that is able to dominate its inmates.

The notion of surveillance inherent in the concept of the Panopticon can be linked to the notion of 'gaze' that Foucault describes elsewhere in the *Birth of the Clinic* (1969). In this work, he considered the active interpretation as opposed to passive observation that doctors in a clinic gave their patients, which he terms as 'gaze'. Richardson (2006b) cites Foucault's (1969) notion of gaze as important to the understanding of the relationship between discourse, power and control: "The gaze is not faithful to truth, nor subject to it, without asserting, at the same time, a supreme mastery: the gaze that sees is a gaze that dominates." (Foucault, 1969, p.39, cited in Richardson, 2006b, p.45). Whilst, in that instance, Foucault was specifically referring to medical professionals, the notion of gaze is equally applicable elsewhere. For instance, Richardson (2006b) makes the link with Gypsies and Travellers by suggesting that "words and terms used in the discourse around Gypsies and Travellers are not passively describing a situation but instead they are interpreting them" (p.46). In the context of the present research, it is the active judicial interpretation of the authenticity of Gypsies and Travellers that is of interest. The gaze of the judge is one which exercises power over Gypsies and Travellers with regard to access to accommodation.

There is a further point of relevance with regard to the identification and (in effect) registration of individuals and groups as Gypsies and Travellers through the planning and legal system: "The examination that places individuals in a field of surveillance also situates them in a network of writing; it engages them in a whole mass of documents that capture and fix them. The procedures of examination were accompanied at the same time by a system of intense registration and of documentary accumulation." (Foucault, 1977, p.189 cited in Richardson, 2006b, p.82). The evidence with regard to statutory definitions in the analytical narrative might well be described as an "intense registration". The considerable amount of evidence on the private lives of Gypsies and Travellers required in the case of planning, evictions from unauthorised encampments, equalities and homelessness matters is kept by the state and is able to build up details of an individual's life with regard to their work, family, education (or lack of) and in the case of homelessness applications, mental health. This is a further example of the exercise of power and control over Gypsy and Traveller communities.

### **3.1.2 Foucault's conception of discourse**

It is useful now to set out the conception of discourse used by the research. Foucault (1994) makes the distinction between purely linguistic discourse analysis and that which he practices: "A few years ago, it was original and important to say and to show that what was done with language – poetry, literature, philosophy, discourse in general – obeyed a certain number of internal laws or regularities: the laws and regularities of language. The linguistic character of language was an important discovery for a certain period...Then it seems, the moment came to consider these facts of discourse no longer simply in their linguistic dimension, but in a sense...as games, strategic games of action and reaction, question and answer, domination and evasion, as well as struggle. On one level, discourse is a regular set of linguistic facts, while on another level it is an ordered set of polemical and strategic facts. (pp2-3). Lessa (2006) summarises Foucault's definition of discourse as "systems of thoughts composed of ideas, attitudes, courses of action, beliefs and practices that systematically construct the subjects and the worlds of which they speak" (p.285). Jaworski and Coupland (1999) echoes this by suggesting that "discourse is language use relative to social, political and cultural formations – it is language reflecting social order but also language shaping social order, and shaping individuals' interaction with society" (p.3).

### **3.1.3 The legal and policy discourse around the authenticity of Gypsies and Travellers**

With regard to the present research, it is the legal and policy discourse around the authenticity of Gypsies and Travellers which is the primary focus of the research. It is suggested that specific instances of such discourse (for example, court judgments) are multi-faceted, and in their own way are an "ordered set of polemical and strategic facts". As the empirical findings bear out, it is the decisions of the courts which often have the most significant implications for access to accommodation for Gypsies and Travellers on both the micro and macro level. The research has chosen to focus primarily on court decisions as initial investigations confirmed that the judiciary have had the greatest impact on the evolution of the statutory definitions. Furthermore, the transcripts of court judgments offer a detailed and (mostly) concise account of the discourse present in

proceedings which have taken place across a substantial period of time. This provides a body of evidence from which discourse of authenticity can be charted over a long period. It is also important to note that it is the transcripts themselves that have the impact, in that they are informed by, create and inform discourses of authenticity. First, the presence of discourses of authenticity in the decisions of a court reflects social order. Second, the social order of those whom the court is making rulings with regard to (Gypsies and Travellers) is shaped by the discourses of authenticity present in the court. Finally, the ruling of a court goes on to bind all courts below it. Thus the discourse present has a wider macro effect in shaping social order for the wider Gypsy and Traveller community. This approach to discourse falls into what Campbell (2009) describes as a critical interpretive approach examining social practises made possible by language. This is in contrast to more formal methodological approaches which take formal components and properties of linguistic representations as their primary concern.

In summary, when the statutory authenticity of Gypsies and Travellers is questioned, the discourse is not only describing the authenticity of the individual or group concerned, it has relevance to the access to accommodation for those persons. There is an underlying element of power and control to this discourse.

### **3.2 The historical relevance of discourses of authenticity in the context of Gypsies and Travellers**

The exercise of power and control within discourses of authenticity relating to Gypsies and Travellers needs to be seen from a historical perspective. This ties in with the Foucauldian approach outlined above as using historical material in order to understand the events of the modern world was a significant part of Foucault's approach. Of particular relevance to the present research was the contention that: "Among the social practices whose historical analysis enables one to locate the emergence of new forms of subjectivity, it seemed to me that the most important ones are juridical practices" (Foucault, 1994, p.4). In the case of discourses of authenticity, their function as part of legal framework in England and Wales can be traced back as far as the 1500s. This historical view highlights a common characteristic of discourses of authenticity which is

their persistence over time. This is evidenced by a succession of Acts during the 1500s known collectively as the 'Egyptian Acts'. At the time, a section of the nomadic population thought to have come from overseas were referred to as 'Egyptians'. There are a number of reasons for this identified by Okely (1983), the prime being the 'outlandish' nature of such people. The relevance of the origins of Gypsies to discourses of authenticity is discussed below. The first piece of legislation in 1530 was "aimed at ridding the country of all Egyptians, or Gypsies, by banning any further immigration and requiring those already travelling the English roads to depart voluntarily within sixteen days or suffer the confiscation of their goods and property, imprisonment and deportation" (Mayall, 1995, p.20). This legislation was eventually found to be problematic as it failed to cover native born offspring of 'Egyptians', any indigenous person found in the 'Egyptians' camps, and even indigenous Travellers imitating the 'Egyptians' way of life. To address this, in 1562 an order 'for the avoiding of all Doubts and Ambiguities' was introduced so that 'all such sturdy and false vagabonds of that sort living upon the spoil of the simple people' might be punished, and the death penalty was extended not only to those 'in any company of Fellowship of vagabonds, commonly called or calling themselves Egyptians<sup>6</sup>', but also to those 'counterfeiting, transforming or disguising themselves by their Apparel, Speech or other Behaviour' (Thompson, 1923 cited in Okely, 1983, p.3). This legislation made the distinction between 'real' and 'counterfeit' Egyptians. However, the boundaries between 'Egyptians' and their counterfeits were exceptionally vague, but the precise definitions of the terms were unnecessary as the state had achieved its primary objective, that of flexibility in proceeding against any traveller or nomad without first having to establish their origin or place of birth (Mayall, 1995). The distinctions made in the Egyptian Acts have parallels with the application of contemporary statutory definitions, for example, Sandland (1996, p.384) notes the similarities of the 1500's legislation with legislation and guidance with regard to the Gypsies and Travellers in the 1990s, one such example being the case of *Ex Parte Gibb* (see section 7.1.1).

The example of the Egyptians Acts provides a historical context for the discourses of authenticity which are notable in both specific Gypsy and Traveller academic work, and in the wider literature. The key point is that discourses of authenticity are evident in the

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<sup>6</sup> 'Egyptians' is the original source of the term 'Gypsy'.

first historical records of Gypsies and Travellers, and have persisted throughout history. The study period of 53 years is testament to this. The remainder of the chapter will work through the literature specific to Gypsies and Travellers, which is concerned with the notion of the 'genuine gypsy', the origins of Gypsies and Travellers, the hierarchical nature of authenticity, and considerations of ethnicity. Finally, the notion of 'the other' from the wider literature is considered.

### **3.3 The 'genuine gypsy'**

Discourses of authenticity can most simply be exemplified by the figure of the 'genuine gypsy', which is a common theme emerging from the literature. The 'genuine gypsy' is the independent, strong, self sufficient exotic Romani, living out a rural existence in brightly painted caravans, selling their craft wares but largely remaining outside of Gorgio (non Gypsy) society (Sibley, 1986). Liégeois (1994) notes the contrast between real Gypsies and mythical (genuine) Gypsies: "The worst Gypsies are the nearest ones, that is, those he sees camped nearby, or who could move into the neighbourhood: these are dirty thieves who make the observer uneasy, even fearful. The further away the Traveller is, both in spirit and in reality, the better he is perceived to be. At the furthest reaches, there is a great appreciation for the mythical Gypsy: he is beautiful, an artist leading a life of petty restraint, a symbol of liberty, accepted if he appears in the sanctioned margin of folklore or the performing arts: music, dance, the circus, song, life in an old fashioned wagon. The only acceptable Gypsy is the mythical one – and he does not exist. It is therefore perfectly safe to credit him with attractive, even enviable, qualities" (p.191).

The contention that the 'genuine gypsy' is fictional is supported by (Acton, 1974) who suggests that the existence of the authentic Traveller is part of a structure of belief utterly remote from reality. In spite of this the notion of the 'genuine gypsy' and its 'bad' counterpart is still prevalent within the modern discourse around Gypsies and Travellers. An example of this is the comments of the then Home Secretary Jack Straw on 'so called travellers' in 2000: "Now the first thing we have to say is that people have got to stop being sentimental about so called travellers. There are relatively few real Romani gypsies left, who seem to mind their own business and don't cause trouble to other people, and then there are a lot more people who masquerade as travellers or gypsies, who trade on

the sentiment of people, but who seem to think because they label themselves as travellers that therefore they've got a licence to commit crimes and act in an unlawful way that other people don't have" - Jack Straw, the then Home Secretary, in an interview with Annie Oathen on Radio West Midlands, 22/7/99, (cited in Clark and Dearling, 1999). These comments are an indication of how discourses of authenticity with regard to Gypsies and Travellers are part of social discourse, and are evident at the highest levels of Government.

### **3.4 Origins and authenticity**

Intrinsically linked with the contention that discourses of authenticity are persistent over time is the debate with regard to the origins of Gypsies and Travellers which has been a continuous feature of the literature from the 17<sup>th</sup> century onwards (see Willems, 1997, Okely, 1983). The subject has been an area of much disagreement between academics in recent years.

Academic opinion, with the notable exceptions of (Okely, 1983, Cohn, 1973), has, until the mid-1990s, been in general agreement regarding the origin of the Gypsies. Angus Fraser's text, 'The Gypsies', seemed to embodied the scholarly consensus about Gypsy history (Acton, 2004, p.666). The opening paragraph of this work states: "This is the story of a wandering people which arrived in the Balkans in medieval times and gradually spread over the entire continent of Europe and beyond. When they knocked at the gates of western Europe in the guise of pilgrims, they aroused intense curiosity, and theories proliferated about their origins. Only much later did it become possible to deduce from their language where the diaspora had begun. Over the centuries, despite constant exposure to a multitude of influences and pressures, they managed to preserve a distinct identity and to show remarkable powers of adaptation and survival" (Fraser, 1995). Fraser's explanation as to the origins of this wandering people is centred upon Indian origins. His evidence is based primarily on linguistic factors, but he admits that "The Romani language and its speakers have been exposed to a multitude of historical, demographic and sociolinguistic influences over the centuries; so too, in their separate ways have the languages and populations of India. After the lapse of so much time it may be a forlorn hope to seek to prove with any certainty the precise people (or combination of peoples)

from which the European Gypsies sprang in the past or which is most closely related to them today. Yet it would be premature to abandon the search” (Fraser, 1995). Fraser demonstrates a keen interest in discovering the origins of the Gypsies.

Mayall (2004) attributes this concern, if not obsession, with origins to the central ideological importance of ideas of nation, nationalism and national identity: in particular, the belief that all people have to have a homeland and to share the appearance, characteristics and culture of the other people from the same land. Mayall takes his lead from the work of two Dutch historians, Willems and Lucassen, who have made radical social-constructionist critiques of the ‘consensus’ over Gypsy history. In particular, Willems has published work entitled ‘In search of the True Gypsy’ (1997). Acton (2005) believes that Willems has attempted to “reconstruct the entire western European understanding of and policy towards Gypsies over the past two centuries” and has been critical of such an approach. Willems traces back the evolution of the understanding of the origins of Gypsies to Heinrich Grellmann who is often regarded as the father of Gypsy studies (Mayall, 2004). Grellmann published one piece of work on the subject entitled *Die Zigeuner* in 1783, and this was taken to be the definitive work on Gypsies at the time (Mayall, 2004). The work was a synthesis of various other disparate works. The key points of the work include the distribution and origins of Gypsies in Europe, various bits of scandal mongering, including in the first edition the claim that Gypsies were cannibals (this idea would take a century or more to die away), and arguments for rehabilitation as opposed to banishment (Fraser, 1995). Fraser (1995, p.195), whilst acknowledging the imperfections of Grellmann’s work, believed that the author’s key achievement was ensuring that the general proposition of the Indian origins of the Gypsies’ language and their ethnic identity was widely accepted. However, Willems (1997) argues that Grellmann constructed Gypsy identities and origins through a synthesis of different approaches concerned with diverse nomadic population groups. This was based on evidence about different groups which he found to have common traits, which was synthesised to create an image of mutually related, alien heathens who lived parasitic, highly mobile lives. Such people all became known as Gypsies. Grellmann also gave these disparate groups an Indian origin from the weakest of evidence (see Willems, 1997, pp22-92) but these ideas have been sustained by Gypsiologists (such as Fraser) until recently.



This position is supported by Okely (1983) who suggests that there is little evidence to suggest that Gypsies had indicated or used an Indian origin until Gorgio scholars gave it to them.

The question of origins has led to a considerable amount of debate, and some personalised disagreements between the relevant authors. However, one Gypsy noted the following when informed of her apparent Indian origins: "A gennelman come 'er one day and said as we is all from India", one Gypsy woman told me. "So I says to 'im, Well, maybe we is, Surr, but it don't make a mighty difference, now, do it, Surr?" (Reid 1964, p.170, cited in Hancock, 2006, p.86). The debate with regard to origins would appear on a superficial level to be irrelevant to discourses of authenticity and subsequently access to accommodation. However, the question of origins informs in part the further characteristics of discourses of authenticity outlined below.

### **3.5 Ethnic authenticity**

The question of origins informs the determination of Romani Gypsies and Irish Travellers identity as ethnic minorities. It is interesting to note the conflation of Indian origins with recognition as an ethnic minority. Such a conflation is made by Hancock (2006), who forcefully refutes those who take the alternative view. He suggests that cynicism regarding Indian origins masks unease on the part of those who seek to define and limit Romani identity and suggests that it is difficult to believe that such scholarship is serious, and that its purpose may just be to generate controversy and debate (p.92). Furthermore, Hancock (2006) asserts that if groups of individuals who identify themselves as Romanies seek to assert their ethnicity, and to ally themselves with other groups similarly motivated, then this is entirely their own business, and the non-Romani anthropologists, linguists, sociologists, folklorists, and others who have taken it upon themselves the role of the ethnic police are interfering and presumptuous at best, and perpetuating paternalistic attitudes (p.93).

Such attacks are aimed at scholars such as Willems (1997) and Okely (1983), the views of whom have been cited above. The contrast between the three authors is in their approach to ethnic status. Willems (1997) and Hancock (2006) both approach ethnic status as something which is wholly informed by origins, and links many disparate groups

across Europe. For Hancock (2006) this is an emancipatory part of Romani identity, whilst Willems (1998) views it as a “death-trap”. What both these views fail to take account of is that the construction of ethnicity can be made without reference to origins.

Adams *et al*, (1975) points to Barth’s (1969) notion of ‘self ascription’ as a means of achieving this and notes that attempts by outsiders to identify Gypsies or Travellers by reference to criteria such as origins, race, language, occupation or general culture have not taken into account such factors as economic and social change and the incidence of marriage with non-Gypsies. Furthermore, how Gypsies and Travellers identify themselves had not been taken into account. Adams *et al*, (1975) goes on to make the case for group self ascription. This is the proposition that if a group of people recognises someone as a Gypsy or Traveller, then that person is a Gypsy or Traveller as a matter of social fact. This approach only takes into account those aspects of culture which the group itself emphasises as important, the most significant of which the authors suggest to be descent which restricts entry to the group and facilitates the perpetuation of the group (Adams *et al*, 1975, pp.34-35).

Finally, ethnicity as recognised by the state affords a group greater levels of legal protection, for instance, Okely, (1997) notes the recognition of the rights of Gypsies by United Nations Educational, Scientific and Cultural Organisation (UNESCO). Like the case of *CRE v Dutton*, where Romani Gypsies were found to be a racial group (see section 6.7.2), Okely notes that such recognition has been “achieved in part because of the declared Indian origin of the Rom or Gypsies throughout the west” (*Ibid* 1997, p.237). However, regardless of how ethnicity is constructed, its denial by the state is thought to be problematic by McVeigh (2007a) with reference to the situation in the Republic of Ireland where Irish Travellers are not afforded ethnic minority status by the Government. The implication of such a policy is that if a group is not an ethnic group, and therefore not recognised by anti discrimination legislation, then it cannot experience racism (p.103). Furthermore, McVeigh (2007a) notes that the denial of ethnicity is a key legacy of the *Porrajmos*: the ‘Gypsy Holocaust’. Those who seek to repudiate or downplay the ‘genocide’ of the Gypsies in the Second World War suggest that they are not an ethnic group, and therefore cannot have experienced genocide (p.101). This highlights the significance of ethnic ascription for Gypsies and Irish Travellers. Conversely, it should be

noted that New Travellers do not have ethnic minority status, and as such do not have protection from discrimination. However, the implications for access to accommodation of 'ethnic authenticity' do not reflect this, and this is highlighted in the empirical evidence (see section 9.2)

### **3.6 The relevance of hierarchy to discourses of authenticity**

The relevance of hierarchy is noted in the literature by (Power, 2004) who, when writing about Irish Travellers, suggested that hierarchies of authenticity are generated historically by economic competition, ethnic and national rivalries, ignorance, and prejudice between indigenous Traveller groups and that this has been exploited by some politicians at all levels of government in Britain. He goes on to suggest that historically British Travellers and Gypsies who claim Romani origins are accorded (and sometimes claim) a privileged nomadic and essentially romanticised ethnic 'authenticity' which has been denied to their Irish nomadic counterparts (and other indigenous Travellers) in official discourses ranging from academic to political arenas (p.10). Whilst Power (2004) is correct in stating that there has been and is rivalry between different groups of Gypsies and Travellers, the evidence contained within this research would suggest that the hierarchies of authenticity were not created solely by Gypsies and Travellers and then exploited by the state. Nevertheless, Power's hierarchies of authenticity are a key factor in enabling the notion of authenticity discourse to be conceptually formed.

The relevance of hierarchy to discourses of authenticity has particular reference to New Travellers in recent times. This has been noted in articles by Geary and O'shea (1995), Barnett (1995), and Clark and Dearling (1999). All of these articles were written during the 1990s, a period where New Travellers were considerably more controversial than at the present time. The premise at the time was that such people were not 'proper travellers' and as such should not be entitled to the same (albeit limited) rights as ethnic Gypsies and Travellers. The case of *Ex Parte Gibb* is the prime example of this (see section 7.1.1)

The relevance of hierarchy to discourses of authenticity is not just concerned with New Travellers; it is a factor which is also applicable in a number of other instances. One such example is that of Robert Ritter, who was a Nazi racial scientist who played a

considerable role in the attempted genocide of the Gypsies under the Third Reich (Mayall, 2004). Ritter maintained the idea of the 'genuine gypsy' as a prototypical nomad (Willems, 1997). His view was that Gypsies were much like hunters and gatherers from prehistoric times, unable to keep pace with modern times. Mixing with pure German people led to the creation of 'halfbloods' whose deviance was from this biological inheritance. When combined with German cleverness and boldness this would lead to asocial and criminal behaviours (Willems, 1997). Part-Gypsies were said to be "In the majority unbalanced, characterless, unreliable, untrustworthy and idle, or unsteady and hot tempered". The solution to this problem would only be found when 'the majority of the asocial and useless part-Gypsies have been collected in large camps and set to work, and when the continued procreation of this mixed population is finally prevented' (Kenrick and Puxon, 1973).

When studying Gypsies, Robert Ritter placed Gypsies into a hierarchical system based on the principles outlined above. Whilst Ritter is an extreme example, the notion of hierarchy is a key characteristic of discourses of authenticity. Introducing the notion of hierarchy adds a level of sophistication to the parallel constructions of the good and bad Gypsy or Traveller that are inherent in the idea of the 'genuine gypsy' described earlier. This is to suggest that there is a range of social constructions of Gypsies and Travellers, and some are more acceptable to settled society than others.

### **3.7 The relevance of notions of 'the other'**

Underpinning discourses of authenticity, and indeed many of the explanations offered in the literature with regard to the discriminatory treatment of Gypsies and Travellers is the concept of 'the other'. 'Othering' is the notion that: "Identity can be defined as much as by what we are not as by who we are" (Crang, 1998, p.61). This is significant to the research, as the basis for statutory definitions is the finding of difference from the social norm of house dwelling, whether this is through the identification of nomadism or ethnic factors. There are a number of different authors and concepts that assist in setting out the notion of 'the other', in particular Said's (1979) work on Orientalism is of relevance.

The following section begins by setting out the roots and causes of 'othering'. It then examines two aspects of the operation of 'the other', the categorisation and

portrayal of Gypsies and Travellers. It then examines the significant notion of the 'other's other' and concludes by examining some of the explanations for 'the other'.

### **3.7.1 The routes and causes of 'othering' – Orientalism and Sedentarism**

The operationalisation of 'the other' is through the finding of difference. Said's (1979) theory of Orientalism is useful in understanding the mechanisms of this process, and parallels can be drawn with other authors' work and the nature of discourses of authenticity with regard to Gypsies and Travellers outlined above. Orientalism is a political doctrine willed over the Orient by the West, because of the strength of the latter over the former. It is a doctrine applicable primarily to the British and the French (Said, 1979). The 'orient' is the Indian sub-continent and the Middle East. It is arguably one of the most useful examples of the operation of 'the other' in the literature.

This history of this phenomenon is traced back by Said (1979) as far as the days of the British Empire. Said's (1979) approach is similar to Foucault (1969, 1977 and 1994) as he identifies a number of historical factors which in his view have shaped the reality of the present: "My thesis is that the essential aspects of modern Orientalist theory and praxis (from which present-day Orientalism derives) can be understood, not as a sudden access of objective knowledge about the Orient, but as a set of structures inherited from the past, secularized [sic], redisposed, and re-formed by such disciplines as philology, which in turn were naturalized [sic], modernized [sic], and laicized substitutes for (or versions of) Christian supernaturalism" (Said, 1979, p.122). There are clear parallels here with the historical development of discourses of authenticity highlighted above insofar as the focus on a set of ideas inherited from the past. Said acknowledges that "Orientalism is a school of interpretation whose material happens to be the Orient, its civilizations, peoples and localities" (*ibid* p.203).

Turning back to the specific Gypsy and Traveller literature, McVeigh's (1997) notion of Sedentarism is a useful comparator. McVeigh presents Sedentarism as very much a negative doctrine, which echoes Said (1979), who explains that Orientalism is better grasped as a set of constraints upon and limitations of thought. Sedentarism is defined as "that system of ideas and practices which serves to normalise and reproduce sedentary modes of existence and pathologies and repress nomadic modes of existence"

(McVeigh, 1997, p.9). Like Orientalism, Sedentarism is deeply rooted in the past. McVeigh (1997) notes that: “Social evolutionism assumes that somewhere in history societies shifted from travelling to sedentary modes of existence. In addition, it assumes that this shift was both total and irreversible. Furthermore, social evolutionism almost inevitably regards this shift as a ‘good thing’ – as a movement upwards towards civilisation, security and modernity” (p.10). McVeigh goes onto critique such a notion, arguing that such a transition was never absolute or unproblematic and that the eventual triumph of sedentary modes of existence was entirely positive or civilising.

What both approaches demonstrate is the deep rooted nature of concept of ‘the other’. The contemporary operation of such ideas will now be examined.

### **3.7.2 Explaining and making sense of ‘the other’ – categorisation**

Said (1979) explains that Orientalism is a set of ideas and unifying values that explained the behaviour of the Orientals, and supplied them with a mentality, a genealogy and an atmosphere. It was a method of allowing the Europeans “to deal with and even to see Orientals as a phenomenon possessing regular characteristics” (p.42). This notion is similar to that of categorisation: “a routine and necessary contribution to how we make sense of, and impute predictability to, a complex human world of which our knowledge is only partial. The ability to identify unfamiliar individuals with reference to known categories allows us at least the illusion that we know what to expect from them” (Jenkins, 2004, p.82). The categorisation of Gypsies and Travellers within the planning and legal system not only allows society to know what to expect of them, it is also the exercise of control over them, as it keeps them both under surveillance and (if granted planning permission) within a designated location.

### **3.7.3 Portrayals of Orientals and Gypsies and Travellers – the disturbing and the exotic**

Returning to Orientalism it is useful to note how the west categorised the east, as such notions have applicability to Gypsies and Travellers. In the early 1900s, Said (1976) notes that the discourse of the time would make the comparison between east and west. The Oriental is “irrational, depraved (fallen), childlike, “different””; thus the European is rational, virtuous, mature, “normal””. (p.40). Turning to modern times, Said (1979) notes that in films and TV, Arabs are often portrayed as an oversexed degenerates, or are

associated with lechery or bloodthirsty dishonesty, whilst in the news, Arabs are always shown in large numbers and have no individuality, no personal characteristics or experience (pp286-287). Such portrayals are similar to those of Gypsies and Travellers in the media in the UK. Morris (2006) notes that the print media “suggests to readers as a matter of course, through select representations of Travelling people, that as a group they routinely display ‘typical’ negative characteristics” (p.237). The televisual media engages in similar practice, and this is best exemplified by the Channel 4 program, ‘Big Fat Gypsy Weddings’ which had general sub-themes of hyper-masculinity, sexism, domestic violence, and the sexualisation of children (Richardson and O’Neill, 2012, p.181). The similarities between the portrayal of the Orientals and Gypsies and Travellers are striking.

The disturbing themes of ‘Big Fat Gypsy Weddings’ noted above were secondary to the central theme of the program. Channel 4’s write up for the program suggested that the program “laid bare the exotic” (*ibid*, p.180). The exotic with regard to ‘Big Fat Gypsy Weddings’ was the lavish weddings which were presented by the programmes. In effect, the program presented a culture which was markedly different from social norms, portrayed as both exotic and grotesque in equal measure. This is similar to the portrayal of the Orient by the west as a place of exoticism. The effect of both approaches is a variation on the theme of ‘the other’, one which is closely tied to the theme of the ‘genuine Gypsy’ discussed above.

#### **3.7.4 The ‘other’s other’**

There is a dichotomy between the disturbing Gypsies and Travellers, and the exotic or romantic ‘genuine Gypsies’. Okely (1997) describes this as an “‘Orientalisation’ of Occidentals” (p.227). Essentially, this takes the concept of the other a set further in that there can be an other to the existing other, the construction of which can be as simple as ‘good’ and ‘bad’. It is useful to refer to literature with regard to asylum seekers in the UK to examine the notion of the other’s other. Lynn and Lea, (2003) write about “*differentiating the other*” [my emphasis] with regard to ‘bogus asylum seekers’. The authentic asylum seeker is already ‘the other’. So others, who are constructed as ‘masquerading’ as asylum seekers are ‘the others’ other’. There are parallels in the cases of asylum seekers and Gypsies and Travellers. For example, much of the coverage in

certain parts of the press with regard to the eviction of Irish Travellers at Dale Farm was concerned with their status as ‘travellers’. Lynn and Lea (*ibid*) cite Billig (1987), who notes that all arguments are constructed in relation to their counter argument. When making a statement that could be construed as being unreasonable, the inclusion of a distinction between, in this case, ‘good’ or ‘bad’ asylum seekers allows the individual to counter any accusations of prejudice. It also has the effect of seamlessly entering the bogus asylum seeker or un-authentic Gypsy or Traveller into the argumentative process, without explanation or qualification (Lynn and Lea, 2003).

Discourses of authenticity, as the empirical work will demonstrate, are often built on the notion of the ‘other’s other’. The notion of the ‘genuine Gypsy’ is the simplest example of this notion at work. The ‘other’s other’ is also present in notions of hierarchy, but is not explicitly stated as such. The research takes the notion of the ‘other’s other’ and applies it to the notion of authenticity and examines the differences experienced by the ‘authentic’ and ‘inauthentic’ Gypsy or Traveller in accessing accommodation.

### **3.7.5 The rationale for ‘othering’**

It is useful to examine the consequences and explanations for ‘othering’ offered by the literature. An explanation of ‘the other’ and its consequences is offered by ní Shuinéar (1997): “The point is that ‘we’ are defined, not by who ‘we’ are but by who ‘we’ are *not*. We understand only what makes us us when we have something with which to contrast ourselves. Even so, we do not approach the problem directly, as one of figuring out what makes ourselves tick. Instead, we do it by figuring out the other group and what they are like. The less powerful that group is the freer ‘we’ become not only to believe whatever we like about them but also to control conditions in such a way that ‘they’ must behave as we need them to, to be whatever it is we need them to be” [original emphasis] (p.30). The significance of the ‘other’ is highlighted in the last line of the quote, “to be whatever it is we need them to be”. Liègeois (1994) applies this notion to political discourse, by suggesting that the state makes great use of stereotypes, both in the image of Gypsies and Travellers as it emerges in legal texts and in actual regulations, and in the definitions it employs in the course of political action. “The Gypsy is not defined as he is, but rather as he must be to meet socio-political requirements” (Liègeois, 1994, p.193). Both these



quotes highlight the inherent nature of power within the notion of the other. Those making an ascription of the other with regard to an individual or group are often in a position of power. With regard to the research, it is primarily the court's exercise of power over the 'other' of Gypsies and Travellers which is of interest. It is the power within the notion of 'the other' which has the potential to significantly alter access to accommodation.

Turning to explanations for 'the other', McVeigh's (1997) central premise with regard to the cause of contemporary Sedentarism is useful as it provides an explanation as to why Gypsies and Travellers are often identified as 'the other': "The cultural and social identity of nomadic communities continues to undermine hegemonic sedentary notions about work and property" (pp21-22). James (2005) echoes this by arguing that industrial capitalism functions by localising a flexible workforce, and as such, physical space in rural and urban environments is divided into defined areas for employment and residential use (through the planning system), which is as Niner (2003) notes is a sedentarist response to land use which Gypsies and Travellers are not easily accommodated within.

These explanations as to why Gypsies and Travellers are constructed as the 'the other' are well rehearsed. They are useful in providing a context for discourses of authenticity. However, the relevance of 'the other' and in turn 'the other's other' to discourses of authenticity is more in its operation as opposed to its cause.

Finally, it is useful to note that these ideas are sometimes taken one step further. For instance, Halfacree (1996) examines Sedentarism on a deeper level: "When smooth (nomad) space comes up against the striated (sedentary) space of capitalism it can expose the void of essential meaning that characterizes abstract space. Nomads de-territorialize and efface meanings imposed by a sedentary society on its striated space, both on the ground and in the imagination" (p.53). There is much scope for taking a philosophical approach to the relationship between the nomad and settled society. However, such approaches, for instance that of Deleuze and Guattari (1987) can often detract from the central interest of this research, access to accommodation for Gypsies and Travellers. As a consequence, they have not been examined in any detail.

### **3.8 Conclusion**

This chapter has set out the relevant context from the literature in order to understand how discourses of authenticity are presented and constructed by others. As was noted at the start of the chapter, the common feature of all these considerations is that they have been persistent over time. The way in which ascriptions of authenticity have been constructed and the source of such ascriptions has varied, from the Nazi genealogy of Robert Ritter to the differentiation of ‘the other’ displayed by Jack Straw. However, the key point is that these ideas are marked by their persistence throughout history, something acknowledged by Said (1979) and McVeigh (1997). The next chapter takes these notions, and views them in the context of 53 years of modern legal history in order to assess whether they have impacted on the development, application and consequences of modern statutory definitions of Gypsies and Travellers.

## **Chapter 4 - The research methodology and structure of the thesis**

Having set out the factual and theoretical foundations for the research in the previous two chapters, this chapter sets out the research approach. The approach taken in this research is qualitative and reflects the intermeshed nature of the statutory definitions of Gypsies and Travellers and the related processes outlined above. In doing so, it takes a holistic view of the evidence and considers the development, application and consequences of statutory definitions concurrently in order to establish the full picture of the impact of discourses of authenticity upon them. This was done by first undertaking an examination of the relevant literature in order to provide a theoretical foundation for the empirical work which consists of an analytical narrative supported by a number of in-depth interviews with informants selected because of their involvement with statutory definitions. This evidence is then presented in the form of a chronological analytical narrative accompanied by an A0 graphic representation provided with the thesis. This is followed by a detailed discussion of themes drawn from the analytical narrative, interviews and literature review. The purpose of this discussion is to provide answers to the research question. This chapter sets out first the theoretical considerations that have guided this process, and then outlines and reflects on the methodology. Finally, the approach to the personal position of the researcher is discussed.

### **4.1 Theoretical considerations which inform the methodology**

The previous chapter set out the theoretical framework. The methodological approach of the research has been informed by this framework, in particular, the historical approach of both Foucault and Said and the nature of discourse. Further to this, there is specific literature with regard to discourse analysis. It is important to acknowledge the relationship between the theoretical framework and the methodology. As Gee (1999) notes: "Any method always goes with a theory. Method and theory cannot be separated, despite the fact that methods are often taught as if they could stand alone. Any method

of research is a way to investigate some particular domain... There is no sensible method to study a domain, unless one also has a theory of what the domain is" (p.5).

In order to understand the social phenomenon they were investigating, both Foucault and Said undertook their research as historical investigations. Foucault termed these 'archaeologies'. The essential premise of this approach was that the understanding of social processes is best achieved through reference to their historical development. A further aspect of this was that particularly for Foucault, the role of discourse as something which has an inherent power is an intrinsic part of the development of social processes (see above). The present research has adopted the same approach, although the initial approach was somewhat different.

Originally, the research methodology was focused on an investigation of the operation of the definition at a local authority level. This approach was centred around the role of discourses of authenticity. The views of local authority officers and Gypsies and Travellers on the role of statutory definitions were to be sought. In addition, documentary analysis of local level documents would have been undertaken. A concise but short history of the case law was to be provided as part of the literature review. However, it lacked the essential historical overview prescribed by Foucault and Said and the approach was rejected as further investigation was undertaken. The reasons for this and the historical approach actually taken are two fold.

First, it became clear that a through understanding of statutory definitions and their operation could only be achieved through an examination of their development and application at the level of the courts and national policy. This is because of the intrinsic relationship between development and application. The application of statutory definitions at a local level does not inform their development, as the only effects of those decisions are at a local level. Consequently, it was decided that the present methodology would yield the most interesting results.

Second, an examination solely of the most recent judicial decisions on statutory definitions would not give a clear understanding of how these decisions came to be. The foundational judgments and statutes identified in the first two chapters of the empirical work are key to understanding the legal framework which statutory definitions are situated within.

The key point here is that in order to truly understand the full impact of the notion of authenticity on statutory definitions, an historical approach of discourse analysis is required. It is useful to briefly note the various approaches to discourse and situate the present research within this. There are a number of different approaches to discourse analysis as a methodology. There are those who as noted in the previous chapter, focus solely on linguistic studies of discourse. A constructionist approach to discourse analysis, such as that of Potter (1996) “focuses on talk and texts as social practices and on the resources that are drawn to enable those practices”. Such an approach is grounded in the psychology tradition. However, the approach taken to the present research is one which is concerned with discourse on a more general level. Its focus is on *what is being said, as opposed to how it is being said*. Such a focus fits in well with the ideas of Fairclough (1992) on critical discourse analysis which are concerned with the ways in which social and political domination are perpetuated by discourse. The next sections will demonstrate how the research methodology took these principles into account.

## **4.2 Review of relevant literature**

To begin with, an extensive review of the relevant literature was undertaken in order to initially assess the state of the existing knowledge and to assist in arriving at a suitable focus for the research. Literature which is discussed in Chapters Two and Three was selected primarily for its relevance. Maxwell (2006) emphasises the importance of relevance: “relevant works are those that have important implications for the design, conduct, or interpretation of the study, not simply those that deal with the topic, or in the defined field or substantive area, of the research” (p.28). The literature selected for inclusion was primarily specific Gypsy and Traveller academic work. In addition to this, as has been outlined in the previous chapter, literature regarding power, control and ‘the other’ were selected for their specific relevance to the research. Essentially, this was the applicability of such materials to the situation of Gypsies and Travellers. Other literature was taken into consideration, notably that with regard to race and planning but as explained in Chapter Two, this was taken to be of limited relevance due to the very specific nature of the situation of Gypsies and Travellers. By taking a focused approach to

the literature, a theoretical foundation was built which first informed the research methodology and second provided a framework for the assessment of the empirical work.

### **4.3 Documentary evidence**

Having set out the relevant foundation literature, the empirical work is built primarily upon an examination of transcripts of relevant court cases from 1959 onwards, with additional examination of significant statute, policy, guidance, reports, and consultations which are of relevance to the development and application of the statutory definitions since 1959. Sixty items are examined in the analytical narrative. Each of the different types of evidence is described below.

#### **4.3.1 Case law**

Case law (also known as common law) refers to the “substantive law and procedural laws that have been created by the judiciary through the decisions they have heard” (Slapper and Kelly, 2011, p.17). In essence this is the court’s interpretation of the statute (see below) which in then in turns informs future cases. The hierarchy of the courts is detailed in Chapter Two. Case law has received limited attention within Gypsy and Traveller research, and only a limited number of academics have undertaken studies of the case law as it relates to statutory definitions of Gypsies and Travellers (see Geary and O’shea, 1995, Sandland, 1996, Barnett, 1995, and Clark and Dearling, 1999). As such these journal articles only relate to a specific period during the 1990s. Its relevance is that it sets out clearly the judicial discourse around the authenticity of Gypsies and Travellers. Due to the inability of judges to be interviewed on specific cases, this is the only access possible to such discourse.

The case law examined in the analytical narrative ranges from 1959 to the present. This is because of the specific chain of events which occurred from 1959 onwards, and is reflective of the historical approach of Foucault when analysing discourse. The case law was selected due to its relevance to statutory definitions of Gypsies and Travellers. The cases were gathered using a ‘snowballing’ technique. The transcripts of significant cases which are cited in the only specific Gypsy and Traveller legal textbook (Johnson and Willers, 2007) were obtained using specialist legal databases.

Such cases contain references to other cases which consider similar points of law. These cases are on the whole 'reported' that is to say they are published in the law reports (legal journals). Not all cases are reported, and unreported cases on occasion required detailed searches in order to obtain copies of judgments from individuals such as legal professionals who may have retained a copy of the particular judgment.

#### **4.3.2 Statute and policy**

In order to provide a context for the case law, the relevant statute and policy which is considered in the case law is set out within the analytical narrative. This enables a fuller picture to emerge as legislative and / or policy changes inform or are in turn informed by case law. The distinction between statute and policy is set out at section 2.3.1.

#### **4.3.3 Reports and consultations**

In addition to the relevant case law, statute and policy reports and consultations of relevance are considered by the analytical narrative. Reports are published by various branches of national government and are regarding or make reference to statutory definitions. Consultations have the same subject matter, but also contain material from non-government sources such as Gypsy and Traveller campaigning groups. Such documents published in recent years (essentially the last decade) are readily obtainable from government websites. Documents dating beyond this however required intensive searches in various paper archives in order to obtain copies.

#### **4.3.4 Justification for the reliance on documentary material**

It is important to acknowledge that there is a significant reliance on documentary evidence, and to offer a justification for this. First, as noted, the events examined in the empirical work take place over a considerable period of time. This is because it is necessary to have an understanding of historical events with regard to statutory definitions in order to provide a context for the current state of affairs. As such, the only evidence available from much of this period is in documentary form, and those involved in the law as it relates to Gypsies and Travellers during the earlier part of the period are either deceased, un-reachable or unable to give detailed accounts of events that happened some years ago.

Second, the documentary evidence is vital to understanding the development of statutory definitions, as it is primarily the case law examined in the analytical narrative which has shaped the statutory definitions over time. As such, the primary evidence on statutory definitions is the case law. Furthermore, the case law offers the views of the legal representatives of local authorities, Gypsies and Travellers, and the government. This is a rich evidence base which offers greater depth than standard documentary evidence used in research.

#### **4.3.5 Use of NVIVO to analyse the documentary evidence**

Initial analysis of the sixty pieces of documentary evidence was undertaken using the NVIVO software package. NVIVO is a piece of software designed for use by qualitative researchers to collect, organise and analyse content from sources such as interviews, documents, surveys, audio – visual materials and other such items. In the present research the software was used as a tool to annotate and code pieces of evidence. A range of different codes were used to either note the links between different documents (for instance where a case refers to earlier cases), or to note common themes running through the evidence. This process afforded the researcher an overview of the extensive range of documents. It also allowed the notes on each of the pieces of evidence to be collated in an organised fashion. This initial analysis using NVIVO informed the production of the analytical narrative and subsequently the conclusions. A criticism of NVIVO is that there can be a tendency to think that worthwhile analysis has been carried out simply because of the use of specialist software as a focus on coding and other technical aspects can give less emphasis to interpretation (Robson, 2011). However, as Crowley, Harré and Tagg, (2002) note, it is the user that is control of the software as opposed to the other way round. It is the responsibility of the researcher to use the software effectively. In the case of the present research, the software has been used as a means to analyse a substantial volume of documentary evidence. The software has been used to support the analysis of this material, but the way this has occurred has been guided by the needs of the researcher as opposed to the structure of the software. NVIVO was also used during the analysis of the interviews to both annotate and to make links between different interviews and/or documentary evidence prior to more detailed analysis.



On reflection, it may have been the case that the research process could have made greater use of the functionality of NVIVO. For example, an analysis of the frequency of different phrases or words would have yielded interesting results. However, given the comments on the approach to discourse analysis above, the decision was taken to use NVIVO as a means of compiling links between documents noted manually. The research is concerned with a more general view of discourse as opposed to the specific use of words and phrases.

#### **4.4 Interviews**

The purpose of the interviews was to provide an additional level of empirical interpretation to the documentary analysis. The interviews should therefore be seen as ancillary to the analytical narrative, in so far as they were undertaken to gain additional perspectives on the documentary evidence. However, as noted in the conclusion, they also produced unexpected findings which added an additional layer of depth to the research.

Seven in depth interviews<sup>7</sup> were undertaken with informants who have had direct involvement in the development or application of statutory definitions, primarily through involvement in litigation. The detail of these informants and the rationale for their selection is provided below, whilst edited transcripts are provided in the appendices. There is a considerable literature on the conduct of interviews, for instance, methods texts by both Robson (2002) and May (2001) contain chapters on interviewing methods. Much of this work focuses on interviews in a social science context. For instance, this might include guidance on probes or prompts, or dealing with interviews where there is a significant amount of emotional material covered. With regard to the present research this is of limited relevance, as the interviews were conducted by a planning professional with other legal, academic or voluntary professionals (it should also be noted that there is a lack of methodological literature on undertaking legal interviews). The emphasis was less on the extraction of knowledge than the free exchange of ideas on particular points of law. However, the interviews still followed a particular format based on semi-structured discussions regarding specific statute, policy or case law and then more

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<sup>7</sup> Six were face to face, whilst one was conducted via written correspondence

general points regarding common themes identified in the documentary analysis. The semi-structured methodology was chosen as unlike a formal structured approach it allowed expansion on particular points. Conversely, an unstructured conversation would have inhibited the researcher's ability to ensure that all the points for discussion required from an interview were covered.

Turning to the conduct of the interviews themselves, five interviews undertaken were face to face which were recorded and then transcribed, whilst one was face to face with the production of notes. A further interview was carried out by correspondence following an initial conversation.

The interviews presented a number of different challenges. The face to face transcribed interviews were carried out entirely with legal professionals. A practical consideration here was that whilst a café can create an informal feel for an interview, it also inhibits the ability to transcribe the recording efficiently. The interview conducted with notes was by accident as opposed to design due to the failure of recording equipment. This was a useful lesson on taking additional equipment as a back up, which was of particular relevance to the set of people interviewed as all had limited availability due to the pressures of their work.

#### **4.4.1 Interviewee selection**

The people selected to be interviewed were chosen for their close involvement with the law as it relates to Gypsies and Travellers, and in particular statutory definitions. All the interviewees gave approval for edited transcripts of their comments to be used as part of the research, and these form the appendices. A short explanation of the background of each of these individuals and the reason for selection is given below.

**Stephen Cottle** is a barrister at Garden Court Chambers, one of the leading sets of barristers taking on Gypsy and Traveller cases. He has taken many of the leading cases in the field, including some of the key cases examined in the analytical narrative.

**Chris Johnson** is a solicitor and a director of the Community Law Partnership, a law firm which has taken many of the leading cases in the Gypsy and Traveller field. He is co-editor

of the Legal Action textbook "Gypsy and Traveller Law" and writes regularly for Legal Action and other publications.

**Helen Jones** is the Chief Executive of Leeds GATE, a community members association for Gypsies and Travellers residing in or resorting to Leeds. The group works specifically on behalf of Romani Gypsies and Irish Travellers.

**Tim Jones** is a barrister from No5 chambers who has appeared in numerous Gypsy and Traveller cases including *Chapman v UK* in the ECtHR (see section 7.6.1).

**Dr. Robbie McVeigh** is a leading academic on Gypsy and Traveller matters, with a particular focus on Irish Travellers. Dr. McVeigh was the expert witness in the O'Leary case which led to the recognition of Irish Travellers as an ethnic minority.

**David Watkinson** is a barrister from Garden Court Chambers with a specialism in Gypsy and Traveller law. Mr Watkinson has taken many of the leading cases in the field.

**Marc Willers** is a barrister from Garden Court Chambers with a specialism in Gypsy and Traveller law. Mr Willers is the co-editor with Chris Johnson of the Gypsy and Traveller law textbook.

All of these individuals are recognised as having a particular knowledge of the research topic. As such they were selected as they would be able to provide insights into both specific cases in the analytical narrative and more general points. Similar studies to the present research also include interviews with Gypsies and Travellers. This was deemed inappropriate as the research is concerned specifically with the legal and planning system, and the way in which it interprets the authenticity of Gypsies and Travellers, as opposed to such communities' view of the system. Furthermore, Brown and Scullion (2009) note the 'research fatigue' of communities wanting 'less talk, more action'.

The approach to the interviews and the choice of interviewees reflects the fact that the documentary evidence is the primary data source for the research. Whilst it is acknowledged that this is a perhaps unconventional approach to PhD research, it should be noted that the interviews are useful in addressing the potential criticism that the present research is based solely on the researcher's interpretation. This point is discussed in further detail below.

#### **4.4.2 Anonymity**

Another unconventional aspect of the research which is reflective of the focus on the documentary work is the lack of anonymity of the interviewees. Robson (2002) notes that: "Giving anonymity to participants when reporting on research is the norm. It is regarded as good practice by ethical research boards and committees and expected in legal frameworks such as the UK's Data Protection Act" (p.207). Grinyer (2002) echoes this: "The consideration of mechanisms to protect the identity of research respondents appears to have become central to the design and practice of ethical research.

Consequent assumptions about the desirability of anonymity are embedded in various codes of ethical conduct." (p.209). Much of the literature reflects this sentiment.

However, a different approach was taken to the anonymity of the interviewees in the present research. Anonymity was offered at the start of the process. In the information sheet sent to participants, the following points were made clear:

- The interview will be audio recorded and transcribed.
- If you wish, the transcript from the interview can be sent to you for approval before its use in the research.
- All information you provide will be held securely.
- Selected quotes from the interview will be used by the researcher when writing research reports, conference presentations and other outputs.
- **If you wish to remain anonymous a pseudonym can be used.**
- You are able to withdraw from this research any time one month from the date of the interview and request any information that you have provided to be removed.

None of the interviewees opted to be anonymous. However, most approved the transcript of the interview once it had been completed.

The reason that anonymity was not taken to be essential by the research was due to the positions of the interviewees and the safeguards involved. None of the interviewees are vulnerable people. Rather, they were people whose opinions on Gypsy and Traveller matters can be readily found through a basic Internet search. In the Gypsy and Traveller advocacy community they are all people with significant standing. However, a sensitive approach was taken and the safeguards outline above and a flexible research approach ensured that the research maintained the highest ethical standards. The flexible approach meant that those who wished not to be recorded had the option to do so, whilst in one case after an unrecorded / un-noted dialogue, two interviewees (not listed) declined to have their views published entirely. A final point to note on anonymity is that all the evidence in the analytical narrative is publically available, and as such did not present an ethical dilemma for the research.

#### **4.5 Analytical narrative**

The analytical narrative presents the evidence in chronological order, and its intention is to illustrate the development, application and consequences of statutory definitions since 1959. Its primary purpose is one of analysis and following the holistic research approach there is focused attention on specific cases. In addition to this, attention is drawn to the connections between different pieces of evidence and material in the literature review where appropriate. As noted above, the reason for choosing a narrative style was based in the approach of Foucault to historical evidence.

Consideration was given to taking a thematic approach to the presentation of the evidence. Such an approach would have perhaps allowed for a clearer relationship between the empirical work and the themes identified in the literature review. However, the chronological approach was selected for the following reasons. First, the evolution of statutory definitions has occurred over a period of time, and it was considered that this needed to be presented as such. This ties in with the identification of the persistence of discourses of authenticity over time (see section 3.2). Second, as the empirical work will demonstrate, there are multiple links between the different pieces of evidence. By examining each piece of evidence individually, it allows for these relationships to be identified in a clear and concise manner. It also allows various themes within each

individual piece of evidence to be examined as a whole, and the relationships between them noted. Finally, the presentation of the themes emerges as the analytical narrative develops. This way, the reader is able to observe the themes develop over the course of the study period. Upon reaching the concluding chapter, the most significant points from the bulk of the evidence are brought together having first provided a detailed specific examination of the individual pieces of evidence.

## **4.6 Graphic representation**

The A0 graphic representation provided with the thesis allows for an overview of the evidence. This is important as the evidence is not linear in nature, and there are a number of different themes which flow through it. The graphic representation presents the relationships between the various pieces of documentary evidence in the form of a flow chart. It has three main functions. The first is to illustrate how different pieces of evidence have had consequences for the subsequent pieces. For example, the decision of one court on a point of law informs subsequent judgments, and in some instances policy or statute. Second, the diagram charts the development of the identified themes. For example, the cases regarding New Travellers and section 6 of the Caravan Sites Act 1968 are grouped together. Finally, the graphic representation highlights the relationships between pieces of evidence which although are grouped as different themes, have had an impact upon each other. This provides a useful companion to the empirical evidence, and allows the reader to easily trace the various themes running through the work, as well as the connections between different pieces of evidence.

## **4.7 Discussion and conclusions**

The purpose of Chapter Nine is to answer in detail the research question set out at the start of the thesis. The evidence collected by the empirical work is extensive and complicated in nature and the Chapter brings together the various elements of the thesis in a cohesive manner. Having opted for a chronological narrative approach in the empirical work, the approach of the conclusions is to clearly set out again the research title and objectives. It then returns to the themes identified in Chapter Three, and discusses each of them in the light of the empirical work. After this, new findings that have

merged in the course of the empirical work are explained and discussed. Finally, the Chapter sets out the significance of the work, the advancement of the literature, and reflects on alternative research strategies and future research.

Given the complexity of the empirical work, and its consequently inherently disjointed nature, Chapter Nine is vital in drawing these matters together and providing the reader with a clear indication of the findings of the research.

## **4.8 Reflections on the methodology**

The primary strength of the research approach is its ability to examine a substantial amount of evidence spread out over a period of 53 years. The presentation of this in both a chronological analytical narrative and diagrammatically gives an overview over both the specific events and the way in which they relate to each other. The interviews provide an additional layer of empirical evidence by providing insights beyond those contained in the documentary evidence.

The research is also open to the criticism that it is primarily the interpretation of the researcher that is being presented. However, the use of NVIVO combined with interviews enables the documentary evidence to be triangulated. Finally, on reflection, an extension of the interview sample would have led to a wider sample range. This could have included barristers who represent local authorities, for example. In addition to this, comparisons with the situation with Ireland and Scotland may have added further depth to the work, as there are similar legal debates with regard to statutory definitions occurring in these countries. However, the time and resource constraints of the research would not allow for this.

## **4.9 The approach taken to the background of the author**

Finally, it is useful to briefly address the personal perspective of the researcher. The author of this thesis is actively involved as a chartered town planner within Gypsy and Traveller planning matters and campaigning, working on behalf of Romani Gypsies, Irish Travellers, New Travellers and Showpeople. Furthermore, the author has lived in vehicles himself for the last nine years and is what could be termed a New Traveller. This professional and personal background is arguably to the benefit of the research. As

Shipman (1988) argues, “the exhilaration of, and motivation, for social science lies in this human endeavour to improve the human lot. Social science is a haven for the curious, the alert, the detached and the non-conformist” (p.176). Given that Gypsy and Traveller issues are often tied up in issues of social justice, it is probable that most of those involved in research area will be motivated by such reasons. As Drury & Stott (2001) noted on some research carried out on collective struggles, if there were not committed people willing to take on the dual role of activist / researcher, the research would have been unlikely to have been carried out in the first place (p.52). Pain (2006) supports this view arguing that there is no inevitable conflict between the dual roles of academic and activist (p.253). In the same way, it is arguable that research on Gypsy and Traveller issues would not occur unless its practitioners had some kind of interest in matters of social justice. Fantaisa (1988) also argues that partisanship in inter-group conflict is essential in order to gain access: “When opposing groups have a great deal at stake, getting data may be difficult since there may be a suspicion of it being used against them”. Green (1993) has makes a similar case in the context of research regarding the miners strike (both cited in Drury and Stott, 2001, p.51). However, there are those who argue that there should be a distance between the researcher and the researched, and this is the approach taken by the research.

Melucci (1996) makes a number of points on this matter in the context of social movements, which can be translated into this context. First, the potential of the community should not be underestimated by a ‘missionary’ researcher: “What we must recognise is that actors themselves can make sense of what they are doing, autonomously of any evangelical or manipulative interventions of the researcher” (Melucci, 1996, p.388). Second, “in the disenchanted world of consummate systemic process where epistemological privileges have been divested together with everything hereditary and natural, all meaning is judged not by the correctness of its content but by the process of its creation” (*ibid*, p.388-389). This is particularly important to a researcher from the community in order for their work to have academic credibility. Third, Melucci argues that maintaining a distance as a researcher is vital: “Only by taking this distance and at the same time by being close to the action itself, one can observe that intense, plural and sometimes contradictory system of meanings that constitute the collective identity of a



social movement” (*ibid*, p.391) To put this into the context of Gypsy and Traveller research, there are certain nuances between the various different communities and within the communities themselves that a observer who is not immersed within the culture would miss. At the same time, becoming over-involved within the conflict between communities would not allow for the researcher to maintain a good degree of objectivity. Finally, Melucci points to the status of researchers as having “the task of performing a professional role within knowledge- producing institutions. They, therefore, are bearers of the ethical and political responsibility for the production and allocation of cognitive resources; but they do not have the right to orient the destinies of society as ‘counsellors of the Prince’ or as ideologues of protest” (*ibid*, p.391). This is a useful reminder of the expected professional status of the researcher.

Returning to the present research, as it evolved, different positions were taken as to how much of the personal involvement should be made explicit to the reader, given the perspective of Melucci cited above. To begin with, it was felt that the whole piece should be written from the perspective of a New Traveller. However, on reflection it was felt that this was playing too much on the ‘otherness’ of the author, and this represented an immature approach, as previous work had been criticised for having too many ‘axes to grind’. Advice given to the author by a planning professional working in the field was not to “get angry anymore, just get clever”. As a consequence the author wished to follow the approach of Melucci above and be respected as an academic and professional planning consultant and wished to carry out work on the nature of the law as it is applied to Gypsies and Travellers, and not discuss any personal involvement within this. A housing academic who lives in bricks and mortar does not articulate their accommodation preference as part of their work, and in the same way why should a Traveller writing on Gypsy and Traveller issues?

Furthermore, involvement in both Gypsy and Traveller planning matters and campaigning meant that the researcher is aware that for some people, a New Traveller identity can be problematic. A separation of the personal and the professional is the pragmatic approach to being able to concentrate on what the researcher deems to be of importance, with regard to the thesis, the investigation of the problematic nature of legal access to accommodation, and professionally, addressing this issue. The background and

accommodation preference of the researcher still informs their motivation, the difference is that it does not hamper them in their efforts. A further point is that separation of the personal from the professional allows for less intrusion into the private life of the researcher. Having often being told that “you live your PhD”, a separation at least on the level of what is written down is beneficial for maintaining the balance between work and private life.

For all these reasons, the approach taken was to limit any kind of personal perspective to an absolute minimum and concentrate solely on the matters in hand. However, it is important to acknowledge that both the motivation for the research has been a concern with the issues involved, namely the inequalities faced by Gypsies and Travellers in accessing accommodation through the planning and legal systems. The personal involvement in the subject particularly through professional work has evidently assisted with the skills required to access the evidence, but it is the concern with regard to inequality as opposed to the accommodation preferences of the author which should be taken as motivation behind the research.

## **Chapter 5 - 1959-1968 The Highways Act**

### **1959 – the Caravan Sites Act 1968: the decoupling of the word ‘gypsy’ from its ethnic meaning**

“The need to define, redefine, group and separate the various itinerant groups has been a continuous feature of the state’s legislative response to nomadism” (Mayall, 2004, p.4).

Since 1959 two types of legal definition of Gypsy or Traveller individuals or groups have developed in parallel, one of ethnicity, and one of nomadism. In addition to this, there is case law which addresses the concept of ‘aversion to bricks and mortar’ which is also important to consider in the context of the statutory authenticity of Gypsies and Travellers. The next four chapters provide an analytical narrative of the developments in case law, statute and guidance. The evidence is presented in chronological order, and a commentary is provided on each item. The themes which this evidence presents are explored in Chapter Nine.

The analytical narrative is constructed primarily from the transcripts of court cases and other relevant documentation, as well as contributions from the interviewees. It simultaneously details key milestones and interprets them in terms of the key concepts around authenticity detailed in Chapter Three. Many documents are quoted in some length. This is necessary to demonstrate precisely how the drafting of policy or legislation, or the decision of a court has had an impact on statutory definitions of Gypsies and Travellers and in turn access to accommodation. Chapter Five deals with 1959-1968, Chapter Six with 1976-1991, Chapter Seven 1994-2003, and Chapter Eight covers the period between 2004 -2012. These are distinct periods in the construction of the analytical narrative. In addition to this, the A0 graphic representation accompanying the thesis entitled “Charting the development of relevant law, policy, and case law of statutory definitions of Gypsies and Travellers since 1959” allows for an overview of the

empirical evidence. It illustrates the different types of cases and the associated relevant law and policy, and then draws connections between them all.

The rest of this chapter sets out a series of events that occurred between 1959 and 1968 that had a significant impact upon statutory definitions of Gypsies and Travellers. The cumulative effect of this sequence of events would provide the foundation for the years after which are detailed in Chapters Six to Eight. These events begin with the Highways Act 1959, which was the starting point of the modern day definition of ‘gypsy’.

## 5.1 1959

### 5.1.1 The bureaucratic consolidation of Highways statute substantially alters the course of legal discourse regarding Gypsies and Travellers (Highways Act 1959)

The Highways Act 1959 and the subsequent case of *Mills v. Cooper* in 1967 (see section 5.4.1) had significant implications for the development of modern statutory definitions. The Act at section 127 deals with the “penalty for depositing things, or pitching booths, etc., on the highway”, it states:

127. If, without lawful authority of excuse, -

- (a) a person deposit on a made-up carriageway, or on any highway which consists of or compromises a made up carriageway within fifteen feet from the centre of that carriageway, any dung, compost or other material for dressing land, or any rubbish, or
- (b) a person deposits any thing whatsoever on a highway to the interruption of any user of the highway, or
- (c) a hawker or other itinerant trader or a gipsy pitche [sic] (Anon., 1959)s a booth, stall, or stand, or encamps on a highway,

he shall be guilty of an offence and shall be liable in respect thereof to a fine not exceeding forty shillings. (Highways Act, 1959, section 127).

The significance of this provision is what was left out. The forerunner of the 1959 Act was the Highways Act 1835. Section 72 of the 1835 Act (dealing with a long list of nuisances – including bull-baiting) stated:

And be it further enacted, That...if any Hawker, Higgler, Gipsy, or other Person travelling shall pitch any Tent, Booth, Stall, or Stand, or encamp, upon any Part of any Highway...every Person so offending...shall for each and every Offence forfeit and pay any Sum not exceeding Forty Shillings, over and above the Damages occasioned thereby (Highways Act 1835, section 72).

As Fraser (1961) notes, there was a clearly defined list for the offence of pitching a tent whereas other similar offences were able to be committed by “any person”, (p.137). In 1958 a draft bill was put before a committee responsible for the consolidation of the complex collection of highways legislation. With regard to the 1835 provision cited above the committee noted that: “Some difficulty was experienced in dealing with this provision as it was considered that its somewhat archaic language prevented its being inserted verbatim in the draft Bill. The draft Bill as submitted to us made the provision applicable generally and not limited to any particular class of person. It appeared to us that this would effect a substantial alteration of the law. The present wording of paragraph (c) in our view substantially re-enacts the provision of the Act in 1835 in modern form”.<sup>8</sup> This modern form was a hawker or other itinerant trader” (*ibid*, p.138). When the draft bill as amended by the committee got to the House of Lords, the word ‘gipsy’ was inserted into the provision. The justification for this was explained by the government minister the Earl of Gosford: “It has been represented to the Minister that in the process of rendering this provision into modern language a defect has been introduced. In its present form the provision would not enable local authorities to deal with gipsies who become a nuisance by camping on the highway in the way that we can deal with them now. Naturally we have no desire to put gipsies at a special disadvantage, and we are not proposing to do so; but it seems clear that, since they can be dealt with under the law now as it stands, the new Bill ought to reproduce the law on this point. This, I am satisfied, the Amendment effectively does”<sup>9</sup> (*ibid*, p.138). The amendment was then in turn accepted by the House of Commons. What Fraser notes about these events is that despite the purpose of the Highways Act 1959 being the consolidation as opposed to the amendment of the existing

<sup>8</sup> *Report of the Committee on Consolidation of Highway Law*, HMSO 1959 (Cmnd. 630), para. 91.

<sup>9</sup> *Hansard* (Lords), Vol.215, cols. 374-5; 25 March 1959

law, parliament had in effect narrowed the width of the offence by not including the “sweeping-up phrase ‘or other person travelling’ after ‘gipsy’” (*ibid*, p.139).

There are three considerations with regard to this exceptionally significant historical sequence of events. First, the decision of the committee not to allow the extension of the offence to ‘any person’ is notable in itself. The reasoning for this lies in the committee’s terms of reference cited in the introduction to its report which set out an intention to consolidate a number of pieces of Highways legislation. Significantly, the committee were to make “no amendment of the law of such importance that it ought to be separately enacted” (Committee on Consolidation of Highway Law, 1959, p.1). The fact that the drafting of the 1959 Act was concerned with consolidation as opposed to reform would have led to the committee being against a widening of the scope of the offence to include any person as opposed to a specific list. Here it is interesting to note the nature of the position taken by the experts commissioned to undertake the task. The emphasis was on the bureaucratic process of consolidation without substantial alteration to the law, as opposed to a process of rationalisation. Therefore an amendment widening the scope of the offence was not deemed appropriate.

Second, the amendment to place Gypsies (and subsequently, after 1967, other Travellers) back within the scope of the offence is notable in itself. The amendment followed the logic of the committee of experts. As Lord Gosford noted, “the new bill ought to reproduce the law on this point”. Both the committee’s and the House of Lord’s amendments support the continuation of the status quo – certain classes of people were to be prohibited to carry out certain activities next to the highway. The logic of the Lord’s amendment makes sense when viewed in the light of a process which sought to consolidate rather than reform the existing law. However, it was what Fraser (1968) would later describe as the thoughtless omission of the old sweeping-up phrase ‘or other person travelling’ which substantially changed the law. The rationale for this omission is unclear, as distinctions were made between Gypsies and other Travellers in a government survey in 1952 (Okely, 1983) and therefore there was certainly an awareness of other Travellers in governmental discourse. It is not possible to analyse the reasons why this decision was made, as the records no longer exist. The only comment available is that of Fraser’s who suggested that it was a lack of rigorous drafting which led to the omission.

Third, Fraser noted that the omission would lead to issues regarding proving an offender's status, and that a significant part of the nomadic population would not be covered by the measure (*ibid*, p.139). These questions over status meant that up until the case of *Mills v Cooper* in 1967, Gypsies were not only in the position of being prohibited from being able to camp in places where anyone else, including other Travellers, were able to, but were also in the unique position of being the only ethnic minority group to be directly discriminated against by statute.

The 1959 Act is the most significant piece of statute in the analytical narrative. The effects of the consolidation of Highways statute and the ambiguous parliamentary drafting would guide the course of the events to come significantly. When seen in the light of discourses of authenticity, the failure to legislate against Gypsies and not "other people travelling" had the initial effect of placing ethnic Gypsies at the top of a negative legal hierarchy where they would remain until 1967. The provisions of the 1835 Act made no such distinction. The point to note here is that it would seem that there was no recognisable intention to make distinctions on the basis of how authentic a particular group of Gypsies or Travellers was. Although the evidence is unclear as to whether this was the case, if the view is taken that there was no intention to discriminate solely against Gypsies, this does not reflect the trends evident in the case law, statute and policy of the following years. Events since 1959 have seen decision makers at all levels question the authenticity of Gypsies and Travellers in a deliberate manner, which was informed in the first place by the drafting and enactment of the 1959 Act. What this legislation produced was confusion over the legal meaning of 'Gypsy', and the subsequent case law has reflected this confusion ever since.

### **5.1.2 The sense of hierarchy in a government report (Caravans as Homes Report)**

In the same year as the Highways Act 1959, a report by Sir Arton Wilson entitled "Caravans as Homes" was published by the Ministry of Housing and Local Government. The aim of the report was to investigate "the nature and extent of the problems which arise in connection with caravans used as residential accommodation, the underlying causes of these problems, and the views of those concerned" (Wilson, 1959, p.ii). Whilst the majority of the report is concerned with members of the settled community making

use of caravans as residential accommodation, there is a paragraph which covers the “Contrast with gypsies and vagrants”. Whilst the author came to the conclusion that there was “no good reason to interpret my terms of reference in such a way as to require a prolongation of my investigation in order to deal with the problems of gypsies and vagrants in any detail in this report” (p.18), there was a clear distinction made between “the true Romany [sic] gypsies” and “the tinkers, “swaggers”, “didicois” and such-like vagrants who in some parts of the country are a regular cause of concern” (p.17). Furthermore, a clear distinction is made with regard to Showpeople, and the views of the Showman’s Guild are cited in some detail (pp 75-76). This identification of “true Romany [sic] gypsies” as opposed to less desirable Travellers makes the omission of “other persons travelling” by parliament even more ambiguous. This distinction is evident in much of the other discourse at the time and subsequently (see Acton, 1974 and Okely, 1983). Aside from the compounding of the ambiguous nature of the omission, on a wider view, the significance of this report is as the precursor to the Caravan Sites and Control of Development Act 1960.

## **5.2 1960**

### **5.2.1 The closure of the commons, protection for Showpeople and the defining of the term ‘caravan’ (Caravan Sites and Control of Development Act 1960)**

Following the 1959 report, the main purpose of the Caravan Sites and Control of Development Act 1960 was to introduce a tighter system of control over caravanning in general. This was due to the increasing number of (non nomadic) people using caravans for holidays or for permanent homes, and the increase in sites being opened in unsuitable locations with inadequate facilities all of which had been noted in the 1959 report. This purpose was achieved in part by the introduction of a requirement for caravan sites to have both planning permission and a site licence. Sites deemed to be unsuitable by a local authority were then shut down (Adams *et al*, 1975, p.9). The Act did however give local authorities a power to build sites.

Although the Act has no specific mention of Gypsies or Travellers, its provisions had an impact on these communities, and has been described as possibly being the



lowest point for Gypsies and Travellers in the post-war period (Greenfields, 2006, p.69). Section 23 allowed rural district councils to prohibit the stationing of caravans on common land. This had the effect of closing down many traditional stopping places (*ibid* p.70). Existing Gypsy and Traveller sites were in many cases shut down and the Gypsy Council claimed in 1971 that more pitches had been closed down by the Act than had been created by the duty to provide sites created by the 1968 Act<sup>10</sup> to be discussed below (Adams *et al*, 1975, p.9). Okely (1983) details its implications in stark terms: “The Gypsies were the victims of the 1960 Caravan Sites and Development Act [sic], which was not specifically addressed to Gypsies but apparently aimed mainly at the increasing number of non-Gypsy house dwellers resorting to caravans during a housing shortage. The Gypsies, for whom caravans are the preferred abode, were subject to the universalistic and inflexible law of the dominant house dwelling society” (p.106). The 1960 Act was effectively the start of Gypsies and Travellers needing to either provide for themselves or be provided for as a result of the closing of the commons and traditional stopping places. This was the start of the modern day inequality of provision discussed in Chapter Two.

Whilst there is nothing in the 1960 Act with regard to the statutory definition of Gypsies and Travellers, it is worth noting two relevant provisions. The first is schedule 10 which allows Travelling Showmen to be exempted for the need for a caravan site licence (and it follows planning consent) when either “travelling for the purposes of his business” or when taking up land for winter quarters (within a particular time frame). Whilst Gypsies and Travellers were disadvantaged by the 1960 Act, Showpeople received active protection, including the ability to stay on land for a period longer than 28 days and not have to seek either a licence or planning consent. The influence of the Caravans as Homes report is evident here, as the needs of Showpeople were clearly highlighted. A clear recognition in statute is made of the needs of Showpeople, which when contrasted with the lack of acceptance of Gypsies and Travellers is indicative of special status afforded to Showpeople. As mentioned previously there is much scope for research regarding the position of Showpeople in law. Second, the other significant inclusion in the 1960 Act was the definition of a caravan at Section 29 (1):

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<sup>10</sup> The 1960 act introduced a power for Local Authorities to open sites, after eight years of few authorities using this power, it became a duty under the 1968 act.

"... any structure designed or adapted for human habitation which is capable of being moved from one place to another (whether by being towed, or by being transported on a motor vehicle or trailer) and any motor vehicle so designed or adapted but does not include:

- a) Any railway rolling stock which is for the time being on rails forming part of a railway system, or
- b) Any tent."

### 5.3 1962 - 1964

#### 5.3.1 Circular 6/62 fails to provide sites and the 'diddicoi' and 'true Romanies' are differentiated in Parliament

Following the 1960 Act, a Ministry of Housing and Local Government Circular was sent out to County Councils in 1962. It called for surveys of itinerants and Gypsies living on unauthorised sites and drew attention to the power of site provision. The Circular was almost completely ineffective. (Adams *et al*, 1975, p.11). This is an example of the failure of local authorities to provide sites after the closing off of traditional stopping places by the 1960 Act (see above).

The Circular was published before the pivotal case of Mills v Cooper (see below), and the distinction was made between Gypsies and other caravan dwellers who have no fixed abode:

The true gypsies, or romanies" ...who "have the right to follow their traditional mode of life, and they have a legitimate need for camping sites. At the same time, the romany [sic] way of life is changing: new occupations and new opportunities are making it less necessary for gypsies to move about in search of work and many are now more ready to settle down. They need help and encouragement in their attempt to find a settled way of life...

...There are other caravan dwellers who present similar problems. These are usually people who are either self-employed or dependent on casual work, and who for lack of regular sites put their caravans on unauthorised sites on commons, waste land and roadside verges. These unauthorised

settlements are usually without sanitary facilities and generally unsatisfactory, and they sometimes cause serious complaint on grounds of nuisance and unsightliness. As some local authorities know from experience, action to secure their removal may result in severe hardship unless caravan families can be directed to acceptable sites. Moving people off one unauthorised site and leaving them to find another is no solution, and no answer to the human and social problems involved. These can only be resolved by the provision of proper sites, in which caravan families can settle down under decent conditions, and in reasonable security. This is probably the only effective way of preventing the persistent use of unauthorised sites, continuing trouble and hardship (paragraphs 2-3, Circular 6/62).

There would seem to be a difference in approach between these two sections. The rights of those regarded as being 'authentic' are acknowledged, whilst all others are said to sometimes be a cause of complaint on the grounds of nuisance and unsightliness. However, the stated aim for both groups is settlement; the only real distinction is that for Gypsies this is expressed in more gentle terms. A comparison can be drawn to the Egyptian acts of the 1500s. In that instance, a multitude of different types of Travellers, ranging from "people who commonly referred to themselves as "Egyptians" to "any who for one month at any time or at several times was in their company" (Mayall, 2004, p.61) were all subject to the same punishments for being such, although there is a more sophisticated sense of hierarchy evident in the 1962 Circular. This is because the "true gypsies" are constructed as having legitimacy because of historical, or arguably ethnic, factors, whilst "caravan families" are defined only by their employment status, and then their substandard accommodation arrangements. The term "caravan families" is representative of the discourse of the time regarding different groupings of travellers. Whilst the 1962 Circular reveals only a small glimpse of this, further investigation into other sources reveals discourse from both parliamentary debates and government documentation which is very much of its time in so far as it would not be tolerated in such forums in the present day. In particular, the phrase "didicoi" is evident within the discourse. Acton, (1974) cites the speech of GJM Longden in a debate in the House of Commons in 1964 as an example of a mixture of prejudice and inaccuracy when addressing the question of what a didicoi is in parliamentary debate:

First then, what are didicoi? I am indebted to the Hon. Member for Fulham, (Mr M. Stewart), whose theory is that the word comes from the Greek διχδοχοι which means followers or successors – originally the troops of Alexandra the Great. This is an ingenious theory because the word ‘Gypsy’ itself comes from Greece which was then called ‘Little Egypt’. I am grateful to the Hon. Member for telling me. It means, incidentally, that there is no ‘s’ at the end of the word. The point is that these people are not Gypsies, they are not true Romanies. They are more the ‘flaming tin-men’ of Thomas Hardy, otherwise itinerant, caravan dwelling tinkers. A Dublin report of last November said that there were no fewer than 100,000 Irish Itinerants in this country, and one asks why? (pp.199-200).

Acton notes that the speech has many factual errors, the reference to the Greek language is incorrect and the estimates of numbers of Irish Travellers are an overestimate. The question of the didicoi will be returned to when the 1967 Ministry of Housing and Local Government (MHLG) report on Gypsies and Travellers is considered below.

## **5.4 1967**

### **5.4.1 Mills v Cooper sets nomadic authenticity as the cornerstone of the definition for the next 45 years (Mills v Cooper<sup>11</sup>)**

The position of Gypsies being excluded as an ethnic minority was dealt with by the Court of Appeal in 1967 in the case of Mills v Cooper. In this case, the defendant (Cooper) was charged by a Police Officer (Mills) with being unlawfully encamped on the highway. The defence’s case was that Mr Cooper was not a ‘gipsy’, and therefore not capable of having committed the offence in section 127 of the Highways Act 1959. The significance of this case cannot be understated, although it could be argued that it was an inevitable consequence of the omission of the phrase ‘or other person’ travelling from the Highways Act 1959. As such, the ruling will be analysed in some detail. The beginning of Lord Parker CJ’s speech provides the background for the case at page 465 of the judgment. It sets out how the defendant (Cooper) had previously been found not to be a ‘gypsy’ and therefore could not be tried again:

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<sup>11</sup> [1967] 2 W.L.R. 1343, [1967] 2 Q.B. 459

Accordingly, when the present proceedings were called on, and before the defendant was asked to plead, a submission was made on his behalf that the question whether he was a gipsy had been argued before the court on the earlier occasion as a separate issue, and that the court had determined that issue in his favour, and accordingly, the submission went on, there was an issue estoppel which would debar the justices from reopening the question and hearing the information.

The justices felt unable to accept that contention, since they were left in doubt whether the doctrine of issue estoppel was applicable in the criminal law; they did, however, feel that in all the circumstances they had power to dismiss the information on the ground that it was oppressive and an abuse of the process of the court, and they exercised their discretion so to do.

Tied up within the *Mills v Cooper* case is the question of whether the doctrine of issue estoppel could be applied in criminal cases. Issue estoppel entails “a legal bar or obstruction which prevents a party changing his position”. Essentially, “a party may not be able to state something in court where he has said something different before” (Anon., 2006). Mr Wigoder QC at page 466 of the judgment made the case for the defence that:

...as a result of an earlier determination by a court of competent jurisdiction as between the same parties that the defendant was not a gipsy, there is a clear case of issue estoppel which should be applied so as to prevent the same issue being re-litigated. He urged that both on principle and authority there was no reason why the doctrine of issue estoppel should not be applied in criminal cases, provided always - what is rare in the case at any rate of a verdict of a jury - that it is possible to ascertain exactly what issue had been in fact determined. This, he said, was one of the rare cases in which it was possible to find out exactly what had been determined, and indeed that had been found as a fact by the justices in the case.

Lord Parker went on to state at page 466 that he was unconvinced that the doctrine had application in criminal cases, but he would consider the case as if it did. What is notable

about issue estoppel in this instance is that its application was affected by the meaning of the word 'gipsy'. At this point a racial interpretation of the word would have led to a very different outcome (again at page 466):

It was urged that the word "gipsy" should be given its dictionary meaning, as being "a member of the Romany [sic] race," and that once it was decided by a court that he was not a member of that race, the matter could not be re-litigated except in the event of there being fresh evidence which could not by reasonable diligence have been adduced on the earlier hearing. Were that the true meaning of the word "gipsy," then I think it would be necessary to consider further the application of the doctrine of issue estoppel in criminal cases. I am, however, quite satisfied that "gipsy" in this context cannot bear that meaning.

He went on to state that:

That a man is of Romany [sic] race is, as it seems to me, something which is really too vague of ascertainment, and impossible to prove; moreover it is difficult to think that Parliament intended to subject a man to a penalty in the context of causing litter and obstruction to the highway merely because of his race. I think that in this context "gipsy" means no more than a person leading a nomadic life with no, or no fixed, employment and with no fixed abode.

In this extract we can see an acknowledgment of Parliament's failure to include "other people travelling" within the scope of section 127 of the Highways Act 1959. A more forceful analysis of the issues that this failure might create if 'gipsy' were to be given its dictionary definition is made in Lord Justice Diplock's speech at pages 467-468 where he states:

I agree that the word "gipsy" as used in section 127 of the Highways Act, 1959, cannot bear its dictionary meaning of "a member of a wandering race (by themselves called Romany [sic]) of Hindu origin...." If it did it would mean that Parliament in 1959 had amended the corresponding section of the Highway Act, 1835 (which referred to "gipsy or other person"), so as to discriminate

against persons by reason of their racial origin alone. It would raise other difficulties too. How pure-blooded a Romany [sic] must one be to fall into the definition? The section is a penal section and should, I suppose, be strictly construed as requiring pure Romany [sic] descent. As members of that race first appeared in England not later than the beginning of the sixteenth century, and have not in the intervening centuries been notorious for the abundance of their written records, it would be impossible to prove Romany [sic] origin even as far back as the sixteenth century, let alone through the earlier centuries of their peripatetic history from India to the shores of this island. The section so far as it referred to "gipsy" would be incapable in practice of having any application at all.

Lord Justice Diplock here highlights why the decision in *Mills v Cooper* was inevitable given the racial discrimination connotations if 'gipsy' were to be given its dictionary meaning. This had the effect of decoupling the notion of ethnicity from the meaning of the word 'gipsy' (in the context of highways law). Further to this, it also led to the notion that 'gipsy status' was not unalterable, as Lord Parker noted, a "man might well not be a gipsy on one date and yet be one on a later date". This notion is very much evident in the case law in the following years and is still applied in planning cases at the present time. It also had the effect of concluding on the application of the doctrine of issue estoppel at page 467 of the judgment:

I cannot think that the doctrine of issue estoppel, even if applicable at all in criminal cases, is applicable except in cases where the determination is as to something which has taken place on a particular day or as to something like the date of a man's birth, which can never vary and has no application whatever to a state of affairs, as here, when a man may be described as a gipsy on one day, and may well not be so described on another day.

In addition to this, the new interpretation of 'gipsy' led Lord Parker (*ibid*) to think that it was:

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...impossible to say that there were any circumstances here which entitled the justices to say that proceedings brought some two-and-a-half months later on the issue whether he was a gipsy could in any sense of the word be said to be oppressive and an abuse of the process of the court.

The questions of issue estoppel and oppressive proceedings are of little relevance to the long term effects of the judgment, but are useful in illustrating how the Court of Appeal had to compensate for the failings of the drafting of the Highways Act 1959. The likelihood is that the case would have never have been brought (at least on grounds of what 'gipsy' meant) had the scope of section 127 mirrored its predecessor. The judgment is mainly concerned with the legal issues as opposed to the facts of the case. It is unclear what the new evidence provided by the prosecution regarding 'gypsy status' was, and, as such this case, and indeed section 127, should not be seen as deliberate uses of discourses of authenticity in their own right. They perhaps could be seen merely as an example of poor legislative drafting, which led to confusion, which was later clarified in the Court of Appeal. In the main, they need to be seen as the catalyst of the events of the following years, during which their effects were felt dramatically. It was perhaps not the intention of the Court of Appeal for this to happen as Lord Parker made it clear at 467 that:

I am hoping that these words will not be considered as the words of the statute, but merely as conveying the general colloquial idea of a gipsy.

The Judge's hopes did not transpire, and Fraser made the following observations regarding the implications of the judgment: "The repercussions of this judgment are, however, going to be unfortunate. First, I know that the very difficulty inherent in the ethnic approach to the word 'gipsy' in the Highways Act inhibited some local authorities from seeking prosecutions, and probably encouraged them to think more readily in positive rather than deterrent terms. It will now be easier to prosecute successfully, and perhaps it will not be long before the penalties are also increased: for some time past there have been noises in Parliament about the inadequacies of the penalties under the Highways Act. But increased facility to 'move on' does not solve anything. Secondly, this



High Court ruling – although really it is relevant to the interpretation of ‘gipsy’ only in the rather peculiar context of the Highways Act – may reduce the chances that the Race Relations Act of 1965 can be used to get rid of ‘No Gypsies’ signs in the pubs and the like” (Fraser, 1968).

On his first point, Fraser was proved right in that an immediate effect was that local authorities were able to prosecute ‘gipsies’ with greater ease. On the second point, in the case of *CRE v Dutton* discussed below, *Mills v Cooper* was taken by the High Court as rendering the ethnic minority status of Gypsies as problematic. The Court of Appeal later reversed that decision (see section 6.7.2). What Fraser did not however predict was the legal battles that would occur over the non-ethnic definition in the following years, and the consequent implications for access to accommodation.

#### **5.4.2 The nomadic authenticity required by *Mills v Cooper* enters the policy discourse later in the same year (MHLG and Welsh Office Gypsies and Travellers report)**

The findings of *Mills v Cooper* immediately entered the policy discourse around Gypsies and Travellers. The 1967 Ministry of Housing and Local Government (MHLG) and Welsh Office report entitled ‘Gypsies and Travellers’ noted the following in its introduction:

The dictionary definition of gypsy is ‘a member of a wandering race of Indian origin; a Romany [sic]’. Although the term has primarily an ethnic meaning, it is often used loosely for all the people described in this report, whether ‘true Romanies’ or not. Since a recent High Court ruling a gypsy is defined, for legal purposes, as a person without fixed abode who leads a nomadic life dwelling in tents or other shelters or caravans or other vehicles; i.e. as a class of person and not a member of a particular race. The people themselves take exception to the term when used by outsiders, considering it has now become derogatory, and prefer to be known as travellers. For these reasons, and because it is difficult to separate these people into distinct ethnic groups, the two terms – gypsy and traveller – are used interchangeably throughout this report although the latter term is preferred as it is less ambiguous. Strictly speaking, by no means all travellers are gypsies (Ministry of Housing and Local Government Welsh Office, 1967, p.1).

The report was based on the findings of a national survey of Gypsies and other Travellers in England and Wales in 1956. The introductory chapter has a discussion regarding whom was to be included, and this is in the same vein as Circular 6/62, but expands the detail. The significance of the report is that it offers a very clear context to the nature of the discourse around the authenticity of Gypsies and Travellers at that particular point in time. As such it is useful to analyse a substantial extract regarding a hierarchical set of descriptions. The extract begins by setting out an argument that:

Linguistic studies leave little doubt that the original gypsy was a descendent of members of certain wandering Indian tribes who, for some reason lost in history, left their native country in about the tenth century A.D. and began travelling westwards, eventually reaching Europe and North Africa”.

It then goes onto describe the activities of such people:

Their traditional occupations followed closely those which were cursed, or prohibited to upper castes in ancient India – including fortune telling; horse training and dealing; smithery; and entertaining by singing, dancing, playing musical instruments, acting, juggling and acrobatics. In particular, horse dealing for men and fortune telling for women were among the occupations of the first gypsies to arrive in Britain. The immigrants also became noted for their wood carving, from which developed crafts such as peg making, chair mending, and flower making. The gypsies’ occupations were suited to their nomadic life and in the early days they travelled on pack-horses or with horse drawn trollies, and camped in tents. It was not until the early nineteenth century they adopted the covered living wagon.

A short description of the oppression of the Gypsies since their arrival in England is then set out, and reference is made to the romantic or philanthropic interest of George Borrow and then the Gypsy lore society. The report then goes onto discuss “Didicois”:

There can be little doubt that over the past five centuries the original Romany [sic] blood has been mixed to varying degrees with that of the settled population. It has been suggested that reduced hostility towards gypsies in the nineteenth century caused them to relax the rules against intermarriage with outsiders, so making travellers of mixed blood more common. Groups with no claim to Romany [sic] blood have also adopted the gypsy way of life and in some cases, have followed it for several generations. This latter group are called mumpers; posh-rats are half Romany [sic] and half mumper; didicois are of mixed blood but less than half Romany [sic], and it is probable that most travellers today fall into this category, i.e. have some Romany [sic] blood. But the term didicoi is often used loosely in a derogatory sense to denote travellers who are supposedly not 'real Romanies'. Concerning the origin of the non-Romany [sic] element among travellers there have been various suggestions: these include the effects of enclosure, immigration owing to the Irish potato famine, the nomadic casual labour force of the industrial revolution, the disruption of two world wars, and the housing shortage.

Following this Irish Travellers are discussed:

Different again are the Irish tinkers in this country. They are reported to travel widely in large groups with as many as ten or more caravans, mainly dealing in scrap metal, not staying in one place very long and frequently leaving a trail of litter and police summonses. Local authorities regard them as undesirable because of their alleged tendency to defy the law and to disturb local residents, while the indigenous travellers despise the low standards and dirty condition of the tinkers which cause trouble for all groups of travellers. Because of the wild and unruly behaviour of the Irish tinkers some traditional camping grounds have been closed to all travellers indiscriminately. It has been suggested that they visit England and Wales only for a few months before returning with their savings. Because of the freedom of movement between the Irish Republic and the United Kingdom there is no check on the numbers involved. Some English travellers think they should be sent home.

Having set out the key groups of Gypsies and Travellers, the hierarchy between the groups is discussed:

The travelling people themselves make a clear distinction between these groups, those families with the most Romany [sic] blood are accorded the highest status and mumpers and tinkers the lowest. Families who regard themselves as Romany [sic] often try to avoid association with mumpers and tinkers. There are signs, however, that this traditional hierarchy is breaking down and is being replaced by one based on wealth, the 'flash' travellers with their expensive lorries, cars and caravans having the highest status, and the less prosperous 'rough' travellers, some still without motorised transport, having the lowest. Although the travellers admit these differences among themselves, the Gypsy Council affirm 'the essential unity of the travelling people, above distinctions of group and origin' (Ministry of Housing and Local Government Welsh Office, 1967, pp.2-3).

There are a number of different points to note on this extract regarding the detail afforded to the history and origins of different groups, the references to notions of blood purity, the further effects of the drafting of the Highways Act 1959, the contrast between the descriptions of Romani Gypsies and Irish Travellers, and the sense of hierarchy evident in the extract.

First, there is a contrast between the amount and nature of the historical details provided regarding the different classifications of Gypsies and Travellers. Much attention is paid to the origins and history of the Romani community, in contrast to the other classifications of Traveller discussed. It is interesting to note that the Indian origins discussed earlier were undisputed at this point in time. Much is made of the language connections with India. This adds an 'exotic' dimension to the discourse, and could be said to be similar to Said's (1978) ideas in *Orientalism* discussed in Chapter Three. There is also a simplification of the nature of the Egyptian Acts, by reducing 'other persons commonly calling themselves Egyptians', 'counterfeit Egyptians', 'any who frequented their society or behaved like them', or 'any who for one month at any one time or at several times was in their company' (see Mayall, 2004, p.61) to 'others found in their company'. What this fails to fully acknowledge is the historical presence of non Gypsy nomads in England and Wales. The Didicois and other groups are taken to have either Gypsy origins, or to have only recently taken to the road / arrived in the country. There are two points to make on the report's findings on these groups. The first is that it

is implied that a nomadic lifestyle is a 'gypsy' lifestyle, when the report refers to 'Groups with no claim to Romany [sic] blood (who) have also adopted the gypsy way of life and, in some cases have followed it for several generations' (p.3). Secondly, on the point of Irish Travellers having arrived as a result of the potato famine, this account has been disproven, and in fact there is reference to nomadic groups in Ireland as far back as the fifth century (see Murdoch and Johnson, 2007, p.10).

The notion of blood purity present in the extract is usefully compared to the ideas of the Nazi eugenicist Robert Ritter mentioned in Chapter Three. Ritter's idea of a 'part Gypsy' equates well to the notions of blood purity mentioned in the extract. There are clear hierarchical implications evident, with Romani blood being seen more favourably than the lesser 'diluted' version evident in Didicois. Ritter contrasted 'pure blooded Gypsies' with 'part Gypsies', and the consequences for those found to be 'part Gypsies' was death. Whilst the intentions of the Ministry of Housing and Local Government and the Welsh Office would have been in no way similar to those of the National Socialist Party in wartime Germany, the trend of blood quantum classification is one which is not evident in present day discourse regarding Gypsies and Travellers. It is also important to examine the extract in the context of its time. Ideas regarding racial purity were still popular in the 1960s, and such notions would not only have been specific to Gypsies and Travellers. However, the use of blood quantum classification is not to be down played. It is the clearest and crudest form of discourse around authenticity evident within all the evidence examined. It lacks subtlety, and whilst it had no practical implications in policy terms, it is nevertheless to be regarded as significant.

There is also a point regarding the legacy of the poor drafting of the Highways Act 1959. Here we can see how the omission of 'other people travelling' has led to the misconception that the legislation was solely targeted at Gypsies, and although the judgment in *Mills v Cooper* is cited, the implication of specific ethnic legislation is made on page 3 of the report where it is suggested that Gypsies are singled out in modern legislation and reference is made to section 127 of the 1959 Act. This idea was reinforced by the title of the definition provided in the Caravan Sites Act in the following year.

Finally, what this extract demonstrates is the contrast between the authenticity of different groups of Gypsies and Travellers and consequent hierarchy. What the references

to origins highlights is a distinction made between the acceptable but romanticised ‘real Romanies’ and the other groups who either did not the same level of blood purity (‘didicois’), or were undesirable (‘Irish Tinkers’). This distinction is primarily built on the level of regard that the authors of the report had for the origins, history and perceived lifestyles / practices of the different communities. The Romani are given an exotic long and detailed history, full of romantic notions of mystical and circus occupations, whilst the ‘Irish tinkers’ are said to be ‘wild and unruly’, and as such engaged in criminal behaviour. Most notably, the Irish tinkers are blamed for the indiscriminate closing of traditional camping grounds. Again, this is the crudest example of the contrast between the acceptable and the unacceptable Gypsies or Travellers. This sense of hierarchy is evident in the final paragraph of the extract, where it is suggested that travelling people make their own distinctions regarding the status of different groups. Whilst there is a lack of detailed evidence for this proposition in the evidence examined in this analytical narrative, the case of Massey detailed at section 8.5.2 is evidence of such distinctions being made by different communities about other communities.

The crux of the report is however the eventual acknowledgment of the lack of importance of such distinctions. Having set out the different classifications of Gypsies and Travellers, the report then goes on to take the same approach as Circular 6/62 (see section 5.3.1). The eventual conclusion was that “From the Ministry’s view these distinctions were of little practical importance: information was needed about the entire traveller population in caravans, huts and tents, who in large measure follow a common way of life, making the same demands on land, and meeting the same obstacles in their search for sites” (Ministry of Housing and Local Government Welsh Office, 1967, p.3). This statement would suggest that authenticity in real terms has a minimal impact on the creation of policy.

## 5.5 1968

### 5.5.1 The term ‘gypsies’ is defined by the statute and the duty of local authorities to provide sites is introduced (Caravan Sites Act 1968)

In 1968 an Act with regard to the provision of Caravan Sites for Gypsies and Travellers was given royal assent. This introduced a duty for councils to provide sites for Gypsies and Travellers residing or resorting to their area. This was in effect a measure to address the lack of accommodation caused by the Caravan Sites and Control of Development Act 1960 (see section 5.2.1 above). In effect it was the first statutory measure with respect to substantive equality for the provision of accommodation for Gypsies and Travellers. In order to determine who should be able to benefit from the positive provisions within the Act, a definition was inserted at section 16 (see below). It is useful to acknowledge that the purpose of this definition was to ensure that the under provision of sites for Gypsies and Travellers was addressed by allowing only those communities to benefit from the provision.

With regard to the development of statutory definitions the duty is significant not only because of the positive implications it would have for Gypsies and Travellers, but also because its application with regard to the New Travellers was given judicial consideration in a series of cases which culminated in *Ex parte Gibb* (see section 7.1.1). The Act at section 12 also introduced a power of designation, that is when the Minister responsible considered that either sufficient sites had been provided or that it was not necessary or expedient to provide sites they could make an order designating that county which opened up the provisions of section 10 of the Act. This had the effect of making it an offence for any person “being a gipsy” to station a caravan for the purpose of residing for any period on land within the boundaries of a highway, any other unoccupied land, and any occupied land without the consent of the occupier. This brings us back to the question of who is a “gipsy”, and the Act echoed the *Mills v. Cooper* judgement by creating the statutory definition of ‘gypsies’ at section 16:

Persons of nomadic habit of life, whatever their race or origin, excluding members of an organised group of travelling showmen or of persons engaged in travelling circuses, travelling together as such<sup>12</sup>

This definition albeit with some additional criteria added in 2006 remains the same to the present day. As barrister David Watkinson (interview 2011), noted the definition in the 1968 Act is for 'gypsies', which is another legacy of the drafting of the Highways Act 1959. However, in the preamble to the Act one of its purposes is described as being "to secure the establishment of such sites by local authorities for the use of gypsies and other persons of nomadic habit, and control in certain areas the unauthorised occupation of land by such persons". This is essentially an anomaly in the 1968 Act and reflects the wording of the Highways Act 1935 regarding "other people travelling". There is no reasoning available explaining why the drafters of the 1968 Act failed to apply this dual terminology to the definition provided by Section 16. Suffice to say, it is this enshrinement in law of the notion of all people who had a nomadic habit of life being referred to solely as 'gypsies' without reference to "other persons of nomadic habit" which was arguably one of the causes of many of the difficulties in the following years. In addition to the definition of 'gypsies', the Act also modified the definition of a caravan to include twin-unit caravans. Section 13 (1) provides that:

"A structure designed or adapted for human habitation which:

- a) Is composed of not more than two sections separately constructed and designed to be assembled on a site by means of bolts, clamps or other devices;

and

- b) Is, when assembled, physically capable of being moved by road from one place to another (whether by being towed, or by being transported on a motor vehicle or trailer), shall not be treated as not being (or not having been) a caravan within the meaning of Part 1 of the Caravan Sites and Control of Development Act 1960 by reason only that it cannot lawfully be moved on a highway when assembled."

<sup>12</sup> Showpeople have had their own specific guidance.



Section 13(2) then goes on to prescribe the following maximum dimensions for "twin unit caravans"

- (a) length (exclusive of any drawbar); 60 feet (18.288 metres);
- (b) width: 20 feet (6.096 metres);
- (c) overall height of living accommodation (measured internally from the floor at the lowest level to the ceiling at the highest level): 10 feet (3.048 metres).

The significance of these definitions with regard to discourses of authenticity only becomes apparent in 2005 in the case of *The Queen on the Application of Roger Michael Green on behalf of the Friends of Fordwich and District v The First Secretary of State, Canterbury City Council, Mr Shane Jones, Mrs Bridget Jones* which is detailed at section 8.2.1.

# **Chapter 6 - 1976 – 1991 Further foundational considerations for the development of statutory definitions of Gypsies and Travellers**

The previous chapter detailed what could be described as the foundations of the modern discourse with regard to the statutory authenticity of Gypsies and Travellers. This chapter sets out a secondary set of foundational considerations, in so far as the events described would in turn have a bearing on those in the following years. These considerations include statutory protection for ethnic minorities, the lack of security of tenure on local authority sites, the duty to provide sites, the advent of New Travellers and the first cases regarding ‘gypsy status’ for the purposes of planning

## **6.1 1976**

### **6.1.1 The protection of racial groups in enshrined in law (Race Relations Act 1976)**

In 1976 legislation was created to address racial discrimination. The Act made it unlawful to discriminate on racial grounds in employment, education, housing and planning, the exercise of public functions and in the provision of goods, facilities and services. With regard to ethnic Gypsies and Travellers it is the sections which relate to the provision of goods and the exercise of public functions (the public sector race equality duty) which have been tested in the courts (see the cases of *CRE v Dutton*, *O’Leary* and *Baker* at sections 6.7.2, 7.5.1, and 8.5.1 below). In order to qualify for such protection, the group in question had to be a racial group under the provisions of section 3 (1) of the Act. The criteria for determining this were set by the House of Lords in *Mandla* (see section 6.3.1), and Romani Gypsies and Irish Travellers were found to fulfil them in *CRE v Dutton* and *O’Leary*.

## 6.2 1977

### 6.2.1 The Cripps report gives the definition a generous application (Accommodation for Gypsies report)

The analysis of the definition included in the Cripps report is brief in comparison with the other topics covered by the document, but nevertheless it is significant in so far as it can be taken as an indication of central government thinking on the subject. There are five key points to note about the discussion of the definition in the Cripps report. First, paragraph 1.5 states the following:

What or who is a gypsy? The question has been put to me repeatedly by local authorities and others. I have replied with the definition in section 16 of the 1968 Act: 'Persons of a nomadic habit of life, whatever their race or origin' other than travelling showmen or persons engaged in travelling circuses. Behind the question has lain the thought, sometimes openly stated, that 'genuine', 'true' or 'local' gypsies are relatively easy to accommodate. They do not arouse the same degree of violent opposition as other travellers. The latter tend to be regarded as troublesome refugees from other counties or districts where the authorities refuse to acknowledge their statutory duty to accommodate them. Prejudice against Irish Travellers is especially strong (Cripps, 1977, pp.1-2).

This distinction between 'genuine' Gypsies and the less acceptable Irish Travellers echoes Circular 6/62 and the 1967 MHLG report examined above. The language that Cripps employs is more observational than the two earlier documents. Instead of making statements of fact regarding the status or behaviour of different groups, Cripps chooses only to note the common claims made by people at the time. This is evidenced through the inverted commas around the words 'genuine', 'true' and 'local', and through the statement: 'Prejudice against Irish Travellers is especially strong'.

Second, the report at paragraph 1.7 makes reference to "house dwellers without gypsy connections who take to the road", and the terms used to refer to them; "drop-outs", "layabouts" or "homeless". These people are taken as potentially being able to fulfil the definition as "one may be a gypsy one day and not another". It is not clear

whether any of these people would fit into the modern understanding of what a New Traveller is. However, it is probable that they would not, as the term ‘hippie’ would have been likely to have been used if this was the case. Regardless of whom the non ‘gypsies’ were, what is notable here is that the author has given the definition a generous application by way of reference to the point regarding the ability to gain and lose ‘gypsy status’ in *Mills v Cooper* (see section 5.4.1).

Third, paragraph 1.8 acknowledges the questions raised by local authorities or Gypsy organisations regarding the statutory definition and also the apparent reluctance of both kinds of organisation to suggest any improvements to the definition. This is in contrast to the evidence in the 1990s and 2000s when both local authorities and Gypsy organisations were arguing for different interpretations or alterations of the definition in the context of the Courts or national policy (see sections 6.10.3 and 8.1.7). There are two possible reasons for this. The first and perhaps primary reason is the lack of New Travellers wishing to claim ‘gypsy’ status. This only began to occur in the 1980s notably in *Berkshire CC v. Bird and Others* and *North Yorkshire County Council v. Capstick and Others and Persons Unknown* (see sections 6.5.1 and 6.6.1). Second, it could be argued that the ‘lack of precision in the statutory definition’ identified by Cripps was largely due to a lack of litigation in the courts. Without the framework of case law which exists at the present time, local authorities only had the section 16 of the Caravan Sites Act 1968 definition to apply, but Cripps notes that seemingly none were inconvenienced by this.

Fourth, the report suggests that there was an acceptance of self ascription by Gypsies and Travellers by ‘gypsy’ officers employed by local authorities. This adds further weight to the suggestions as to why the statutory definition was unproblematic (at least at a national policy and judicial level) outlined in the previous paragraph.

Finally, both points 1 and 2 outlined above illustrate the generous application given to the term ‘gypsies’, and this is demonstrated further by paragraph 1.9:

I have assumed that the aim of the promoters of the 1968 Act was to secure the provision of sites for families, at least one member of which was brought up in a gypsy way of life. I use the term ‘gypsy’ to include Romanies, didicois, mumpers, tinkers and any such persons of nomadic habit of life who travels about the country living in caravans or tents (Cripps, 1977, p.2).

Again, the unproblematic acceptance of a range of categories of Gypsy or Traveller is indicative of the effects of *Mills v Cooper*<sup>13</sup> and the events preceding it. Furthermore, the acceptance of the different categories as falling within the scope of the definition is indicative of the 1967 MHLG report's acceptance of having to provide for all nomadic people regardless of race or origin.

### **6.2.2 Circular 28/77 echoes the Cripps report**

A year after the Cripps report in 1977 The Department of the Environment introduced a Gypsy Caravan Sites Circular. The Circular echoed the thinking of the Cripps report on the statutory definitions in so far as it states at paragraph 4 that the definition "makes no distinction between different groups of travellers or their trades. It includes romanies [sic], didicois, mumpers, tinkers – hawkers etc." (Department of the Environment, 1977). Like Cripps it goes on to acknowledge the ambiguity of the definition at paragraph 5:

In law, therefore, the term "gypsy" refers to a class of people and is not confined to an ethnic group. Nevertheless, it is clear that gypsies do constitute a cohesive and separate group within our society, with strong internal social ties, notwithstanding the differences and tensions often apparent between families and sub-groups. The criterion "nomadic habit of life" leads to a certain ambiguity, especially in relation to gypsies who settle for lengthy periods on authorised sites. Although fears have been expressed that the gypsy way of life encourages 'dropouts' from settled society to enter it, there is little evidence to substantiate this. There has always been a degree of movement by gypsies into and out of houses, often by marriage, and outward movements of this kind should not be misinterpreted as a substantial movement of the homeless and others into the gypsy way of life. (Department of the Environment, 1977)

This paragraph is notable on three counts. It begins by stating that the statutory definition is not concerned with ethnicity. It then goes on to immediately suggest that 'gypsies' are a separate group. If one compares this to the criteria as to what constitutes an ethnic group for the purpose of the Race Relations Act 1976 laid out by Lord Fraser in the *Mandla* (commonly known as the *Mandla* criteria, see section 6.3.1) then there is a clear

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<sup>13</sup> [1967] 2W.L.R. 1343 [1967] 2 Q.B. 459

connection. Romani Gypsies were found to fulfil these criteria in *CRE v Dutton* and Irish Travellers in *O’Leary v Allied Domecq* (see sections 6.7.2 and 7.5.1). The notable point here is that although there is a statutory definition which has uncoupled the ethnic meaning from the word ‘gypsy’, the government was still keen to give an ethnic ‘flavour’ to the definition, and this Circular was referred in *R. v Gloucester CC Ex p. Dutton* (see section 6.10.2) where it was concluded that New Travellers did not fulfil the definition. The conflation of different Gypsy and Traveller ethnic groups is also notable, although this is qualified by the recognition of sub groups.

The second point is the noting of the ambiguous nature of the statutory definition, and the long-term nature of some sites. This was considered in *Greenwich v Powell* where Lord Bridge noted that at paragraphs 61-65 that the Circular also made provision for permanent sites for long-term residential use. The judgment in *Powell* clarified the status of Gypsies and Travellers living on long-term sites, as this one sentence had created ambiguity in itself (see section 6.7.4). The final point again echoes the Cripps report in that it notes the concerns expressed regarding ‘drop outs’, but then dismisses the claim as having ‘little evidence to substantiate’ it (paragraph 5).

Both the Cripps report and Circular 28/77 would suggest that the statutory definition was at least in Government policy discourse seen as unproblematic during the 1970s. This supposition is supported by the lack of case law concerning the statutory definitions during the decade. This does not however mean that questions regarding the authenticity of Gypsies and Travellers were not present in public discourse, and there are clear references in both documents to suggest that there was debate around the subject. However, evidence of debate around the statutory definition does not exist beyond the documents already examined.

## 6.3 1983

### 6.3.1 The creation of the Mandla criteria as a marker of ethnic authenticity (Mandla v Dowell Lee<sup>14</sup>)

The Mandla case was concerned with discrimination against a Sikh schoolboy denied entry to a private school on the basis of not being allowed by the school to wear a turban. This was a highly significant case in Race Relations law as it set out criteria for the determination of what constitutes a racial group with reference to ethnic origins for the purposes of the section 3 (1) of the Race Relations Act 1976 (see section 6.1.1), which states:

3.(1) In this Act, unless the context otherwise requires –  
“racial grounds” means any of the following grounds, namely colour, race, nationality or ethnic or national origins;  
“racial group” means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person’s racial group refer to any racial group into which he falls.

The question for the House of Lords to consider was whether Sikhs were able to fulfil this definition, specifically by reference to ethnic origin. The facts of the case which are important in providing a context were set out by Lord Fraser at page 559 of the judgment. The appellants in the case were a father and son from Birmingham, the latter had been denied entry to an independent school due to the wearing of a turban due to the rules of the school with regard to uniform. The father complained to the Commission for Racial Equality (CRE) on the basis that the school had discriminated against him and his son on racial grounds. The commission took up the case and were in effect the real appellants. The County Court and then the Court of Appeal had both found that Sikhs were not a racial group and the CRE went onto appeal to the House of Lords.

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<sup>14</sup> [1983] 2 A.C. 548

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The involvement of the Commission for Racial Equality (CRE)<sup>15</sup> is notable as they were also the Appellants in the Dutton case and funded the *O'Leary v Allied Domecq* (both cases concerned the status of ethnic Gypsies and Travellers as a racial groups, see sections 6.7.2 and 7.5.1). Whilst the facts of the later cases are different (the Dutton case was regarding a 'no travellers' sign in a pub and *O'Leary*, the refusal of service to Irish Travellers in five London pubs) the application of the law in all three instances is identical in that it turns solely on the recognition of Sikhs, Gypsies or Irish Travellers as an ethnic group.

*Mandla* was the first case in the UK to consider questions of a group's status with regard to ethnic origins. In the Judgment the dictum of Richardson J in *King-Ansell v. Police*<sup>17</sup> was applied. Lord Fraser outlined the context and reasoning of the decision of the New Zealand Court of Appeal at pages 563-564:

In that case the appellant had been convicted by a magistrate of an offence under the New Zealand Race Relations Act 1971, the offence consisting of publishing a pamphlet with intent to incite ill-will against Jews, "on the ground of their ethnic origins." The question of law arising on the appeal concerned the meaning to be given to the words "ethnic ... origins of that group of persons" in section 25 (1) of the Act. The decision of the Court of Appeal was that Jews in New Zealand did form a group with common ethnic origins within the meaning of the Act...The reasoning of all members of the New Zealand court was substantially similar, and it can, I think, be sufficiently indicated by quoting the following short passages....The first is from the judgment of Woodhouse J. at p. 538 where, after referring to the meaning given by the Supplement to the Oxford English Dictionary (1972), which I have already quoted, he says:

"The distinguishing features of an ethnic group or of the ethnic origins of a group would usually depend upon a combination, present together, of characteristics of the kind indicated in the Supplement. In any case it would be a mistake to regard this or any other dictionary meaning as though it had to be imported word for word into a statutory definition and construed accordingly. However, subject to those qualifications, I think that for purposes of construing the expression 'ethnic origins' the 1972 Supplement is a helpful guide and I accept it."

<sup>15</sup> The CRE has been superseded by the formation of Equalities and Human Rights Commission in October 2007.

<sup>17</sup> [1979] 2 N.Z.L.R. 531, 543



Richardson J. said, at p. 542:

"The real test is whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their colour or their racial, national or ethnic origins. That must be based on a belief shared by members of the group."

And the same learned judge said, at p. 543:

"a group is identifiable in terms of its ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents."

My Lords, that last passage sums up in a way upon which I could not hope to improve the views which I have been endeavouring to express. It is important that courts in English-speaking countries should, if possible, construe the words which we are considering in the same way where they occur in the same context, and I am happy to say that I find no difficulty at all in agreeing with the construction favoured by the New Zealand Court of Appeal.

It is on the foundation of *King-Ansell v. Police* that the *Mandla* criteria were built. As is evident in *CRE v Dutton* these criteria have come to be regarded as defining when considering the status of minority groups under the terms of section 3 (1) of the Race Relations Act 1976, and subsequently section 9 of the Equality Act 2010. The criteria and associated reasoning are set out at 562:

For a group to constitute an ethnic group in the sense of the Act of 1976, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups.

A group defined by reference to enough of these characteristics would be capable of including converts, for example, persons who marry into the group, and of excluding apostates. Provided a person who joins the group feels himself or herself to be a member of it, and is accepted by other members, then he is, for the purposes of the Act, a member. That appears to be consistent with the words at the end of section 3 (1): "references to a person's racial group refer to any racial group into which he falls." In my opinion, it is possible for a person to fall into a particular racial group either by birth or by adherence, and it makes no difference, so far as the Act of 1976 is concerned, by which route he finds his way into the group.

The application of these criteria to Romani Gypsies and Irish Travellers is discussed at sections 6.7.2 and 7.5.1.

### **6.3.2 The Mobile Homes Act 1983 excludes Gypsies and Travellers from provisions regarding security of tenure on local authority sites**

In 1983 the Mobile Homes Act was enacted in order to update previous legislation. The significance of the Act to the analytical narrative is in the omissions that it made in section 5 (1) when defining a site which was afforded protection under the provisions of the Act

as not including “any land occupied by a local authority as a caravan site providing accommodation for gypsies”. The significance of this omission is highlighted in *Greenwich v Powell*, *Smith v Dagenham* and *Connors v UK* (see section 6.7.4, 7.7.4 and 8.1.3).

## 6.4 1984

### 6.4.1 Defining a Gypsy Report

1984 saw the publication of a report by the Gypsy Sites Branch of the Department of the Environment entitled “defining a gypsy”. The report was in places inaccurate when viewed in the light of the modern academic literature (see Chapters Two and Three), but is useful in explicitly illustrating the discourse around the authenticity of Gypsies and Travellers at the time. The inaccuracies in themselves are an illustration of how the discourse regarding the authenticity of Gypsies and Travellers can at times be conflated and confused. It is suggested that in this context, the effects of the Highways Act 1959 and *Mills v Cooper* are particularly evident. There are a number of points on the report to note. They can broadly be divided into discourse around the “genuine gypsy”, origins of Gypsies and Travellers, settled Gypsies, references to the Race Relations Act 1976 and the subsequent *Mandla* criteria, and the entry of “hippies and dropouts” into the discourse.

The report takes account of the proposition that the statutory provision of accommodation for Gypsies and Travellers under the Caravan Sites Act 1968 should be restricted solely to ‘true Romanies’. It offers the following comments in recommendations at paragraph 49:

(ii) A "real" gypsy: Another argument against the present definition of gypsy is that it includes the whole range of gypsy life from true Romany [sic] through to the Irish tinker. Some argue that only the true Romany [sic] should benefit from the Caravan Sites Act, although what should happen to the others who live in caravans (and have done so for a number of generations) appears rarely, if ever to be considered.

This study finds that although the literature and current commentators [sic] on gypsy life talk about different types of gypsies there is no possible way of distinguishing them. There are no

written records relating to ancestry and without these identification would have to rely on a person's claim to be a Romany [sic]. It would be virtually impossible to disprove or prove such a claim where this is challenged. Thus although the idea of identifying true Romanies among the gypsy population is a popular notion, it is quite impracticable.

The effect of the Court of Appeal's decision in *Mills v Cooper* regarding the statutory meaning of the word 'gypsy' is evident here when the report refers to the "whole range of gypsy life". The more significant point in consideration of this extract is the acknowledgment of the impracticalities of the determination of who is a 'real Romani'. This follows the approach of the 1967 MHLG report and the 1976 Cripps report (see sections 5.4.2 and 6.2.1), both of which are cited at paragraph 35 and paragraph 39 respectively. All three reports are evidence of the governmental discourse of the time, which is in essence an acknowledgment of the perceived hierarchy of authenticity, with the 'true Romani' at the top, and 'Irish Tinkers' near the bottom, but an acceptance that any attempts to distinguish between Gypsies and Travellers are not only impractical, but also undesirable as the issue of the accommodation of those not perceived to be authentic would remain.

The origins of Gypsies and Travellers are considered at paragraphs 7-15 and it is here that the inaccuracies of the report are most explicit. A number of different schools of thought are noted, and the debate about origins highlighted in Chapter Three is evident, with references to Indian origins, settled people becoming nomadic during the Middle Ages, the effects of enclosure / highland clearances, and the origins of Irish Travellers. The common inaccuracy is again the classification of all Travellers as 'gypsies'. The discussion of language at paragraph 11 is particularly revealing as it is said that the "[Indian origins] theory falls down where Irish and Scottish gypsies are concerned, as their languages, 'Shelta' and 'Gammon', have apparently very little relationship with any Romani or Indian language. So, for their origins, other explanations have to be found". Again the combined effect of the Highways Act 1959, *Mills v Cooper* and the subsequent importation into section 16 of the Caravan Sites Act 1968 is evident as the Civil Servant writing this report 17 years after the Court of Appeal's decision refers to all Gypsies and Travellers as 'gypsies'. Rather than using this term solely in the statutory sense of the word, the notion

has been taken a step further and has been applied to the social construction of Gypsies and Travellers. This reflects the ideas on discourse discussed in Chapter Three. This conflation of the statutory and the social may of course be due to a lack of rigorous research on the part of the author, as the MHLG and Cripps reports do not take this approach. However, there are other examples in the following years where the word 'gypsy' has been applied to non-Gypsy travellers in the social sense, the most prominent of which is the Channel 4 program 'My Big Fat Gypsy Wedding' which cast Irish Travellers as 'gypsies'.

The previous point concerned the effect of preceding events on then present discourse. The final three points to note with regard to the report are indications of future events and are significant in demonstrating how such discourse can be persistent over time. The final point demonstrates the transfer of a perceived lack of authenticity from one group to another.

First, at paragraph 3 the report highlights the paradoxical position of "a substantial number of gypsy families [who] have settled on caravan sites and no longer travel. Thus the nomadic definition in the legislation may no longer apply to them and appears no longer to be appropriate". Later at paragraph 47 it is noted that some Inspectors in planning appeal decisions for private "gypsy" sites had found the Appellants not to fall within the statutory definition because of this. This particular issue is dealt with by a number of different cases in the following years, and it is interesting to note at this point in time that no significant and thus recorded cases had been brought to the higher courts regarding 'gypsy status' since *Mills v Cooper*, and this would remain the case with regard to ethnic Gypsies and Travellers until 1989 (see section 6.8.1). The reference to the Planning Inspectorate would imply that at the appeal level there were instances where the statutory status of ethnic Gypsies and Travellers had been in dispute, but there is no evidence available to assess the extent or impact of this.

Second, having noted the reluctance of some planning inspectors to afford settled ethnic Gypsies and Travellers 'gypsy status', the report makes reference to the Race Relations Act 1976 and the subsequent *Mandla* criteria, and suggests that the "ruling on identifying an ethnic group could be relevant to any future definition of a gypsy in the future. It notes earlier at paragraph 41 a report published in 1981 by the Commission for

Racial Equality (CRE) “in respect of Four Formal Investigations made by them into alleged discrimination against a gypsy family in Brymbo (N Wales)”. At paragraph 42 the view of the CRE that Gypsies in the UK constituted an ethnic minority for the purpose of the Race Relations Act 1976, and the fact that this proposition had not been tested in the courts was noted. The report went on to detail the Mandla criteria and at paragraph 46 suggests that such “characteristics might well apply to the whole range of gypsies from the so-called Romani through to Irish tinker although they might be found less applicable to dropouts and hippies”. The point regarding the ethnic minority dimension in relation to the statutory definition of gypsy for the purposes of planning is a much contested notion and is the subject of detailed analysis at section 9.2. On the point regarding the status of Gypsies and Irish Travellers with regard to the Race Relations Act 1976, the cases for these propositions were successful in 1988 and 1990 respectively (see sections 6.7.2 and 7.5.1).

As noted above, “hippies and dropouts” were not perceived as being able to be afforded ethnic minority status. The presence of what would now be termed ‘New Travellers’ in this particular example of the discourse is significant as it is the first point at which there is a connection made between New Travellers and the statutory definition within the evidence examined in this research. The report makes two points regarding such people. The first at paragraph 24 is that “hippies, dropouts and other housedwellers who take to the road are easily distinguished from gypsies by local authority officials and others who have experience of dealing with gypsies”. The second at paragraph 49 is that “although some argue that the present definition is unsatisfactory, in practice it seems to work well and only those who are gypsies are benefitting from the provisions of the Caravan Sites Act [1968]”. This is a key point as there were four cases in the following years concerning New Travellers arguing that they were statutory gypsies (Berkshire CC v Bird, North Yorkshire CC v Capstick and R. v Gloucester CC Ex p. Dutton and R. v South Hams DC Ex p. Gibb, see sections 6.5.1, 6.6.1, 6.10.2 and 7.1.1).

## 6.5 1986

### 6.5.1 New Travellers argue that they have statutory authenticity (Berkshire CC v. Bird and Others<sup>18</sup>)

Berkshire CC v. Bird and Others is the first case of New Travellers arguing that they were 'gypsies' for the purposes of section 6 of the Caravan Sites Act 1968. This event is significant as it is the first case regarding 'gypsy status' since the creation of the statutory definition in the 1968 Act. Hawes and Perez (1995) describe this development as bringing the matter of the definition once again into crisis (p.163), whilst Mayall (2004) describes the frenzy of redefinition that was to occur subsequently over the issues of whether or not New Travellers should be accepted as 'legitimate' nomads (p.5).

Miss Bird argued that she was a statutory Gypsy who regularly resorted to Berkshire, and as such the Local Authority were in breach of their duty under s.6 of the Caravan Sites Act 1968 Act to provide her with a transit site. She argued that she had not slept in a permanent dwelling for over four years, and she intended to continue travelling for the rest of her life. She also stated that her adoptive mother was of Romani origin and that her maternal Grandmother was a Traveller. There are two arguments being made here. The first may have (but ultimately did not) afforded Miss Bird the right to be provided with a pitch under the provisions of the 1968 act. However, the second point regarding ethnicity in the light of Mills v. Cooper would not have been taken to be a valid argument. Here we can see an example of an individual trying to claim authenticity by arguing that there is some kind of Gypsy heritage, despite the futile nature of this claim in the light of the legislation and preceding case law. Leggatt J held:

...it is difficult for Miss Bird...to satisfy the plaintiffs that she is a gypsy, since there is nothing...in her appearance, lifestyle, tradition, culture or background...which establishes that the way of life she now professes is or has become habitual, or which helps to distinguish her from those who may be termed drop-outs from society with nowhere else to live...

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<sup>18</sup> Unreported, September 26<sup>th</sup>, 1986

A discourse of authenticity is present in this statement, where a clear distinction is made between the qualities that would constitute an authentic Gypsy, and societal dropouts. The qualities that might make one an authentic Gypsy, would seem to contradict the 1968 Act definition and indeed the case law that followed in the intervening years. The effect on the micro level here was to deny Miss Bird any rights under section 6 of the 1968 Act. On the macro level, the judge would have been unlikely not to have been aware of the precedents which may have been set if they had found in favour of the defendant. He set out his interpretation of the meaning of “gipsies”:

"[Gipsies] are persons whom the Act contemplates will live in caravans, as no doubt befits a person whose habit of life is nomadic, that is wandering. The term 'nomadic' originally applied to members of races or tribes who moved from place to place to find pasture. It still seems to me, even in the statutory definition, to presuppose a type of person who, when he moves from place to place, does so with some purpose in view. 'Habit of life' is, in my judgment, a phrase meaning a manner of living so settled as to have become customary. It has, as I have already remarked, been found expedient to distinguish between permanent and transit sites for gipsies. That difference is perhaps reflected in the reference in section 6 of the Act of 1968 to 'gipsies residing in or resorting to their area,' since a gipsy no doubt resides on a permanent site, though he may wander from it from time to time, whereas he resorts to a transit site temporarily... It seems to me that [the word 'resorting'] may have the connotation of having recourse to a place for a purpose, whether it be to do work or on the way to a more remote destination. That is at least consonant with the behaviour of a nomad."

There are two points regarding this extract. First, the interpretation of “nomadic” and “habit of life” add a gloss to the section 16 definition which imports both a test of purpose and of (an unspecified) time frame. The statutory authenticity of a Gypsy or Traveller is therefore assessed with how much of a “purpose” the person may have in their nomadism, and how long they may have been undertaking such nomadism for. The idea of purpose is something which was later defined in economic terms in *Ex parte Gibb* (see section 7.1.1). Second, the extract demonstrates the use section 6 of the 1968 Act to



construe the meaning of the section 16 definition. This type of construction is one that is again expanded upon in *Ex parte Gibb* in 1994.

### **6.5.2 The Wibberley report notes the development of New Travellers trying to claim statutory authenticity (Analysis of responses to consultation on the operation of the Caravan Sites Act 1968)**

The report of Professor Gerald Wibberley for the Department of the Environment regarding an “Analysis of responses to consultation on the operation of the Caravan Sites Act 1968” reflects the development of New Travellers claiming ‘gypsy status’. It is also significant as it is the first time that references to economic criteria are cited as a means of assessing who should be granted ‘gypsy status’. The report notes at paragraphs 1.11-1.12:

...The National Gypsy Council (in response 48) would also like to restrict the definition of the word ‘gypsy’ so as to exclude a variety of ‘hippy’ groups who are beginning to claim gypsy status. They suggest that this can be done by using a list of occupations which ‘real’ gypsies are now following and which demand some degree of mobility. ‘Hippy’ groups with no discernible occupations would therefore be excluded.

1.12 Looking at all the material supplied to me for study there seems to be considerable support for the view that the group of ‘travellers’ or ‘itinerants’ which merit help with the provision of sites for their caravans are nomadic families, who by reason of their lifestyle, habitually travel to sell the products of their self employment and to pick up casual or seasonal work and whose only or main residence is a caravan or tent for which they have no permanent site.

There are two points to be noted here. The first and most significant is the proposition that the (self) employment of an individual or group should be a determinative factor when assessing whether they are ‘statutory gypsies’. This notion has been evident in the development and application of statutory definitions up until the present day, most notably in *Ex parte Gibb* (see section 7.1.1). The second is that the discourse around the definition at this point is focused on who should benefit from the duty of local authorities

to provide sites for statutory gypsies in section 6 of the Caravan Sites Act 1968. This focus is only evident until 1994 when the Criminal Justice and Public Order Act removed this duty, and subsequent planning guidance in the form of Circular 1/94 suggested that Gypsies and Travellers should provide their own sites.

## **6.6 1987**

### **6.6.1 New Travellers demonstrate a pattern of group travel and are held to be statutorily authentic (North Yorkshire County Council v. Capstick and Others and Persons Unknown<sup>19</sup>)**

In another unreported case of North Yorkshire County Council v. Capstick and Others and Persons Unknown (cited in R. v Gloucester CC Ex p. Dutton<sup>20</sup>) a group of New Travellers who followed a group travel pattern from Yorkshire to the West County and back again were afforded status under the 1968 Act. In this case the regular habit of life qualified the Travellers to benefit from the positive guidance offered by the 1968 Act. Of the four significant New Traveller cases in the 1980s and 1990s this is the only one where the Travellers in question were found to be statutory ‘gypsies’. The significant factor for the Judge in coming to this conclusion would appear to be the notion of group travel. However, the case was unreported and the transcript is not available so firm conclusions cannot be drawn.

### **6.6.2 Showpeople attempt to take an alternative statutory identity (Hammond and another v Secretary of State for the Environment and another<sup>21</sup>)**

The Hammond case was concerned with Showpeople living in the Surrey Green Belt claiming ‘gypsy status’. In this case, there was a permissive policy in the Surrey Structure Plan for the development of Gypsy and Traveller sites in the Surrey Green Belt. There was no such policy for Travelling Showpeople. The definition of “gypsies” in Section 16 of the Caravan Sites Act 1968 specifically excluded “members of an organised group of travelling showmen, or of persons engaged in travelling circuses, travelling together as such”. The

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<sup>19</sup> Unreported (cited in R. v Gloucester CC Ex p. Dutton)

<sup>20</sup> [1992] 24 H.L.R. 246

<sup>21</sup> CO/1996/85

Appellants were Travelling Showpeople who argued that they were statutory “gypsies” during the winter months. The judgement sets out the claimant’s argument and then responds to them at pages 2-3 of the judgment:

...[the Appellant’s barrister] says that the position of the travelling showmen during the winter months is obviously and sharply different from that of their summer months' work when they travel the roads from fairground to fairground for the entertainment of the public. During the four months or so of winter, on the other hand, they are essentially engaged in a time when they cannot pursue their commercial occupation. It is a time of retrenchment, of repair of their vehicles and no doubt of rest in one spot. Further, this spot -- particularly [sic] in the case of Mr and Mrs Hammond -- may fairly be described as a permanent home, unlike the various sites at which they halt and carry on their business during the summer months.

While fully accepting that difference, and indeed contrast between the winter and the summer months so far as Mr and Mrs Hammond and the other travelling showmen are concerned, I conclude none-the-less [sic] that they lie outside the definition which I have quoted. It is, as it seems to me, a definition couched in generic and permanent terms. It is, of course, designed to go beyond the word "gypsies" in any specific or racial sense. It is a definition which fastens on the nomadic habit of life of those to whom it applies. The feature of travelling showmen which brings them within that habit of life, is their annual activity of travelling the country in organised groups as showmen. It is precisely in that capacity, however, that they are singled out by the words of the definition for exclusion from the genus. It would be odd indeed if, for the time of the year when they are not travelling, they were to be regarded as gypsies within the meaning of the section.

The Appeal was dismissed but the case was heard again in the Court of Appeal the following year. The interesting point to note is that the Hammond case is an example of the transferable nature of authenticity, in so far as the Showpeople concerned were claiming a statutory identity at odds with the social identity.

## 6.7 1988

### 6.7.1 Gypsies argue against having statutory authenticity in order to have security of tenure on a local authority caravan site (London Borough of Greenwich v Powell<sup>22</sup>)

The Powell family resided on a local authority Gypsy site owned by the London Borough of Greenwich. The council sought possession of the site in the County Court in order to put it to another use. The Powells appealed.

The case in the Court of Appeal was concerned the security of tenure provisions of the Mobile Homes Act 1983, specifically the meaning of the expression “caravan site providing accommodation for gypsies” which forms an exclusion to the definition of “protected site” for the purposes of section 5 (1). The point of interest in this case is that it is, like Hammond, an example of how the discourse around authenticity is transferable. This is because the defendants were arguing that they did not have ‘gypsy status’, in order to be in scope of the protection of the Mobile Homes Act 1983 with regard to the provisions relating to security of tenure on local authority owned sites. The facts of the case were concerned with a group of people who had settled permanently on a site provided by the London Borough of Greenwich. The site was compulsorily purchased by the Local Authority as a caravan site by way of the power to provide caravan sites in section 24 of the Caravan Sites Act 1960. The order was for a “municipal caravan site” as opposed to a ‘gypsy’ site. However, due to the provision of this site, in May 1974 the local authority were successful in an application to become designated under section 12 of the Caravan Sites Act 1968 (see section 5.5.1). In 1986 the local authority terminated the tenancy agreements and sought possession. The tenants of the site argued that they were not ‘gypsies’ as they treated the site as a permanent base. Therefore, the provisions regarding security of tenure in the Mobile Homes Act 1983 applied, and possession should not be granted to the local authority. The Judge at the county court level disagreed with this approach, and held that despite the defendant’s lack of nomadism, they were not protected by the Mobile Homes Act 1983 since the land was occupied by a local authority as a Caravan site providing accommodation for ‘gypsies’. The Court of Appeal, found otherwise. The appeal was allowed on two points:

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<sup>22</sup> (1988) 20 H.L.R. 411

(1) The necessary exercise is to determine whether the land is occupied as a continuing operation at the material time as a caravan site providing accommodation for gypsies, and not to determine the intention of the local authority in acquiring the land;

(2) The nomadic habit must be of a contemporaneous quality; it was not intended that persons of a certain ethnic origin who traditionally followed a nomadic way of life but who have perhaps for a generation or more abandoned that way of life should be described as continuing to have a nomadic habit of life; a merely temporary abandonment of a settled way of life would not without more convert the person concerned into someone with a nomadic habit; a person who establishes a residential base and merely departs from that base with the intention always of returning to it after a short period cannot be said to be following a nomadic way of life.

The first point is not of particular significance to the development of the statutory definition. The second, however, is paradoxical when considered in the light of the following years which have seen a succession of cases where the Gypsies and Travellers concerned argued that a permanent settled base was not in conflict with the notion of a nomadic way of life. Indeed this was the proposition accepted the House of Lords on appeal regarding this case (see section 6.7.4). What makes this significant when viewed in the light of the discourse around authenticity, is the fact that the defendants were arguing that they were *not* statutory “gypsies”. The Judgement reveals that they were almost certainly of a Gypsy or Traveller background, and it would appear the local authority was also of this opinion. This is evidence of the fluid nature of the ascription in so far as the denial of the statutory identity was in the best interests of the defendants.

### **6.7.2 Romani Gypsies gain ethnic statutory authenticity (Commission for Racial Equality [CRE] v Dutton<sup>23</sup>)**

CRE v Dutton was a case regarding whether Romani Gypsies were a racial group for the purposes of the Race Relations Act 1976 (see section 6.1.1). It was the first case brought on such a matter after the Mandla criteria had been set out by the House of Lords in

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<sup>23</sup> 1989 WL 651202

1983. The case is significant as it highlights the issues around the ethnic authenticity of 'travellers'. The facts of the case concerned Mr Patrick Dutton, a pub landlord in East London. Mr Dutton had been the licensee at two premises previously where he "had unpleasant experiences with people who came from caravans which were parked illegally on nearby sites". To remedy this situation he put up a sign saying 'no travellers'. 18 months after moving to a third pub called the Cat and Mutton, there was an incident with a group of Travellers and Mr Dutton put up handwritten signs in the windows of the Cat and Mutton saying "Sorry, no travellers". In June 1985 a local resident, who does not use the Cat and Mutton, brought these signs to the attention of the Commission for Racial Equality (CRE), who took the view that the signs discriminated against Gypsies. The CRE went to the County Court in order to seek a declaration that by displaying the signs Mr Dutton has contravened section 29 of the Race Relations Act 1976 and an injunction restraining him from continuing to display the signs. The action was heard by Judge J. P. Harris, Q.C. at the Westminster County Court. The claim was dismissed and the case was then heard by the Court of Appeal.

The case was brought on two different grounds. The first was that the word 'travellers' was synonymous with the word 'gipsy'. Therefore, it was argued by the CRE, direct discrimination had occurred, which offended section 1 (1)(a) of the Race Relations Act 1976 which states that a person discriminates against another if "on racial grounds he treats that other less favourably than he treats or would treat other persons". The second ground was that 'gipsies' were a racial group by virtue of their ethnic origins for the purposes of section 3(1) of the Act, and as such were indirectly discriminated against under section 1(1)(b) as the proportions of 'gipsies' who would be able to comply with a 'no travellers' sign is "considerably smaller than the proportion of persons not of that racial group who can comply with it". The arguments made for both these propositions are indicative of the presence of discourses of authenticity within the Court of Appeal at the time. Each set of arguments will be outlined in turn.

The judge at the County Court had held that Mr Dutton's "No Travellers" sign was not direct discrimination. In the Court of Appeal, Nicholls LJ held the following regarding the relationship of the words "traveller" and "gipsy" at page 4:

“No travellers”

I can now state my reasons for agreeing with the judge's conclusion on the “direct” discrimination issue. Like most English words, the meaning of the word “traveller” depends on the context in which it is being used. It has one meaning when seen on a railway station. For some time now the refreshment service provided at railway stations and on trains has been styled “Travellers Fare”. The word has a different meaning when in its context it is directed at travelling salesmen. In my view, in the windows of the Cat and Mutton “no travellers” will be understood by those to whom it is directed, namely, potential customers, as meaning persons who are currently leading a nomadic way of life, living in tents or caravans or other vehicles. Thus the notices embrace gypsies who are living in that way. But the class of persons excluded from the Cat and Mutton is not confined to gypsies. The prohibited class includes all those of a nomadic way of life mentioned above. As the judge said, they all come under the umbrella expression “travellers”, as this accurately describes their way of life.

It is estimated that nowadays between one-half and two-thirds of gypsies in this country have wholly or largely abandoned a nomadic way of life, in favour of living in houses. I do not think that the notices could reasonably be understood as applying to them, that is, to gypsies who are currently living in houses. Gypsies may prefer to be described as “travellers” as they believe this is a less derogatory expression. But, in the context of a notice displayed in the windows of a public house near a common on which nomads encamp from time to time, I do not think “no travellers” can reasonably be understood as other than “no nomads”. It would not embrace house-dwellers, of any race or origin.

For this reason I cannot accept that MrMr Dutton's notices indicate, or might reasonably be understood as indicating, an intention by him to do an act of discrimination within section 1(1)(a) . Excluded from the Cat and Mutton are all “travellers”, whether or not they are gypsies. All “travellers”, all nomads, are treated equally, whatever their race. They are not being discriminated against on racial grounds.

This passage demonstrates the importance placed on what the Equality Act 2010 refers to now as “protected characteristics” by the statute, of which nomadism is not one. It is interesting to note that the provisions of the Race Relations Act 1976, and subsequently

the Equalities Act 2010 offer no protection for nomadic people, whereas Robbie McVeigh (personal correspondence 2011) notes that a right to nomadism was included in a draft bill of rights in Northern Ireland. However, given the position of the legislation that a person can only be subject to statutory discrimination if they are part of a racial group, the judgment on this point would appear to have been correct.

It is the second ground regarding indirect discrimination which was evidently a more contested point. There are a number of issues to discuss regarding this point including, the width of the interpretation with regard to the word “gipsy”, the fulfilment of the Mandla criteria and the presentation of the ‘other’.

The width of the interpretation of the word “gipsy” is dealt with by the Court of Appeal by means of a discussion of the use of dictionary definitions and the relevance of the dicta of *Mills v Cooper* and the subsequent definition in section 16 of the Caravan Sites Act 1968. Nicholls LJ outlined the differences in dictionary interpretations at pages 2-3:

The classic “dictionary” meaning can be found as the primary meaning given in the Oxford English Dictionary (1933):

“A member of a wandering race (by themselves called ‘Romani [sic]’), of Hindu origin, which first appeared in England about the beginning of the 16th century and was then believed to have come from Egypt”.

Hence the word “gipsy”, also spelled as “gypsy”. It is a corruption of the word Egyptian. We find this

usage in Shakespeare, where Othello says to Desdemona (Act III, scene IV):

“That handkerchief  
Did an Egyptian to my mother give  
She was a charmer, and could almost read  
The thoughts of people.”



Alongside this meaning, the word “gipsy” also has a more colloquial, looser meaning. This is expressed in the Longman Dictionary of Contemporary English (1987), where two meanings are attributed to “gipsy”. The first meaning is along the lines I have already quoted. The second is this:

“A person who habitually wanders or who has the habits of someone who does not stay for long in one place”.

In short, a nomad.

The first definition makes clear reference to Indian origins and adds in a further religious dimension to the notion. This and the reference to Shakespeare are notable as there is a clear sense of ‘the other’ within them. In particular in the quote from Othello the (fictional) Gypsy concerned is said to have mind reading abilities. The idea of the other is significant in the consideration of this case, and is discussed below. Aside from the point on the ‘other’, what is notable regarding the use of dictionary definitions is the approach that judge at the County Court took to them, which is highlighted by Taylor LJ at page 10:

The third approach [that the judge took] was to examine dictionary definitions. Here, the learned judge expressed the view that one could pick and choose the meaning one wished to find. He cited six definitions ranging from “A member of a dark haired race which may be of Indian origin etc.” through the broader meaning of “A person who habitually wanders” to the merely abusive “Cunning rogue”. Having set out those definitions the learned judge said, “Accordingly in my judgment the plaintiffs cannot really derive any assistance from dictionary definitions. People obtaining the meaning from the dictionary could not think that a gipsy was a member of a racial group or had basic ethnic origins”. Here, I do not follow the learned judge's reasoning. The fact that dictionaries give more than one meaning for the word gipsy does not prevent the word from having, at any rate in some contexts, the meaning given in four out of six of the definitions.

It is interesting to note that the last occasion that dictionary definitions had been considered in this context by the Court of Appeal was in *Mills v Cooper* in 1967 (see section 5.4.1). There was only one dictionary meaning cited on that occasion and that was

the 1944 Shorter Oxford dictionary which is similar in content to the 1933 definition cited by Nicholls LJ above. The definition cited from the Longman Dictionary of Contemporary English from 1987 had a dual definition of the word 'gypsy'. Whilst it cannot be said with any certainty, this could be construed as an example of the statutory discourse as a result of Mills v Cooper and the subsequent section 16 definition in the Caravan Sites Act 1968 entering social discourse, and subsequently the dictionary.

What is also notable about this case is that Stephen Sedley was making similar arguments as the junior barrister regarding the interpretation of the word "gypsy" in Mills v Cooper in 1967. On both occasions Sedley was arguing for a narrow interpretation of the word. In Mills v Cooper the point was not accepted, and this dictum was considered by the Court of Appeal in relation to this case. The previous judge's comments are cited at page 9:

"Although the Highways Act 1959 and the Caravan Sites Act 1968 are statutory examples of the use of the word "gypsy" the meaning given to the word in those Acts does have great weight in my mind. If you find a word defined in a definition section of one Act of Parliament and defined by the Divisional Court on another use of the same word in another statute it would be difficult to say: well when you are looking at the Race Relations Act 1976 you must have a wholly and totally different meaning attached to it. I consider, agreeing as I do with the Divisional Court in Mills v. Cooper, that it would be impossible to discover if any person or any body of persons were members of the Romany [sic] race or true gypsies. It is not difficult to discover whether they are leading a nomadic life, whether they are travelling from place to place with no fixed abode and no fixed employment. But having ascertained these matters one might justifiably come to the conclusion that they being travellers were not clearly gypsies. As I say I do not think one can be a gypsy or a non-gypsy in one statute and not in another."

The legacy of Mills v Cooper in uncoupling the word 'gypsy' from its ethnic meaning is evident here. Unlike the dictionary definitions there was no statutory definition beyond that in Mills v Cooper and the Caravan Sites Act 1968 to take account of, and it is perhaps understandable that a judge in a lower court would take such an approach. However, the Court of Appeal took a different approach to (the interpretation of) section 127 of the

Highways Act 1959 and section 16 of the Caravan Sites Act 1968. This approach is outlined by Taylor LJ at page 9:

Those statutes, however, have nothing whatsoever to do with race relations or discrimination. They are concerned with highways and the provision and regulation of caravan sites. The statutory adoption of the second broad meaning of gypsy in those contexts cannot be taken to consign a racial group called gypsies to oblivion if it still exists in fact. I therefore agree that the learned trial judge misdirected himself in relying upon the statutory meaning of “gypsy” in contexts quite different from that of the present case.

At page 11 of the judgment, Stocker LJ makes the further point that “both statutes would be unworkable in practice if “gypsy” for the purposes of those Acts were to be defined in the strict sense”. However, it is still interesting to note the continuing presence of *Mills v Cooper* and preceding omission of the phrase ‘other people travelling’ from section 127 of the Highways Act 1959 in legal discourse. Taylor LJ’s comment that the translation of this into the Race Relations context would be to consign Gypsies to oblivion is forceful in its tone but illustrates well the effect of the events of 1959 and 1967.

An additional criticism of the trial judges reasoning on the relevant statute cited above was made by Taylor LJ at page 9:

In fact, the word gypsy does not occur in section 1 of the Race Relations Act 1976 . The phrase which has to be construed is a “Racial Group” as defined in section 3(i) and as interpreted in *Mandla v. Dowell Lee* [1983] 2 A.C.560 .

It is primarily on this point that the case turns. There are two views on this point evident in the judgment, and these are based on differing approaches to the Mandla criteria. The presentation of the ‘other’ is significant within these approaches and therefore will be dealt with concurrently.

Nicholls LJ sets out the approach of the trial judge to the Mandla criteria and then makes his own assessment at pages 6-7:

In the present case the judge expressed his conclusion on the conditions enunciated by Lord Fraser in this way:

“It may well be, as I have said, that there is a small number of travelling people who can claim either by looks or characteristics to be true gypsies but these people have been absorbed into a larger group. Some have abandoned the nomadic way of life and some are indistinguishable from any ordinary member of the public. The larger group of travellers or gypsies forming a part of a larger group cannot in my judgment on the evidence before the Court satisfy those two essential conditions and can satisfy barely any of the other 5 conditions. Although there may be a Romany [sic] language, some may be able to trace their ancestry back to people who came to England many hundreds of years ago, the language does not seem to be in general use. There is no common religion, they have no literature. Although it was urged upon the Court that there should be some relevance in the fact that they have what was described as oral literature passing on myths and other old stories I do not think that was what Lord Fraser was referring to.”

He decided that gypsies were not a group defined by reference to ethnic origins. I come here to a further difficulty about the present case. The evidence on this part of the case consisted principally of evidence called by the commission: the two experts I have mentioned [Donald Kenrick and Thomas Acton, two Romany [sic] studies academics], and a Mr Peter Mercer, who is a gypsy. No expert evidence was led by the defendant. But although there was no contrary evidence called by the defendant, the judge was not impressed by either of the commission's expert witnesses. He approached their evidence with much caution and doubt. Mr Sedley criticised the judge's comments in this regard, but on this the judge's advantage, of having seen and heard the witnesses, is obviously of paramount importance. We are not in a position to conclude that the judge erred in his assessment of the reliability of these witnesses.

Nevertheless, taking the judge's assessment of the witnesses fully into account, and with all respect to the judge, I am unable to agree with his conclusion on what have been called the Mandla conditions when applied, not to the larger, amorphous group of “travellers” or “gypsies” (colloquially so-called), but to “gypsies” in the primary, narrower sense of that word. On the evidence it is clear that such gypsies are a minority, with a long-shared history and a common geographical origin. They are a people who originated in northern India. They migrated thence to Europe through Persia in medieval times. They have certain, albeit limited, customs of their own,

regarding cooking and the manner of washing. They have a distinctive, traditional style of dressing, with heavy jewellery worn by the women, (although this dress is not worn all the time). They also furnish their caravans in a distinctive manner. They have a language or dialect, known as “pogadi chib”, spoken by English gipsies (Romany [sic] chals) and Welsh gipsies (Kale) which consists of up to one-fifth of Romany [sic] words in place of English words. They do not have a common religion, nor a peculiar, common literature of their own, but they have a repertoire of folktales and music passed on from one generation to the next. No doubt, after all the centuries which have passed since the first gipsies left the Punjab, gipsies are no longer derived from what, in biological terms, is a common racial stock, but that of itself does not prevent them from being a racial group as widely defined in the Act.

This extract contains the construction of an ethnic boundary, built in on a combination of points regarding culture, language and origins. The cultural factors can be related back to the construction of the ‘genuine gypsy’ discussed in Chapter Three. In particular the references to distinctive styles of dress and the appearance of women create a stereotyped image of the ‘other’. The reference to language and Indian origins is perhaps unsurprising given that the expert witnesses Kenrick and Acton were two of the leading proponents of this position discussed in Chapter Three, which aside from Okely’s 1983 book *The Traveller-Gypsies* was still the accepted view in 1988. The academic Robbie McVeigh who was an expert witness in the O’Leary case concerning the ethnic status of Irish Travellers makes the point that:

*“legal discourse is most persuaded when it is presented with the ‘other’.  
People need to ‘feel the other otherness’” (Interview, 2011).*

The construction of a ‘genuine gypsy’ discourse cited above allows for this ethnic boundary to be put in place, and this allows in the view of Nicholls LJ and Taylor LJ for a fulfilment of the Mandla criteria. A different approach is taken by Stocker LJ, the third judge sitting in the Court of Appeal who suggested that the fact alone that a group may comply with all or most of the relevant criteria does not itself establish that such a group is of ethnic origin, and noted that Benedictine Monks and Free Masons had been cited as

such groups. A comparison between Gypsies and the Sikhs whom were the subject of the Mandla judgment followed:

Most people would regard Sikhs as a “race” even if they falsely believed that their race was “biologically derived”. Many, if not all, of the general public would know that there had been two Sikh wars and would know that for generations Regiments of Sikhs formed a part of the Indian Army and were often a symbol, through their presence on guard at British Embassies and establishments, of British Imperial power based on the Indian Army and the British Army in India. They would know that they fought in two world wars as distinctive units. They would know of their distinctive dress and probably some of their customs regarding hair and the wearing of turbans. They would know that the Sikhs had a distinct religion or would at least have heard of the Golden Temple at Amritsar. The question whether or not Sikhs were of ethnic origin within the criteria was, in my view, a simple and obvious one and would have been regarded as such by the general public once the appropriate criteria for the phrase “ethnic origin” was established. A Sikh would certainly have so regarded himself and his fellow Sikhs. The same does not necessarily apply to gypsies and if the judge's findings of fact were justified by the evidence I would, for my part, be inclined to agree that even if individual gypsies fall within many of the Mandla criteria they were not an ethnic group because upon the judge's finding such a group was not in any true sense identifiable as a group even by the gypsies themselves or by others, and no sufficient racial flavour existed. If the judge's findings were justified by the evidence the fact that the conclusion was reached by a process of flawed reasoning would not necessarily be fatal to the decision.

Was the finding justified on the evidence? Accepting that the judge was entitled, having heard them, to form an unfavourable view of the experts and to regard their evidence with caution it is not easy to understand how he can have wholly rejected their historical discourse nor their evidence with regard to the customs and traditions and traditional way of life peculiar to gypsies since no evidence to controvert this was tendered. The evidence of Mr Mercer who described himself as “a gypsy by birth” and whose people “were gypsies back in 1888” was to the effect that he could identify “our own people”. However, the evidence of the continued separate identity of gypsies as people “who regarded themselves and who were regarded by others as a distinct community” was scant and it is for this reason I have hesitated whether or not it could be said that the ethnic identity of gypsies in the strict sense was established. The validity of the judge's finding above recited “that there may well be a small number of travelling people who can claim

either by looks or characteristics to be true gypsies, but these people have been absorbed into a larger group” must depend upon whether or not there is sufficient evidence that such absorption has occurred. There was, at least, some evidence that it has not and for these reasons I do not feel I can properly dissent from the conclusions of my Lords. I reach this conclusion with some regret.

Stocker LJ took a narrower view about what constitutes ‘ethnic origins’ for the purpose of section 3(1) of the Race Relations Act 1976. The reason for this was the proposition that insufficient evidence existed regarding “the continued separate identity of gypsies as people who regarded themselves and who were regarded by others as a distinct community”. The significant part of the extract above is the comparison of Gypsies to Sikhs, and the way that the ‘otherness’ of Sikhs is constructed. This reveals much about how the judge constructed different ‘others’, and in turn their validity when viewed in the context of Race Relations legislation. There are three elements to this construction. All of these elements are qualified by a reference to what the “ordinary general public” would have knowledge of. The first is the connection made by the judge of Sikhs to the British Empire, the most notable line being the reference to the group being a symbol of “British Imperial Power”. The second element is the identification of clear visual and religious differences between Sikhs and the “general public”. Finally, a reference is made to a clear geographical origin for the group. These elements could be taken as being the recognition of an ‘acceptable other’. Going back to Robbie McVeigh’s comments on the need for judges to ‘feel the other’, it would seem as if the clear boundaries with regard to culture, religion and geographical origin enabled this particular judge to do this in the case of Sikhs. In addition to this, the extract offers an unusual approach on the notion of the ‘acceptable other’ as it highlights the services of the ‘other’ in question to the British Empire, and some kind of respect from the “ordinary general public” is implied.

The dichotomy evident in the judgment when viewed from a sociological perspective is perhaps due to the contrast in the judge’s approach to ‘feeling the other’. The criteria set out by Lord Fraser in *Mandla* require the presentation of a group as the statutory ‘other’ in order to be granted protection against discrimination. It may of course be that the evidence provided by the expert witnesses at the trial was insufficient or presented in

such a way as to be found unconvincing. Certainly the comments of trial judge cited by Taylor LJ at page 9 of the judgment would suggest this. In contrast, the evidence of Peter Mercer, a Gypsy, was found to be credible. This would suggest that the presentation of the 'other' to the judiciary is of importance. The notions of ethnicity, the 'acceptable other' and the presentation of the 'other' are discussed in Chapter Nine.

### **6.7.3 The Court of Appeal considers the attempted change of statutory authenticity of Travelling Showpeople (Hammond and another v Secretary of State for the Environment and another, Smith and another v Secretary of State for the Environment and another<sup>24</sup>)**

A different form of 'presentation of the other' was evident in the judgment of the Court of Appeal in the Hammond case, namely the notion of taking the statutory identity which is expedient evident. The Hammond case in the High Court from the previous year (see section 6.6.2) by this point had been conjoined with another Appeal concerning the same point. The Court of Appeal took the same approach to the definition as the High Court. There is nothing new to note on this, apart from the consideration given to Mills v Cooper. O'Connor LJ found that:

In that case the court did not deal with the definition of "gypsies" but was concerned with a defendant who had been acquitted of an offence which involved a finding that he was not a gipsy. Ten weeks later he was convicted of a similar offence when it was held that he was a gipsy, and the question was whether there was an issue estoppel. The divisional court held that there was none, and I do not think that that is an authority which helps us to construe section 16 of the 1968 Act.

This finding is problematic. As noted above, in Mills v Cooper, the case was found not to turn on issue estoppel point (see section 5.4.1). Rather, it was concerned with how the term 'gipsy' should be applied for the purposes of the Highways Act 1959. As has been shown, this interpretation informed the definition in section 16 of the 1968 Act. Furthermore, the approach taken by O'Conner LJ to Mills v Cooper is contradicted by that

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<sup>24</sup> [1988] 3 PLR 90



taken in other judgments. For example, in *CRE v Dutton* (see section 6.7.2), Nicholls LJ found first that in *Mills v Cooper*, “the court was there concerned with the meaning of the word “gipsy” in section 127 of the Highways Act 1959.” Second, that “the substance of that definition was then adopted by Parliament in the Caravan Sites Act 1968.” There are two significant points to be noted regarding this. The first is that the interpretation of the case law by the judge in *Hammond* is at odds with both the case law itself, and the approach taken in the same Court only a month earlier by a different judge. The application of the statutory definition is dependent on the person making the assessment at the material time. The second point to note is that given the view of Parker LJ in *Mills v Cooper* that a “man might well not be a gipsy on one date and yet be one on a later date”, there is a notion that ‘gypsy status’ is not unalterable. The issue arises because of the exclusion in the definition in section 16 of the 1968 Act. There are two points in which there was ambiguity. The first comes when considering what the correct construction of “an organised group of travelling showmen” who are “travelling together as such” should be. However, O’Conner LJ found that:

In the present cases it was conceded that the applicants fell within the exception in the summer when they were travelling the country with fairs. For that reason it is unnecessary, in my judgment, to give any decision as to what is meant by “an organised group of travelling showmen”. I am clear that it cannot mean the Showmen's Guild, because it is common ground that the members of the Showmen's Guild do not always all travel together. But what sort of organised group is required to bring travelling showmen within the exception we need not consider within these appeals.

The second point of ambiguity is whether there is a time factor in the definition, which would follow the dictum of *Mills v Cooper*. The judgment sets out the debate on this point:

The question really was as to whether the exception was confined to the applicants during the period when they were actually travelling from fair to fair. It was the applicants' case that they

were persons of a nomadic habit of life. Again that is not in dispute. They therefore would have been gipsies within the definition unless they were removed from being gipsies by the exception.

It was submitted quite shortly by Mr Speaight [for the appellants] that, when one looks at the wording of the definition, it was seeking to say that travelling showmen did not qualify as gipsies while they were travelling the country, but, when they stopped travelling for the winter, they did qualify as gipsies. The effect of that construction would be to put a time factor into the definition.

Mr Ouseley, for the Secretary of State, has submitted that there is no time factor in the definition. What one is looking at is whether travelling showmen remain "persons of a nomadic habit of life". He submits that they take themselves out of that class if they are travelling showmen who are members of an organised group travelling together as such.

Mr Speaight submitted that if what was intended was to remove travelling showmen from the definition, Parliament would have said so. Quite obviously it was not the intention of Parliament to remove travelling showmen as such. So one finds that they had to be members of an organised group of travelling showmen. Once again, an organised group, as Mr Ouseley submitted, might cover organised for purposes quite other than travelling together, and it was because it was sought to limit the number of people being excluded from the class that we find "travelling together as such".

Despite the arguable weight that the notion of a time factor inherent in the definition and in turn the exclusion has, particularly in the light of *Mills v Cooper*, the Court of Appeal found that the Showman exclusion should be based on a 'quality' element alone. Essentially, the fact that they the appellants were travelling as Showpeople for the rest of the year did not put them in the scope of the definition when not doing so.

The interesting point to note here is that it is unusual for Showpeople to identify themselves as Gypsies or Travellers. Like Powell this is again evidence of individuals or groups taking on a statutory identity which is perhaps at odds with their social identity.

#### **6.7.4 Seasonal nomadism with return to a fixed abode is held to be authentic (London Borough of Greenwich v Powell<sup>25</sup>)**

The ruling of the House of Lords in Powell was a reversal of the decision of the Court of Appeal in the same matter earlier that year (see section 6.7.1). This decision was that Mr and Mrs Powell (and others) were not statutory ‘gypsies’ and therefore had the benefit of security of tenure under the Mobile Homes Act 1983. The basis of the decision to reverse the decision of the Court of Appeal was set out by Lord Bridge of Harwich at 69-70 of the judgment. In essence this was the contention that the draftsman of the Caravan Sites Act 1968 had envisioned that a person may be “within the definition if he leads a nomadic life only seasonally and notwithstanding that he regularly returns for part of the year to the same place where he may be said to have a fixed abode or permanent residence”. This is because of a lack of the phrase “no fixed abode” in the definition at section 16 of the Act. In addition to this, the duty imposed at section 6(1) was to provide accommodation for “gypsies *residing in* or resorting to their area”. This approach was then applied to the provisions of the Mobile Homes Act 1983 with regard to ‘protected sites’ and it was concluded that the Powells and the other were statutory ‘gypsies’

The consequences on the micro level for the accommodation of the Powells and the other site residents were grave, the possession order granted by Woolwich Crown Court was to be restored. However, this judgment is paradoxical as in contrast the consequences for subsequent cases have been positive for the Gypsies and Travellers concerned as the ruling allowed for a widening of the definition in section 16 of the 1968 Act. This is a useful example of the implications of discourses of authenticity being transferable, in so far as the authenticity found in the Powell’s case had negative consequences for them, but had positive consequences for future decisions.

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<sup>25</sup> (1988) 20 H.L.R. 411

## 6.8 1989

### 6.8.1 A settled Romani Gypsy family is found not to be authentic (Horsham District Council v Secretary of State for the Environment and Mark Giles<sup>26</sup>)

Horsham is in contrast to the decision of the House of Lords in Powell, although it does refer to it. Horsham District Council applied to the High Court to have the decision of a planning Inspector to grant consent quashed on the basis of that Mr Giles was not a statutory 'gypsy'. McCullough J at page 6 of the judgment stated that the "matter was very much one of impression". Before this he had outlined the planning inspector's comments on the matter at page 6:

What the inspector did was to enumerate the factors on each side. On the one side he put (1) the fact that the applicant and his parents were of gypsy descent; (2) that their past and present lifestyles reflected many of the traditional romany [sic] patterns; (3) that the family clearly regarded themselves as part of the cohesive societal group referred to in paragraph 5 of circular 28/77; (4) that members of the family living on the site had followed a "nomadic way of life", and (5) that gypsies do sometimes settle for long periods.

On the other side he mentioned two factors: (1) that the family had remained more or less continuously settled at the site for a long time; and (2) that the applicant himself did not travel an unusual amount in the course of his work.

Had he heard evidence on the question of what the family would do, or would be likely to do, were they forced to leave the site, his finding about this could properly have taken it into account. But he made no such finding and there is nothing to show that any member of the family was asked what his intention would have been in that event.

The case is a precursor of the discourse regarding the statutory authenticity of Gypsies and Travellers in years to come. It highlights points on the rights of ethnic Gypsies (and in later years Irish Travellers), ill health, bricks and mortar accommodation and the width of

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<sup>26</sup> CO/547/89 13 October 1989 (unreported), High Court

interpretation of nomadic habit of life. These are not dealt with in the sophisticated manner of the judgments in the following years, but they do provide an indication of the discourses of authenticity to come.

The point on the rights of ethnic Gypsies and Travellers is not explicitly expressed within the judgment, but the implications of it are that a family of ethnic Gypsies are unable to live in a culturally appropriate manner. This premise is arguably the foundational point which runs through all the following cases regarding ethnic Gypsies and Irish Travellers. Whilst it is not always explicitly implied, it is something which is always in the background.

The issue of ill health is covered at page 7 of the judgment:

Mrs Pooley, in, if I may say so, a most attractive and forceful argument, has sought to avoid this conclusion by saying that the fact that Mr and Mrs Giles senior have not travelled in recent years is explained by their ill-health. But that submission has to be judged against the fact that they kept the house at Worthing even after they had moved to Billingshurst for two reasons, one of which was to ensure that if they were forced to leave Billingshurst they had somewhere to live. This is an indication that, if forced to leave, Mr Giles senior would not, even 20 years ago, have returned to travelling.

The point regarding ceasing to travel due to ill health was dealt with in significant detail in Wrexham case in the High Court, and then the Court of Appeal (see sections 7.7.2 and 7.8.2). In Horsham it is coupled with a point regarding the intentions of the Gypsies in question if forced to leave. It is notable that the question of whether 'gypsy status' is lost is not explored in the judgment, it is set aside because of the retention of bricks and mortar accommodation. Again the acceptance or lack of acceptance of bricks and mortar accommodation is a point dealt with in detail by the Courts in the following years (see the Clarke case, section 7.6.2).

Finally, the point explored in Powell about the interpretation of nomadic habit of life is discussed at page 9 of the judgment:

Mrs Pooley points to the difficulty that there is in applying the definition where gypsies -- again she was using the word ethnically -- stay in the same place for many years. In effect she was arguing that a gypsy had a "nomadic habit of life" if he had a nomadic inclination, so that it would be enough if his attitude was, "If I need, or want, to leave here I may well go back on the road". In this connection she cited part of paragraph 5.10 of circular 57/78, in which the Secretary of State was commenting upon the report "Accommodation for Gypsies" by Mr John Cripps in 1977. He said:

"In this context account must be taken of the report's fundamental concept, accepted by Secretaries of State, that the gypsy has a right to a nomadic existence for so long as he wishes to continue it."

However, I note that the paragraph continues:

"This will usually mean living in a caravan but not necessarily being constantly on the move; a gypsy may be content to stay in one place for most of the year but wish to be free to move at any time -- for seasonal agricultural work, for instance -- without forfeiting the opportunity to return to his normal camping ground."

The spirit of that paragraph accords with the tenor of the observations of Lord Bridge in his speech in *Greenwich London Borough Council v Powell* [1989] 2 WLR 7. There is nothing in that speech or, so far as I know, elsewhere to warrant the wide interpretation for which Mrs Pooley contends.

The judge had previously mentioned at that it was "implicit from the findings that when he [Mr Giles] travels he goes alone, leaving behind his wife and son and of course, his home" (p. 3). This was evidently a key factor in his finding against Mr Giles. It is unclear from the judgment if Mr Giles travelled with a touring caravan, but the fact that he did not travel with his family was held against him. Here the statutory authenticity of Mr Giles is assessed on the basis of the *way* in which his albeit limited nomadism was presently expressed. There was also mention in the judgment of past nomadic patterns of life. Again these two points are significant in judgements in the following years. To return to

Powell, the significant dictum at 69-70 of that judgment is that “a person may be within the definition if he leads a nomadic life only seasonally and notwithstanding that he returns for part of the year to the same place where he may be said to have a fixed abode or permanent residence” (see section 6.7.4). It is notable that there are no specific time frames attached to this, and the judge in Horsham afforded it a narrow interpretation. Whilst the judgment in Horsham lacks a sophisticated analysis of the points it raises, it is significant for two reasons. First, as mentioned previously, it is a precursor to many of the points to be raised in future years. Second, with the exception of the Hammond case it is the first case within the comprehensive evidence gathered for this research that is specifically concerned with a Gypsy or Traveller planning matter. All other cases were concerned with the Highways Act 1959, the Caravan Sites Act 1968 (specifically the duty to provide sites), the Mobile Homes Act 1983, and the Race Relations Act 1976. This case represents the starting point for many of the discourses of authenticity that would develop in the following years. It is also the first recorded case where the definition in section 16 of the Caravan Sites Act 1968 was used to deny planning permission on land owned by Gypsies and Travellers. Prior to this, the only negative use of this definition was directed towards New Travellers. The significant point to note is that this is the first time that the 1968 Act definition is used in a negative manner towards ethnic Gypsies and Travellers. Such a use is at odds with the original intention of the 1968 Act to address the shortfall in suitable accommodation for ‘gypsies’.

## **6.9 1990**

### **6.9.1 Aggrieved local residents question the authenticity of a Gypsy family (R. v Shropshire CC Ex p. Bungay<sup>27</sup>)**

Ex Parte Bungay was concerned with the ‘gypsy status’ of a Romani Gypsy family who had been relocated by Shropshire County Council to land adjacent to the property of an aggrieved local resident (Bungay). The facts of Bungay are set out at 195-196 of the judgment:

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<sup>27</sup> (1991) 23 H.L.R. 195

From 1961, a family consisting of four members, Alfred and Nora Bennett and their two children Sheila and Stephen, had lived in a cottage and a caravan within the curtilage of the cottage. The cottage was owned by Mr Bennett's sister, but following her death was sold. In about 1988, the owner of the land obtained a possession order against the family and the respondents were therefore obliged to rehouse them.

A report prepared by the respondent's liaison officer to their Gypsy Working Party stated that the Bennetts were part of an extended gypsy family. Up until the Second World War, Alfred had travelled in all parts of Shropshire and Herefordshire. In 1941, Alfred and Nora had married and settled in a caravan in the respondent's area, continuing to travel and carry out agricultural work. In 1961, they moved to the property from which they were evicted. Alfred and Stephen continued to travel with their horse and cart collecting scrap metal, rags, rabbit skins, bones, etc. In 1974, the horse died. Alfred stopped travelling as a result of age and ill health and Stephen took up farm work. The whole family spoke Romany [sic]. The officer concluded that the nomadic lifestyle had been given up since Alfred had reached the age for stopping, although but for this "the younger Bennetts would have continued to travel and would be likely to resume travelling if the parents did not need their care."

On the basis of this report and with the benefit of local knowledge, the Gypsy Working Party produced their own report in November 1988 for consideration by the respondent's General Purposes Sub-Committee who decided to select a site to rehouse the family, in order to comply with their duty under section 6 of the Caravans Sites Act 1968. The site selected adjoined land owned by the applicant.

On March 7, 1989, representations were made on the applicant's behalf that the Bennetts were not gypsies in that they were no longer of nomadic habit. On March 8, a Planning Committee meeting was held to consider the proposed gypsy caravan site, at which the County Solicitor stated that it was his view that the Bennetts fell within the definition contained in section 16 of the Caravan Sites Act 1968.

On March 15, 1989, the General Purposes Sub-Committee sought clarification of the definition of gypsy. The respondent's Chief Executive stated that he was also of the view that the Bennetts fell within the definition. The Sub-Committee gave deemed planning permission for development of



the caravan site. Site works commenced on May 15, 1989. The family moved to the site in July 1989.

In about June 1989, four local residents swore affidavits to the effect that the Bennetts were not a travelling family and had carried on their scrap business from a permanent address. The applicant sought judicial review of the decision of March 15, 1989. The application was not made until June 23, 1989.

The key issue in this case was the question of whether a nomadic habit of life can be held in abeyance due to ill health and old age. In addition to this, it is interesting to note that a third party was responsible for questioning authenticity.

Unlike Horsham, the health and age of Mr Bennett senior were considered by way of a reference to a statement of the Gypsy Liaison Officer who had visited the family and reconfirmed his view that they were 'statutory gypsies':

"My reasons for reaching this conclusion were based on the information they gave me in answer to my questions. This or most of it I set out in a document prepared in April 1989  
.... The family had only stopped travelling or seasonal travelling because of Alfred's age when their last horse died. They had always lived together and intended to continue doing so. It did not appear correct to me to conclude that they had all ceased to be 'of nomadic habit of life' merely because Alfred had reached an age for stopping. It appeared to me that but for this circumstance the younger Bennetts would have continued to travel and would be likely to resume travelling if their parents did not need their care."

Otton J accepted this view. This finding is in contrast to Horsham, and he laid out his reasoning for distinguishing the present case at 205-206 of the judgement:

Can it be said that the decision was wrong or unreasonable in the light of McCullough J.'s decision? I answer the question in the negative. The Horsham case can be distinguished on the facts. In that case the decision was that of a planning inspector. The learned judge held that the only conclusion the inspector could reasonably have reached was that the family were not

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persons of nomadic habit of life. Here, the decision was made by local councillors on the advice of their officials who were properly informed of section 16 and who were entitled to take into account their own local knowledge.

In the Horsham case the appellant's father had been a council tenant for 20 years; the appellant himself had lived in a timber building for 20 years. The evidence was that the applicants had not been travelling in that period except to trade shows. In the instant case three of the Bennett family lived in a caravan for a substantial period of time. They gave an explanation to the Gypsy Working Party as to why they had ceased travelling because of the father's failing health. It was open to the Gypsy Working Party to infer that this was a closely-knit family, that the explanation was true and understandable and was arrived at from a genuine desire to cease travelling for the purpose of caring for the father and that the nomadic lifestyle had not been abandoned but only held in abeyance. The Committee were entitled to put into the balance the fact that the family were undoubtedly of gipsy descent; that their past lifestyle reflected many of the gipsy lifestyles; they were Romany [sic] speaking; and that gipsies do settle for long periods and yet still retain their nomadic way of life.

There are two points to note regarding this extract. The first is that is that the judge made a distinction between not only the facts of both cases, but also the way in which the original decision makers had come to their conclusions. The decision making process undertaken by Shropshire County Council is evidently afforded more credibility than that of the planning inspector in Horsham. Certainly there was a potentially more rigorous process of assessment with a number of decision makers in the form of the General Purposes Sub-Committee, which inserted a democratic element into the process, which is unlikely not to have been far from the mind of the judge. The second point is that the way that the Bennett family's situation is constructed has a sympathetic tone. The "close-knit family...[with a] genuine desire to cease travelling for the purpose of caring for the father" who were most likely to be of limited means was contrasted to the family in Horsham who had evidently had secure forms of accommodation for a number of years. A further contrast is made between the forms of accommodation. In Horsham the appellant had lived in a timber building for 20 years (although it is unclear as to whether this would have fallen into the definition of a twin unit caravan provided by section 13(1) of the

Caravan Sites Act 1968), whilst in Bungay the Bennett family lived together in one caravan. Whilst not explicitly stated, it could be inferred that the situation of the Bennett family was one which attracted sympathy from the judge, whereas the judge in Horsham was unable to reach the same conclusion for the Giles family.

Finally, Bungay is significant as it is the first case within the research evidence where a third party has sought to question the statutory authenticity of Gypsies and Travellers. The reasoning for instigating proceedings can be inferred from the comments of Otton J at 197:

The applicant is Mervin Bungay of Woodlands, Pontesbury Hill, Pontesbury. He is the adjoining landowner of the proposed caravan site and he fears that the site will diminish the value of his property.

The diminishment of property values is unable to be taken as a material consideration in planning matters, so it might be inferred that the questioning of ‘gypsy status’ was seen as the most expedient route by Mr Bungay’s legal advisors. What is notable here is the transfer of the making or questioning of an ascription to a private individual. It demonstrates that discourses of authenticity in the context of statutory definitions are transferable in so far as *who* is making an ascription. It is also interesting to note that there is evidently an ulterior motive for Mr Bungay in doing this. This highlights a further level of sophistication to discourses of authenticity: the understanding of why authenticity is being questioned and by whom.

## 6.10 1991

### 6.10.1 Timing and intention impact on authenticity (Runnymede Borough Council v Secretary of State for the Environment<sup>28</sup>)

Runnymede was another case concerned with Gypsy sites in the Green Belt. The case raises two issues, the first is the timing of when ‘gypsy status’ should exist, the second, whilst not explicitly stated in the present judgment is the notion of ‘intention’ as it was

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<sup>28</sup> [1992] JPL 178

referred to by Pill LJ in *Herne* (see section 7.4.1). The application was made by Runnymede BC to quash the decision of a planning inspector to grant on appeal permission for a single pitch Gypsy site in the Surrey Green Belt. The facts of the case regarding 'gypsy status' and the family's intentions are detailed at page 2 of the judgment in a quote from the inspector's decision letter:

"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 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 on 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 hope 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."

The Judge, Mr L Read QC concluded that the family were statutory 'gypsies' and set out his reasoning for this at pages 2-4 of the judgment by reference to the dicta of *Mills v Cooper* (see section 5.4.1) with regard to 'gypsy status' being alterable:

That case is the plainest acceptance that a person may be a nomad and hence a gypsy one day and not a nomad and a gypsy the next and may revert back to a nomad and a gypsy later. In this case, the second respondent had plainly been a nomad in his childhood and youth when he lived with his parents. He twice settled in, but was forced to move from, mobile homes. He then moved to the appeal site. In my judgment, this afforded ample evidence to justify the inspector's conclusion that he was at that time a gypsy within the statutory definition. Indeed, in as much as his decision was one of law, I can find no fault in it and agree with it.

The implications which can be inferred from this reasoning are that the correct time to consider status was at the time of the appeal, notwithstanding the intention of the appellants to settle on the site and essentially abandon their nomadic way of life. The dictum was reconsidered in *Herne* in 1999.

#### **6.10.2 New Travellers attempt to gain statutory authenticity (*R v Gloucester County Council Ex parte Dutton*<sup>29</sup>)**

*Ex Parte Dutton* was a judicial review of the decision of the local authority to evict a group of New Travellers from a disused railway line. The case was brought on the premise that the respondent local authority was in breach of its duty to provide sites under section 6 of the Caravan Sites Act 1968. In *West Glamorgan County Council v. Rafferty*<sup>30</sup> the decision to evict was quashed because of a failure to comply with this duty. The case is the third regarding New Travellers which precede the highly significant *Ex parte Gibb* (see section 7.1.1). Brooke J provides a background to the applicant and the other Travellers living on the site at 248-250. It is helpful to cite the first part of this as it provides an insight into the nature of the New Traveller community:

The applicant came to live on the disused railway line in about August 1990. She has described how she has been living what she describes as a nomadic lifestyle since the summer of 1986 when she says she decided to become what is called a New Age Traveller because it was the only choice open to her financially: she could not afford to live in a house and she decided to travel to find work. There is no evidence about her movements prior to October 1989. She then came to live on the railway line for two months before she was evicted, in ignorance, she now maintains, of her legal rights. She moved from there to a wood near Selsey in Stroud for a month and after storm damage there she moved to Horsley Priory in Nailsworth, from which she was evicted two months later. She then moved to sites outside Gloucestershire, at Bishops Castle, East Hendred, Burbury and Brighton Race Course, before returning to the railway line in August 1990.

She maintains that she came to Stroud to find a market for her arts and craft business. She is a self-employed ringmaker and she came to Stroud because, she says, it was well known for having

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<sup>29</sup> (1992) 24 H.L.R. 246

<sup>30</sup> [1987] 1W.L.R. 457

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a populace that are interested in the arts and crafts. However, because of the recession, she was unable to continue with that business and took a job in a local factory from which she was made redundant.

Although she was often evicted from the sites she occupied, she maintains she was usually intending to move on anyway. She owns a vehicle which is registered as a caravanette. She is expecting a baby next month and wishes to stay in the Stroud area, where she is receiving ante-natal care, in order to have her baby. She does not know where she would go if she was evicted.

She has described in her affidavits how other travellers had lived on the railway line since April 1990, and in early December there were 25 to 30 travellers on the site together with 10 children. They owned buses, cars and other vehicles which were mainly roadworthy. Some of them had been travelling for 10 years and led this lifestyle through choice; others had no option because they had been evicted from accommodation in towns and cities; and others were homeless and could not find any other form of accommodation. Several families had young children of pre-school age, and some of them hoped to send their children to school in the Stroud area when they came of age.

What the transcript of the judgment does not reveal is the context in which it was made. The history of New Traveller culture is described at section 2.1.4. The Judge would have been confronted with a group of people very different from what the societal understanding of a 'gypsy' would be. The discourse around New Travellers at this point in time was highly controversial and this is reflected in the literature (see Hetherington, 2000, Clark, 1997, James, 2006, James, 2005, Martin, 2002). The government was unsympathetic to their situation and this is reflected by the reference at 253 of the judgment to "a copy of a letter written in June 1988 from a representative of the Gypsy Sites Branch of the DOE to another county council in which he made clear that while the question of whether any individual hippies or new age traveller qualified within the statutory definition was a matter for the council to resolve, the Government's view was that no responsibility rested on local authorities to provide sites for occupation by particular groups of hippies such as, inter alia, new age gypsies". Against this backdrop the conclusion that Brooke J came to at 260 is perhaps unsurprising:

It would be very unwise for a judge, and particularly a judge at first instance [being the High Court], to attempt a tighter definition of the words “gypsies residing in or resorting to their area” than that provided by Parliament. But if on ordinary principles of statutory construction I place myself in the draftsman's chair in 1968 and consider through 1968 eyes the mischief against which Parliament was legislating, it was in my judgment the mischief of the persistent hounding from place to place of people who had a recognisable identity in the social history of this county: people of a nomadic habit of life who either resided in a county as their more or less permanent residence of choice or such people who regular resorted to a county during the year for a particular purpose, like those who went hop-picking in Kent or strawberry-picking in Somerset at the appropriate season. It may be that Judge Herrod identified that sort of recognisable pattern in the life of the defendants in the Capstick case (supra).

I have found assistance in the passages of the judgment of Leggatt J. in the Bird case and Sir John Megaw in the West Glamorgan case. The Shorter Oxford English Dictionary meaning of “nomadic” includes the meaning “one of a race or tribe which moves from place to place to find pasture” and one of the meanings of “resort” is “to ... go ... habitually or frequently to a place.”

Whether a person is indeed a gypsy resorting to the area of a county is a question of fact for the council to decide in each case, and in the present context I only have power to set aside its decision if it acted to with Wednesbury unreasonableness in its approach to the identify [sic] of the applicants and the others trespassing on its land. If the trespassers place facts before the council which would lead any reasonable council to conclude that they were indeed and in law gypsies resorting to their area within the meaning of the Act, then the council's failure to take expressly into account the nature and extent of the duty it owed them would be a factor which could be weighed in the scales against the council, but that is not this case.

The legacy of the Highways Act 1959 and Mills v Cooper is striking here. The descriptions of the lives of the Travellers concerned would in some interpretations amount to a nomadic habit of life, and although one mentions ethnic Gypsy / Traveller parentage, this is irrelevant due to the “regardless of race or origin” element of the definition in section 16 of the Caravan Sites Act 1968. In addition to this, a reading of Mills v Cooper suggests that ‘gypsy status’ may be gained or lost. So, in theory at least, it would be possible for New Travellers such as those in Stroud in this instance to fulfil the requirements of the

1968 Act definition. However, the Judge was being asked to consider whether the group were able to be classed as statutory ‘gypsies’ so as the council were obliged under section 6 of the Caravan Sites Act 1968 to provide sites. This is one step beyond a mere fulfilment of the definition, as it would require actual provision to be made for the New Travellers concerned. It would be interesting to have seen what might have happened if the same judge had been confronted with a question of ‘gypsy status’ for the purposes of a planning matter regarding such group’s own land.

There is a clear sense of injustice in the extract above, the reference to the “mischief” that was intended to be dealt with by the 1968 Act is indicative of this. The judge did however recognise that it would be unwise for him to attempt to tighten the definition on this point, and instead was able to use the dictum of *Wednesbury* unreasonableness to suggest that he was unable to interfere with the council’s decision on the matter.

The notion of authenticity is readily apparent in this case. Despite the potential that the group could have been found to be authentic in the statutory sense, it can be inferred from the transcript that the judge did not find them socially authentic. In this case the statutory authenticity is interpreted by reference to the social.

### **6.10.3 Counting Gypsies (and New Travellers separately)**

The paradoxical situation with regard to New Travellers and the statutory definitions was further evidenced by report produced on behalf of the Department of the Environment (DoE) regarding the caravan count entitled “Counting Gypsies”.<sup>31</sup> In addition to this, the counting of “Gypsies who rarely travel” was considered. There is no evidence available to suggest that count has had a significant impact on the statutory definitions, and it is not clear what action if any the DoE took with regard to the recommendations of the report. The report is included solely because of the evidence regarding the discourse regarding New Travellers and in contrast “Gypsies who rarely travel”. The Office of Population, Censuses and Surveys (OPCS) carried out the study, and their views did not necessarily represent the views of the Department of the Environment. Therefore the following

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<sup>31</sup> At the time, the caravan count was undertaken to “estimate the size of the Gypsy population and monitor progress towards meeting the provisions of the 1968 Caravan Sites Act”.



extract from the report's recommendations cannot be taken as an indication of central government thinking on the issue. However, it does provide an indication of the thoughts of local government officials who responded to the survey:

OPCS suggest that the groups to be covered by the count be specified. For the test of the revised count in stage 2, a list was provided for counting staff which included Romany [sic] Gypsies, Irish Travellers, long distance Travellers, Gypsies who rarely travel and New Age Travellers. There were some problems associated with the last two groups which suggest that the definition of who should be counted cannot be based purely on the concept of nomadism given in the Act.

#### Gypsies who rarely travel

A substantial number of families who live on authorised sites rarely travel. Since one of the aims of the count is [to] monitor the number of families who are provided for, it needs to cover such families. Thus the definition of who should be counted should include some non-nomadic Gypsy families. In order to distinguish these families from others, the definition of who should be counted also need to be based on the concept of an "ethnic" or "cultural" Gypsy.

#### New Age Travellers

New Age Travellers were included in the list of Travellers to be counted because they are a nomadic group and would appear to be covered by the definition of a "Gypsy" given in the Act. Currently, they are not usually included in the Gypsy count and the research suggested that many areas would object to their being included in the count, undifferentiated from other Travellers, because targets for site provision would be extended. For pragmatic reasons, therefore, it is recommended that New Age Travellers be excluded from the Gypsy count. The differentiation between different nomadic groups means, again, that the definition of who should be covered by the Gypsy count would need to be based on the concept of an "ethnic" Gypsy.

To summarise, it is suggested that the following groups be covered by the Gypsy count:

i. Persons of a nomadic habit of life living in caravans or mobile homes but excluding New Age Travellers;

ii. Other persons living in caravans or mobile homes who consider themselves to be Gypsy-Travellers.

Thus the definition of who should be counted would include certain non-nomadic Gypsies and be based on the concept of a “Gypsy identity”. OPCS does not consider it necessary to define a “Gypsy” since, in practice, counting staff appear to have little difficulty identifying them. Examples of the groups to be covered can be given and an opinion question can be used in cases of doubt.

#### Count of New Age Travellers

The unauthorised encampments of New Age Travellers cause problems for local authorities and there is a feeling that a policy on site provision is needed. Such policy formulation would need to be informed about the numbers and locations of Travellers. It is therefore recommended that a separate count of the caravans / accommodation occupied by New Age Travellers be conducted at the same time as the count of Gypsies. OPCS does not consider that a formal definition of a “New Age Traveller” is needed since, in practice, district staff appear to have little difficulty distinguishing them from Gypsies.

There are three significant points with regard to this extract. First, the need to count but also distinguish “ethnic or cultural” Gypsies living on authorised sites who rarely travel is notable as it is a precursor to the definition of Gypsies and Travellers for the purpose of section 225 of the Housing Act 2004 which effectively includes ethnic Gypsies and Travellers (see section 8.4.1). The distinction is notable as it infers recognition of the failure of the definition to include such people. Second, the rationale for the exclusion of New Travellers would appear to be on the basis that local authorities would then have to make provision under the duty in section 6 of the Caravan Sites Act 1968. It is not possible to clarify the basis of this rationale, whether it was one of economics, a non-acceptance of the social and / or statutory authenticity of New Travellers or a combination of both.

The acceptance by the report that New Travellers at that point were able to come within the scope of the definition is also interesting as it is a conclusion which the courts had only reached in one out of the three cases mentioned previously (Bird, Capstick and Ex Parte Dutton). Finally, the report takes a similar view to that of the “Defining a gypsy” (see section 6.4.1) report in that it accepts that local authority officers have no difficulty in distinguishing between New Travellers and Gypsies. Here the assessment of statutory authenticity is made by the local authority, in much the same way as Brooke J held was appropriate for assessing whether someone could benefit for the section 6 duty.

# Chapter 7 - 1994 – 2003 The introduction of economic nomadism to the withdrawal of ‘gypsy status’ due to ill health

Having set the foundational pieces of legislation and associated case law in the previous two chapters, the nine years covered by this chapter forms the first period of a substantial amount of litigation concerned with how Gypsies and Travellers are statutorily defined. The start and end points of this period are marked by two highly significant decisions in the Court of Appeal, which had consequences on both macro and micro levels. Sandwiched between these events are a number of cases which form part of the case law which informed both the development and application of statutory definitions. In addition to this, a number of significant pieces of legislation were enacted during the period.

## 7.1 1994

### 7.1.1 Ex parte Gibb introduces economic authenticity to the construction of the definition (R v South Hams DC Ex parte Gibb<sup>32</sup>)

The case of Ex Parte Gibb was concerned with three groups of New Travellers camped without permission on local authority land. The case is a pivotal moment in the development of the statutory definition for ‘gypsies’ with regard to land use, and its dicta has informed the construction of statutory authenticity in much of the subsequent case law. It represents the culmination of the judicial trend of finding New Travellers not able to benefit from the section 6 duty of local authorities to provide sites under the provisions of the Caravan Sites Act 1968. This trend began in 1986 with the Bird case (see section 6.5.1). However, the implications of Ex Parte Gibb have been arguably more negative for ethnic Gypsies and Travellers than for New Travellers.

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<sup>32</sup> [1994] 3 W.L.R. 1151, [1995] Q.B. 158

The Court of Appeal heard three conjoined cases from South Hams, Gloucestershire, and Dorset. The facts of the cases concern a district council and two county councils who commenced possession proceedings against the unauthorised occupiers of council land. In the same way as *Bird, Capstick and Ex parte Dutton* the occupiers had claimed that they fulfilled the definition of 'gypsies' in section 16 of the Caravan Sites Act 1968 and pursuant to section 6 of the same Act the county councils had a duty to provide them with adequate accommodation. The respective councils had decided that they were not 'gypsies'. The occupiers then made applications for judicial review which were dismissed. The following extracts from *R. v Dorset County Council ex parte Rolls and another*<sup>33</sup> sets out the reasoning of Laws J at 383-385 in dismissing the application for one of the applications in the High Court:

Mr Watkinson's submission as to the true interpretation of the section 16 definition is seductively simple. He says that a "nomadic habit of life" means no more nor less than a settled habit of moving from place to place: staying in one for a time and moving on to another. In particular, he submits that the definition contains no qualification to the effect that the purpose of so moving from place to place must be an economic one of a kind which requires such travelling.

He might be forgiven for submitting (though in fact he did not put it so bluntly) that the definition simply means what it says.

In the course of argument I canvassed the question whether this was a case in which resort might properly be had to Parliamentary material to gain assistance on the issue of construction, given the decision of their Lordships' House in *Pepper v. Hart* [1993] A.C. 593. This suggestion was not very warmly received, at any rate by Mr Straker, for the understandable reason that it would mean an adjournment and the council, if they were right, were anxious to proceed to repossess the land (it was part of Mr Straker's last submission, that the result would have been the same whether or not the applicants are gypsies, that the council had good and urgent reasons for doing so). In addition, there were potential listing difficulties had I adopted this course, and in the result I did not adjourn the case, and neither I nor counsel have consulted Hansard.

<sup>33</sup> (1994) 26 H.L.R. 381

In my judgment, it has to be remembered that the purpose of Part II of the Act of 1968 is to accord rights to gypsies. I cannot think that Parliament intended to confer the benefits of section 6(1) on any person simply because he has no permanent home of his own and makes a habit, seasonal or continuous, of moving from place to place to live. So to conclude would be to hold that Parliament intended to advantage persons who frankly chose to move around the country or county so as to live rent-free on other people's land where possible, and had no other purpose in their travels than doing so. In making this observation I intend no specific finding of fact about the applicants.

The term "nomad" has a Greek derivation, from the word meaning "to pasture". Plainly, gypsies nowadays do not have to be itinerant farmers, whether within the section 16 definition or not; but I apprehend that the notion of a nomadic way of life has always meant something more than the mere fact of moving from place to place. In my judgment, the definition contemplates that class of persons whose means of getting an independent living necessarily involves their wandering from place to place. I think that the notion of economic independence, or at least of an aspiration to economic independence, is inherent in the idea of nomadic life, as is the notion that the nomad's living is to be got in an activity which requires him to go from place to place.

The trouble with this case, and, I venture to think, the other cases where the courts have had to consider section 16, is that the definition is on the face of it imprecise, and the courts look for precision in statutes. The approach which I have set out seems to me, however, to identify with tolerable clarity the class of persons whom it may be presumed Parliament intended to protect. I think that this approach is supported by the exceptions to "gypsies" provided for by section 16 which I have read: "Members of an organised group of travelling showmen..." The persons who fall within the exceptions have a way of life in which their travelling is intimately connected with their work, and Parliament has taken care to exclude them from the definition.

There are four points regarding this extract. First, the noting of David Watkinson's "seductive" submission that the definition should simply mean what it says. In theory, this is correct, as there is no economic qualification within the section 16 definition. Until Bird in 1986 there had been no attempt by the courts to insert an economic qualification (see section 6.5.1). Second, the suggestion of examining Parliamentary material is interesting

as this may have added a different dimension to the judgment. Whilst the Hansard records for the parliamentary debates regarding the 1968 Act are not now readily obtainable, the MHLG report in 1967 (see section 5.4.2) offers an indication of the evidence base that would have informed the drafting of the Act. The notable point on this report is that it acknowledges a wide range of nomadic people who might be termed ‘gypsies’, and included in this “groups with no claim to Romany [sic] blood [who] have also adopted the gypsy way of life and, in some cases, have followed it for several generations” (Ministry of Housing and Local Government Welsh Office, 1967, p.3). This would indicate an appreciation in Governmental discourse of different nomadic communities. Third, there is a value judgment when Laws J describes New Travellers as being “persons who frankly chose to move around the country or county so as to live rent-free on other people's land where possible, and had no other purpose in their travels than doing so” (p.384). This is a finding of fact on the part of the judge, and again needs to be seen in the context of its time described in Chapter Two. It is also an indication of how the lack of social authenticity of New Travellers as statutory ‘gypsies’ informed the judge’s reasoning in the next paragraph. Third, the reasoning regarding the use of the term “nomadic” acts as a prelude to the judgment of the Court of Appeal. On this point there is the identification of economic independence being an inherent part of nomadism, and there is a perhaps tenuous suggestion that the exception from the section 16 definition of Showpeople is evidence to support this reasoning.

Following the dismissal of this application, and of *R. v South Hams District Council* and another, *Ex Parte Gibb* and *R. v Gloucestershire County Council, Ex Parte Davies* by Harrison J, all three cases were heard by the Court of Appeal. As well as the point on the section 16 definition, points regarding evidence as precedent fact and the duties of district councils were considered by the Court of Appeal. The significance of the two additional points is eclipsed by the first, and this is reflected by the limited coverage they are given in the judgment. There are two key areas of consideration relevant to the research within the transcript, the legacy of the Highways Act 1959, and the criteria set out by the Court of Appeal to determine the fulfilment of the section 16 definition.

First, the legacy of the drafting of the Highways Act 1959 is particularly relevant in this case, and there is a slight difference of approach between Neill LJ and Leggatt LJ on

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this point. Neill LJ notes at 165 the wording of section 72 the Highways Act 1835 which included “other person travelling”. No further comment is made on this point. This in contrast to Leggatt LJ who found the following on the section 16 definition at 172:

The present definition adopts the element of leading a nomadic life, makes no reference to employment, and treats the lack of fixed abode as implicit in the need for a caravan site. It also asserts that the Act applies irrespective of race or origin. Yet the term "gipsy" is used as the word to be defined. The term might have been "nomads" or "travellers," but "gipsies" was preferred. From this it may be inferred that Parliament intended the Act to apply to persons who behave like gipsies without necessarily being Romanies by race or origin.

This approach is not only evidence of the 1959 Act’s legacy in relation to the omission of “other people travelling”, but also of the notion of hierarchy present in the assessment of statutory authenticity. Romanies are taken to be the benchmark, whilst all others are said to “behave” like them.

Second, the approach set out by the Court of the Appeal with regard to the section 16 definition consisted of a three part test regarding group travel, patterns of travel and the purpose of the travelling.

Neill LJ at 169 constructs the first test as being “the links between members of the group and between the group and other groups who are either at the site or visit the site. Living and travelling together in cohesive groups is a feature of nomadic peoples.” There is no further explanation as to what constitutes “links”. This rationale is qualified by reference to the purpose of the Caravan Sites Act 1968 by Leggatt LJ at 172:

It is to be noted that the definition is of "gipsies" in the plural. No doubt that is because the duty conferred on local authorities is to provide sites for gipsies generally and not for individual gipsies. Despite this, and despite the exclusion from the definition of particular groups, the term is not expressly confined to those who travel in groups, and the Act does not stipulate that persons cannot be gipsies unless they do so. Conversely, although the fact that persons travel in groups does not of itself make them gipsies, it may nevertheless be an indication that they are, provided that they are neither showmen nor participants in a circus.



Therefore, the point can be taken to be a desirable as opposed to essential indication of whether someone is a statutory “gypsy”. What is notable is that the notion of nomadic people existing as groups in a social sense has been imported in to a statutory notion. This effectively means that “gypsies” are not viewed as ‘individuals’, rather as a group. The purpose of the 1968 Act to provide sites is significant here, as this provides the rational for suggesting that ‘group travel’ is a relevant criteria.

The second point is set out by Neill LJ at 169:

(2) The pattern of the journeys made by the group. Though a group of gypsies may have a permanent residence (*Greenwich London Borough Council v. Powell* [1989] A.C. 995), a nomadic habit of life necessarily involves travelling from place to place. Furthermore, as the duty imposed by section 6(1) relates to the provision of adequate accommodation "for gypsies residing in or resorting to" the area of the county council, it is relevant to inquire whether the group visits sites in the county on a regular basis.

The idea of a pattern of group travel was cited in *Ex parte Dutton*, with reference to the unreported case of *Capstick* (see section 6.6.1). In this case, there is no further gloss added to the notion by the Court of Appeal. Again the purpose of the 1968 Act is used as a rational for the test, and the word “resorting” is central to this.

The final test is the most significant with regard to impact on a macro level. The approach to this is set out by Neill LJ at 169:

(3) The purpose of the travel. I accept that the word "nomadic" no longer has any connection with the concept of "seeking pasture," but it seems to me that in the context of the Act the word "nomadic" adds to the words "habit of life" a sense of purpose for the travelling. The powers conferred by section 6(4) of the Act are conferred on local authorities as defined in the *Caravan Sites and Control of Development Act 1960* rather than on county councils, but it is to be noted that the power is to provide "working space," and "facilities for the carrying on of such activities as are normally carried on" by gypsies. These words seem to me to mean that "habit of life" involves purposive activities including work and that travel forms part of that habit of life.

As Lord Donaldson of Lymington M.R. remarked in *Mole Valley District Council v. Smith* (1992) 90 L.G.R. 557, 560, the definition in section 16 of the Act of 1968 is not "a particularly happy definition." In my judgment, however, in the context of Part II of the Act the definition of "gypsies" in section 16 imports the requirement that there should be some recognisable connection between the wandering or travelling and the means whereby the persons concerned make or seek their livelihood. Persons, or individuals, who move from place to place merely as the fancy may take them and without any connection between the movement and their means of livelihood fall outside these statutory definitions.

At this point, the connection between movement and economic purpose became part of the interpretation of the definition, with significant consequences for many of the following cases. Again, there is a reliance on the 1968 Act in order to arrive at this construction. A further gloss is added by Leggatt LJ at 172-173:

I have come to the conclusion that Parliament must have recognised and assumed the characteristic of nomads and also of gypsies that it is in order to make or seek a living that they move from place to place. It is because they have no fixed abode and no fixed employment that gypsies live in caravans, so that they can both have a home and go where work is. It may be seasonal or sporadic, regular or occasional; to reach it they must use the caravans in which they live. Living in them as they do for that purpose, they are entitled under the Act to have a site provided for them in any area in which they reside or to which they resort. In my judgment, however, this privilege is not available to occupants of caravans who do not live in them for that purpose, and whose moves are actuated not by need, but by caprice. The nomads for whom sites have to be provided live in caravans so that they can travel in them from time to time, as their means of livelihood requires.

Here the connection between movement and an economic purpose is seemingly cemented, and is done by way of an assumption of why "gypsies" have a nomadic lifestyle. In the short term, micro level, sense this would have had the desired effect of excluding New Travellers from the scope section 6 of the 1968 Act. However, it needs to be appreciated that by placing an economic requirement on the section 16 definition, the

Court of Appeal had in effect excluded ethnic Gypsies and Travellers who were unable to prove an economic purpose. Again, this is an example of how a provision of law designed to substantively address inequality became a means of creating further inequality. For example, single parents with full time child care responsibilities or those too ill to work would have difficulty fulfilling the definition. As barrister Tim Jones notes:

*Essentially, the Court of Appeal in Ex parte Gibb introduced this economic purpose for nomadism and that seemed to be under a misplaced apprehension that the Gypsy community did not include within it, people who were retired, people who were unable to work because of disability, or people who carried out the traditional role of a woman or indeed the role of a single mother. I don't think the Court of Appeal even considered these issues privately. (Interview 2012).*

The interpretation of Ex parte Gibb is contested. In particular, barrister Marc Willers made the following comment:

*"when you read the judgment, they're not excluding the possibility that people will get within the definition who aren't travelling for an economic purpose, they're saying, I think, by and large, that's what you need to show" (Interview 2011).*

In addition David Watkinson noted that when he is;

*"...conducting public enquiries and I'm addressing the Inspector on the definition, I make two points. The first is, what it says in Gibb is 'make or seek livelihood', so first point is, you don't actually have to achieve your means of livelihood by your pattern of travel, just so long as you're looking for it, that's enough to get within the definition. The second thing is that if you look at the contrast that's made between those who wander aimlessly, and those who have some purpose to their travel, so it doesn't need to be the only purpose of the travel, the making or seeking of*

*livelihood. Of course the gloss I'm putting on it, which has never been contradicted in the public inquiries, is that it makes it much easier for those claiming 'gypsy' status to come within the definition, than a stricter application" (Interview 2011).*

The basis for these opinions could be taken to be the comments of Neill LJ at 169 that "one can identify the following matters as being relevant to a decision whether or not any particular group is composed of gypsies". Further to this at 169 the judge stated:

I have not been able to construct one simple test by reference to which the statutory definition can be applied to particular persons or groups. One can only suggest guidelines and point to the purpose behind Part II of the Act as appears from the relevant sections read as a whole.

However, as the cases from the following years will demonstrate, these guidelines have been taken to be binding, the point on an economic purpose in particular.

There are three attributes of discourses of authenticity which can be drawn from *Ex parte Gibb*: hierarchy, transferability and persistence over time.

The notion of hierarchy is relevant on two counts. The first is that Leggatt LJ found that 'gypsies' could also include "persons who behave like gypsies without necessarily being Romanies by race or origin". There is a sense of the position of Romani Gypsies as being top of the hierarchy of authenticity in that they are the benchmark upon which all other Travellers must be assessed against. Second, it is clear that there is a certain amount of disdain against New Travellers, which was evident in *Bird*, *Ex parte Dutton* and *Ex parte Rolls*. There can be inferred from this an intention not to allow such persons statutory authenticity, and this is achieved by assessing them against an interpretation of the section 16 definition which takes into account the wider purposes of the Act which it forms a part of.

The point on transferability has been dealt with in part above, and is one which is very much on the macro level. The decision of the Court of the Appeal not to hold the New Travellers concerned as statutorily authentic, led to the debarring of such status of other Gypsies and Travellers in the future. In this way, there is a transfer of exclusion

from one instance to future instances by way of the dictum of the Court of Appeal, the Wrexham case being the most prominent example of this (see section 7.8.2).

Finally, Ex parte Gibb has been without question persistent over time. To begin with the notions that form the foundation were laid by Leggatt J (as he was then) in Bird in 1986, and these were expanded upon in Ex parte Dutton. Having reached a cumulative point in Ex parte Gibb, the points raised are evident in many of the following cases. What makes Ex parte Gibb so significant is that as noted above, its implications were unlike Bird, Capstick and Ex parte Dutton, not restricted to New Travellers.

### **7.1.2 New legislation and guidance signals a radical departure from previous Gypsy and Traveller policy (Criminal Justice and Public Order Act 1994, Circular 1/94 Gypsy Sites and Planning, Circular 18/94 Gypsy Sites Policy and Unauthorised Encampments, R. V Lincolnshire County Council and Wealden District Council and Wealden District Council, Ex Parte Atkinson, Wales and Stratford<sup>34</sup>)**

The provisions of the Criminal Justice and Public Order Act 1994 (CJPOA 1994) which were of relevance to Gypsies and Travellers were primarily a reaction to the culture of 'New Age Travellers' considered by the Court of Appeal in Ex Parte Gibb. At the time this was a group "whose numbers and mobility had greatly strained the tolerance of landowners, the police and the public" (Barnett, 1995) p.161. The Act caused much controversy and protest before entering the statute and its provisions were wide ranging, and covered groups such as hunt saboteurs, public protestors, organisers of 'rave' music events and Gypsies and Travellers. The Act has been described as a radical departure from previous policy, (Hawes and Perez, 1995, p.117) and James (2005, p.164) argues that the general acceptance of nomadism was removed from statute. Hawes and Perez provide a useful summary of the key implications for Gypsies and Travellers:

- The Repeal of part II of the 1968 (Caravans) Act, removing the duty on local authorities to provide sites, and abolishing the government grant for constructing Gypsy Caravan sites.

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<sup>34</sup> (1996) 8 Admin LR 529; [1997] JPL 65; (1995) *The Times*, 22 September QBD

- An extended power for local authorities to direct unauthorised campers to leave land, including any land forming part of a highway, any other unoccupied land, or any occupied without the owners consent. It would become a criminal offence for anyone directed to refuse to leave, or to return to it within three months.
- An extended power to magistrates courts to make orders authorising local authorities to enter land and remove vehicles and property, if persons are present in contravention of a direction to leave.
- A strengthening of the powers contained in the Public Order Act 1986 (section 39), giving police power to direct trespassers to leave if they have damaged the land itself (as distinct from property on it), or if they have six vehicles. It also extends the application of this section to common land, highway verges, byways, green lanes, and other minor highways; and includes new police powers to remove vehicles (1995, p.121).

Research on the effects of the act has been undertaken by (Bucke and James, 1998), (James, 2005, James and Richardson, 2006, James, 2006, James, 2007) and (Greenfields, 2006). The common finding of all the research is that the implications have been negative for Gypsies and Travellers.

When considering the CJPOA 1994 in the light of discourses of authenticity, it is important to note that its provisions were introduced on the basis that they would deal with the problem of 'New Age Travellers'. The Minister of State for the Home Office during the committee stage of the bill suggested that the powers of eviction from unauthorised encampments contained in the bill were "not aimed at the genuine Romany [sic] or other Gypsy (but at the) destruction, menace and music caused by so-called new age travellers and hippy convoys" (Hawes and Perez, 1995, p.139). Furthermore, research by ACERT (cited in Hawes and Perez, 1995, p.131) suggests that over half of Local Authorities wished to see a distinction made between "New Age Travellers" and traditional Travellers and Gypsies. Whilst no distinction was eventually made in the legislation, a survey of the relevant local government Officers undertaken by Geary and

O'Shea (1995) found that a substantial number of respondents were quite definite that New Travellers did not fulfil the statutory definition of a 'gypsy'. The lack of distinction made in the legislation is indicative of where authenticity in real terms has had minimal impact on the drafting of legislation and policy. This is similar to the approach taken in the MHLG report of 1967 (see section 5.4.2), which contained a clear sense of hierarchy when considering the different communities of Gypsies and Travellers, but eventually concluded that these differences mattered little in the formulation of policy.

The Labour peer Lord Irvine in a House of Lords debate regarding the bill provided a summary of the sense of iniquity caused by the Government's proposals:

"There is humbug at the heart of the Government's policy. This humbug is not simply that they must know what they are suggesting is unrealistic as a solution to the problem of unauthorised sites; it is also that at the same time as they suggest that private site provision is the solution on which we should reply, they are making such provision more difficult by altering national planning policies. The real effect of the legislation, which they dare not openly avow, is to make those who have no lawful place to reside in their vehicles disappear through the imposition of criminal sanctions" (cited in Hawes and Perez, 1995).

Further to the enactment of the CJPOA 1994, the government published guidance on Gypsy Sites and Planning<sup>35</sup>, and Gypsy Sites Policy and Unauthorised Encampments<sup>36</sup>. The Planning Circular contained the definition in section 16 of the Caravan Sites Act 1968. The Circular introduced a less permissive planning regime for Gypsies and Travellers. This guidance is relevant to all planning cases cited in the analytical narrative up until the inception of Circular 01/06 (see section 8.3.1).

Circular 18/94 "offers guidance on the provisions in sections 77 to 80 of the Criminal Justice and Public Order Act 1994...which affect gypsies and unauthorised campers". The distinction made in the opening line of the Circular is then qualified by the interpretation of the Court of Appeal in *Ex Parte Gibb* is cited alongside the 'nomadic habit of life'

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<sup>35</sup> DoE Circular 1/94, WO Circular 2/94

<sup>36</sup> DoE Circular 18/94, WO Circular 76/94

definition (which had by this point been relocated to section 24 of the Caravan Sites and Control of Development Act 1960). The rationale for doing this would be to appear to exclude those who at the time were unable to fulfil the definition (specifically New Travellers) from the guidance in paragraphs 6-9 regarding a “Policy of toleration towards unauthorised encampments gypsy encampments” which suggests that local authorities should use the powers in the CJPOA 1994 in “a humane and compassionate fashion” and suggests ways in which this might occur. Following this, paragraphs 10-13 set out “Local authorities’ obligations under other legislation” which is concerned with provisions of law regarding the welfare and education of children, and health and welfare services. These are obligations which were required by the law, and therefore ‘gypsy status’ is not relevant to their application. The intention of the government of the time would appear to be creating a two-tier system for dealing with the eviction of unauthorised encampments. This reflects the comments noted above regarding the intention of the government to target the provisions of the CJPOA 1994 at ‘New Age Travellers’.

Circular 18/94 was considered in the R. V Lincolnshire County Council and Wealden District Council and Wealden District Council, Ex Parte Atkinson, Wales and Stratford by Sedley J (who it will be recalled acted on behalf of the Gypsies and Travellers in Mills v Cooper and CRE v Dutton, see sections 5.4.1 and 6.7.2) in a case concerning the judicial review of the decisions of two councils to evict two groups of New Travellers. At 534 of the judgment, Sedley J noted that “The present applicants do not contend that they come within the meaning of “gypsy” for the purposes of the circular”. He then to quote both the guidance relating to the “Policy of toleration towards unauthorised gypsy encampments” and then statutory obligations. Following this at 535 Sedley J held that:

Detailed analysis of these passages and debate about what legal force, if any, an advisory circular of this kind possesses has been made unnecessary by the realistic concession of counsel for both local authorities that, whether or not they were spelt out in a departmental circular, the matters mentioned in the paragraphs I have quoted would be material considerations in the public law sense; that to overlook them in the exercise of a local authority’s powers under ss.77 to 79 of the Act of 1994 would be to leave relevant matter out of account and so jeopardize the validity of any consequent step [and thus being Wednesbury unreasonable, see section 2.3.3]. The concession is



rightly made because these considerations in the material paragraphs which are not statutory are considerations of common humanity, none of which can be properly be ignored when dealing with one of the most fundamental needs, the need for shelter with at least a modicum of security.

Sedley J was at this point considering the status of the Circular as guidance, and its legal force. The significant point is that he was considering the implications of the guidance for unauthorised campers who did not fulfil the statutory definition, as interpreted by the Court of Appeal in *Ex Parte Gibb*. In this instance, the decision maker found “considerations of common humanity” to outweigh the concern of the lack of statutory authenticity of the claimants. In doing this, the two-tier system evident in Circular 18/94 was effectively removed. It is important to note that this development is primarily of relevance to the post *Ex Parte Gibb* context, where New Travellers were generally thought not to have ‘gypsy status’. The situation is now different as the *Massey* case demonstrates (see section 8.5.2).

## 7.2 1995

### 7.2.1 Seasonal nomadism whilst horse trading is found to be authentic post *Ex Parte Gibb* (*Maidstone BC v Secretary of State for the Environment and Dunn*<sup>37</sup>)

The case of *Dunn* concerned a judicial review against a planning Inspector’s decision to grant an ethnic Gypsy family planning consent in open countryside around Maidstone. The planning Inspector had found Mr *Dunn* to be a statutory Gypsy as despite operating a landscape gardening business from the site, as he spent around two months of the year trading horses at fairs such as *Appleby* or *Stow-on-the-Wold*. The Inspector came to these conclusions with reference to *Ex parte Gibb*. The local authority sought judicial review partially on the basis of ‘gypsy status’. *Dunn* is the first significant post *Ex parte Gibb* case, and the applicant local authority made full use of the judgment when making its case. Mr *Spence* QC (sitting as a High Court judge) outlined the applicant local authority’s points with regard to *Ex parte Gibb*:

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<sup>37</sup> [1996] JPL 584

From the South Hams case, Mr Bailey [Maidstone Borough Council's barrister] derives five propositions. I shall deal with each in turn. First, from the judgment of Neill LJ, it was necessary to fall within the definition that the candidate must be part of a cohesive group. It is to be noted that whilst Millett LJ agreed with this, Leggatt LJ did not. Moreover, it is the experience of this court that a number of the gypsy cases do not involve groups of gypsies. In particular, it was not, I am told, urged on the Inspector at the Inquiry that Mr Dunn was not a gypsy for this reason. It would doubtless have been a difficult contention anyway, given that the question was whether he had lost his gypsy status, which had been accepted at the Inquiry nine months earlier, at a time when likewise he was not part of a group. Certainly, for the purposes of this case, I consider the words of Leggatt LJ to be apposite.

Secondly, Mr Bailey, referring to the judgment of Neill LJ, said that there must be a pattern to the journeys, that is as the "habit". But there was a pattern to Mr Dunn's journeys. The Inspector describes it in para 12. Much of Mr Dunn's work was landscape gardening locally but he travelled to horse fairs to buy and sell horses, I am told, taking his caravan. The pattern took the form of his touring around these various fairs.

Thirdly, there must be a purpose to the travel. There was such a purpose, to buy and sell horses, which the Inspector considered to be a traditional gypsy activity. Fourthly, there must be a connection between the movement and the livelihood as opposed to it being merely a hobby. There was such a connection. I appreciate that there is some dispute in the affidavits as to whether or not the evidence was that Mr Dunn did this as a hobby, but the Inspector's finding on this is clear beyond doubt and I am not entitled to interfere with it, namely, with reference to the fairs, "where he buys and sells horses".

Fifthly, from the judgment of Leggatt LJ, Mr Bailey says that the man considered must be of no fixed abode. However, Lord Bridge of Harwich, with whom all four of the other Lords of Appeal in Ordinary agreed, in *Greenwich*, after referring to the judgment of Lord Parker and Diplock LJ in *Mills v Cooper*, said at page 1010:

"It is difficult to think that the draftsman of the Act of 1968 did not have these passages in mind when he provided the definition of 'gypsies' in section 16. He could have defined them as 'persons

of nomadic habit of life and of no fixed abode', but he did not. Moreover, the duty imposed by section 6(1) is to provide accommodation 'for gypsies residing in or resorting to their area'. I am inclined to conclude from these indications alone that a person may be within the definition if he leads a nomadic life only seasonally and notwithstanding that he regularly returns for part of the year to the same place where he may be said to have a fixed abode or permanent residence."

The key point to make here is that this is the first example of *Ex parte Gibb* being (albeit unsuccessfully) employed in order to question the status of the individuals concerned. The points made by counsel for the local authority are taken to be weak by the Judge, and this raises questions as to why the status was being challenged in the first instance. In addition to this, it is clear that certain points, for instance the one on lack of group travel, had not been made at the Inquiry, and this would indicate a multi-faceted approach to the point in order to attempt to convince the judge on at least one element.

The final point to make regarding *Dunn* is a further point made by the local authority regarding the planning conditions and in turn the status of the defendant's family set out at page 6 of the judgment:

I shall read condition 4:

"The occupation of the site shall be limited to gypsies within the meaning of s.16 of the Caravan Sites Act 1968 who reside in or resort to Kent."

Because I have upheld the Inspector's decision that Mr *Dunn* is a gypsy, Mr *Bailey* concedes that this submission cannot succeed. However, Mr *Bailey* goes on to submit that:

"There is no evidence at all that his wife or children are of a nomadic habit of life. That they are related by marriage or blood to an alleged seasonal nomad does not bring them within the meaning of 'gypsies' within section 16 of the Caravan Sites Act 1968."

But the reason that there was no evidence at the Inquiry upon this point was that neither party chose to distinguish between Mr *Dunn* and his family, nor to question his family status rather than his. Accordingly, this point cannot be advanced as if it were a point of law for this court. In any

event, I would not exercise the discretion of the court to grant relief because the applicant Council is fully protected by the condition. If the Council really did wish to distinguish between Mr Dunn and his family, which would seem most unlikely, they could enforce the condition. However, it is salutary and sensible that, if ever Mr Dunn does cease to be a gypsy, the Council would be entitled, if they so wished, to enforce the condition.

The judge could not accept this argument under *Wednesbury* principles. In addition to this, it is interesting to note how the local authority's argument had transferred the questioning of status from the defendant to his family. If such an argument had been accepted the effect would have been to split a family up. At this point questions regarding the proportionality of this action would have undoubtedly been raised.

## 7.3 1998

### 7.3.1 The European Convention on Human Rights becomes enshrined in UK law (Human Rights Act 1998)

In 1998, the European Convention of Human Rights (ECHR) was incorporated into UK law by Human Rights Act 1998 (HRA 1998). The convention requires that contracting states shall secure to everyone in their jurisdiction a number of rights and freedoms. Further to this, the ECHR provides individuals with the right to complain to the European Court of Human Rights (ECtHR) in Strasbourg when they feel that any of their rights or freedoms under the convention has been violated. The main purpose of making the convention part of UK law as the Human Rights Act 1998 was to give domestic courts the duty to protect individual's human rights, thereby making the Convention directly accessible to people in the UK (Hunt and Willers, 2007, p.23). Hunt and Willers highlight three key provisions of the HRA 1998 with regard to Gypsies and Travellers:

"The HRA 1998 imposes new duties on all the 'public authorities' with which Gypsies and Travellers are frequently in contact, including: government ministers and departments; the Planning Inspectorate; local authorities; the police; education authorities; health authorities; social services department; and the courts."

“HRA 1998 s3(1) requires all legislation to be read and given effect in a way which is compatible with Convention rights, ‘so far as it is possible to do so’ and HRA 1998 s4 gives the High Court, Court of Appeal and House of Lords [now the Supreme Court] the power to make a declaration of incompatibility in circumstances where it is concluded that a statutory provision is incompatible with a Convention right”. [this provision is relevant in the *Smith v Dagenham* case, see section 7.7.4]

“HRA 1998 s6(1) makes it unlawful for a ‘public authority’ to act in a way which is incompatible with a Convention right, unless mandated to do so by legislation which cannot itself be read compatibly with Convention rights”. [see the *McCann and Wingrove* cases, section 8.6.1] (*ibid*, p.23)

The two relevant articles with regard to Gypsies and Travellers are 8 and 14. Article 8 is regarding the right to respect for private and family life and provides that:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The first thing to note about Article 8 is that it is not absolute and its first limb is qualified by its second. The implications of this is that public authorities are required to consider carefully the proportionality of their actions when making decisions which interfere with Article 8 rights (*ibid*, p.25). In practice this is the balancing of considerations such as a pressing social need and the protection of the Green Belt. It may also be concerned with whether a particular piece of legislation is convention compatible. Such decision making is

problematic, and is the subject of the *Chapman v UK*, *Dagenham v Smith*, *Connors v UK*, *McCann* and *Wingrove* cases (see sections 7.6.1, 7.7.4, 8.1.3, 8.6.1).

One important concept that needs outlining in order to appreciate these cases is that of the 'margin of appreciation' given to contracting states. This is in essence the notion that the ECtHR is less well equipped than the decision maker in the first instance (such as a planning inspector) to deal with detailed question of local fact where the decision maker has visited the site and heard the evidence (*ibid*, p.31). In this instance, the contracting state is given a wide margin of appreciation. In matters such as security of tenure on local authority Gypsy and Traveller sites (see section 8.1.3) the margin of appreciation is narrow, as it is a question of principle as opposed to one of local fact. Article 14 is concerned with the prohibition of discrimination:

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

The key point noted by Hunt and Willers is that Article 14 is concerned with discrimination in the context of the enjoyment of other convention rights, it is not a freestanding equality provision. Furthermore, differences of treatment, even in relation to Convention rights, are capable of being objectively justified under Article 14. "What has to be established in order to make out a breach of Article 14 is that other people in an analogous or relevantly similar situation have been treated more favourably, and that there is no objective or reasonable justification for such differences of treatment." (*ibid*, p.25).

The Convention has played a role in the development of statutory definitions, primarily through the decision of the ECtHR in *Chapman* (see section 7.6.1) which has been cited in a number of cases concerning the application of statutory definitions to ethnic Gypsies and Travellers. At the present time it is hoped by Gypsy and Traveller

campaigners and lawyers that Article 8 may be able to increase the width of the planning definition to the benefit of ethnic Gypsies and Travellers (see section 8.6.1).

## 7.4 1999

### 7.4.1 The intentions of a Gypsy to settle lead to a loss of statutory authenticity (Hearne v National Assembly for Wales<sup>38</sup>)

Hearne was concerned with an ethnic Gypsy whose site had been the subject of an enforcement notice concerning the use of the land as a residential caravan site. In contrast to Dunn, the Hearne case had no explicit discussion of Ex Parte Gibb. The case is significant as the Court of Appeal accepted that the intentions of someone were able to be taken into account of when considering the issue of 'gypsy status'. These intentions were noted by the planning Inspector cited at page 2 of the judgment:

"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 are 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 moved 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 1/94 and that you gave up gypsy status when you moved onto the land."

Whilst the Court of Appeal acknowledged later in the judgment that it is possible to live on a settled site, travel on occasion and retain status, as per the decision of the House of Lords in Powell (see section 6.7.4), the issue for Mr Hearne was the intention to settle that the planning Inspector had regarded as forfeiting 'gypsy status'. The High Court and

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<sup>38</sup> JPL 161, QBD

the Court of Appeal both took this approach in the present case. Given the preceding case law, and that unlike *Runnymede* (see section 6.10.1) the Inspector had found against the appellant on 'gypsy status', the Court of Appeal decision is perhaps not surprising. The point to note here is the notion of ethnic Gypsies and Travellers who are held to be no longer nomadic wishing to remain in culturally appropriate accommodation.

## **7.5 2000**

### **7.5.1 Irish Travellers are held to be an authentic racial group for the purposes of the Race Relations Act 1976 (*O'Leary & others v Allied Domecq and others*<sup>39</sup>)**

The claimants in the *O'Leary* case had been refused entry to five public houses in or around north-west London on the basis of being Irish Travellers. They complained to the Commission for Racial Equality (CRE), and a case was brought (with the support of the CRE) against the establishments on the basis of discrimination under the provisions of the RRA 1976. Before considering the facts of the claim, a preliminary trial to establish whether Irish Travellers were a distinct racial group for the purposes of the RRA 1976 took place at the Central London County Court. HHJ Goldstein sitting with two assessors<sup>40</sup> found that Irish Travellers were such a group. The rationale for this decision was by way of reference to the *Mandla* criteria regarding what constitutes a racial group by reference to ethnic origins (see section 6.3.1). Taking Lord Fraser's criteria, the Court found that Irish Travellers were able to fulfil both the essential points regarding a long shared history and a cultural tradition of their own, and also the points with regard to a common geographical decent and a common language. This can be taken as a relatively straightforward fulfilment of the criteria set out in *Mandla*. With regard to discourses of authenticity, it is the additional points in favour of finding Irish Travellers to be a racial group that HHJ Goldstein in the judgment notes that are of interest. At page 40 of the judgment these three points are described as "glaring anomalies which we would have been unable to explain". The first is concerned with the view of the Judge and the assessors that there was:

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<sup>39</sup> CL 950275-79 29<sup>th</sup> August 2000 (unreported), Central London County Court

<sup>40</sup> The assessors were appointed from the list maintained by the Secretary of State under section 67(4) of persons who appear to him to have special knowledge and experience of problems connected with relations between persons of different racial groups.



...very little, if any, distinction to be drawn within the minds of the population, certainly of the United Kingdom and certainly within the minds of many other people around the world, between gypsies on the one hand and the traveller on the other. They are not synonymous, as was previously argued [in CRE v Dutton, see section 6.7.2], but they do share many of the same characteristics. That indeed would be the first anomaly, that gypsies should be included and Irish travellers excluded.

In this way, the statutory authenticity found for Romani Gypsies in CRE v Dutton (see section 6.7.2) has been able to be applied to Irish Travellers. It is interesting to note the comparison of this extract to the comments of Stoker LJ in CRE v Dutton. In the later, Stoker LJ made a point that an ordinary person would regard Sikhs as an ethnic minority, but potentially not Romani Gypsies. In comparison, it is the connection made by the same ‘ordinary people’ of Romani Gypsies to Irish Travellers that weighs in favour of the latter’s status as an ethnic minority. This not only an example of how discourses of authenticity develop, it is an argument for the acceptance of ethnic statutory authenticity by proxy. In this way the O’Leary case is an example of how authenticity is transferable in so far as the acceptance of the Court of Appeal of the ethnic authenticity of Romani Gypsies in DRE v Dutton was then in effect taken by as a lower court to provide further justification for finding Irish Travellers as such.

The second anomaly identified by the judge was regarding the Human Rights Act 1998:

At the time when this country is about to incorporate the European Convention of Human Rights into its legislation – and of course one of the most significant articles is the wholesale end of discrimination on any grounds – at such a time this court should be even considering excluding Irish Travellers from protection under the Race Relations Act.

In spite of the lack of understanding of the Convention on the point regarding the “end of discrimination on any grounds” (see section 7.3.1), this is a useful indication that if Irish

Travellers had been found not to be a racial group, an appeal by the claimants would have been more than likely to make reference to the provisions of the Convention.

The final anomaly concerns the point that Irish Travellers were recognised in Northern Ireland as an ethnic minority by the Northern Ireland Order in 1997, which had the effect of importing the provisions of the RRA 1976 into Northern Irish law, and named Irish Travellers as a protected group. The point made is that it would be an anomaly for the British Government to grant rights to Irish Travellers in Northern Ireland, and then for the court not to in England. This is a point echoed by barrister Tim Jones (interview 2012), who noted that “when one part of the UK adopts a new definition, other parts will consider whether they ought to be doing the same thing”. In this way, statutory authenticity has been justified (in part) by reference to its presence elsewhere in the UK.

## **7.6 2001**

### **7.6.1 The European Court of Human Rights places and obligation on the UK government to facilitate the traditional way of life of Gypsies (Chapman v United Kingdom<sup>41</sup>)**

Chapman v UK concerned planning enforcement against an ethnic Gypsy in Hertfordshire. There was no question of the statutory ‘gypsy status’ of the applicant. The case is the leading judgment on the implications of the Human Rights Act 1998 on Gypsy and Traveller planning matters, and as such it has been discussed elsewhere (see Hunt and Willers, 2007). Its implications for the statutory definitions are the points that the majority judgement makes with regard to the traditional lifestyles of Gypsies and its relationship with Article 8 rights:

73 The Court considers that the applicant's occupation of her caravan is an integral part of her ethnic identity as a gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. This is the case even though, under the pressure of development and diverse policies or from their own volition, many gypsies no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children. Measures which affect the applicant's stationing of her caravans have therefore a wider

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<sup>41</sup> (2001) 33 E.H.R.R. 18

impact than on the right to respect for home. They also affect her ability to maintain her identity as a gypsy and to lead her private and family life in accordance with that tradition.

74 The Court finds therefore that the applicant's right to respect for her private life, family life and home are in issue in the present case.

At para 96 the Court found that;

...the vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in arriving at the decisions in particular cases. To this extent there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the gypsy way of life.

These extracts are significant for three reasons. First, the Court makes a connection between Gypsy ethnic identity and living in a caravan. Second, having done this, it acknowledges that nomadism may be limited for various reasons (including prohibitive policies). These notions are significant as they are discussed in cases in the following years (see the Wrexham, Cooper and Connors cases at sections 7.8.2, 8.1.1 and 8.1.3). Finally, the recognition of a “positive obligation to facilitate the gypsy way of life” is significant as it adds further weight to the statutory authenticity of ethnic Gypsies and Travellers, in so far as it places a requirement on the Government. However, the consequences of the positive obligation do not automatically guarantee the provision of suitable accommodation. Therefore, the authenticity given to ethnic Gypsies and Travellers and their traditional way of life is not necessarily completely determinative of a positive outcome with regard to accommodation. The positive obligation has been mentioned in various cases in the following years.

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### **7.6.2 The rat infested barn (Thomas George Clarke v Secretary of State for the Environment transport and the regions and Tunbridge Wells Borough Council<sup>42</sup>)**

The case of Clarke was a judicial review of a planning appeal decision, where the Inspector in question had taken account of an offer of bricks and mortar accommodation made to Mr Clarke, the appellant. The case is the starting point for the notion of ‘aversion to bricks and mortar’ entering the discourse regarding the authenticity of Gypsies and Travellers. The Inspector’s findings on the issue are cited at paragraphs 6 and 7 of the judgment:

6....After setting out, in considerable detail, to which I shall return, the important detrimental planning effects of the possibility of this land being used by way of permanent residence, the Inspector turns to what he calls the Appellant's personal circumstances:

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

7. Then at 21 he says:

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

Burton J found at paragraph 30 that Inspector had breached articles 8 and 14 of the Human Rights Act 1998 (see 7.3.1):

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<sup>42</sup> [2001] EWHC Admin 800

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

The comparison between religious practice and cultural aversion to bricks and mortar is striking and Burton J sets out a set of criteria by way of reference to “Gypsy status” to be assessed before a breach of Articles 8 and 14 can be found. The findings on these points are set out at paragraph 31 of the judgment:

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

being referred to is someone that is perfectly distinguishable, and the use of the word “Gypsy” appears to me to enable, or best enable, a definition to be arrived at. Indeed there have been a number of authorities in which questions relating to such definition have been canvassed and, in particular, I have been referred to the decision of the Court of Appeal in *R v South Hampshire [sic] District Council ex parte Gibb* [1994] 4 All ER at page 1012.

There are a number of different points to note on this extract, in which the importance of the word “Gypsy” as opposed to “Traveller” is evident. The first is that unlike all previous materials examined in this analytical narrative, Burton J capitalises the G in “Gypsy status”. As explained in Chapter Two, there is a wide spread contention amongst Gypsy and Traveller campaigners that the words Gypsy and Traveller should be capitalised. This is primarily because of the status of Romani Gypsies and Irish Travellers as ethnic minorities. By capitalising the g in “Gypsy status”, Burton J is giving the term what he would have most likely termed a “cultural” flavour given his comments on Chapman noted below. Second, the word “traveller” is found to be “fashionable”, and to have too wide a meaning. It is especially interesting to note that New Travellers are without doubt out of the width of application that Burton J sets out. Finally, like in *Ex parte Dutton* (see section 6.10.2), reference is made to the intention of the relevant legislation, which is taken to be the fulfilment of the needs of “Gypsies” with a cultural heritage.

Having set out a rationale for “Gypsy status”, Burton J at paragraph 32 then went on to set out some guidelines as to how it might best be assessed. The first was concerning whether the person or where appropriate family lived in a caravan or mobile home. This point was discussed in future years in the *Friends of Fordwich* case (see section 8.2.1). The third and fourth are concerned with well established principles regarding the proportion of the year that a person is nomadic (as per Powell, see section 6.7.4), and an economic purpose connected to their nomadism (as per *Ex parte Gibb*, see section 7.1.1).

The second point made is the one which of interest when considering discourses of authenticity. This was whether “such a person is Romany [sic] and/or subscribes to the Gypsy culture”. This point follows the reasoning set out in the previous paragraph in the judgment regarding the nature of “Gypsy status”. Reference is made to the ethnic identity

of Gypsies noted by the ECtHR in Chapman. Burton J made the following comments on this point:

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

Burton J's application of the principles of Chapman to the planning definition here is somewhat problematic, and is an example of the legacy of the uncoupling of the word 'gypsy' from an ethnic meaning in Mills v Cooper. The primary issue is that the planning definition (at this point as set out in paragraph 5 of Circular 1/94) makes no reference to either ethnic or cultural factors. Further to this, as the barrister Tim Jones notes:

*"...decisions of the European Court of Human Rights cannot be based on a definition in any one legal system. I have no doubt that the majority of the Court, when they talk of Gypsies would have been thinking of Roma, or they would've been briefed on the special situation in the United Kingdom and Ireland which in some ways is very different from the continental mainland. So no doubt the Court had traditional Gypsies in their mind when they are going over that judgement, and you can't just import the UK definition." (Interview, 2012)*

Whilst the application of Chapman to a case regarding a traditional Romani Gypsy family is correct, the former was concerned with the protection of the traditional way of life of an ethnic minority as opposed to the statutory definition. This is further evidenced by the

preference of Burton J to have been able to consider a cultural as opposed to ethnic identity.

However, on a macro level the gloss given to “Gypsy status” is of little significance, as it the principles of paragraphs 33 and 34 which have had a lasting legacy:

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

34. Seventhly, if such be established then, in my judgment, bricks and mortar, if offered, are unsuitable, just as would be the offer of a rat infested barn. It would be contrary to Articles 8 and 14 to expect such a person to accept conventional housing and to hold it against him or her that he has not accepted it, or is not prepared to accept it, even as a last resort factor.

Again the use of religion as a comparator is notable, as it adds a flavour of ethnicity to the discourse. It can be likened to someone being a ‘non-practising (in some aspects) Gypsy’. However, the key point arrived at is that the person / family in question must prove to the decision maker that they have an aversion to bricks and mortar. This point is one that has not been explicitly examined in planning cases, but has been highly significant to homelessness cases (see the Price, Codona, Thompson and Sheridan cases at sections 7.8.1, 8.1.4, 8.7.2, and 8.9.1). The approach taken by Burton J was affirmed by the Court of Appeal the following year.



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## 7.7 2002

### 7.7.1 Pre-arranged work brick laying is found to be statutorily inauthentic (Robert Clarke Gowan v Secretary of State for Transport, Local Government and the Regions and North Wiltshire District Council<sup>43</sup>)

Clarke Gowan was a judicial review by Forbes J of a planning Inspector's decision not to afford 'gypsy status' on the basis of the kind of economic activity and related travelling undertaken by the appellant. The decision is in contrast to that of Burton J in Clarke the previous year as there is no mention of the ethnic / cultural heritage of the claimant. The only indirect reference there to ethnic / cultural heritage is the involvement of the Romani studies scholar Dr. Kenrick, who it will be recalled was an expert witness in CRE v Dutton (see section 6.7.2).

The case turned on 'gypsy status'. The planning Inspector had found the following on the issue (cited at paragraph 6 of the judgment):

"Reasons

Gypsy Status

4. The appellant claims to be a gypsy as defined for planning purposes, and considers that the retention of the mobile home should be judged against Policy DP16 of the Structure Plan and Policy RH17 of the Local Plan. He states that he travels for the purpose of making or seeking his livelihood. He describes himself as a bricklayer and stonemason and takes on sub-contract works both within daily travelling distance of the appeal site and further afield; a site at Swaffham, Norfolk was referred to. When working at a distance from the appeal site, he states that he uses a caravan, and that this is presently at Swaffham awaiting his return to that work.

5. The appellant was unable to provide documentary or other corroborative evidence of any contracts, payments, employers, locations or duration of these works. With regard to the nature of the work, the appellant states that he gets repeat orders from firms and other contacts in an area. I consider that this is the essence of the relationship between an employer and a sub-

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<sup>43</sup> [2002] EWHC 1284 (Admin)

contractor in the building industry. Where a sub-contractor carries out work reliably and where the terms are acceptable, an employer would seek to place repeat orders. For the sub-contractor, the need to travel and stay away from home would be weighed against the prospect of continuing employment. I am of the opinion that many single-person sub-contractors in the building industry would find themselves needing to work away from home from time to time and would be reluctant to pass-over the opportunity of ongoing sub-contract work.

6. Turning to the accommodation that the appellant stays in while away, no detailed information was forthcoming on the caravan. I understand that the appellant's family does not accompany him, even when that may be possible during school holidays. The appeal site is clearly the appellant's home and whilst it might be considered as a base from which to travel, it is my opinion that the caravan cannot be considered as a home. It appears to me that it could more be more accurately described as a place to stay overnight whilst away from home, as the same way as a guest house might be described.

7. ...The appellant appears to me to carry on the lifestyle of a sub-contract building tradesman, choosing to fulfil contracts on the basis of personal contacts. The travelling does not appear to be any more than a means to reach pre-arranged work. I do not consider, from all that I have read and heard that this way of life amounts to nomadism such as to bestow gypsy status. I conclude that the appellant is not a gypsy as defined in Section 80 of the Criminal Justice and Public Order Act 1984 [sic], and that Policy DP16 of the Structure Plan and Policy RH17 of the Local Plan are not applicable to the appeal proposal."

The Inspectors decision makes three points regarding 'gypsy status': the type of work undertaken, the use of caravans and travelling undertaken by the family. These three points should be viewed in the light of the relevant case law. Barrister David Watkinson on behalf of the claimant made reference to both *Ex Parte Gibb and Powell*. Interestingly no reference is made anywhere in the judgment to the *Clarke* case. With regard to *Ex Parte Gibb*, there appears to be no attempt made by Forbes J to distinguish it from the present case. In particular the reference at page 169 in *Gibb* to "some recognisable connection between the wandering or travelling and the means whereby the persons concerned make or seek their livelihood" would suggest that travel to pre-arranged work

is acceptable within the terms of the planning definition. It is the construction of Powell by Forbes J which is ultimately problematic for the claimant. David Watkinson argued that the reference by the Inspector to the claimant's touring caravan being similar to a guesthouse when seen in the light of Powell was incorrect. This is because Powell allows for seasonal travel with a return to a fixed abode. Forbes' J interpretation which was made with reference to the skeleton argument of Tim Mould, counsel for the Secretary of State, distinguishes the facts of Powell from the present case. In this, there is a sense of McVeigh's (interview 2011) notion of being able to "feel the other". Forbes J notes at paragraph 10 that:

"...critical to the decision in Powell was that, although the defendants did have a permanent residence on the site in question, for a significant part of the year the family unit led a nomadic existence, that is to say the defendants had no fixed abode or home, as they moved about the country as a family whilst seeking and carrying out seasonal work".

This is in contrast to paragraph 5 of Tim Mould's skeleton argument quoted by Forbes J at paragraph 11 of the judgment:

"5. The Inspector found that the Claimant's peripatetic working life was typical of those engaged in sub-contractual work in the building industry. He was not persuaded that the evidence of the Claimant's use of his caravan to stay in whilst he was working away from the appeal site was sufficient to establish a nomadic lifestyle. There was not that essential connection between wandering and working..."

The wandering seasonal workers in Powell, could be said to have had a sense of the 'other' about them. The implication of Clarke Gowan is that Gypsies are unable to undertake work which is thought to be 'settled' in nature and still live in a culturally consistent manner. In this way, the need for the decision maker to be able to 'feel the other' when affording 'gypsy status' is clear. Furthermore, the implications for access to suitable accommodation for ethnic Gypsies and Travellers who may wish to undertake

work which is not deemed to be sufficiently 'gypsy like' are problematic, and in effect this restricts such people to certain occupations if they wish to live in a culturally consistent manner. In this way, the provision of suitable accommodation is tied to the requirement to be able to prove 'otherness'.

### **7.7.2 Ceasing to be a 'gypsy' because of ill health is found to be contrary to common sense and common humanity (Wrexham County Borough Council v The National Assembly of Wales and Berry<sup>44</sup>)**

Wrexham was concerned with an Irish Traveller (Mr Berry) who was no longer able to travel due to ill health. The judgment of the High Court is significant mainly because of the Court of Appeal decision that was to follow it, and subsequently the revised planning definition in Circular 01/06 (see sections 7.8.2 and 8.3.1). This sequence of events began with a planning appeal for a site for Mr Berry and his family, who had previously been found to have 'gypsy status' by the Council. During the course of the public enquiry it emerged that Mr Berry having previously lived a nomadic existence for his entire life had been unable to work and consequently travel for the previous three years due to severe health issues. However, as noted by Sullivan J at page 23 of the judgment the adult male members of Mr Berry's family living on site continued to travel for economic purposes. The Council in their closing statements changed their position on status and made reference to *Ex Parte Gibb* in its closing statements cited in paragraph 9 of the judgement:

"For the purposes of national policy, the relevant definition is that given in S.16 of the Caravan Sites Act 1968, as interpreted by the Court of Appeal in the *R v South Hams DC ex parte GIBB* [1995] QB 158, 169A-G, 172F-173B. In essence a gypsy must lead a nomadic existence and there must be a connection between the travelling of those claiming to be gypsies and the means whereby they make or seek their livelihood.

Mr Berry ceased travelling to make a living about 3 years ago. He has been prevented from leading a nomadic way of life because of ill-health. There is no realistic prospect of him resuming

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<sup>44</sup> [2001] EWHC 2414 (Admin)

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a nomadic way of life. This is not a case of a short, temporary interruption in the necessary travelling for a living; it is effectively the permanent cessation of the gypsy way of life (as defined). The twice yearly trips to Ireland are for family reasons, unconnected with Mr Berry's livelihood. Mr Berry is not, for planning purposes, a gypsy. The development is not a gypsy caravan site."

The planning appeal was subsequently upheld and the Inspector (cited at paragraph 10 of the judgment) found that:

"I note that Mr Berry has had to give up his previous mobile employment and that his travels are now normally restricted to about two visits to Ireland each year. However this is due to his ill health and I see no clear evidence to suggest that the appellants are no longer within the normal definition of gypsies for the purposes of the planning legislation."

The Council sought judicial review of the decision on the basis that the Inspector was wrong to find that Mr Berry had 'gypsy status'. The argument they made was primarily concerned with the dicta of *Ex Parte Gibb* regarding the need for an economic purpose (see section 7.1.1). Noting elsewhere that the matter under consideration in *Ex Parte Gibb* was the (by then repealed) duty to provide sites under the provisions of section 6 of the Caravan Sites Act 1968, Sullivan J at paragraph 18 made the following comments in relation to the Council's reliance on the judgment:

The Council's reliance upon the dictum of Neill LJ and Leggatt LJ in the *Gibb* case is a useful example of the inadvisability of treating judicial pronouncements, made in a particular factual context, as though they were enactments of general application.

This echoes both the comments of Lord Parker CJ in *Mills v Cooper* who hoped his words would "not be considered as the words of the statute" (at page 467), and Neill LJ in *Ex Parte Gibb* regarding only suggesting "guidelines" (at page 169). There is also a contrast to be made with the New Travellers whose status was considered in *Ex Parte Gibb*, the

authenticity of whom was found to be lacking. In this instance the Judge was faced with a defendant who had ethnic authenticity, and this is reflected in the comments made at paragraphs 18 and 19:

[19] In the Gibb case the court was not concerned with whether someone who had for many years been a gypsy and travelled around in search of work, but had then ceased to be able to travel to seek work because of illness or old age, thereby ceased to be a gypsy for the purposes of the 1968 Act. It was concerned with a group of travellers (sometimes described as "new age" travellers) who had never travelled for the purposes of seeking employment but who had led a wandering life simply because they had taken a fancy to it. Hence, the emphasis in the judgments between those who travelled in order to seek work and those who travelled "from place to place merely as the fancy may take them and without any connection between the movement and their means of livelihood."

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

Further to this Sullivan J noted that since Ex Parte Gibb, the European Convention on Human Rights had become incorporated into domestic law (as the Human Rights Act 1998), and cited extracts from Chapman (see 7.6.1). The key extract is paragraphs 73-74 of Chapman:

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

74. The court finds therefore that the applicant's right to respect for her private life, family life and home are in issue in the present case."

Sullivan J at paragraph 22 held the following on the implications of Human Rights legislation to the present case:

[22] The Gibb case was concerned with the ambit of local authorities' duties under the 1968 Act. This case is concerned with the application of planning policies relating to sites for gypsy caravans. Given that such policies must show respect for home and private and family life, there could be no possible justification for construing the policies as though they cease to apply to a gypsy who, through no fault of his own, has become too old and/or too ill to work.

Following this forcefully reasoned judgment, the appeal of Council was dismissed. However, the Council appealed to the Court of Appeal and the reasoning of Sullivan J was reconsidered by Auld LJ (see section 7.8.2). What is notable here is that the authenticity of Mr Berry is validated by both Article 8 and the decision of the Court in Chapman. In this way, statutory authenticity and consequent access to accommodation is clearly affected by the decisions of the higher courts.

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### **7.7.3 The judicial interpretation of statutory authenticity found in Wrexham is transferred (O’Conner v Secretary of State of transport, Local Government and the Regions and Bath and North East Somerset Council<sup>45</sup>)**

O’Connor was a judicial review of the decision of a planning Inspector to dismiss an appeal made by an Irish Traveller single parent family in Keynsham, near Bristol. The case was heard by Field J nineteen days after the Wrexham case in the High Court. The circumstances of this family are set out at paragraph 8 of the judgment and concern a single Irish Traveller parent with health problems and three children. The Inspector found that Mrs O’Conner did not have ‘gypsy status’ and the reasoning is cited at paragraph 11 of the judgment:

"19. I turn now to Mrs O'Connor. Although she has travelled from the appeal site during the last two years, those trips have not been as a means of seeking a livelihood. She and her family rely for the most part on state benefits and are likely to do so for the foreseeable future. She and her children do on occasion travel to fairs. Income derived for example from selling artificial flowers at such events is however strictly limited by the terms of her benefits payments.

"20. So far as this appeal is concerned, in the light of the above information I do not consider the gypsy status of Mrs O'Connor has been demonstrated. Policy 37, together with Policies H12, HO.22 and HG 16 do not therefore apply to the appeal proposal.

"21. It was stated at the Inquiry on her behalf that as she intends to resume her nomadic way of life once the reasons why she is currently seeking a more settled way of life have been resolved, her gypsy status should be considered to be in abeyance. This is a statement of intent made on behalf of Mrs O'Connor and may be subject to a number of external factors that could influence the future situation. There is therefore no basis on which I can consider this matter further."

This finding was made with reference to Ex Parte Gibb. In response to this, Field J noted at paragraph 12 that the Court of Appeal in Gibb did not “deal with whether a gypsy who

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<sup>45</sup> [2002] EWHC 2649 Admin



settles for a period for reasons of ill–health, and/or old age and/or the education of children ceases to be a gypsy for planning purposes”. In addition, the judgment makes reference to *Ex Parte Bungay* with regard to holding nomadism in abeyance (see section 6.9.1), and distinguishes it from *Horsham* and *Herne* (both cases where ‘gypsy status’ was lost, see sections 6.8.1 and 7.4.1 respectively). Powell was cited with regard to the acceptability of a permanent base. Most significantly, a substantial portion of Sullivan J’s judgment in *Wrexham* was cited verbatim by Field J. Following this the following guidance on ‘gypsy status’ is set out at paragraph 19:

In my opinion, the authorities to which I have referred show that, where an individual or family has ceased travelling and has settled for health, educational requirements, or old age, then all the surrounding circumstances must be looked at to determine whether they are gypsies for planning purposes, including: (1) the person's history; (2) the reasons for ceasing to travel; (3) the person's future wishes and intentions to resume travelling when the reasons for settling have ceased to apply; and (4) the person's attitude to living in a caravan rather than a conventional house. It is not enough, as the Inspector did in this case, to focus on the travelling currently being undertaken or likely to be undertaken in the future.

The judgment goes onto to find that the Inspector gave disproportionate weight to *Ex Parte Gibb*, and the appeal decision is quashed. The significance of *O’Conner* is that continues the rationale of Sullivan J in *Wrexham* of finding statutory authenticity on the basis of other considerations other than solely economic purpose. In this way the authenticity of Mr Berry found by Sullivan J is transferred to Mrs O’Conner by Field J, the outcome with regard to access to accommodation is positive.

#### **7.7.4 Nomadism is used as a justification for a lack of security of tenure on local authority sites (The Queen (on the application of) Albert Smith v London Borough of Barking and Dagenham and the Secretary of State for the Office of the Deputy Prime Minister<sup>46</sup>)**

On the same day as O'Conner, elsewhere in the High Court the case of Albert Smith was heard. The case concerned a claim brought by a Romani Gypsy against the London Borough of Barking and Dagenham which sought to prevent the eviction of the Gypsy and his family from a site owned and operated by the Council. The claim had been compromised before the trial, but during the course of it, a declaration that the provisions of Part I of the Caravan Sites Act 1968 ("the 1968 Act") were incompatible with Articles 8 and 14 of the European Convention on Human Rights was sought. The case was therefore solely concerned with this point.

Article 8 of the ECHR is regarding the right to respect for private life, whilst Article 14 is concerned with the prohibition of discrimination (see section 7.3.1). With regard to the provisions of part 1 of the Caravan Sites Act 1968, the issue is that these only offered Gypsies and Travellers the most basic form of protection from harassment and illegal eviction when compared to that available to the occupants of private sites found in the provisions of the Mobile Homes Act 1983 which specifically excludes local authority operated Gypsy and Traveller sites. In addition, reference was made in argument to the security of tenure enjoyed by tenants of bricks and mortar council housing under the provisions of the Housing Act 1985.

The judgment is highly technical in nature and cites a range of different case law, much of which is not relevant to the present research. The relevance of the Smith case to discourses of authenticity is the justification given by the Secretary of State as to why the lack of security of tenure on local authority run sites does not offend Articles 8 and 14. This justification is primarily concerned with nomadism, with additional reasoning with regard to site availability and flexibility of provision. These points are set out at paragraphs 22 and 23 of the judgment:

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<sup>46</sup> [2002] EWHC 2400 Admin

22. The justification which there has been for the absence of security of tenure for gypsy caravan dwellers on council sites, which is still the justification presently put forward by the Secretary of State, can be summarised as follows:

i) Nomadism. The whole *raison d'être* for gypsy culture and identity, and indeed its defining factor, given the absence of necessary ethnicity not all gypsies are Romanies, not least the so-called New Travellers is nomadism. Hence the definition in section 16 of the 1968 Act set out in paragraph 2 above.

ii) Site Availability. There must be a substantial availability of sites for gypsies. Stanley Burnton J referred to the problem of 'balance' in general term in *Isaacs* [a case concerning the same point] in para 33:

"statutory regulation of housing and the consequences of such regulation are matters of some complexity. For example, while security of tenure may be to the advantage of existing tenants or licensees, it may be to the disadvantage of tenants and licensees generally. In the 1960s, security of tenure for residential tenants and control of rents were reimposed under the Rent Act 1965. Doubtless those measures were in the short term interests of residential tenants. However, in the long term, they led to a reduction in the supply of privately-rented accommodation, which, on one view, was disadvantageous to residential tenants and potential tenants generally. There is no simple equation between security of tenure and the public interest. "

The submission is thus that it is no good clogging up all caravan sites with those who do not move, and effectively removing them from the stock of available sites, by giving security of tenure.

iii) Flexibility. This is reflected in the decision in *Isaacs*. There is a stock of secure pitches on private sites, where there is security of tenure by virtue of the MHA. It is in respect of private sites that protection from commercial exploitation is necessary, and in any event the safeguard of administrative law remedies is not available. Such is not necessary in regard to council sites. Thus the necessary 'mix' of private and council, secure and insecure, pitches, is maintained.

23. Mr Gahagan [for the Council] most clearly sets out the effect of these justifications in combination at para 15 of his reply witness statement:

"There are limited resources for providing publicly funded accommodation, whether it be for gypsies or members of the 'settled' community. The Government is trying to make sure that there is provision for gypsies who have a nomadic way of life. There are other alternative forms of occupation for those with a settled way of life, which are as equally available to gypsies as they are to any other person. However, if accommodation which was intended for those with a nomadic way of life could become converted into accommodation for those with a settled way of life just by the life choices made by the occupants, then this would make planning for nomadic persons by local and central Government very difficult. "

According to the claimant, what these arguments failed to take account of was the circumstances of those living on local authority Gypsy and Traveller sites. It should be noted at this point that such sites are almost all occupied by Romani Gypsies and Irish Travellers. The arguments of the claimant's expert witness, Dr. Kenrick (who it will be recalled also appeared in *CRE v Dutton and Clarke-Gowan*) were cited at paragraph 24 of the judgment:

24. Dr Kenrick, while not challenging the historic justification, submits that it no longer applies:

"44. Mr Gahagan states that the legislation regarding gypsy accommodation is tailored so as to facilitate a nomadic way of life. The fact is that the nomadic way of life is ending for most gypsies, and therefore the existing legislation is unsatisfactory

66. In conclusion, the situation today is very different from what was envisaged at the time of the 1968 Act and the [MHA]. The examples I have given of low turnover and lack of vacancies show that council sites are becoming permanent residences for most of the families. They often have mobile homes and utility buildings. In this changed situation there seems no reason why residents should not have the same right as the tenants of council housing or non-Gypsy mobile home sites. "

This point was supported by a government commissioned report regarding *“The Provision and Condition of Local Authority Gypsy/Traveller Sites in England”* which was considered by Burton J. Having considered the arguments, the following conclusion was reached at paragraph 33 of the judgment:

...There is, in my judgment, quite apart from any simple question of giving security of tenure to those in council caravan sites, a necessary, indeed crucial, concomitant question to be considered and resolved, before it can be concluded that the present position is unjustified. I conclude that there is a very difficult question of how to define gypsies, to whom security of tenure in such sites is to be given (if it is). If security of tenure is to be given to all long-term caravan occupiers on council sites, as they are on private sites, then how, if at all, is there to be any differentiation between gypsy/traveller such occupiers and any other occupiers who wish to place a mobile home on a Council site, with security of tenure? And if there is to be no such differentiation, then the last state of gypsies whose cultural heritage or spiritual and cultural state of mind is nomadism or travelling may be worse than its first. At present that actual or potential nomadism ("a substantial nomadic habit of life ") is the justification both for the lack of security of tenure and also for the special arrangements for local authority sites catering especially for them, i.e. within section 24 of the Caravan Sites and Control of Development Act 1960. Dr Kenrick himself refers obliquely to the problem, in paragraph 53 of his witness statement: "The residents of council sites do not have to retain their Gypsy status (by travelling for an economic purpose) in order to retain their pitches ". [Judgment's emphasis throughout]

The interpretation offered here is that actual or potential nomadism is the primary issue preventing Gypsies and Travellers from having security of tenure. The law is built around the principle of providing sites for “persons of nomadic habit of life” as opposed to ethnic Gypsies and Travellers. The required statutory authenticity is that of nomadism as opposed to cultural or ethnic heritage. Further to the problem of defining Gypsies and Travellers, there is the question of the under provision of sites noted at paragraph 26 of the judgment with the statistic that 20% of Gypsy and Traveller caravans were stationed on unauthorised sites. In a situation where there was adequate accommodation for both those who wished to maintain a nomadic way of life and those who would prefer a more settled existence but one in culturally consistent accommodation, then is its potentially

doubtful that such a justification for the lack of security of tenure would have been made. In this instance, the notion that the *"Gypsy is not defined as he is, but rather as he must be to meet socio-political requirements"* (Liègeois, 1994, p.193) is applicable. In essence, the under provision of sites is compensated for by a lack of security of tenure, which is justified by the expected nomadic authenticity of Gypsies and Travellers. The issue of security of tenure was later addressed by the European Court of Human Rights in *Connors v UK* (see section 8.1.3).

## 7.8 2003

### 7.8.1 Cultural aversion to bricks and mortar is considered by the High Court (*Margaret Price v Carmarthenshire County Council*<sup>47</sup>)

Price is the first case where the notion of cultural aversion to bricks and mortar was considered in the context of homelessness legislation. The facts of the case concern an Irish Traveller occupying council land in Llanelli, Carmarthenshire. The occupation of the site was due to a compromise reached with Carmarthenshire County Council when she was being evicted from public land elsewhere. The intention was for both parties to seek alternative sites during a month long period. The claimant then made a homelessness application, and the defendant Council accepted a duty to secure accommodation for the claimant and her family. The Council then offered bricks and mortar accommodation. In the offer letter it was explained that this was a temporary measure until a suitable pitch became available. Further to this the letter cited at paragraph 3 of the judgment noted the following:

"(e) That whilst your client expresses a wish not to live in a house, it is the view of the council that on the facts of this case it does not amount to a cultural aversion. Your client's mother lives in a house, and your client's sister has, until recently, resided in a house. Therefore in terms of your client's family culture there is a clear acceptance that conventional housing is a suitable form of accommodation."

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<sup>47</sup> [2003] EWHC 42 (Admin)

Finally, the letter from the Council gave notice that if the claimant was to refuse the offer of accommodation, eviction proceedings would be brought against her with regard to the land she currently occupied. The offer of a house was then rejected and the claimant sought a review of the decision. The review maintained the position that the claimant did not have a cultural aversion to bricks and mortar accommodation. The Council's reasoning during the course of a meeting is cited at paragraph 7 of the judgment:

"The meeting then went on to consider the evidence relating to the existence of a cultural aversion. They noted that Mrs Price had been saying since April that she had a cultural aversion to housing. However, she had previously expressed an interest in conventional housing. At the council's customer service centre on the 24<sup>th</sup> October 2001, she had indicated she would be contacting Gwalia housing as there was a house available at 5 Caer Elms and she wished to be considered for it. In addition, she had provided the council with a doctor's letter in October 2001 in support of her application for housing."

It is critical to this challenge to set out the balance of the reasoning of the defendant:

"Mrs Price had not expressed any aversion to conventional housing when seeking accommodation in October 2001, and it was felt she would have made this known – and not expressed an interest in conventional housing – last year, if she had a cultural aversion. On that basis, it was decided that Mrs Price did not have a cultural aversion to conventional housing in October 2001, and the officers did not accept that she had developed an aversion since that date. Therefore, they were of the view that Mrs Price does not have a genuine, cultural aversion to conventional housing and were satisfied that the council house she had been offered was suitable for Mrs Price and her family."

Mrs Price sought to challenge the Council's decision to evict her and to uphold their decision regarding the offer of suitable accommodation upon review. The challenge was successful.

There are two points to consider with regard to how the notion of cultural aversion to bricks and mortar was both developed and applied in this case. First on a

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macro level, the case had the effect of prompting a change in the English Homelessness Code of Guidance for Local Authorities. Previously the 2002 version of guidance at 21.27:

"Occupiers of caravans, houseboats etc. including gypsies: under section 175(2) someone is homeless if his/her accommodation is a caravan and s/he has no place where s/he is entitled or permitted to put it and live in it. If a duty to secure accommodation arises for this reason the authority is not required to make equivalent accommodation available, although of course it may do so if resources permit. This is particularly relevant in the case of applicants who are gypsies or travellers, who should be considered on the same basis as any other applicant. If no pitch or berth is available, it is open to the authority to arrange for some other form of suitable accommodation."

Before making findings on the facts of the case Newman J at paragraph 15 of the judgment found that the suggestion that the needs of Gypsies and Travellers should be considered on the same basis as any other applicant was not in line with "Strasbourg jurisprudence<sup>48</sup> or what I regard as the proper state of the law since the passing of the Human Rights Act 1998". This contention was made with particular reference to paragraph 96 of the Chapman judgment with regard to the special position of Gypsies and Travellers as a minority means that "some special consideration should be given to their needs and their different lifestyle both in the regulatory planning framework and in arriving at decisions in particular cases". Following this the Code was updated in 2002. Paragraph 16.38 covers Gypsies and Travellers:

16.38. The circumstances described in paragraph 16.37 will be particularly relevant in the case of Gypsies and Travellers. Where a duty to secure accommodation arises but an appropriate site is not immediately available, the housing authority may need to provide an alternative temporary solution until a suitable site, or some other suitable option, becomes available. Some Gypsies and Travellers may have a cultural aversion to the prospect of 'bricks and mortar' accommodation. In such cases, the authority should seek to provide an alternative solution. However, where the authority is satisfied that there is no prospect of a suitable site for the time being, there may be

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<sup>48</sup> The European Court of Human Rights sits in Strasbourg



no alternative solution. Authorities must give consideration to the needs and lifestyle of applicants who are Gypsies and Travellers when considering their application and how best to discharge a duty to secure suitable accommodation, in line with their obligations to act consistently with the Human Rights Act 1998, and in particular the right to respect for private life, family and the home.

This is a useful example of how the decision of the ECtHR in Chapman has been applied in other cases, and subsequently has developed not only the case law but also the policy. With regard to discourses of authenticity, the finding of Burton J in Clarke regarding cultural aversion to bricks and mortar is then used by Newman J in Price, and with the assistance of the relevant passages of Chapman inserts the term into the guidance. In this way the development over two unconnected cases of a discourse of authenticity with regard to aversion to bricks in mortar has a positive effect on access to accommodation for Gypsies and Travellers.

In addition to this there are the findings with regard to cultural aversion to conventional housing which are of direct relevance to the case in question. Newman J's findings are made by reference at paragraph 18 of the judgment to Article 8 of the European Convention on Human Rights which:

...requires respect to be given for private life, family life and home. "Respect" means more than "acknowledge" or "take into account", it implies some positive obligations on the part of the public authority (see *Campbell v UK* [1982] 4 EHRR 293; *Valsamis v Greece* [1996] 24 EHRR 294).

At paragraphs 20-22 Newman J outlines how the defendant local authority had failed to have respect on the point of the claimant's traditional way of life:

20. The error in the approach of the defendant in seeking to respect her gypsy way of life was to regard the fact that she had evinced a preparedness to give it up to live in conventional housing in 2001 as sufficient reason for disregarding it altogether when considering her wishes. Equally had it reached the conclusion that the claimant's cultural commitment to traditional life was so powerful as to present great difficulty in her living in conventional housing, it was not bound by a

duty to find her a pitch, but it would have been a significant factor in considering how far it should go to facilitate her traditional way of life.

21. It seems plain to the court that there can be degrees of aversion to conventional housing. Again it can be assumed that according to particular prevailing circumstances there can be a reluctant contemplation of the need to give up, at least for a time, the traditional way of life. These are the particular circumstances of a case which have to be assessed. The fact that members of a family of an applicant, other than the applicant, have given up the traditional way of life is not a particularly telling guide as to the viewpoint of the applicant, although it may be relevant. Any number of reasons could exist for the decisions taken by the family members. Yet again it is necessary to observe that a viewpoint formed in 2001 cannot be assumed to have continuous validity so as to be a telling consideration a year later.

22. If a local authority has concluded that certain facts exist which are inconsistent with or contradict an assertion by an applicant that he or she has a present cultural aversion to living in conventional accommodation, it should, in the normal course, give the applicant an opportunity to provide an explanation for the inconsistency between the facts and the asserted aversion. That is not to say there is a requirement to afford a hearing. The general need or requirement for the course to be followed stems from the requirement to respect the applicant's Article 8 rights. It must lawfully and properly assess whether and to what extent it would be compatible with the applicant's position to require occupation in conventional housing. The defendant recognised the need to assess the facts of the individual case but failed to properly assess the claimant's position.

On this basis the claim was successful and the decision to evict the claimant was quashed. With regard to discourses of authenticity, the approach taken by the Council is one which found a lack of authenticity on the basis of the choices of Mrs Price's family and her previous inquiry regarding bricks and mortar accommodation. On the first point, the Council's wide application of an assessment of cultural aversion to bricks and mortar to other family members is of note. The analysis of the case in the second edition of Gypsy and Traveller Law reveals that her Mother had previously travelled but now lived in a bungalow due to ill health, whilst her sister who travelled with her had only lived in bricks and mortar for a short period of time. It is evident that the Council chose not to consider

the reasons as to why these individuals had chosen (or had been compelled) to move into bricks and mortar accommodation. The implication of the Council's view is that the authenticity of the Traveller in this instance is dependent on her immediate family. On the second point, Gypsy and Traveller Law notes that Mrs Price had "made her earlier enquiry purely because of pressure from a local authority officer and that she had no intention of moving into housing" (Johnson, Willers and Watkinson, 2007, pp229-230). The approach of the local authority was one which set a low threshold for being found to be inauthentic, and was one that ultimately Newman J found lacking. It was also an approach that would have been likely to be the most expedient, as the accommodation of Gypsies and Travellers who had been occupying Council owned land removes both the issue of continued trespass and the need to provide suitable accommodation in the form of a site.

#### **7.8.2 Ill health and a permanent cessation of nomadic habit of life is found to be inauthentic in the statutory sense (Wrexham County Borough Council v The National Assembly of Wales and Berry<sup>49</sup>)**

Wrexham in the Court of Appeal concerned an appeal by Wrexham County Borough Council challenging the decision of Sullivan J (see section 7.7.2). The case was concerned with an Irish Traveller who had ceased travelling permanently due to ill health. Auld LJ making the lead judgment in the Court of Appeal summarised Sullivan J's judgment at paragraph 4:

...[Sullivan J] seemingly [found] as a matter of principle, that traditional gypsies who had been obliged to give up travelling and settle in one place because of illness or age nevertheless retained a nomadic way of life and were thus gypsies as a matter of planning law and policy; and 2) that, on the facts of the case, the Inspector had been entitled to conclude that they were still gypsies for the purposes of the planning legislation although they had ceased travelling because of Mr Berry's ill-health.

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<sup>49</sup> [2003] EWCA Civ 835

Before giving the substance of his judgment, Auld LJ made some preliminary points.

Paragraph 41 concerned the historical purpose and current width of the definition:

As a matter of history, this different treatment developed to meet the needs of ethnic or traditional gypsy families who typically travelled to find work. Now, as a matter of statute and national planning policy, gypsy status has been both extended and confined - extended to those who are not traditional gypsies, and confined to persons "of nomadic habit of life, whatever their race or origin."

This is a short but useful summary of the development of the planning definition up until this point, and can be applied until the advent of Circular 01/06 in 2006. It accords with the notion of the authenticity of Gypsies and Travellers being transferable. The changeable extent and confines of the statutory definitions are discussed in the next chapter.

Auld LJ then moved on to two "unresolved questions" with regard to the extent of the definition. The second of these concerned a short point which sought to clarify that although the definition under consideration referred to "gypsies", there was no reason as to why it could not be applied to a "single gypsy who is of nomadic habit of life". The first unresolved question concerned the point that *Ex Parte Gibb* had been concerned with the duties of local authorities to provide sites under (by then repealed) section 6 of the Caravan Sites Act 1968. It will be recalled that Sullivan J at paragraph 22 of his judgment made the distinction between the section 6 duty to provide sites considered in *Ex Parte Gibb*, and the facts of Mr Berry's case concerning a planning matter. On this point, Auld LJ notes that Circular WO 76/94 (which was concerned with unauthorised encampments, see section 7.1.2) expressly applies the definition as interpreted by *Ex Parte Gibb*. Thus *Ex Parte Gibb* had entered the policy sphere, much in the same way as the judgment in *Price* affected a change to the English Homelessness Code of Guidance for Local Authorities (see section 7.8.1 above). This point highlights the circular manner in which the law develops, and in turn the circular development of discourses of authenticity within legal discourse.

Turning to the substance of Auld LJ's judgment, it began at paragraph 44 with reference to the issue in question for the planning Inspector:

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

These two observations underpin the rationale for the remainder of Auld LJ's judgment, which is characterised by a strict interpretation of the relevant provisions in order to criticise Sullivan J's previous findings. In particular, the reference made by the latter in paragraph 20 of his judgment to "common sense and common humanity" is said to miss "the purposes and effect of the Circulars, which are there to provide land for those who are nomadic" at paragraph 46 of the present case. Further to this, the point regarding the nomadic habit of life of the members of Mr Berry's family also living in the site is dismissed as the planning permission granted was for Mr Berry, his wife and their resident dependants.

The judgment then makes reference to Hearne and distinguishes the facts of the case from Bungay, O'Conner and Chapman. The approach taken in Hearne (see section 7.4.1) regarding the permanent loss of nomadic habit of life and consequently 'gypsy status' is approved. Bungay (see section 6.9.1) and O'Conner (see section 7.7.3) are distinguished on the point that nomadism was said to be held in abeyance, and there was

an intention for it to resume once the factors such as ill health or childcare were no longer issues. On Chapman (see section 7.6.1) Auld LJ noted at paragraph 53 that:

1)...Chapman was concerned with enforcement measures against gypsies whose qualification for that status was not in issue; and 2) that the Court found that United Kingdom planning control in this respect was Convention compatible.

Further to this he found at paragraph 54:

The whole premise of the Strasbourg Court's judgment and observations in those passages was that gypsies, by reason of their nomadic, though not necessarily wholly nomadic, lifestyle, require special consideration. There is nothing in art 8 or the reasoning of the Court to suggest that such special consideration should continue in the manner indicated in the policies after they have given up that lifestyle, whatever the reason for doing so.

Earlier at paragraph 52 of the judgment, Auld LJ cites paragraph 73 of the majority judgment in Chapman:

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

Whilst Auld LJ has noted the nomadic element within Chapman, he seemingly did not take account of the point that the protection of ethnic Gypsies and Travellers goes

beyond nomadism and included the occupation of their caravans. This is a selective interpretation of Chapman, and one which places the emphasis entirely on nomadism. This could be termed as selective authenticity, as Auld LJ takes an approach which is based entirely on nomadism, as was noted above he identified a “nomadic habit of life” as the corner stone of the definition. Such an approach places limited or no weight on other material considerations such as the defendant’s status as an ethnic Irish Traveller or the needs of his family. This is arguably contrary to the requirement of Article 8 for respect for private and family and home, as interpreted by the ECtHR in Chapman. Stephen Cottle, barrister for Mr Berry offered the following perspective on Auld LJ’s approach to Article 8 rights:

*“...we said [the definition] doesn’t have to be construed inconsistently with giving expression to Article 8 rights, the private and family life, and that completely went over Lord Justice Auld’s head. Just didn’t register with him at all, that there was no necessity to construe it so strictly, and actually consistent with Article 8 he should construe it more broadly, so the policy did apply to somebody that had a particular accommodation need, that didn’t stop just because they were unable to work” (Interview, 2012).*

The construction given to the definition is then summarised by Mr Cottle:

*“Lord Justice Auld was minded to construe the definition in a very strict way. Therefore, to get inside his mind is difficult, but if the benefit, if you can call it that, of having Gypsy and Irish traveller dedicated policies, has got nothing to do with ethnicity, it’s only to do with those people who happened be earning a living by travelling. So as soon as you stop travelling, you fall outside the purpose of the benefit within the policies. That’s his logic. So it only attaches to those people who are actively hawking, going around asking if they want drives redone or fences put up, and only applies to those people who otherwise have got no transit sites. And soon as they’re not working, they can pack up and disappear,*

*which completely denies their cultural integrity and their ethnic backgrounds and who they are, it's completely ahistorical; entirely form, as opposed to substance. Its shallow...There are also the disability implications. Its indirect discrimination, isn't it? Because you're maintaining a requirement, that only active people can comply with, and a proportion of disabled people cannot comply with. So it's wrong. We were off to the European Court" (Interview, 2012).*

Mr Cottle forcefully notes the problematic nature of Auld LJ's construction. It is one which is legalistic in substance in so far as it could be said to be excessive adherence to a complex procedure. The contrast between the previous ruling of Sullivan J in the High Court and that of Auld LJ's reveals how statutory authenticity is constructed differently by different decision makers. In the High Court, considerations which could be defined as compassionate and related to Article 8 rights were taken to be of relevance in the construction of the definition whilst Auld LJ was not convinced by such points in the Court of Appeal. This raises wider questions with regard to the place of considerations such as those of compassion within the planning and legal system. A strict interpretation of statutory authenticity leaves little room for such considerations, and the results are negative with regard to access to accommodation. Again, the original intention of the definition to substantively address inequality has been diverted due to the presence of negative discourse around the authenticity of the Traveller concerned.

Before making it the European Court, Mr Berry's planning application was re-determined in a manner which could be termed compassionate in nature described here by Mr Cottle:

*"Mr Berry did end up getting planning permission, because his health got better. He had just suffered a coronary, and it was looking very bad, then the Inspector, who is the Chief Inspector of Planning in Wales at the time, very nice man, decided that he was acting as a sort of mentor to his sons, so therefore he was still involved in his sons' earnings...the point is, even if you've got two disabled parents, you've got one actively earning son,*



*then it's still a Gypsy site, even for the purposes of [the judgment in] Berry" (Interview, 2012).*

The eventual outcome on the micro level highlights the differences in approach to 'gypsy status' taken by the Council, the original planning Inspector, Sullivan J in the High Court, Auld LJ in the Court of Appeal and finally the Chief Inspector of Planning in Wales. This is another example of the transferable nature of discourses of authenticity in so far that the outcome of the assessment of status alters depending on who is making the assessment. The final point to make on the micro level of the Wrexham case is that not mentioned in the judgment and is the offer of the local authority of accommodation elsewhere, described by Stephen Cottle:

*"But the annoying thing in Berry, was that they [the LPA] were arguing that [Mr Berry wasn't] a Gypsy, but that we should be satisfied with an offer on the site of their Gypsy site, and that really, really annoyed me. How on earth can anybody say, "you're not a Gypsy for the purpose of the planning, but you are a Gypsy for the purpose of meeting your accommodation need." And it made it plain, that obviously it's within the discretion of the local authority as to the width and scope of their Gypsy and Traveller policy, as to whom it should apply to. So therefore they could decide that it applied to non-economically active Gypsies (Interview 2012).*

This is another useful point on how ascribed authenticity is lost or gained depending on the circumstances. It would appear that it was in the interests of the Council to offer the family a place on the publicly owned site which in theory has a prerequisite of 'gypsy status', yet not to accept that status for the purposes of planning consent for their own site. In this way authenticity is variable according to the convenience of the ascription dependent on the circumstances in which it is being made.

Turning to the macro level Stephen Cottle also noted the qualifications given in the judgment of Clarke LJ:

*“...Lord Justice Clarke qualified it, paragraphs 61, 62, 63, and said that looking at the Shrewsbury case of Bungay you can actually not travel for a very long period of time, as long as you haven’t abandoned it...”*

This qualification is significant for the Cooper and Friends of Fordwich cases below (see sections 8.1.1 and 8.2.1). This and other future implications of the Wrexham case are detailed in the next part of the analytical narrative, and culminate in the addition of exemptions to the definition in Circular 01/06 regarding cessation of nomadism due to ill health or old age.

## Chapter 8 - 2004-2012 Questions of the width of application

The final period of eight years to be examined begins with the legacy of the decision of the Court of Appeal in *Wrexham* (see immediately above), which eventually culminated in a change in policy in Circular 01/06. Following this, the question of security of tenure on local authority Gypsy and Traveller sites considered in *Albert Smith* (see section 7.7.4) is concluded upon by the ECtHR. The remainder of the chapter considers a number of other events, including the introduction of the Housing definition, the impact of Race Relations / Equalities legislation upon access to accommodation, the continuation of the consideration of aversion to bricks and mortar, the impact of Article 8 upon the definition, and the campaign for a protective statute for Gypsies. It concludes by offering a summary of the current state of the statutory definitions at the time of writing.

### 8.1 2004

#### 8.1.1 Cessation of travelling because of (inter alia) lack of sites is considered by the Court of Appeal in the light of *Wrexham* (*Basildon DC v First Secretary of State, Rachel Cooper, Elizabeth Cooper*<sup>50</sup>)

The *Cooper* case concerned an application by Basildon District Council to quash the decision of a planning Inspector to grant consent for a site for an extended Romani Gypsy family. The case was brought solely on the basis that the planning Inspector had erred in principle when considering the ‘gypsy status’ of the defendants. The situation for the defendant Gypsies was one where they would like to travel but were frustrated by a lack of stopping places. Further to this, the planning Inspector cited at paragraph 9 of the judgement found that considerations of ill health and childcare “restricted” their ability to travel. It was also noted that Rachel Cooper travelled to Gypsy fairs, and her barrister, Marc Willers noted:

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<sup>50</sup> [2004] EWCA Civ 473

*“Mrs Cooper goes to the fairs and what she does is she sells little furry things that go on fridges, and stuff like that, little crafty things, she doesn’t make very much, but makes more than some pin money. Considering her yearly income, it may be with benefits and the like, its a substantial proportion, but its not that much really, a couple of hundred of quid rather than thousands, but she was deemed to be entitled to Gypsy status, as that was the extent of her travelling, and that’s what she did when she travelled. It wasn’t just for the purposes of meeting people at the fairs” (Interview 2011).*

Rix LJ at paragraph 10 described the judgment of Auld LJ in Wrexham as the “linchpin of Basildon’s appeal”. The Council maintained that because of cessation of travelling due to considerations of health and childcare, the Cooper family had forfeited ‘gypsy status’, and that the travel to fairs was not sufficient in order to keep them within scope. In the rejection of Basildon’s case, reference was made to the qualification given to Auld LJ’s judgment by Clarke LJ in Wrexham cited above. In essence this is the notion that ‘gypsy status’ can be held in abeyance for a considerable amount of time, as long as it had not been fully abandoned. The Inspector’s finding that the Cooper’s had been “restricted” by the considerations of a lack of stopping places, ill health, and childcare led to the following conclusion by Rix LJ at paragraph 24 of the judgment:

There is, in my judgment, a plain, implicit acceptance of Rachel's and Elizabeth's case, and an equally plain rejection of the Council's case that they had abandoned their nomadic habit of life and were for a sufficiently material period of time unable or unwilling to return to life on the road. In addition, there was the finding that they presently regularly travelled to gypsy events. In my judgment, those are - albeit brief - adequate findings and reasons to support a conclusion which was ultimately a conclusion for the inspector as a matter of fact and degree as to the status of Rachel and Elizabeth at the relevant time.

The significant point to note here is that the construction of the facts made by the Inspector was one which was able to fit into the construction given to statutory

authenticity by Auld LJ, as qualified by Clarke LJ. The judgment also highlights the importance of the judgment of Clark LJ in allowing those Gypsies and Travellers who may have ceased travelling because of the considerations mentioned above to retain 'gypsy status'. Access to accommodation was determined by the ability to fit into a very narrow and specific version of statutory authenticity, one in which there was still a connection to a nomadic occupation which had something of 'the other' (being the Gypsy fairs).

### **8.1.2 The effects of the decision of the Court of Appeal in Wrexham are felt (The Queen on the Application of Basildon District Council v The First Secretary of State, Mrs Gail Doran<sup>51</sup>)**

The facts of Doran are broadly similar to those in Cooper. An extended Irish Traveller family had settled on a site primarily because of health considerations. As such, the Council argued at the planning appeal that because they had indicated an intention to no longer travel, they had lost status. The case of Hearne (see section 7.4.1) regarding the loss of status if an intention to cease travelling was stated was cited in support of this proposition. However, the Inspector (cited at paragraph 6 of the judgment) distinguished the facts of the Doran family's case from Hearne because the "the decision made by Mrs Doran and her family to give up travelling and cease their nomadic lifestyle has not been made on a voluntary basis, rather it has been forced upon them by ill health" and "in my opinion it would be unreasonable and unjust to conclude that a person born a gypsy should cease to retain their gypsy status simply because ill health or infirmity restricted their ability to travel". The Council's case was that the "Inspector was wrong to hold that the decision made by Mrs Doran and her family to give up travelling and cease their nomadic lifestyle did not affect their acknowledged previous status as gypsies because it was not made on a voluntary basis but had been forced upon them by ill health". This submission relied on the Court of Appeal's decision in Wrexham.

The findings of the Inspector in Doran were contrasted with those of the Inspector in Cooper at paragraph 13 of the judgment. It is on this distinction that the case turned. In Cooper, as highlighted above the significant point was that the Inspector had found the appellants were "frustrated" or "restricted" by factors which prevented them from

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<sup>51</sup> [2004] EWHC 951 (Admin)

travelling, but there was an intention to travel again. In Doran, no such intention was cited, and the Inspector (cited at paragraph 11 of the judgment) found that there would be “injustice in finding that if a person ceases to be a gypsy simply because ill health or infirmity restricted their ability to travel”. This was found to be contrary to the dicta of Wrexham and Basildon’s appeal was upheld.

Doran highlights the significance of the role of the decision maker in the assessment of ‘statutory authenticity’. Whilst in Wrexham there are clear differences in the opposing approaches taken to ‘gypsy status’ by Sullivan J in the High Court and Auld LJ in the Court of Appeal, in Cooper and Doran, both planning Inspectors found ‘gypsy status’. The distinction is in how ‘gypsy status’ was approached. In Cooper, the Inspector found similar considerations as Doran with regard to ill health, but these were not constructed as meaning the permanent cessation of travel. In Doran, the inclination of the Inspector towards principles regarding justice (much like Sullivan J in Wrexham) was ultimately to the detriment of the family concerned when the decision was challenged in Court. The point here is that principles such as ‘injustice’ can be taken to be of lesser importance than a literal interpretation of law and policy by some decision makers in the application of ‘gypsy status’. Consequently, access to accommodation has a greater degree of dependence on a literal interpretation than any moral reasons.

### **8.1.3 Nomadism is not accepted by the ECtHR as justification for the lack of security of tenure on local authority sites (Connors v UK<sup>52</sup>)**

Connors v UK was concerned with a violation of an Irish Traveller’s rights under Article 8 of the European Convention on Human Rights as a result of his family being evicted from a local authority run site in Leeds following possession proceedings in the County Court for breach of licence conditions. The facts of this case on the micro level are not of relevance to discourses of authenticity or statutory definitions: there would appear to be no question of the ‘gypsy status’ of Mr Connors and his family. The significance of the case is solely at the macro level, and is the conclusion of the debate regarding the compatibility of tenure provisions on local authority Gypsy and Traveller sites and Article 8 in Smith v Dagenham (see section 7.7.4). The key point is that the ECtHR rejected the

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<sup>52</sup> [2004] All ER (D) 426 (May)

Government's argument regarding nomadism which had previously been made in the *Smith v Dagenham* case. In essence this is that the policy sought to cater for the special needs of Gypsies and Travellers who live a nomadic lifestyle, which required flexibility in the management of local authority sites. The rejection of this argument at paragraph 88 of the judgment makes reference to the same report published in 2002 and cited in the *Smith v Dagenham* case entitled *the Provision and Condition of Local Authority Gypsy/Traveller Sites in England*. The Court held:

88. As regards the nomadism argument, the Court notes that it no longer appears to be the case that local authority gypsy sites cater for a transient population. The October 2002 report...[on Local Authority Gypsy and Traveller sites]... indicates, as has been apparent from the series of cases brought to Strasbourg over the last two decades, that a substantial majority of gypsies no longer travel for any material period. Most local authority sites are residential in character. On 86% the residents have been in occupation for three years or more and there is a very low turnover of vacancies. Of an estimated 5,000 pitches, only 300 are allocated as transit pitches. It is not apparent that it can be realistically claimed that the majority of local authority sites have to provide, or aim to provide, a regular turnover of vacancies to accommodate gypsies who are travelling round or through the area. The Court is not persuaded therefore that the claimed flexibility is related in any substantial way to catering for an unspecified minority of gypsies who remain 'nomadic' and for whom a minimum of transit pitches have to be made available. It appears that there are in fact specific sites designated as "transit" sites and that these are distinguished from the vast majority of other local authority gypsy sites. The material before the Court certainly does not indicate that eviction by summary procedure is used as a means of maintaining a turnover of vacant pitches or of preventing families from becoming long-term occupants.

The Court makes two further significant points with regard to nomadism, first at paragraph 93:

...The complexity of the situation has, if anything, been enhanced by the apparent shift in habit in the gypsy population which remains nomadic in spirit if not in actual or constant practice. The

authorities are being required to give special consideration to a sector of the population which is no longer easy to define in terms of the nomadism which is the *raison d'être* of that special treatment.

This is an explicit acknowledgement of the lack of nomadism for many ethnic Gypsies and Travellers, and in particular those living on local authority sites who were the subject of the 2002 report. The Court's view was that nomadism was not a justification for a lack of security of tenure on local authority sites. Whilst security of tenure cannot directly be taken to be 'access to accommodation', it is still very much part of the quality of accommodation offered by local authorities to Gypsies and Travellers. The contrast between the planning judgments in the recent years outlined above and this is notable. Whilst the planning judgments sought nomadism as a marker of statutory authenticity, the ECtHR took into account the evidence which suggested that nomadism no longer paid such a key role in the lives of Gypsies and Travellers. In this way, nomadic authenticity in the context of security of tenure was weakened, whilst it remained the cornerstone of another area of law. This is a good example of the fluid nature of discourses of authenticity. Nomadic authenticity is discussed in further detail in section 9.5.6.

The final point that is made in *Connors v UK* is an explanation as to why nomadism is no longer a central feature of many Gypsies and Irish Traveller's existence. At paragraph 94 the Court notes the paradoxical nature of the law as it relates to Gypsies and Travellers:

...It would rather appear that the situation in England as it has developed, for which the authorities must take some responsibility, places considerable obstacles in the way of gypsies pursuing an actively nomadic lifestyle while at the same time excluding from procedural protection those who decide to take up a more settled lifestyle.

This point is highly significant to the understanding of the state of the law as it relates to Gypsies and Travellers, which statutory definitions and the related discourses of authenticity form a part of. It highlights the paradoxical situation of a planning system



which requires Gypsies and Travellers to be nomadic to be statutorily authentic and consequently gain access to accommodation, whilst curtailing the ability to be nomadic.

#### **8.1.4 'Cultural' identity is uncoupled from aversion to bricks and mortar (Codona v Mid-Bedfordshire District Council<sup>53</sup>)**

Codona was concerned with a judicial review if an offer of temporary bricks and mortar accommodation in the form of bed and breakfast was suitable for a traditional Gypsy with a cultural aversion to bricks and mortar and her extended family. Ultimately, the appeal was unsuccessful, but there were a number of significant points on the suitability of accommodation offered to Gypsies and Travellers when making homelessness applications, and of interest to this thesis, cultural aversion to bricks and mortar. The significant points are in paragraph 16 of Auld LJ's judgment:

16. I should interpolate at this point that the weight to be given by a local housing authority when deciding what property to offer a person with such an aversion should, it seems to me, turn on the degree of its intensity and of its potential effect on that person if not heeded, rather than any claimed "cultural" basis for it. Here, although there was evidence that Mrs Codona would find it "unbearable" and claustrophobic to live in a house, there was no evidence that it would cause her or her son or any of her extended family psychiatric harm, as distinct from an assertion from a counselling psychologist that housing the Codona family in "bricks and mortar" accommodation "would undoubtedly result in psychological harm".

The first point concerns the uncoupling of 'cultural' factors from aversion to bricks and mortar. It will be recalled that in the Clarke judgment (see section 7.6.2), the second of the relevant considerations outlined by Burton J in favour of a Gypsy or Traveller's refusal of an offer of conventional bricks and mortar because of aversion, it was "whether they were Romany [sic] or subscribed to a gypsy culture". This consideration was later endorsed by Newman J in Price, with reference to Chapman (see section 7.6.1). Auld LJ took a different approach, and effectively removed the notion of 'culture' from the

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<sup>53</sup> [2004] EWCA Civ 925

consideration of aversion to bricks and mortar. David Watkinson, barrister for Mrs Codona takes the following view of this:

*“I think that’s a good thing, because one of the difficulties in arguing cultural aversion is what is the culture that you’re actually referring to, whereas what you are really talking about is people who can’t live in bricks and mortar without suffering mental harm. It is that which makes bricks and mortar accommodation offered to them unsuitable. Certainly, if you keep it to aversion, it is easier to apply than if you were adding cultural onto it as well. I think the Court of Appeal in Codona probably did a service removing cultural from aversion to bricks and mortar”*  
*(Interview 2011).*

There are parallels that can be drawn with the uncoupling of the notion of ethnicity from the word ‘Gypsy’ in *Mills v Cooper* (see section 5.4.1), in so far as both cases see the disconnection of an ethnic / cultural consideration from the law. However, in *Mills v Cooper*, the reason for this was the lack of the phrase ‘other people travelling’ in the Highways Act 1959 which arguably offered no other option to the Court of Appeal save for interpreting the provision as only applicable to members of an ethnic minority. Furthermore, it is interesting to note that Auld LJ also gave the leading judgment in *Wrexham* (see section 7.8.2) where he held that a severely ill Irish Traveller no longer had ‘gypsy status’, which was an implicit rejection of that individual’s cultural heritage as having any impact on their ability to access accommodation. The wording of Auld LJ’s comments on cultural aversion to bricks and mortar would suggest that he took a similar approach in this case, the comment with regard to a “claimed “cultural” basis” for aversion to bricks and mortar is evidence of this. Again the significance of whom is making the ascription of authenticity is of relevance here, as the different approaches of Burton J in *Clarke* (who attached importance to cultural considerations) whereas Auld LJ’s approach was one which found psychiatric considerations to be of greater significance than the cultural heritage of ethnic Gypsies and Travellers. Whilst the logic of this approach is acknowledged in the comments of David Watkinson above, it is one which

has had differing outcomes for Gypsies and Travellers and this is evidenced by the *Thompson v Mendip* and *Sheridan v Basildon* (see sections 8.7.2 and 8.9.1 below).

Auld LJ goes on to make a distinction between “psychological harm” (which there was evidence for), and “psychiatric harm” (which there was no evidence for). The difference between the two phrases can be understood by reference to dictionary definitions:

Psychology *n., pl. -gies*. Study of human and animal behaviour; *Informal* person’s mental make-up.

Psychiatry *n.* Branch of medicine concerned with mental disorders. (Krebs, 1981).

It would appear from this simple comparison that psychiatry is in fact a more focused form of psychology. As solicitor Chris Johnson commented (personal correspondence, 2012), “psychiatric and psychological harm would seem to be two sides of the same coin”. Semantics aside, what this has led to is a requirement for psychiatric harm to be demonstrated in homelessness cases, in the form of a report from a Psychiatrist. Chris Johnson notes the following on this:

*“Understandably, especially amongst ethnic Gypsies and Travellers, all this psychiatric evidence causes quite a bit of annoyance actually. And it’s very difficult to explain “you’re just an ordinary person. We’re going to get a psychiatrist to do a report on you.” That’s not how you explain it, by the way. You say “Now, this is going to sound really strange, but because aversion is a matter of the mind, and because of how the courts have interpreted this, we need - even though you’re perfectly sane, there’s nothing wrong with you – we need to get a psychiatrist to talk to you.” And to be fair, as long as you explain it properly, clients appreciate what you’re saying. They don’t think you’re saying they’re mentally ill. But it is a bit odd” (Interview 2012).*

The implications of making a connection between an aversion to bricks and mortar and psychiatry in the context of discourses of authenticity is that it requires the (ethnic) Gypsy or Traveller concerned to have a severe mental health issues in order to be given access to culturally appropriate accommodation. This is a point explored again by the Court of Appeal in *Sheridan v Basildon* (see section 8.9.1). This effectively means that statutory authenticity with regard to homelessness applications for Gypsies and Travellers is directly connected to the mental health of the individual concerned.

#### **8.1.5 Select committee report highlights different positions on the definition before the publication of Circular 01/06 (The House of Commons ODPM: Housing, Planning, Local Government and the Regions Committee Gypsy and Traveller Sites Thirteenth Report of Session 2003–04)**

The House of Commons ODPM: Housing, Planning, Local Government and the Regions Committee Gypsy and Traveller Sites Thirteenth Report of Session 2003–04 was the report of the Select Committee which oversaw the work of the Office of the Deputy Prime Minister (ODPM), who in the main were responsible for Gypsy and Traveller policy. The committee took evidence from a wide range of witnesses on a comprehensive range of law and policy with regard to Gypsies and Travellers. The relevant section of the report with regard to discourses of authenticity is the section which focuses on statutory definitions. The section is useful as it outlines the perspectives of a number of different people / groups, and provides an indication of government thinking on the matter at the time.

At paragraph 57 the views of Sarah Spencer, Deputy Chair of the Commission for Racial Equality (CRE) are cited. It will be recalled that the CRE were responsible for taking the *Mandla*, *Dutton*, and *O’Leary* cases with regard to the classification of Sikhs, Romani Gypsies and Irish Travellers as racial groups by reference to ethnic origins (see sections 6.3.1, 6.7.2, and 7.5.1):

“What we would like to suggest is that the law should refer to “Gypsies and Travellers” and define Travellers as “persons that are members of ethnic groups for whom living in caravans is an integral part of their traditional way of life, such as Irish Travellers [and presumably Romany [sic]

Gypsies], and persons of nomadic habit of life whatever their race or origin.” The effect of that would be to encompass those whom the courts have defined as Gypsies and Travellers under the Race Relations Act but would also encompass those who are of a nomadic way of life but whom the courts have not yet defined as having the protection of the Act, for instance, Scottish Travellers, for whom we are at the moment considering taking a case to clarify that they have that ethnic status but do not yet have it.”

The focus of the CRE on issues of racial discrimination is evident here. What the comment appears to miss, is that all of those with a nomadic way of life, regardless of whether they are also an ethnic minority were (and are still) covered by the planning definition. As has been shown above, it is ethnic Gypsies and Travellers who have ceased travelling for whom the definition had proved (and still does prove) to be problematic. However, the CRE definition in its wording is similar to that used for the purposes of section 225 of the Housing Act 2004 (see section 8.4.1). Further to this, the report from the Centre for Urban and Regional Studies at the University of Birmingham regarding the Provision and Condition of Local Authority Gypsy / Traveller Sites in England (as mentioned in the Smith and Connors cases, see sections 7.7.4 and 8.1.3), was cited at paragraph 58 of the report:

“While we are all aware of considerable resistance from traditional Gypsy/Traveller groups to the inclusion of new Travellers within a revised definition, we believe that national policy must explicitly recognise their existence alongside the traditional groups. This does not mean that different cultural needs should be ignored or that all ‘Travellers’ should always be lumped together indiscriminately.”

Niner highlights opposition to New Travellers from some traditional Gypsy groups, evidence of which is discussed with regard to the Massey case (see section 8.5.2). What is interesting to note here is that Niner recommends that there should be explicit references to New Travellers in national policy, but qualifies this by stating that these should be cultural distinctions between groups.

The views of OPPM officials are cited at paragraph 59 – 60 of the report:

59. Officials from ODPM...suggest that:

“There is a difference between having a definition that leads specifically to a site’s outcome so far as the planning legislation is concerned and the sort of definition that you might want for a housing needs survey to accommodate the wider needs of Gypsies and Travellers. The planning definition would necessarily be related to the land use, whereas a housing needs assessment might be related to the wider needs of Gypsies and Travellers, considering those who are already living in bricks and mortar, for example.” [Dawn Eastmead, Head of Housing Management, Office of the Deputy Prime Minister]

This quote needs to be read in the context of the enactment of the Housing Act in 2004 which occurred in the month after the publication of the present report. The relevant provision in section 225 of the Act with regard to the assessment of the accommodation needs of Gypsies and Travellers is considered below (section 8.1.6). The provision required a definition, and this was consulted on in 2006 and then published by regulations in 2007 (see sections 8.1.7 and 8.4.1). The point is that ODPM officials would have been alive at the time to the need to define Gypsies and Travellers for the purposes of accommodation assessments. The reference to a survey to “accommodate the wider needs of Gypsies and Travellers” is an indication of the shape of the housing definition published in 2007. What is somewhat unclear from this comment is what purpose there might be in assessing the needs of those who would also be unable to be accommodated under the planning definition. The comments then went onto consider the changing circumstances of the Gypsy and Traveller communities:

As part of the review of Circular 1/94, ODPM are considering the issue of definitions John Stambollouian, Head of Planning Directorate Division told us:

“We do recognise the greater propensity for Gypsies to want to stay in one place in order to access services and maybe travelling for part of the year and the fact that there are fewer reasonable opportunities for work. We realise that the definition does need revisiting and we are proposing to do that. In terms of planning what we would want to secure is that link to land use.”

The comments of Mr Stambollouian are indicative of the shape of the planning definition to come. ODPM officials would have been alive to the impact of the Wrexham case with regard to the loss of status of those too ill to continue travelling, and this was addressed in the definition in paragraph 15 of Circular 01/06 (see section 8.3.1). However, the official makes a clear link between ‘gypsy status’ and land use, which does not include an ethnic dimension. The reasoning for this is outlined in paragraph 60 of the report:

60. ODPM Officials recognised that multiple definitions applied for different purposes could lead to a situation where some people were Gypsies/Travellers under one definition but not another. They were not confident that the definition proposed by the Commission for Racial Equality would be workable:

“[...] we are considering the definition but obviously, as has already been stated, for planning purposes there needs to be a very clear link to land use because Gypsies and Travellers are having their needs met outside of the ordinary system of gaining planning consent. [...] “The CRE definition also includes anybody who might want to travel so it is a very, very wide definition. If you were to link that definition to the provision of a duty it would substantially increase the financial exposure or the duty upon local authorities to provide. The CRE definition would also allow for Gypsies and Travellers who may have been settled for generations in bricks and mortar to seek to have their needs met.” [Dawn Eastmead, Head of Housing Management, Office of the Deputy Prime Minister]

There are two points to be made on this quote, the first is on the perceived width of application of the CRE definition, the second is with regard to the rationale for the exclusion of ethnic considerations from the planning definition.

First, the official suggests that the CRE definition includes “anybody who might want to travel”, yet a reading of the suggested definition above would suggest that it is only inclusive of ethnic Gypsies and Travellers and other persons of nomadic habit of life. However, there is more logic to the suggestion that the CRE definition would include those Gypsies and Travellers currently living in housing.

Second, there is a rationale as to the lack of inclusion of ethnic Gypsies and Travellers in the planning definition. This rationale is twofold. First, the special exemptions from planning control that those with 'gypsy status' receive is noted. The implication is that allowing an exemption to the use of land to persons because of their ethnic status would be unacceptable in planning terms. Such a rationale can be seen in the Smith and Connors cases (see sections 7.7.4 and 8.1.3) where the rationale given for lack of security of tenure on local authority Gypsy and Traveller sites was that of nomadism. In this instance, the logic for 'gypsy status' is nomadism. Second, the connection of a definition to a duty to provide sites is made. This is interesting as it would suggest that the government was considering the reintroduction of the duty of local authorities to provide sites which was repealed by section 80 of the Criminal Justice and Public Order Act 1994 (see section 7.1.2). However, the duty was not re-introduced in subsequent years. It is interesting to note the comparison with *Ex Parte Gibb* (see section 7.1.1), where part of the reasoning for the exclusion of New Travellers from the definition was so that local authorities were not bound to make provision for them under section 6 of the Caravan Sites Act 1968. There are two markers of authenticity evident here, the first is the lack of acceptability in planning terms of a use of land owing to a person's cultural heritage as opposed to practical considerations. The second is resource based: authenticity cannot be found due to the potential financial implications for local authorities in such an ascription.

Perhaps the most unique of the perspectives offered on the definition is that of Charles Smith, Chair of the Gypsy Council for Education, Culture, Welfare and Civil Rights cited at paragraph 62 of the report:

"The Gypsy and Traveller people cannot buy their freedom or rights by denying others their freedom. It is therefore important that others who wish to live in caravans, whether they are Gypsy families or not should be able to do so. Caravan sites are cheaper to build than houses, they are less damaging to the environment and they respond better to the fast movement of today. It is becoming usual to move job and house every 3 to 5 years. The population is becoming more mobile and the use of land is becoming of concern. Increased risk of flooding is exacerbated by building of roads and houses, the concrete and impermeable surfaces prevent rain from



soaking into the ground; more goes down drains and into the rivers. We do not want ghettos and reservations; we want to be able to live in harmony with other people. Our old people do not want to have to move into a house when they are ailing; they need their family even more so at this time of their lives. Where there is housing there should be the possibility of a caravan site. If it is for ANYONE then it will encourage good relations and improve standards for everyone. [...] The Gypsy Council believes that the right to a reasonable choice of any type of accommodation, and the right to stable and secure family residence within cultural tradition are human rights that all people, regardless of ethnicity, should enjoy.”

Mr Smith’s vision is one where the authenticity of Gypsies and Travellers would be irrelevant in the context of access to suitable accommodation. It is perhaps the most radical perspective on the definition and one that merits further discussion with reference to the views of others. This is to be found at section 9.6 of the next chapter.

Finally, the recommendation of the Select Committee on the matter of the definition is set out at paragraph 63 of the report:

63. Many Gypsies and Travellers now live increasingly sedentary lifestyles. The current definitions imply that those within the community who do not adopt a nomadic lifestyle are not actually Gypsies and Travellers. Any new definition should comprise both the alternatives of ethnic origin or similar, and nomadic lifestyle. However, we advise the Government to exercise caution in considering applying different definitions for different policies. There is already a lot of confusion surrounding definitions of Gypsies and Travellers and we would not want to see a situation where multiple definitions add to the confusion. In addition we are concerned that the issue of defining Gypsies and Travellers may be over-emphasised. The Equality of Opportunity Committee at the National Assembly for Wales recently argued that Gypsies and Travellers should have the right to self-identify. We agree with this approach, but believe that self-identification must be supported by evidence. This may enable all parties to move forward and address the problems associated with accommodation provision.

This is an explicit acceptance of the sedentary lifestyles of some ethnic Gypsies and Travellers and in turn a statement of support for a nomadic and ethnic definition for the

purposes of planning and housing assessments. Furthermore, the statement acknowledges the way that the land use definition implies that some members of the (ethnic) communities are not in fact Gypsies and Travellers. Furthermore, the advice given to the government with regard not to have multiple definitions for different purposes was not heeded, with an amended nomadic definition in Circular 01/06 for the purposes of planning and a (broadly speaking) dual ethnic and nomadic definition for the section 225 Housing Act 2004 duty to assess the accommodation needs of Gypsies and Travellers (see sections 8.3.1 and 8.4.1).

#### **8.1.6 The introduction of a duty to assess the accommodation needs of Gypsies and Travellers (Housing Act 2004)**

Section 225 of the Housing Act 2004 as mentioned previously included a duty for local housing authorities to carry out an assessment of the accommodation needs of Gypsies and Travellers residing in or resorting to their area, and then take the strategy into account when exercising their functions. At subsection (3) it is stated that “Functions” includes functions exercisable otherwise than as a local housing authority. This could be taken to include the purposes of planning. The duty to assess need was a key part of the framework of planning Circular 01/06 (see section 8.3.1). Whilst the duty to assess accommodation need is an important consideration in Gypsy and Traveller policy, for the purposes of this research it is the definition which is used to guide this that is of interest. As mentioned previously, this definition was consulted upon in 2006, and then published by regulations in 2007 (see sections 8.3.2 and 8.4.1).

#### **8.1.7 A new definition for the purposes of planning is put out to consultation (Planning for Gypsy and Traveller Sites consultation)**

At the end of 2004, following the publication of the select committee report, a consultation paper regarding “Planning for Gypsy and Traveller Sites” was published. At paragraph 12 a new definition was proposed:

12 For the purposes of this Circular "Gypsies and Travellers" means a person or persons who have a traditional cultural preference for living in caravans and who either pursue a nomadic habit of

life or have pursued such a habit but have ceased travelling, whether permanently or temporarily, because of the education needs of their dependent children, or ill-health, old age, or caring responsibilities (whether of themselves, their dependants living with them, or the widows and widowers of such dependants), but does not include members of an organised group of travelling show people or circus people, travelling together as such

Although there is no explanatory text as to the meaning of “traditional cultural preference of living in caravans”, it is possible to contend that the authors of the definition intended this to mean ethnic Gypsies and Travellers. The use of an explicitly ethnic definition would have led to the same issues of application that the Court of Appeal found in *Mills v Cooper*. However, arguably the term “traditional cultural preference of living in caravans” would present its own difficulties of application. Furthermore, the definition does not extend to ethnic Gypsies and Travellers who have not had a nomadic existence, such as those in housing. It narrows the width to only include the nomadic or formally nomadic ethnic Gypsy or Traveller. As the consultation responses published in 2006 (see section 8.3.1) noted, this approach was welcomed by some, but not by others.

## 8.2 2005

### 8.2.1 The Court of Appeal considers if caravan dwelling is an essential requisite of statutory authenticity (*The Queen on the Application of Roger Michael Green on behalf of the Friends of Fordwich and District v The First Secretary of State, Canterbury City Council, Mr Shane Jones, Mrs Bridget Jones*<sup>54</sup>, *Mrs Bridget Jones v Roger Michael Green; on behalf of the friends of Fordwich and District*<sup>55</sup>)

The Friends of Fordwich case in the High Court and then the Court of Appeal were concerned with the perceived requirement of having to live in a caravan to qualify for ‘gypsy status’. The challenge was brought by a local residents’ group against the decision of a planning Inspector to grant planning permission to a Romani Gypsy family in the

<sup>54</sup> [2005] EWHC 691 (Admin)

<sup>55</sup> [2005] EWCA Civ 1727

Canterbury area. A number of different grounds were brought, but the majority of these were dismissed by Gibbs J in the High Court.

Significantly, arguments were made regarding the cessation of nomadic habit of life for childcare and health reasons on the basis that the judgment of Auld LJ in Wrexham debarred those who were found to have permanently ceased travelling from 'gypsy status'. However, these were rejected as they were also in Cooper (see section 8.1.1) on the basis of the qualifications given to the Auld LJ's judgment by Clarke LJ (see section 7.8.2) which emphasised that nomadism could be held in abeyance for a long time, so long as it was not permanently abandoned (see Bungay, section 6.9.1).

The point regarding 'gypsy status' and the use of caravans as accommodation was made with reference to questions regarding the status of the accommodation units stationed upon the site. These concerns are usefully summarised by the reference made to an email sent from the Council's licensing officer<sup>56</sup> cited at paragraph 50 of the High Court judgment:

"Having now been out to the above [the site in question], they have 3 homes there – one consists of two static caravans linked by a timber structure, the second & third both have timber extensions to them, & they have a fourth static used for storage. Are all of these included in the pp [planning permission]? The timber extensions/link structure takes the homes out of the definition of a caravan under the Caravans Sites & Control of Devt Act [1960]. They said you know all about them all, but I am a bit concerned about licensing caravans that aren't strictly speaking caravans anymore!"

The High Court and Court of Appeal both found that the Inspector had wrongly granted planning permission for structures which were not caravans as set out in the relevant statute. The further point made on this by the local resident group claimant / respondent<sup>57</sup> is cited at paragraph 53 of the High Court judgment:

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<sup>56</sup> All caravan sites including those occupied by Gypsies and Travellers require a site licence under sections 1-12 of the Caravan Sites and Control of Development Act 1960

<sup>57</sup> The Friends of Fordwich were the claimant in the High Court, and were responding to the appeal by Mrs. Jones in the Court of Appeal

"This is the first of three proposed residential units, created by bolting together two 'mobile' units. To qualify as a caravan (under the Caravan Sites Act 1968) it needs to be capable of being transported on public highways in one piece, without separation into its component parts. If the above structure is not a mobile home according to the 1968 Act, then the application fails the first test of Gypsy status employed by the Officer."

At paragraph 58 of the High Court judgment, Gibbs J agrees with this point stating that it "had at least a significant potential impact on the question of gypsy status". However, in the Court of Appeal, Laws LJ at paragraph 27 of the judgment held that:

So far as this was advanced as a proposition of law it was, in my judgment, clearly wrong. It is no part of the statutory definition of 'gypsy', which I have set out, that in order to qualify as such a person has to live in a caravan, whether one that is within the statutory definition of caravan or otherwise. The requirement for gypsy status in terms of the Act of 1968 is that the person must have a "nomadic habit of life".

This is then qualified by reference to the Clarke case in the High Court regarding cultural aversion to bricks and mortar (see section 7.6.2). In this case, Burton J held that inter alia living in a caravan was one of the considerations to be taken into account when assessing 'gypsy status'. Laws LJ held at paragraph 28 that this was:

"...obviously right. Plainly it is capable of being a relevant factor. But Burton J was not holding that residence in a caravan was a *sine qua non* [essential condition] of gypsy status. If he had, he would have been wrong to do so."

There are two points to make on this case with regard to discourses of authenticity. The first is that 'gypsy status' like in Bungay (see section 6.9.1) was questioned on this occasion by an aggrieved third party. Such a third party was well resourced as the conversation between the parties regarding costs recorded at the end of the transcript of

the High Court judgment demonstrates<sup>58</sup>. Counsel for the claimant third party put in a claim for £13,000 for the costs accumulated up until this point (this does not include the cost of the Court of Appeal). In effect this suggests that there can be a monetary aspect to the questioning of the authenticity of Gypsies and Travellers. This is discussed in further detail in section 9.5.3.

The second point is with regard to the (albeit failed) attempt to create an essential connection between caravan dwelling and ‘gypsy status’. As has been shown above, such an approach was rejected by the Court of Appeal. However, what is notable is that an attempt was made to insert another essential element into the assessment of statutory authenticity, alongside most significantly the economic purpose arrived at by the Court of Appeal in *Ex Parte Gibb* (see section 7.1.1) and subsequently the ability to lose status because of ill health found by Auld LJ in *Wrexham* (see section 7.8.2). Again Liégeois’s (1994) contention that the “*Gypsy is not defined as he is, but rather as he must be to meet socio-political requirements*” (p.193) is of relevance. It could be implied that the third party’s reasoning for the questioning the status of the Jones’ family was primarily based on an objection to the site, this contention is evidenced by the range of different grounds for judicial review cited at paragraph 22 of the High Court judgment which made reference to considerations other than ‘gypsy status’. It follows that in this instance the socio-political requirement of the Friends of Fordwich group was that ‘gypsy status’ was to be found lacking in order to fulfil a wider purpose of removal of the site.

## **8.3 2006**

### **8.3.1 The introduction of a new planning definition (Circular 01/06 Planning for Gypsy and Traveller Sites)**

In February 2006 the ODPM published Circular 01/06. This was the end result of the consultation noted above (see section 8.1.7). The summary of consultation responses received was published in June later that year. There were significant developments in Gypsy and Traveller planning as a result, which can be characterised as a more permissive approach with an emphasis on the assessment of need at a regional level, and the

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<sup>58</sup> In the majority of court cases the losing party is generally expected to pay the other party’s costs

subsequent allocation of suitable land for sites at a local level. Up until the policy was cancelled in 2012, the evidence shows that it was starting to be effective in the provision of sites (Richardson, 2011). Of relevance to this research is the revised definition in paragraph 15 of the Circular:

15. For the purposes of this Circular “gypsies and travellers” means  
Persons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family’s or dependants’ educational or health needs or old age have ceased to travel temporarily or permanently, but excluding members of an organised group of travelling show people or circus people travelling together as such. (Office of the Deputy Prime Minister, 2006)

This definition retains the phrase “nomadic habit of life regardless of race or origin” unlike the one put out to consultation, where the phrase “traditional cultural preference” was proposed. In effect this allows New Travellers to continue to remain within the definition, although the summary of consultation responses notes at paragraph 10 that there was uncertainty as whether New Travellers would fall within the proposed consultation definition. Respondents were divided on whether the definition should include New Travellers. Further to this, the rationale for the definition in paragraph 15 of the Circular is set out in the same paragraph:

The definition has been revised in the light of the consultation, and covers applicants for planning permission who can prove that they are nomadic, or have in the past been nomadic, and have ceased travelling for specified reasons, regardless of their ethnic origin. The previous planning definition contained in Circular 1/94 did not reflect the fact that many Gypsies and Travellers have stopped travelling permanently or temporarily because of health reasons or caring responsibilities but still maintain their traditional caravan dwelling lifestyle. (DCLG, 2006)

The definition provided in the Circular had the effect of bringing in to the scope of application those who in the Wrexham case Auld LJ had held not to be, namely those who

had permanently ceased travelling due to ill health (see section 7.8.2). However, the definition was still found to be problematic for ethnic Gypsies and Travellers who did not fall within one of the exceptions but did not have a nomadic habit of life (see the cases of McCann, Wingrove and Medhurst, at sections 8.6.1 and 8.8.1 respectively). What the definition in paragraph 15 of Circular 01/06 demonstrates is the circular nature of the legal system, and consequently authenticity. This point is one which is discussed in further detail in Chapter Nine.

**8.3.2 A definition to include “all other persons with a cultural tradition of nomadism and / or caravan dwelling is consulted upon (Consultation on the Definition of the term ‘gypsies and travellers’ for the purpose of the Housing Act 2004)**

In the same month as the publication of Circular 01/06, the ODPM published a consultation paper on the “Definition of the term ‘gypsies and travellers’ for the purpose of the Housing Act 2004”. In essence this is the definition used to assess the accommodation needs of Gypsies and Travellers under section 225 of the Act (see section 8.1.6). The proposed definition is set out at paragraph 16:

Persons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family’s or dependants’ educational or health needs or old age have ceased to travel temporarily or permanently, and all other persons with a cultural tradition of nomadism and/or caravan dwelling.

As noted at paragraph 15 of the document, the proposed definition “builds on and extends the planning definition.” On the face of it, this widening of the scope of the definition would include those currently excluded. However, the purpose of the definition needs to be kept in focus when considering this definition.

The rationale for the need for separate planning and housing definitions is set out at paragraphs 12-14 of the document which contrasts the differing purposes of the definitions:



12. The purpose of the planning system is to regulate the use and development of land in the public interest. It is, therefore, appropriate that the planning definition should be limited to those who can demonstrate that they have specific land use requirements arising from their nomadic way of life. The planning definition is relevant to the application of planning policies and the determination of applications for planning permission. In this context, having 'gypsy status', where it has implications for land use, can be a material consideration in the determination of planning applications.

13. The proposed housing definition is for a very different purpose. It is intended to be a pragmatic and much wider definition which will enable local authorities to understand the possible future accommodation needs of this group and plan strategically to meet those needs. It recognises that there will be movement between sites and bricks and mortar housing, and that an understanding of the full gypsy and traveller community, not just those who are currently travelling, is necessary in order for local authorities to meet their responsibilities and put proper strategic plans in place.

14. Falling within the housing definition does not confer a direct advantage on any individual. It does not in itself imply that that person 'should' live on a site, or has 'gypsy status' for planning purposes. It means that the individual belongs to a group whose accommodation needs must be assessed by the local authority. Once a need has been identified the local authority will then develop a strategy to meet it. However, there are a variety of ways in which gypsy and traveller accommodation needs may be met and the definition does not tie the local authority to specific solutions.

The extract follows on from the comments cited from ODPM officials in the Select Committee report in 2004 (see section 8.1.5). Again, the 'essential link' between 'gypsy status' and land use is noted. Whilst there are objections by Gypsy and Traveller campaigners and lawyers to the lack of an ethnic dimension to the planning definition, its rationale on a superficial basis is one that could be said to be coherent. In contrast, the rationale for the Housing definition could be taken to be somewhat lacking in coherence. The purpose of the definition set out in paragraph 13 could be summarised as allowing local authorities to take a 'strategic overview' of the accommodation needs of Gypsies

and Travellers in their area. However, in paragraph 14, there is said to be no “direct advantage” to the fulfilment of the definition, save for having one’s accommodation needs assessed. This is said to then allow the local authority to develop a strategy to meet this need and to not be tied to specific accommodation solutions. However, the logic of this is questioned by barrister Marc Willers:

*“...it honestly doesn’t really make sense to me that when you’re assessing the needs of Gypsies and Travellers residing in or resorting to your area under section 225 of the Housing Act, you’re meant to be creating a positive strategy to meet those needs but then if someone comes along who fits into the Housing Act definition, that doesn’t necessarily entitle them to Gypsy status.” (Interview, 2011).*

In this instance, the proposal is for the widening of statutory authenticity, but in a way that has no real impact on access to accommodation for those ethnic Gypsies and Travellers who cannot fulfil the planning definition but wish to live on sites.

There is one additional point to make on this consultation, and that is the acceptance of New Travellers at paragraph 19:

19. In some parts of the country ‘new age travellers’ form a substantial minority of the travelling population. Although these people have adopted a nomadic lifestyle relatively recently their needs should be assessed alongside those of the more traditional gypsy and traveller groups. To do otherwise would be to neglect the needs of part of the community, leading to practical problems and potential legal challenge.

This acceptance by the government of the statutory authenticity of New Travellers is significant, although the justification is said to be because of practical problems and legal challenge. This acceptance is discussed in further detail when the Massey case is considered below (see section 8.5.2).

The definition published by regulations in 2007 was not substantially different to that contained in the consultation document. Opinion amongst the Gypsy and Traveller

law and campaigning community with regard to the content of Housing definition differs, and this is discussed in section 8.4.1 immediately below.

## **8.4 2007**

### **8.4.1 The housing definition and responses to the consultation are published (The Housing (Assessment of Accommodation Needs) (Meaning of Gypsies and Travellers) (England) Regulations 2006)**

The Housing regulations definition came into force on the 2<sup>nd</sup> of January 2007. Almost identical regulations came into force in Wales on the 14<sup>th</sup> December 2007. The definition in both documents is as follows:

For the purposes of section 225 of the Housing Act 2004 (duties of local housing authorities: accommodation needs of gypsies and travellers) “gypsies and travellers” means—

(a) persons with a cultural tradition of nomadism or of living in a caravan; and

(b) all other persons of a nomadic habit of life, whatever their race or origin, including—

(i) such persons who, on grounds only of their own or their family’s or dependant’s educational or health needs or old age, have ceased to travel temporarily or permanently; and

(ii) members of an organised group of travelling showpeople or circus people (whether or not travelling together as such).

The published definition is almost identical to that consulted upon, but now had an explicit reference to Travelling Showpeople and Circus People. Whilst the purpose and rationale of the definition has been discussed above, as mentioned previously opinion as to the wording and consequently the width of application was divided. The summary of consultation responses at paragraph 12 notes that “Four respondents (one of which represented around 13 Gypsy and Traveller groups) expressed concern over the breadth of the proposed definition and argued that a definition should be confined solely to ethnic Gypsies and Travellers rather than encompassing other types of traveller”. There

are similarities between this point and that made in the campaign with regard to the definition discussed in section 8.9.3. It is also important to note that this point is equally applicable to the planning definition, and indeed the consultation responses summary notes at paragraph 12 that “three of the four respondents also supported the adoption of an ethnic definition for planning purposes rather than the definition contained in Circular 01/06 Planning for Gypsy and Traveller Caravan Sites)”. There are two points to make on the suggestion of a solely ethnic definition for either planning or housing purposes. The first is that a solely ethnic definition would have to make reference to specific ethnic groups, namely Romani Gypsies and Irish Travellers. However, solicitor Chris Johnson notes some issues with this:

*“You could have a definition for Romani Gypsies, Irish Travellers, Scottish Travellers, Welsh Travellers etc. But then you’d have a bit of a problem, because then it’d be like, right, how do we decide who is one? Although the Housing Act definition is not the perfect definition, it’s not really an ethnic definition in a sense, it’s about a tradition of living in caravans. So it fits nomadic or ethnic Gypsies and Travellers. It works and it’s a nice simple way of working it. Because if you start saying only Gypsies or Irish Travellers etc, then you’re back into “okay, what is a Romani Gypsy? Who is a Romani Gypsy?”. In fact, all due credit to whoever wrote that, because it’s a brilliant short hand for including everyone without entering into “have you got a specific language? What history have you got? Your parents? Your grandparents? What are your customs? Do you have specific traditions or culture?” Which happened in CRE v Dutton, O’Leary v Allied Domecq, and the McLennan case in Scotland [which recognised Scottish Travellers as an ethnic minority], for the purposes of the Race Relations Act, an enormous analysis of the whole history and culture of the Gypsy and Traveller people. But we don’t really need to do that.”*  
*(Interview 2012)*

Mr Johnson’s point recognises the difficulty of application that a specific ethnic definition would have.

The second point concerns the exclusion of other travellers from the definition. The Government's response to the point of a solely ethnic definition at paragraph 15 of the consultation responses summary notes that: "Some of those currently living in caravans on unauthorised sites are not ethnic Gypsies and Travellers but nevertheless need somewhere authorised to live". A solely ethnic definition (for the purposes of planning) would have the effect of removing any claim to statutory authenticity that such people have, and in turn their ability to access suitable accommodation. This is one practical implication of a narrowing of the width of the definition. Another practical implication is that as Chris Johnson notes, the situation 'on the ground' is not readily defined with ease:

*"I think the arguments about just ethnic ignores the complexity on the ground of the whole thing. I've got clients who you would describe as New Travellers. They travel with New Travellers, but they're ethnic, because one or more of their parents were Gypsies or Irish Travellers. They were brought up in housing, because of course, most of the Gypsy and Irish Traveller population live in housing because of what's happened over the years. So I've got these people that go on the road, even though their parents are no longer on the road, they were brought up in a house, and they joined the New Travellers. So they are part of the New Traveller community, but they're ethnic. And then, I've got a client at the moment, a second generation New Traveller who was born on the road, who tried living in a house for about 6 months, because of difficulties when she was having a child, but she couldn't cope with it as that was her only experience of bricks and mortar.*

*Where do you draw the line really? Though Irish Travellers go back before the Irish famine in the 1840s, it is an undoubted fact that a lot of people went on the road, and become subsumed in the Traveller community, and that happens all the time. Obviously it takes a long time for this to happen.*

*Our friends who lived down the road from us, the old guy just died, he was a Romani Gypsy, lived in a bender. But his daughter married a gorgio [Romani word for a non-Gypsy]. If you meet Paul, he lives in a barrel top with her. They've kind of moved up in the world. You'd think Paul was a Gypsy, he has got a neckerchief, and he's great with horses, and he built the barrel top himself, so he's become very much part of the community." (Interview 2012).*

These comments are then qualified by an acknowledgment of the importance of ethnicity to traditional Gypsies and Travellers.

There is a further argument made with regard to the Housing definition, and that is that it should be used for the purposes of planning, a view which was (and is) dismissed by the government (see sections 8.1.5 and 8.4.1). The rationale for this in the view of Chris Johnson is as follows:

*"Well I think it's difficult, because of course there's a difference between an extremely good moral argument and the practicalities on the ground. And the simple reason why neither the Labour government nor the Coalition government want to let that in is because of all the Gypsies and Travellers in housing. They would see it as opening the floodgates. All of those could go... "I'm in there now. Me as well. You've got to take care of me." (Interview 2012.)*

Marc Willers also highlights the point on the perceived "opening of the floodgates" but suggests that:

*"The reality of that is I don't think that is going to happen, because I think a lot of Irish Travellers and Romani Gypsies have moved into housing and they have accepted it. But there are some people who are still suffering living in bricks and mortar, having being forced into it because of a lack of sites, and they want to get back onto site. I think the reality is that it's not a great number. I think that it might be half again the number of*

*caravans that we can't already accommodate, but is that really going to break the bank? I don't really think it is" (Interview 2011).*

As has been shown above, the government was not inclined to use the Housing definition for the purposes of planning. However, the consultation responses summary at paragraph 24 indicates that (at that time) this might change by way of amendments to the Caravan Sites and Control of Development Act 1960 definition. This was the definition originally devised for the purposes of the duty of county councils to provide sites in section 6 of the Caravan Sites Act 1968 (see section 5.5.1). When this duty was repealed by the Criminal Justice and Public Order Act 1994 (see section 7.1.2), it was inserted into the 1960 Act. In essence it is “persons of nomadic habit of life regardless of race or origin”:

24. The definition cited in the Caravan Sites and Control of Development Act 1960 (CSCDA) provides a permissive power so that local authorities can provide additional working space and other facilities for anyone on caravan sites who falls under the definition of ‘gipsy’. The definition in the CSCDA does not recognise that many Gypsies and Travellers want to settle for health and education reasons and does not match modern requirements. The Government does not believe it is appropriate to adopt the CSCDA definition for housing purposes. However, if a suitable legislative opportunity occurs, the Government will consider whether to align the CSCDA definition with the housing definition allowing local authorities to provide sites for all those identified as in need.

There are two points to take note of here. The first is it that the government were alive to the case to insert an ethnic dimension into the planning definition, but it could be contended that they did not feel that point in time was right for this to happen. It may have been that a view was taken that this would be a ‘step too far’, by a government that had already made significant positive alterations to Gypsy and Traveller policy. However, this point is merely conjecture. The second point to note is that such an amendment would appear to allow local authorities to provide sites for ethnic Gypsies and Travellers who could not fulfil the planning definition, and not make allowances for self-provision. Again, this is conjecture, as until such a time as the relevant legislation was being

consulted upon, it would not be clear how far such an amendment would go.

Furthermore, it should be noted that this was the response of the Labour Government, and that there is no indication the current Coalition government have an intention to make such an amendment.

## **8.5 2008**

### **8.5.1 The Court of Appeal examines the impact of ethnic authenticity on access to accommodation (R (on the application of Baker and others) v Secretary of State for Communities and Local Government and another<sup>59</sup>)**

The Baker case concerned an application for judicial review by a group of Irish Travellers to quash the decision of a planning Inspector to dismiss three appeals to grant permission for the retention of a number of mobile homes and caravans in the Green Belt in Bromley, a suburb of London. In the High Court nine grounds of challenge were advanced, all of which were rejected. Two of those were raised before the Court of Appeal. In addition a third ground of appeal was made, namely that the Inspector had failed to have due regard to the need to promote equality of opportunity between persons of different racial groups in breach of section 71 (1)(b) of the Race Relations Act 1976. The relevant section states:

"71 (1) Everybody or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, have due regard to the need -

- (a) to eliminate unlawful racial discrimination; and
- (b) to promote equality of opportunity and good race relations between persons of different racial groups.

(2) The Secretary of State may by order impose, on such persons falling within Schedule 1A as he considers appropriate, such duties as he considers appropriate for the purpose of ensuring the better performance by those persons of their duties under sub-section (1).

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<sup>59</sup> [2008] EWCA Civ 141



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Schedule 1A referred to in subsection (1) is a list of public sector bodies and includes the Planning Inspectorate. The duty in the section was known as the Public Sector Racial Equality duty, but since the advent of the Equality Act 2010, is known as the Public Sector Equality duty (see section 8.7.1). It is this element of the appeal that is of specific interest to the research as it is concerned with how much impact the status of Romani Gypsies and Irish Travellers as racial groups by virtue of ethnic origins should have on planning matters (it will be recalled that the *CRE v Dutton and O’Leary* cases in sections 6.7.2 and 7.5.1 found these groups to be as such). This is the first of only two cases in the analytical narrative which directly considers the impact of ethnic authenticity on planning (the other being *Medhurst*, see section 8.8.1), and as noted at paragraph 5 of the judgment this is the first time the Court of Appeal had considered the public sector racial equality duty in a planning context. Given this, the Equality and Human Rights Commission<sup>60</sup> (EHRC) were given permission to intervene<sup>61</sup>. The public sector racial equality duty is explained by Dyson LJ at paragraphs 30 and 31 of the judgment:

**[30]** We had detailed submissions from Mr Allen [Counsel for the EHRC] as to the meaning of s 71(1) and in particular the promotion of equal opportunity limb of s 71(1)(b). I shall summarise his principal submissions briefly, because they were not disputed by Mr Coppel [Counsel for the Secretary of State]. First, the duty is imposed on a large range of public authorities. This demonstrates its importance as a national tool for securing race equality in the broadest sense. Secondly, promotion of equality of opportunity (and indeed good relations) will be assisted by, but is not the same thing as, the elimination of racial discrimination. Mr Drabble [Counsel for the Mr Baker and the others] emphasised that his case on behalf of the Appellants was not based on an allegation of racial discrimination. Thirdly, the promotion of equality of opportunity is concerned with issues of substantive equality and requires a more penetrating consideration than merely asking whether there has been a breach of the principle of non-discrimination. Fourthly, the duty is to have due regard to the need to promote equality of opportunity (and good relations) between the racial group whose case is under consideration and *any* other racial groups. The reference to any other racial groups may be no more than a reference to the general

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<sup>60</sup> This is the predecessor of the Commission for Racial Equality, who had significant involvement in the *Mandla*, *Dutton* and *O’Leary* cases (see sections 6.3.1, 6.7.2 and 7.5.1 respectively).

<sup>61</sup> This is where a third party are given permission to make representations to a Court on areas of specific interest to them

settled community. Fifthly, the equality of opportunity is of opportunity in all areas of life in which the person or persons under consideration are, or may not be, at a disadvantage by reason of membership of a particular racial group. In practice, this is likely to include disadvantage in the fields of education, housing, healthcare and other social needs.

[31] In my judgment, it is important to emphasise that the s 71(1) duty is not a duty to achieve a result, namely to eliminate unlawful racial discrimination or to promote equality of opportunity and good relations between persons of different racial groups. It is a duty to *have due regard to the need* to achieve these goals. The distinction is vital. Thus the Inspector did not have a duty to promote equality of opportunity between the Appellants and persons who were members of different racial groups; her duty was to have due regard to the need to promote such equality of opportunity. She had to take that need into account, and in deciding how much weight to accord to the need, she had to have *due regard* to it. What is *due regard*? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing.

The countervailing factor which the Inspector had to consider in these circumstances was that of the Green Belt. The question for the Court of Appeal noted at paragraph 37 of the judgment was whether the decision maker (in this case the Inspector) had in substance had due regard to the relevant statutory need. Stephen Cottle, the junior barrister for the Irish Travellers made the following comments with regard to whether this had been the case:

*“Well, when I read this inspector’s decision – I thought, it’s like saying well, she knows she’s dealing with a guy who’s Caribbean, and who’s black, so therefore this decision maker must have had the equality duty in mind. It does not follow. And if the equality duty is a statutorily implied relevant consideration that decision makers must address, then I thought that the absence of any stopping place for Irish Travellers within Bromley [there were sites in the area for Romani Gypsies which Irish Travellers*

*were not welcome on], meant there was an inequality of opportunity, which should have been addressed.” (Interview 2012).*

The way in which it was suggested by Mr Cottle and Richard Drabble QC that this inequality should be addressed (at paragraph 44 of the judgment) was “that the discharge of the s71(1) duty required at least that the Inspector grant the Appellants temporary planning permission”. The submission was ultimately unsuccessful for reasons set out below.

The rationale for finding that the Inspector was not in breach of the section 71(1) duty begins at paragraph 35 of the judgment. Mr Drabble QC is cited as having suggested that a decision maker has only performed the section 71 duty if explicit reference is made to it. Dyson LJ did not accept that this was determinative of the duty having being performed, and noted at paragraph 37 that: “Just as the use of a mantra referring to the statutory provision does not of itself show that the duty has been performed, so too a failure to refer expressly to the statute does not of itself show that the duty has *not* been performed” (although at paragraph 38 it is suggested that it is good practice for the decision maker to make reference to the section 71(1) duty where appropriate). The assessment of whether the duty had been performed in substance was to be made in an examination of the decision letter. This examination is set out at paragraphs 39-46. There are two points to make on this examination. The first is that that at paragraph 40 of the judgment, Dyson LJ discusses the Inspector’s findings with regard to ‘gypsy status’:

The Inspector was alive to the plight of gypsies and travellers and the disadvantages under which they labour as compared with the general settled community. The first of the "other considerations" which she addressed in her decision was what she referred to as "gypsy status". It is clear from para 32 that she considered this to be a factor which weighed in the balance in the Appellants' favour. The only reason that there could rationally have been for this view was that gypsies suffer from inequality of opportunity as compared with persons of different racial groups, ie the general community. The Inspector took full account of this and, by treating it as a factor which weighed in the Appellants' favour, she showed that she was having due regard to the need to promote equality of opportunity between them (as persons of gypsy status) and persons of

different racial groups. There is no other explanation of why she identified gypsy status as a factor weighing in favour of the Appellants. It is immaterial whether she was aware of the existence of the s 71(1) duty.

This finding is problematic because as has been shown throughout this analytical narrative, 'gypsy status' is found in persons "regardless of race or origin". 'gypsy status' brings with it the benefit of positive planning policies (then in the form of Circular 01/06) and as such the suggestion by Dyson LJ that there was no other reason why the Inspector had identified 'gypsy status' as a factor weighing in favour of the Appellants is problematic. However, as Mr Cottle notes this is not the central point of the case (Interview 2012).

The second and central point to make about the case is noted by Mr Cottle:

*"And what Dyson LJ said, was that if you're implementing a policy that itself has itself been assessed [in an equalities impact assessment], for the purposes of the Race Equality Act duty then in force, as [Circular] 01/06 expressly was, then because the policy epitomises trying to achieve equality, then you need to do no more than apply the policy.... I think that the main point of it is that if you read paragraph 43, "Thirdly, in paras 26 - 29, the Inspector explained in detail why the five authorised sites in Bromley are not available to the Appellants at the present time. Once again, this is relevant because it shows that she recognised the disadvantages facing the Appellants" and it was in paragraph 42, the Inspector referred to the Circular, and this is the recognition of the inequality of opportunity. **So that was where we lost, because we were saying that the recognition of inequality of opportunity hadn't been factored in, and they're saying no, it had, because they were implementing 01/06.**" [my emphasis] (Interview 2012).*

In the Baker case, the impact of statutory ethnic authenticity on planning is found to be limited. In essence the Race Relations Act 1974 (and subsequently the Equality Act 2010) is currently the only means (in law) by which the ethnic status of Romani Gypsies and Irish

Travellers can be brought into decisions regarding access to accommodation. The Baker case is the most significant consideration of this legislation and its effectiveness. The logic of the judgment is problematic. If the duty imports a requirement to have due regard to the need to promote the equality of opportunity for recognised ethnic minorities then this would imply that this is an additional consideration above and beyond the application of Circular 01/06. The rationale for this proposition is that the application of Circular 01/06 is for those who fall within the definition of paragraph 15 of the document, that of “persons of nomadic habit of life regardless of race or origin”, therefore this is not a document which is directly focused upon addressing equality of opportunity for recognised ethnic minorities. Rather, such considerations are indirect consequences of its application as the majority of those who it would be applied are ethnic Gypsies and Travellers. Following this logic, it would appear that the fulfilment of the public sector racial equality duty (as updated by the Equality Act in 2010) requires something more than the application of policies aimed at ‘persons of nomadic habit of life’. The view that the application of Circular 01/06 is sufficient to address inequalities ties into the misunderstanding of ‘gypsy status’ noted above. Baker is a useful example of the confused and often conflicted nature of land use policies which have no ethnic dimension to their application but are by and large mainly aimed at two ethnic minorities. The issue highlighted by Baker is the problematic nature of trying to achieve substantive equality for two ethnic minority groups by using a definition and associated case law which fails to acknowledge the ethnic authenticity of such groups in any meaningful way.

### **8.5.2 Three claimants are found to not to have statutory authenticity as New Travellers (The Queen on the Application of Massey v Secretary of State for Communities and Local Government, South Shropshire District Council<sup>62</sup>)**

The case of Massey was a judicial review against the decision of a planning Inspector to find three persons not to fall within the planning definition in paragraph 15 of Circular 01/06 (see section 8.3.1). The facts are set out at paragraph 2 of the judgment:

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<sup>62</sup> [2008] EWHC 3353 (Admin)

The Inspector in fact allowed a change of use to what was described as a travellers' site, but he limited the right and occupation to two only of the number of appellants who had sought permission to have their caravans there. He formed the view in his determination that the site in question did not qualify to be regarded as one appropriate for gypsy and traveller living, because in various respects it did not accord with the requirements of the relevant plan. The reason why he allowed the two was because he decided that they were travellers within the meaning of that term (in the relevant guidance in the Circular 01/2006), and that despite the failure to comply with various of the plan conditions, to which I will come shortly, the personal circumstances of those two prevailed.

However, a number of others living on the site were found not to have 'gypsy status'. The findings of the Inspector regarding the three claimants in the High Court, are set out at paragraphs 25-27 of the judgment:

25. He then went on to consider the actual circumstances of each of the appellants. Those three who are present before me were dealt with as follows. At paragraphs 17 and 18 he said this:

"17. Philip Massey has a partner, Hannah Campbell, and their household includes her daughter, Minerva (8), and their son, Callum (5). He has been travelling since completing his A-levels in 1987, initially playing in a band and doing scrap metal and piercing work. Spells of agricultural work were also undertaken subsequently but his last substantial employment was picking apples in 2002. He moved to the Oakery in 2004 and describes his recent work as 'minimal' -- it including piercing but his attendance at festivals has been as much for social or cultural reasons as to make money.

18. It seems that Mr Massey's dearth of paid employment since 2002 is at least partly attributable to caring for Callum (not educational or health needs or old age); nevertheless, I consider the lack of reliance on travelling for an economic purpose means that he is not a 'gypsy and [sic] traveller'."

26. Miss Campbell is pregnant with her third child. She started travelling when she joined a band in 1996. She took a degree course over the next three years in Hereford, working in various

locations during the vacations. After her daughter was born in 1999, she did not travel again until 2004 at festivals and farms. She travelled as a performer to various festivals in 2006 and 2007. She had also had spells of living in a house, particular [sic] between November 2002 and July 2006. Even if her recent travelling helped her gain a livelihood, which seems doubtful, the Inspector considered that this had not been sufficiently long or sustained to constitute a habit of life, and so she did not fulfil the definition of "gypsy or traveller".

27. Finally, Mr Thompson had a partner expecting a baby and two small children. He left home at 17 and started travelling in about 1997, undertaking mostly sporadic work before moving to the Oakery about three years before. He had not travelled for work since then and had not worked for the past couple of years for health reasons. He had been living for some three months in a hostel with his partner. Although he had worked in different places, it seems his pattern of movement since at least 1999 was driven primarily by evictions rather than choosing to seek work, thus not satisfying the gypsy and traveller definitions. Furthermore, he gave up travelling for work once he had settled at the Oakery rather than for health reasons at that time, although the Inspector acknowledged that he was now in receipt of incapacity benefit.

In the case of the claimants, they had been unable to meet the requirements of statutory authenticity, namely none of them could fulfil the requirement for an economic purpose set out in *Ex Parte Gibb* (see section 7.1.1). Collin J agreed with the approach of the Inspector and held at paragraph 28:

The summary that the Inspector gives of the evidence does not seem to me to be wrong or inadequate in any way that is material. In those circumstances, the decision was that in each case they simply did not qualify because they did not have the necessary lifestyle, the necessary nomadic way of life. Accordingly, the reason why they may not have been travelling at the precise time of the determination is not material. They did not come within the inclusory part of the guidance because they had not ceased to be travellers; they never were.

Despite the ruling of Collin J against the claimants, it is important to note that this case unlike *Ex Parte Gibb* (see section 7.1.1) was not a rejection of New Travellers *per se*. This is explicitly acknowledged at paragraph 24 of the judgment where it is noted that the

definition could cover New Travellers. What is notable about this is that like the reference in the consultation on the Housing definition (see section 8.3.2) to the need to include New Travellers within the scope of the definition, there is an acceptance by both the Planning Inspector and the High Court of the statutory authenticity of New Travellers on a general level. The reasons for this acceptance could be attributed to a number of different factors. Fourteen years had passed since *Ex Parte Gibb*, and the attention that had previously been given to New (age) Travellers in the media had subsided. This is reflected by the tailing off of academic interest in the group noted in section 2.1.4. What is also notable is that some New Travellers were (and are) able to be held to have statutory authenticity on the basis that they have a long standing nomadic habit of life, and there is an economic purpose inherent within it. The import of the notion “nomadic habit of life, regardless of race or origin” into the Caravan Sites Act 1968 following the Court of Appeal’s decision in *Mills v Cooper* (see sections 5.5.1 and 5.4.1) is what solicitor Chris Johnson (interview 2012) describes as a “nice little accident” as it works for New Travellers. Further to this, despite the Court of Appeal’s intention not to afford authenticity to the New Travellers in *Ex Parte Gibb*, the importation of the notion regarding an economic purpose for nomadism, was something that many New Travellers were (and are) able to fulfil. In this way, the intentions of the Court of Appeal in *Mills v Cooper*, the draftsman of the Caravan Sites Act 1968 and the Court of Appeal in *Ex Parte Gibb* have all resulted in outcomes which were perhaps never either anticipated or intended. This is certainly true of the Court of Appeal in *Ex Parte Gibb*, and David Watkinson (interview 2011) doubted “whether the 1968 Act draftsman had New Travellers in mind”. Authenticity is something which is found to be fluid, the interpretations of statutory authenticity by the legislature and judiciary at certain points in history have had significantly different impacts on access to accommodation to that which was intended for both ethnic Gypsies and Travellers and New Travellers.

For New Travellers by this point in time, it is clear that the impacts of the planning definition could on the whole be taken as positive. However, as has been shown above in a number of different cases, there has been a negative impact on access to accommodation for ethnic Gypsies and Travellers. This has caused tension between these communities and New Travellers, which was noted by the academic Pat Niner in the



OPPM select committee report above (see section 8.1.5). The involvement of the Derbyshire Gypsy Liaison Group (DGLG) in the Massey case is symptomatic of these tensions. Tim Jones who acted as counsel for DGLG in Massey outlines the issue:

*“...the concern of the Derbyshire Gypsy Liaison group was that an over broad definition would mean that there would be yet more people searching for a very limited number of sites, and there shouldn’t be an over broad definition of Gypsies and Travellers. So there was no challenge to the Inspector’s finding that some of the New Travellers fell within the definition. However, the traditional Gypsies represented by the Derbyshire Gypsy Liaison group didn’t want a broad definition to include people who hadn’t been travelling for long enough or hadn’t established an economic purpose to their travel, because that would’ve just meant yet more people chasing after the inadequate number of pitches. The rate of provision is way below what it should be almost everywhere, and certainly there is a perception among Gypsies and Irish Travellers, that somehow people can get in and take pitches which ought to be for them.” (Interview 2012).*

This view is understandable given the severe lack of provision on a national scale noted in section 2.2, and the long history of the challenges to the statutory authenticity of ethnic Gypsies and Travellers which has been illustrated above. If there were sufficient sites and a more inclusive definition, then it is possible that such tensions may subside. The campaign of the DGLG and others with regard to a more inclusive definition is discussed in section 8.9.3 below.

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## 8.6 2009

### 8.6.1 Article 8 is used to challenge the measure of authenticity in the planning definition (The Queen on the application of McCann v Secretary of State for Communities and Local Government and Basildon District Council<sup>64</sup>, Wingrove and Brown v Secretary of State for Communities and Local Government and Mendip District Council<sup>65</sup>)

The cases of McCann and Wingrove were heard within two months of each other. Both cases are applications to the High Court to quash the decisions of planning Inspectors not to grant planning permission. The facts of each case are different but the common feature is that of an ethnic Irish Traveller or Romani Gypsy not being able to fulfil the planning definition because of a lack of ‘nomadic habit of life’. The argument made by barrister Marc Willers for the claimants in both cases with regard to Article 8 is the same, although the response of Ouseley J in Wingrove compared to that of Mr Ian Dove QC (sitting as a Deputy Judge) in McCann is different in one respect.

The findings of the Inspector in McCann with regard to ‘gypsy status’ are cited at paragraph 6 of the judgment:

32. My view is that Ms McCann was brought up within a traveller family following an itinerant lifestyle. She then travelled with her partner, when her main responsibilities were looking after her family. She had a nomadic habit of life. After she came to Hovefields Avenue she has had a settled lifestyle and not had any form of employment that has involved travelling. She likes being near to her mother but she no longer lives on the same site as part of an extended family group and she does not rely on their financial support. In the future she has no intention of travelling even when the children have finished at school. She was clear that she no longer wished to travel because of the hardship involved with this lifestyle and her aversion to travelling was strongly expressed. I was left in no doubt that she has stopped travelling not for reasons such as health, education or old age in the family but because she wants to have a settled existence as a lifestyle choice. There was little evidence to show Ms McCann had contemplated any other options in the

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<sup>64</sup> [2009] EWHC 917 (Admin)

<sup>65</sup> [2009] EWHC 1476 (Admin)

event she was unsuccessful in her appeals, apart from appealing against such a decision. Therefore I attach little weight to her expectation that she would return to living on the roadside.

33. My conclusion is that at the current time Ms McCann does not have a nomadic habit of life and she does not enjoy gypsy status as a matter of planning law and policy. Therefore she is not able to benefit from planning policies aimed at providing gypsy caravan sites. Even so her accommodation needs remain important, not least because of the Government's key objective for planning for housing – to ensure that everyone has the opportunity of living in a decent home. Her home and family life are at issue in relation to her human rights under Article 8, whilst her personal circumstances, a single mother with four children, will be relevant in the overall planning judgment."

Barrister in both cases Marc Willers made these comments on Mrs McCann's situation:

*"[Mrs McCann] was basically saying, "it's too difficult to travel, there's no sites, it's dangerous out there". She also had the argument, "I'm a single woman how can you expect me to travel?" Frankly, I don't think she should have lost her case in front of a planning Inspector on 'gypsy status'. I don't think you should be debarred from having 'gypsy status' because you've stopped travelling because of a lack of sites, and because there are no halting or stopping places, and you are being moved on continuously. That ought to be acceptable as a reason for stopping travelling." (Interview 2011)*

The arguments that Mr Willers made in support of this premise were concerned with the differences between the definition in paragraph 15 of Circular 01/06 for the purposes of planning (see section 8.3.1), and that within the Housing Regulations 2006 (see section 8.4.1). Mr Ian Dove QC (sitting as a Deputy Judge) sets out the arguments made by Mr Willers for the claimants at paragraph 11 of the judgment:

11. On the difference between the two definitions two submissions hang. First is the wide submission that the definition in the circular is in breach of Article 8, and the second submission is the narrowed submission, that in the circumstances of this claimant to apply the more restricted definition contained in the circular would amount to a breach of Article 8. These submissions are put on the basis that either generally, or in the specific circumstances of this claimant, insufficient respect is accorded to the need of this claimant or claimants in her circumstances to live in a caravan, albeit that she or others may no longer wish to pursue a nomadic lifestyle for reasons outside those allowed for in the circular, such as the education or health needs of themselves, their families or dependants, or because of old age. The reason in this case is that the claimant found the hardships of travelling more than she could continue to bear.

In response to the first wide submission, at paragraph 12 of the judgment Mr Ian Dove QC held that:

...it is important to bear in mind that Article 8 is not an unqualified right and it has to be balanced with the need for planning regulation to control impacts on the environment from development. I would not, on its face, be persuaded that it gives rise to an entitlement without special reasons, such as a cultural commitment to a nomadic habit of life, to chose [sic] a particular style of accommodation. Thus in principle I would not have necessarily been drawn to the conclusion that the narrower definition [in Circular 01/06], which confines itself to those committed to a nomadic life, with limited exceptions which do not include those who have chosen to stop for reasons other than health, education or old age, and does not include those who are not nomadic but wish to live in a caravan, was necessarily a breach of Article 8. Rather in the light of the balance which needs to be struck, as I have set out above, it would be regarded as an interference with the right under Article 8, which was in the circumstances, in accordance with the law, necessary in a democratic society and proportionate.

The rationale here is that the rights of ethnic Gypsies and Travellers are outweighed by consideration of environmental controls. Mr Ian Dove QC then goes onto find support for this view in the ECtHR's decision in Chapman (see section 7.6.1). The application of Chapman is problematic, as it is suggesting that the case was concerned with the

implications of 'gypsy status' in relation to Article 8. However, paragraphs 73-74 of the judgment in Chapman states that:

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

74 The Court finds therefore that the applicant's right to respect for her private life, family life and home are in issue in the present case.

Chapman was therefore concerned with the implications of Article 8 on the "ethnic identity as a gypsy", as opposed to 'gypsy status'. This is a crucial distinction as the key point in the argument made regarding the breach of Article 8 by the Circular 01/06 definition is concerned with the ethnic status of the Mrs McCann (and subsequently Mrs Wingrove), which the occupation of caravans is an integral part of. Further to this, the significant parts of the extract from Chapman cited in the judgment in McCann are concerned with the wide margin of appreciation given to contracting states in planning matters (see section 7.3.1) and the point that "Article 8 does not in terms give a right to be provided with a home". On the first point, the principle of a wide margin of appreciation is with regard to the specifics of planning matters. The reason for this is set out at paragraph 92 of Chapman:

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 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, here the arguments on all sides and allow examination of witnesses, they are better situated than the Court to weigh the arguments.

The “particular use of a site” is a micro level matter, specific to the facts of the case in question. In this case, the definition in Circular 01/06 is very much a principle at a macro level, which is in fact more akin to an issue such as security of tenure on local authority Gypsy and Traveller sites which was examined by the ECtHR in *Connors* (see section 8.1.3). The second point is concerned with paragraph 99 of the judgment in *Chapman*:

99. It is important to recall that Article 8 does not in terms give a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being has a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision.

The key point with regard to the extract is that the last sentence indicates that the ECtHR was making a general point that contracting states were not bound to provide homes. This is different to the question of ‘gypsy status’ which is not concerned directly with the provision of sites, rather it is a question of development control. The final point that is made by Mr Ian Dove QC with regard to *Chapman* was that as the ECtHR found that the less permissive policy in Circular 1/94 (see section 7.1.2) was not in breach of Article 8 it follows that Circular 01/06 was not either. This is a point which is also made by Ouseley J in paragraph 43 of *Wingrove*. However, it is important to consider that it was not the definition in Circular 1/94 which was under consideration by the ECtHR, rather it was the planning policies within the document. As noted above the weight of authenticity is given to considerations of nomadism rather than ethnicity in Circular 01/06 and consequently *McCann*. It is interesting to note that the balance is made the opposite way in *Chapman*,

and the rational used in McCann with regard to the application of Chapman is arguably problematic as a consequence.

Turning to the narrow submission made by Mr Willers on behalf of Mrs McCann, that in the circumstances of this claimant to apply the more restricted definition contained in the circular would amount to a breach of Article 8, the following by noted by Mr Ian Dove QC noted the following at paragraph 14-15 of the judgment:

...it is important to note that the two definitions are provided for different purposes. The circular definition is for use in development control. The definition in the regulations is to inform the needs appraisal of the forward planning system. It is right that the definition for forward planning needs to be wider to capture those who wish to follow a nomadic way of life, but are currently in bricks and mortar accommodation which is unsuitable for them. This is set out in, for instance, paragraph 26 of the new guidance on the preparation of GTAAs. Their need for accommodation to facilitate them following a nomadic way of life are [*sic*] relevant to the amount of pitches the planning system should plan for. They would like to, but cannot, bring themselves within the definition in the circular. That is, in principle, different from the circumstances of this claimant, who is not in bricks and mortar accommodation but also not within the definition of the circular.

15. In terms of respecting and facilitating those of a nomadic way of life to undertake that way of life, there are important reasons why the definitions are different relating to their purposes within the planning system. The definition in the regulations is seeking to ensure that the needs of those who wish to pursue a nomadic lifestyle, but are forced to use unsuitable bricks and mortar housing, are met. It is not designed to provide for those who have abandoned a nomadic lifestyle for reasons other than education, health or old age, but who wish to live in a caravan.

The conclusion drawn from paragraph 16 of the judgment is that there was no breach of Article 8 either from the difference in the definitions, or from the fact that the claimant was not treated as having 'gypsy status' when she was potentially capable of falling within the regulations' definition for forward planning, but not within the circular's definition for development control purposes". The implications of these propositions are problematic

for reasons expressed by Ouseley J in *Wingrove* at paragraph 39 regarding the completeness of the exposition of the law within paragraph 14 of *McCann*:

It is plain that the essential need to which the GTAA [Gypsy and Traveller Accommodation Assessment which the housing definition is used for] is directed is accommodation, including housing and caravan sites. The definition includes those who may wish to leave the nomadic way of life and settle in bricks and mortar and is intended to make sure that a variety of needs, including those of support, are also considered.

In essence this makes the point that the needs of Mrs *McCann* were covered by the housing definition, contrary to the views of Mr Ian Dove QC. Further to this Ouseley J at paragraph 41 of *Wingrove* sets out considerable reservations about the last sentence of paragraph 15 of *McCann* regarding those who have abandoned a nomadic habit of life for reasons other than education, ill health or old age:

The primary purpose of the regulations is to make sure that nobody's accommodation needs are ignored. The regulations to my mind plainly do require consideration to be given through the development plan system of fair provision for those who have abandoned a nomadic lifestyle for reasons other than education, health or old age, but who wish to live in a caravan. That is because the definition in sub-paragraph (a) includes those who have a cultural tradition of living in a caravan as distinct from those who have a cultural tradition of nomadism. It is difficult now to think of those with a traditional culture of nomadism other than those who live in a caravan.

Having made these reservations with regard to *McCann*, Ouseley J turns to the narrow micro level submission made in *Wingrove* with regard to the application of the planning definition being a breach of Article 8 rights. In doing this the Judge takes a different approach to *Chapman* than in *McCann*, and identifies that the aspect of being a Gypsy which is the occupation of a caravans as noted in paragraph 73 of *Chapman* cited above does have implications for Article 8. It is then accepted that this point may not have been taken into account by the planning Inspector when considering Article 8 rights. However,



it is noted at paragraph 48 of the judgment that this point had not been made to the planning Inspector.

The final relevant point with regard to Wingrove is the approach recommended at paragraph 44 of the judgment which suggests that “a court should assess whether there has been a breach of Article 8 is by reference to the application of the policy to the facts of an instant case”. The facts in Wingrove with regard to ‘gypsy status’ are set out at paragraphs 8-9 of the judgment:

8. The inspector appreciated the appellants' "feeling of identity with the gypsy and traveller community and their present wish for a lifestyle commensurate with that feeling of identity", but concluded that they fell outside the scope of that definition. He found that Mr Brown, who agreed that he was not an ethnic gypsy, had lived in a dwelling until he met Mrs Wingrove in about 1986. Mrs Wingrove had lived in a house from 1962 until meeting Mr Brown in 1986. It appears that while she was a child and teenager until she was about 21, she - coming from a gypsy family - had gone to fairs, but mainly for social gathering purposes, frequently and fairly regularly, and would sell things from door to door. From 1986 to 1989 the couple had inhabited a caravan but this was not related to a nomadic habit of life. From 1990 to 2007 they had lived in a house or bungalow. During that time they had travelled to work each day for the purposes of their mobile catering business which they had given up in September 2008. They had come to the place in question at about the end of 2007.

9. The inspector concluded:

“... the evidence of Mr Brown and Mrs Wingrove showed no clear indications of a nomadic habit of life, or which might have given rise to the wish to settle, temporarily or permanently, from this lifestyle. The appellants are now striving for a contented country life in a caravan in the appeal site, and to pursue [various minor agricultural activities]. That however is an aspiration shared by many people but... it has to be judged in relation to the appropriate planning policies.”

The application of the policy to the facts of the case by Ouseley J was not favourable to the claimants. The approach is set out at paragraphs 32 and 45:

Without trespassing on the evaluative process which it might be for an inspector to undertake, I have the greatest difficulty in seeing how somebody who, for two-thirds of her life, 40 plus years, has lived within bricks and mortar could be said to have a cultural tradition of nomadism or a cultural tradition of living in a caravan. There was no evidence either - indeed the evidence was the other way - that Mrs Wingrove intended at some point to abandon the settled way of life and revert to the nomadic style of her youth. Nor was there any suggestion that she had a cultural aversion to bricks and mortar. It is obvious, as the inspector found, and perfectly understandably, that she wanted to stay with the lifestyle that she had recently begun.

45. So far as the maintenance of her identity as a gypsy in relation to her lifestyle is concerned, the inspector considered her past dwelling habits, that is to say for 40 years and more she had not lived in a caravan. There was no evidence of aversion to bricks and mortar. She wanted a contented country life. The fact that she may be an ethnic gypsy does not mean that she always seeks to live in a caravan. In my judgment, there was no breach of Article 8 in the way in which the inspector considered the impact that an enforcement notice would have.

There are two points to make with regard to this approach. The first is that Ouseley J offered a narrow interpretation of the first part of the housing definition with regard to a cultural tradition of nomadism or living in a caravan. This would indicate that in some circumstances, the application of the housing definition might fail to capture those who are ethnic Gypsies and Travellers. However, the assessment of whether someone is a member of an ethnic minority may have its own difficulties of application. A suggested remedy to this by reference to the Powley case in Canada is discussed at section 8.9.3. There is also a point on the role of the decision maker in interpreting authenticity in a statutory context. Given Ouseley J's acceptance that the planning Inspector may have failed to take into account an infringement of the claimant's Article 8 rights with regard to the occupation of caravans, and his views on the facts of the case cited above it is possible that if confronted with the facts of McCann, a (slightly) different conclusion may have been arrived at. Similarly, a different judge may have arrived at a different conclusion given the facts of Wingrove. In this way, the assessment of statutory authenticity is dependent both on the facts of the case, and the decision maker. The second point to consider is that Ouseley J did not find that the claimant had a particular

pressing need to reside in a caravan. This finding was made by reference to Mrs Wingrove's past accommodation and a lack of aversion to bricks and mortar. Authenticity here is seen to be something which is found through a lifetime of caravan dwelling combined with an aversion to bricks and mortar. There is a sense that rights should be afforded due to hardships as opposed to rights gained due to ethnic minority status. This reflects the approach taken by the Court of Appeal in *Codona* (see section 8.1.4) where the emphasis was placed on the psychiatric harm that would be caused by placing a Gypsy or Traveller in bricks and mortar as opposed to the aversion to bricks and mortar that an ethnic Gypsy or Traveller may have on a more general cultural level. Authenticity is found because of hardship as opposed to ethnicity.

Barrister Marc Willers offered the following conclusions on *McCann* and *Wingrove*, and the potential for the arguments made with regard to Article 8 and the planning definition to be taken further:

*"If any of these or other people like McCann or Wingrove take their case to the European Court of Human Rights, the European Court itself might say that the definition, and the requirement to show that you are travelling for an economic purpose in order to be able to establish a Gypsy site and live in accordance with your traditional way of life, places too high a burden on the individual. I'm keen to take such a case to the European Court. We didn't do so in the McCann case because we won on other grounds, or in the Wingrove case, because the appellant went back to another Inspector, with a fresh application and we convinced that Inspector that she was entitled to Gypsy status.*

*The Article 8 argument is the way to unravel all this...Article 8 would be able to tip the scales the other way. If you're going to recognise and respect the traditional way of life, the integral part of which Chapman says is living in caravans, it's the living in the caravans that really needs to be accommodated. If they travel away then fair enough, if you want to live in your caravan why do you need to show that you travel? So it is*

*quite frustrating in those two cases that the courts wouldn't accept that.”*  
*(Interview 2011).*

## **8.7 2010**

### **8.7.1 The public sector racial equality duty is expanded (Equality Act 2010)**

The Equality Act 2010 effectively expanded the racial equality duty in section 71 of the Race Relations Act 1976 (see section 6.1.1) to include ‘protected characteristics’ other and including race. These characteristics are listed at section 149(7) of the Act and include age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. The relevant provision at section 149(1) states:

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The first two points repeat the limbs of the racial equality duty in the 1976 Act, with the exception that the previous wording required the ‘promotion’ of equality of opportunity, whereas the 2010 provision requires the ‘advance’ of such considerations. How the two terms are distinguished in substance remains to be assessed by the courts. There is also the addition of a third limb regarding the fostering of good relations. The key point to note about the duty in the context of statutory definitions is the inclusion of a range of other protected characteristics within its scope. If the Wrexham case (see section 7.8.2) had occurred after the enactment of this Act, the decision of Auld LJ that a Irish Traveller no longer had ‘gypsy status’ could potentially have been challenged with regard to the protected characteristic of disability. The potential impact of the provision is discussed by barrister Stephen Cottle:

*“... if the equality duty is properly understood, then it can be used as one of the factors to weigh in favour [of a planning consent]. The point is that equality implications are material considerations to planning matters: full stop. As a matter of law they are...in the right hands, it’s a potentially powerful weapon, because it’s trying to achieve substantive equality” (Interview 2012).*

The potential use of the provision in the Medhurst case is discussed below (see section 8.8.1), whilst the notion of substantive equality is discussed in section 9.6.

### **8.7.2 A New Traveller is found to have an aversion to bricks and mortar (Thompson v Mendip District Council<sup>66</sup>)**

Thompson v Mendip is an example of psychiatric evidence being used to support a claim of an aversion to bricks and mortar. It will be recalled that in Codona (see section 8.1.4) Auld LJ uncoupled cultural considerations from the notion of bricks and mortar, and placed the emphasis on proving the psychiatric harm that a Gypsy or Traveller would experience if forced to live in bricks and mortar accommodation. In the Thompson case, HHJ Bromilow decided that an offer of bricks and mortar accommodation to a New Traveller following a homeless application and the subsequent review was unacceptable given the psychiatric evidence submitted. The evidence was that the appellant Ms Thompson suffered from mild to moderate depression, and that this condition would worsen if placed in bricks and mortar accommodation. This case is an example of the positive effect for New Travellers of the uncoupling of ‘cultural’ from aversion to bricks and mortar. Essentially, this has allowed those New Travellers with a psychiatric aversion to bricks and mortar to raise such considerations in homelessness applications. The approach taken by HHJ Bromilow is in contrast to that taken in the Sheridan case discussed at section 8.9.1.

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<sup>66</sup> Claim No: OYE00456 3<sup>rd</sup> December 2010 (unreported), Taunton County Court

## 8.8 2011

### 8.8.1 The public sector race equality duty and the notion of cultural aversion to bricks and mortar is applied to the definition (*Ann Medhurst v Secretary of State for Communities and Local Government*<sup>67</sup>)

Medhurst is the latest case regarding 'gypsy status' and is useful in summarising current arguments being made in the courts. Further to this, an application has been made to the Court of Appeal, and there are further points which will be raised if the case is heard. The case was a judicial review against a planning Inspector's decision to dismiss Mrs Medhurst's appeal regarding a site in the Green Belt in Kent.

The facts of the case concern an ethnic Romani Gypsy in her early fifties who had spent a period of her adult life living in bricks and mortar. Mrs Medhurst had been engaged with travelling for an economic purpose, but this was found to be insufficient by the Inspector. The same conclusions were also made with regard to her sons. In the High Court, a number of grounds of challenge were advanced, including the same argument made in *McCann and Wingrove* with regard to Article 8 was made again by Marc Willers (barrister in all three cases). However, it was accepted that this had been rejected in the two preceding cases, and was made only so it could be reserved for consideration by a higher court. It is the two final arguments which are of interest, as like the Article 8 point, they are considerations of both a micro and macro level due to the implications that they may have for future cases if accepted by the Court.

The first concerns the public sector race equality duty considered in *Baker* (see section 8.5.1). The point made by the claimant was that the Inspector failed to consider whether the refusal of temporary planning permission would promote equality of opportunity and good race relations between persons of different racial groups. The key points of this were the effect that the refusal of temporary planning permission would have on the "ability of the claimant and her sons to live their traditional way of life; the impact that a roadside existence would have on their equality of opportunity; and the impact of a roadside existence on race relations".

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<sup>67</sup> [2011] EWHC 3576 (Admin)

Clive Lewis QC (sitting as an additional High Court Judge) having considered the Baker case (see section 8.5.1) found the following on whether the Inspector had complied with the section 71 duty at paragraphs 59-61 of the judgment:

59. In the present case the Inspector here was aware that Mrs Medhurst was ethnically a Romany [sic] Gypsy. He was aware that she and her family did not wish to live in bricks and mortar and wanted to pursue a Gypsy lifestyle, living in a caravan and not in a house (see paragraphs 7 and 10 of the Inspector's decision). He was also aware of the effect that refusing temporary planning permission would have on Mrs Medhurst and her family.

60. Mrs Medhurst had given evidence of that, as appears from paragraph 20 of her witness statement for the Inquiry, and indeed the Inspector did extend the time for compliance with the enforcement notice, which required the use to cease and the mobile homes and caravans to be removed, so that they had more time to try and make alternative living arrangements. But, at the end of the day, the Inspector also had regard to the powerful countervailing factor that this site was in the Green Belt, and he considered that the presence of the mobile home and the caravans would be inappropriate development which would be harmful to the character and appearance of the countryside. As he said at paragraph 21:

"I further conclude that Mrs Medhurst or her family members have no overriding personal needs or circumstances that justify their continued occupation of the appeal site on a permanent or temporary basis. The objections to the development in its present form in terms of its impact on openness of the Green Belt and the appearance of the landscape are substantial and cannot be overcome by granting permission subject to conditions such as those agreed by the parties in the Statement of Common Ground."

61. In my judgment, the Inspector did have due regard to the circumstances and needs of the claimant and her family. He also paid regard to the countervailing factors concerning the protection of the countryside forming the Green Belt, and ultimately he considered that those countervailing factors prevailed over the needs of the claimant and her family. In those circumstances the Inspector did, in my judgment, perform in substance the duty required of him by Section 71(1) of the Race Relations Act 1976, and ground 7 of this claim is not made out.

This finding would indicate that like Baker, the race equality duty, although legally a material consideration, is not of sufficient weight to override countervailing factors such as the Green Belt. This is another example of how ethnic statutory authenticity is not sufficient to have a significant impact on access to accommodation for Gypsies and Travellers.

The second point concerns cultural aversion to bricks and mortar and is covered by paragraphs 65 and 66 of the judgment:

65. It is in the next part of that paragraph that he deals with the personal needs and circumstances of Mrs Medhurst and her family, and in context that must be a reference, amongst other things, to their ethnic Gypsy origin and their wish not to live in bricks and mortar. They wanted to have permission to live on the appeal site precisely because there is a shortage of such sites available. If they are not able to stay on that site, the family may, as the Inspector knew from the evidence, have nowhere else to go because of the shortage of sites. It seems clear, in my judgment, that the Inspector did have the needs of Mrs Medhurst and her family as ethnic Gypsies and the difficulties that they would face if they had to leave the site well in mind.

66. By way of example, the Inspector refers to the personal circumstances and the needs of the two sons: George and Michael. Those needs were needs stemming from their ethnic origin and their wish not to live in a house. They had no health needs. They had no educational needs. They are long since grown up and they are fit men doing landscaping and gardening work. Their personal circumstances and their needs stem from the fact that they are ethnically Gypsies who do not wish to live in a house and their needs stem from the need to have a site where they can live. But the Inspector considered that the interests of preserving the Green Belt outweighed the circumstances and the needs of Mrs Medhurst and her family. That is ultimately a judgment for the Inspector.

Like Wingrove (see section 8.6.1), the Judge does not have sympathy for cultural / ethnic need to live in a caravan as opposed to need for health or educational reasons. Although not mentioned by the judgment, this follows the rationale of Auld LJ in *Codona* (see section



8.1.4), where cultural considerations were uncoupled from the notion of ‘aversion to bricks and mortar’. Again, the cultural and ethnic authenticity of Romani Gypsies is not sufficient to impact on access to accommodation.

At the time of writing, an application has been lodged with the Court of Appeal in the hope that it might overrule the decision of the High Court. What is notable about this is that the National Federation of Gypsy Liaison Groups (NFGLG) has applied to be joined in the case as either an interested party or a claimant. Barrister Tim Jones is instructed on behalf of the NFGLG in the case and anticipates that the public sector equality duty in section 149(1) of the Equality Act 2010 (see section 8.7.1) will be considered by the Court of Appeal. This is because:

*“the absolutely critical thing is this [definition] is discriminatory against women. How that is expanded upon and what legal coat hangers (as it were) are hung on would be a matter for sitting working through the details of the provisions” (Interview 2012).*

The rationale for this is that for single mothers such as Mrs McCann (see section 8.6.1), an economic purpose for nomadism can be unachievable. When asked what the Court of the Appeal may choose to do if they find the definition unsatisfactory, Mr Jones noted:

*“Well the first thing of course is that in any planning appeal they quash your decision and the matter is remitted to the Secretary of State to re-determine, and the Secretary of State must re-determine it in the light of the Court’s judgement. And so it would be re-determined bearing in mind a proper interpretation of the definition of “gypsy”, that is a legal interpretation. The Court can effectively say what it thinks appropriate in its judgement and that may amount to saying that the literal wording of the policy is wrong. This could mean that either they then go on to say that the literal wording should be interpreted in the following way, despite the fact it’s not the literal meaning, or they could take a slightly stronger step and say it really ought to be rewritten. What they won’t do in these proceedings is make an order against the government, other*

*than quashing its decision. They won't order the government to rewrite it however they can phrase things in such a way that it can be very difficult for the government to do anything apart from rewrite it" (Interview 2012).*

The outcome of the application to the Court of Appeal is unknown at the time of writing, it may not be given permission to be heard<sup>68</sup>.

## **8.9 2012**

### **8.9.1 The bar for the impact of an aversion to bricks and mortar is raised (Sheridan & others v Basildon Borough Council<sup>69</sup>)**

Towards the end of 2011, the eviction by Basildon Borough Council (formally District Council) of part the largest Traveller site in Western Europe at Dale Farm took place. The eviction was exceptionally high profile and was the subject of much discussion in the media. Whilst questions of authenticity with regard to the Irish Travellers residing on the site had been raised in the media, there was nothing in the eviction itself which had particular consequences to the legal discourse with regard to statutory definitions or indeed other matters such as planning injunctions and the subsequent direct action (eviction) on the part of the Council. However, a number of homelessness applications were made by the residents, and the Sheridan case heard by the Court of Appeal was concerned with three such applications. The applicants had all rejected offers of bricks and mortar accommodation, and following negative reviews of the decisions by the Council and subsequently the Southend on Sea County Court, had taken their cases to the Court of Appeal. Each of the cases was based solely on a cultural aversion to bricks and mortar. Although the case raises other points, for example the availability of alternative sites, it is the weight and interpretation given to 'cultural aversion to bricks and mortar' which is of significance to the research. The first application covered in the judgment is that of Mrs Flynn, and Patten LJ notes that her case is made solely on the basis that she is

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<sup>68</sup> Applications to the Court of Appeal are assessed as to whether they have a realistic chance of success before being heard.

<sup>69</sup> [2012] EWCA Civ 335

an Irish Traveller, and as such her aversion to bricks and mortar was largely on cultural grounds. This is in contrast to Mr and Mrs Sheridan, who had submitted psychiatric evidence as part of their applications. The couple were separated and as a consequence had submitted separate applications; therefore their cases were dealt with as such. This evidence regarding psychiatric considerations is detailed at paragraphs 8-15 of the judgment. In summary, the evidence with regard to Mr Sheridan was that he had received no formal education and is illiterate. Whilst he was separated from his wife, he continued to live on the same pitch as her and their three children at Dale Farm, and was surrounded by his extended family. He had a number of medical and psychiatric problems including diabetes raised cholesterol and high blood pressure. These conditions were exacerbated by excessive drinking, smoking and, on occasions, the use of cannabis. The following extracts from the judgment demonstrate the severity of the situation faced by Mr Sheridan:

12. Mr Sheridan has been on antidepressant medication since his discharge from hospital after his diabetic coma. Dr Slater says that it is unclear what type of depression Mr Sheridan had and that it is more likely that it is reactive in nature rather than a kind of depressive illness...Dr Slater says that:

“ The risk would be particularly high at times of stress, and especially if he lost the support he receives from his wife and siblings, had reduced contact with his children, and was living in an isolated setting alien to his culture.

19.18 The prognosis for his drinking is that his alcohol intake will increase dramatically at times of stress, especially if the containing influence of his wife is not there.

19.19 Mr Sheridan has limited understanding of his diabetes, is poorly organised and has low motivation to manage his diabetes effectively. Although only 32 years old, he also has raised cholesterol and blood pressure and is extremely obese. Without adequate support, in particular someone to supervise his medication, his physical health would deteriorate.

19.20 The depression, drinking, and poor diabetic control would all worsen each other, leading to a recurrence of the life threatening condition Mr Sheridan had after the death of his parents....

...19.23 I believe that if Mr Sheridan was forced to move to any bricks and mortar accommodation his mood would deteriorate as a direct result. Secondary effects would be the loss of the social and practical support he currently receives from his wife, siblings and others on the site. It would also be more difficult for him to maintain contact with his three children.

19.24 As a result, Mr Sheridan would become deeply depressed and, for the reasons and via the mechanisms I have outlined above, this would be life threatening. He has stated that he would become suicidal, and he told me that he would “drink himself to death”, something he nearly did after his parents died.

19.25 Even if Mr Sheridan did not destroy himself through alcohol, failing to keep to his diabetic, cholesterol and blood pressure medication would dramatically increase his risk of suffering a fatal heart attack or stroke....

...19.27 Overall, I believe that there would be a significant risk of Mr Sheridan suffering psychiatric harm if he was forced to accept the accommodation proposed by the Council. I do not think it would be overstating it to say that it could amount to a death sentence for him.”

Like her husband, Mrs Sheridan had had no formal education but, unlike him, she has no serious medical problems, although she has suffered from depression on several occasions in the past. Her thoughts and feelings about moving into bricks and mortar accommodation are set out in the judgment:

14. She was asked by Dr Slater about having to move to the house at Laindon:

“17.3 I asked her what her views were about bricks and mortar accommodation and she said “I could not live in a house, I never have”. I asked her what effect it would have on her if she was forced to do so and she said, “It would put my nerves at me, like I was locked in jail”.

17.4 She went on, “Here I can get the shopping, friends visit me, talk to them. In a council house, people I don’t know, I’d be a nervous wreck, terrified of people watching through the window, perverts taking the kids”. She added, “I get depressed thinking about it.”

17.5 I asked how she would feel if members of the community from the current site moved to the same area, i.e. she would have the same social contacts. She said, “It would be beautiful”, but added, “but I still couldn’t stay. We’re quite happy here, want to stay”.

15. On the basis of this evidence coupled with some evidence of depression in the past, Dr Slater expressed the following opinion:

“19.7 In the documentation I have read, Mrs Sheridan has expressed multiple concerns about the accommodation she was offered by the Council. This includes a general aversion to bricks and mortar accommodation, something she reiterated to me. She also states that she would be unable to cope without the practical and social support from the other people on the current site. I have no reason to disbelieve this aspect of her account.

19.8 I believe that if Mrs Sheridan and the children were forced to move into any bricks and mortar accommodation, she would experience significant depression and anxiety, even if the house was of high quality. Her sense of dislocation would relate to losing her familiar location, a heightened sense of isolation from her culture and loss of the ready access to support she currently enjoys.

...

19.11 It is difficult to predict just how depressed Mrs Sheridan would become if she was forced to move to the house in Laindon, or other bricks and mortar accommodation. It is possible that her distress about what she would see as an impossible situation might drive her to deliberately harm herself, although I believe that any such act would not be with the intention of killing herself.”

The response of the Council’s review panel to this evidence was to make the following recommendation to both Mr Sheridan and Mrs Sheridan in the decision letters cited at paragraphs 22 and 23 of the judgment:

Should you feel that your mental health was deteriorating at any time you should contact your G.P. for further medical input, which may include a referral to the mental health services.

The approach of the Court of Appeal to the evidence and the review panel's response is set out at paragraphs 50-51 of the judgment:

50. But on these appeals the issue of whether the risk of psychiatric harm is sufficient to make the offers of [bricks and mortar] accommodation unsuitable does not really arise in that stark way. The answer to the s.204 appeals of both Mr and Mrs Sheridan is that the risk of depression (and in the case of Mr Sheridan of a possible collapse in his medical regime) is the consequence not of the offers of accommodation which have been made but of the applicants' removal from Dale Farm. It is clear from Dr Slater's reports that what Mr Sheridan will lose is the close support of his wife and family which he depends on. Even though the distances between them (if accommodated in what has been offered) will not be excessive by the standards of most people, they may be sufficient to induce in Mr Sheridan the sense of loss which can trigger in him a depressive state. On the evidence contained in Dr Slater's report, the same would exist even if the offer of accommodation made to Mr Sheridan had been of a separate caravan pitch some distance away from his wife.

51. The physical separation of Mr and Mrs Sheridan is the inevitable result of their removal from Dale Farm under the powers sanctioned by the court in the earlier proceedings coupled with their decision not to seek accommodation together as a single family unit. Faced with these circumstances, the review panel was entitled in my view to treat the risk of psychiatric harm as an existing problem which would not be avoided by any offer of accommodation within the terms of the separate applications which they had to consider. It was not therefore *Wednesbury* unreasonable of them to proceed on the basis that Mr Sheridan's psychiatric problems should be dealt with through the use of local NHS services. The same applies to Mrs Sheridan who also faces separation from her husband and extended family in the events which have happened.

Solicitor Chris Johnson, writing in the journal TAT news makes two observations about this conclusion. The first is that the Court of Appeal would appear to be saying that the

fact that harm may occur does not make the offer of bricks and mortar unsuitable because of the availability of care from the NHS when it occurs. Second, the Court of Appeal has got its facts wrong. The evidence in the case of Mrs Sheridan is that psychiatric harm would be caused if she had to live in bricks and mortar accommodation and not just because she would have to leave Dale Farm (Johnson, 2012, p.36). Leaving aside the point on the misreading of the facts by the Court of Appeal, the implication of this case is that neither culture nor severe psychiatric harm is authentic enough to be able to allow a Court to quash the decision of a local authority to offer bricks and mortar accommodation. This is rendering the arguments made in courts with regard to aversion to bricks and mortar problematic as Chris Johnson notes:

*“...attempts have been made by CLP [Community Law Partnership, Mr Johnson’s law firm], Davies Gore Lomax [one of the other leading firms dealing with Gypsy and Traveller cases], and others on cultural aversion to bricks and mortar. But that’s proving really, really difficult, because of the way the courts are dealing with them. And the biggest problem, the latest problem is the Sheridan v Basildon case. Obviously we’re going to keep plugging away at it, but what it’s doing, to a certain extent, is putting us into a corner a bit, where we’re trying to fight out of this corner. We have to find a Gypsy or a Traveller, who if you put them into a house they’d actually commit suicide. It’s moving a long way away from a situation where the campaigners and the lawyers could say, if someone’s in a house and they say “I need a pitch, not a house. I’m a Gypsy or Irish Traveller” and actually that will be sufficient. That’s their tradition and that’s their way of life, and if they say “that’s what I need, not this house”, then they shouldn’t have to really produce a psychiatric report and go to court to prove it...We’re still plugging away at the homelessness side of things at the moment. It hasn’t proved to be the route through that we hoped it would be. I think the homelessness thing needs to go to the Supreme Court, but you’d need to obviously have the case to take it to the Supreme Court. So I think the lawyers out there are now going “I want the case. I want to go to the Supreme Court” (Interview 2012).*

Given the findings of the Court of Appeal in the Sheridan case, aversion to bricks and mortar has become the highest test of authenticity for Gypsies and Travellers. In contrast to the Clarke and Price cases (see sections 7.6.2 and 7.8.1), cultural and ethnic factors are no longer of any real relevance in its assessment. It should also be noted that homelessness applications are made by some of the most vulnerable Gypsies and Travellers, and the bar has now been set at an exceptionally high level for them.

### **8.9.2 The Circular 01/06 planning definition is imported into the Coalition's Planning Policy for Gypsy and Traveller Sites document**

In March 2012 the Coalition government published its new policy for Gypsy and Traveller sites in England. The new policy is less permissive than Circular 01/06 (see section 8.3.1), and has not been well received by Gypsy and Traveller campaigners and lawyers. Significantly, planning policy for Travelling Showpeople has now been merged with Gypsy and Traveller policy. The definition of Gypsies and Travellers has remained the same as that in paragraph 15 of Circular 01/06.

### **8.9.3 The protective statute for the Métis people in Canada is suggested for Romani Gypsies in the UK**

The final part of the analytical narrative is concerned with a campaign organised by the National Federation of Gypsy Liaison Groups (NFGLG) with regard to the definition used for planning. The rationale for the campaign is set out in an article by Siobhan Spencer, the NFGLG coordinator. The article first highlights issues with regard to homelessness cases, *Mills v Cooper* (see section 5.4.1), *Ex Parte Gibb* (see section 7.1.1), and the *Wrexham* case (see section 7.8.2). The essential starting premise of the article is that:

We are now at a point in time where there is a system that allows anyone who may choose to take to the road to become a 'gypsy' for the purposes of planning law and, at the same time, the



system denies the status to the original Gypsy people as they do not fit comfortably into the 'case law interpretation' (Spencer, 2012. p.22).

The suggestion that the planning system allows anyone who chooses to take to the road to gain 'gypsy status' is problematic, especially given the decision of the High Court in *Massey* (see section 8.5.2). The article then suggests that the Race Relations Act 1976 (see section 6.1.1) lacked the "teeth when it was needed" (see the *Baker* case, section 8.5.1), and notes that the Equality Act 2010 (see section 8.7.1) allows further arguments to be made with regard to the discriminatory nature of the planning definition as interpreted by *Ex Parte Gibb* (see section 7.1.1) against women (due to the economic test). The article then goes on to ask: "but do we want more years of endless argument, more years of a pincer movement of Equalities / Homeless / Planning / Human Rights [articles 8 and 14] and case law that has defined who and what is a Gypsy and often defined it wrongly?". The alternative proposed by the article is a protective statute for the "indigenous Gypsy and Traveller people of England and Wales...similar to that of the Métis people of Canada". The article suggests that the Métis' situation is the "closest to that of the Gypsy cultural group as it stands today". Essentially, the Métis are a distinctive group whose culture has developed over 600 years who have "struggled for their cultural identity, usually involving hunting and fishing rights" (*ibid*, p.23). The Canadian case of *R v Powley*<sup>70</sup> sets out a set of ten criteria for defining who can be classified as having 'Métis status'. Of these, seven are regarding harvesting and fishing rights whilst three are suggested by the article to be applicable to Gypsies:

a) Self - identification. The individual must self- identify as a member of the Métis community. It is not enough to self identify as Métis. The individual must also have an ongoing connection to a historic Métis community.

b) Ancestral connection, there is no minimum blood quantum requirement, but Métis rights holders must have some proof of ancestral connection to the historic Métis community whose

<sup>70</sup> [2003] 2 S.C.R. 207, 2003 SCC 43

collective rights they are exercising. Ancestral connection was also defined by the Court as by birth or adoption.

c) Community acceptance. There must be proof of acceptance by the modern community - a membership of a Métis community must be put into evidence. The court stated that the evidence presented must be objectively verifiable. (*ibid*, p.22).

This approach is a step further on from the process undertaken with regard to the ethnic status of Romani Gypsies in *CRE v Dutton*, and that of Irish Travellers in *O’Leary* (see sections 6.7.2 and 7.5.1) in two distinct ways. The first is that it introduces a means of measuring the ethnic authenticity of an individual or group. The *Mandla* criteria used to assess whether a group is a racial one as defined by its ethnic origins (see section 6.3.1) is only applicable to creating a category which receives the protection of the Race Relations Act 1976 and subsequently Equality Act 2010 (see sections 6.1.1 and 8.7.1). The impact of these Acts on access to accommodation can be best described as minimal (see the *Baker* case, section 8.5.1). Therefore, it has not been necessary for the government or the courts to create a set of criteria in order to assess an individual or group’s ethnic authenticity. However, if the ethnic status of a group or individual is to be linked to access to accommodation, and significantly accommodation which is at present a scarce resource, then it follows that a set of criteria might be useful in assessing this. However, the form that the criteria take in Canada is that of a constitutional protective statute, and solicitor Chris Johnson (interview 2012), notes that there are issues with the application of this model to UK law. However, barrister Tim Jones notes that:

*“The Canadian case is interesting and I think that will go to the first limb of the Housing Act definition [see section 8.4.1], as to who exactly are traditional travellers, the second of course deals with those who are nomads, and that’s a separate matter. As far as the first limb is concerned, it is imprecise and it is important to know who is covered by “people who have a cultural tradition of travelling”, both to understand what is meant by the definition for the Housing Act and the assessments,*

*and also bearing in mind that Chapman referred to traditional lifestyle, so one has to wonder what exactly is meant by that” (Interview 2012).*

It would seem that the direct application of Canadian law to that of England and Wales would not be possible for constitutional reasons, but the principles in the Powley case may have applicability to the 2006 Housing Regulations definition. In this way the criteria in Powley are a means by which to assess the ethnic authenticity of Gypsies and Irish Travellers. The interesting point to note with regard to these criterion is that they place emphasis on the acceptance of the community itself of a group or individual as authentic. This is a significantly different approach to that which has been evident throughout the analytical narrative where the majority of those making ascriptions of authenticity are decision makers who are part of the planning or legal systems. The Canadian model puts authenticity into the control of the communities (as administered by the legal system). Such a model could represent a means of achieving sustentative equality for ethnic Gypsies and Travellers with regard to access to accommodation.

## **8.10 Conclusion**

The current situation for the statutory definitions of Gypsy and Traveller with regard to statutory definitions is as follows:

The planning definition is contained in Annex one of Planning Policy for Traveller Sites. With the exception of the reversal of part of the Court of Appeal’s ruling in Wrexham with regard to ceasing to travel permanently for reasons of old age or ill health, the case law set out in this analytical narrative is still applicable. The most significant considerations are the lack of an ethnic dimension due to the ruling of the Court of Appeal in 1967 in *Mills v Cooper* and the introduction of the test of an economic purpose for nomadism introduced by the Court of Appeal in 1994 in *Ex Parte Gibb*. Due to this, the planning definition on the whole works well for those Gypsies and Travellers who are able to prove an (economic) habit of life, but has been found lacking for ethnic Gypsies and Travellers unable to do so.

The recognition of Romani Gypsies and Irish Travellers as protected ethnic minorities in *CRE v Dutton and O’Leary* (see sections 6.7.2 and 7.5.1) has ensured that

those groups are protected from discrimination by the Race Relations Act 1974 and subsequently the Equality Act 2010. However, the impact on access to accommodation of this status has been minimal (see Baker, section 8.5.1).

The Housing Act 2004 regulations definition (see section 8.4.1) has included those with a cultural tradition of nomadism or living in a caravan, but has no direct impact with regard to access to accommodation for ethnic Gypsies and Travellers beyond their potential inclusion in a housing needs assessment. It is, however, a definition on the statute, which gives it greater potential to be applied to planning purposes.

The notion of ‘aversion to bricks and mortar’ in homelessness legislation is currently uncoupled from any ethnic or cultural considerations, and its impact on access to suitable accommodation since the Sheridan case (see section 8.9.1) is questionable. Whilst it has been noted above that there is a need for an aversion to bricks and mortar case to be heard by the Supreme Court (section 8.9.1), arguably the most significant issue faced by Gypsy and Traveller campaigners and lawyers is how the planning definition can be altered to the benefit of ethnic Gypsies and Travellers who are not within its scope at present. Tim Jones notes the following on the chances of reform on this point:

*“I think, in the short term, the best prospects are through the courts, after all there was a lot of lobbying immediately before the new Gypsy and Traveller policy [Planning Policy for Traveller Sites, see section 8.9.2], and if lobbying was going to succeed I would have expected it to succeed then, so in the short term I would expect the courts to be a better prospect. We’ve yet to see the effect of lobbying in Wales, assuming of course that they produce a new policy and alters its definition. Of course when one part of the UK adopts a new definition, other parts will consider whether they ought to also do the same thing. So there’s a prospect there as well” (Interview 2012).*

Mr Jones highlights the point that Wales is still subject to a more permissive planning regime for Gypsies and Travellers, and that there are proposals for change being made at

present, which include the potential reintroduction of the duty to provide sites repealed by the Criminal Justice and Public Order Act 1994 (see section 7.1.2).

It would seem that the future shape of statutory definitions will be most likely to be determined in the courts (see Medhurst and Sheridan in sections 8.8.1 and 8.9.1), or potentially in Wales. It is highly unlikely that any change will occur directly at a policy or statute level in England without the influence of these two factors. The next chapter will discuss the findings of the empirical work and draw together some conclusions with reference to the literature review.

## Chapter 9 - Discourses of authenticity and their impact on statutory definitions and access to accommodation

This chapter draws together the empirical evidence examined in the previous four chapters in the light of the discussion regarding conceptions of authenticity in Chapter Three. Before doing this it is useful to restate both the research question and objectives:

**Research question:** How have discourses of authenticity impacted on the development and application of statutory definitions of Gypsies and Travellers and consequently their legal access to accommodation in England and Wales since 1959?

**Objectives:**

1. To outline and discuss the concept of discourses of authenticity with regard to Gypsies and Travellers.
2. To outline the relevant legal framework which the statutory definitions of Gypsies and Travellers are part of.
3. To chart and analyse the development of statutory definitions since 1959 through the creation of law, policy and case law and the subsequent consequences with regard to accommodation for Gypsies and Travellers.
4. To identify and examine significant applications of statutory definitions since 1959 and their consequences with regard to the impact on access to accommodation for Gypsies and Travellers.

Objectives one and two have been addressed in Chapters Two and Three. Objective three is met through the detailed outlining of the evidence which is examined in the analytical narrative and the A0 graphic representation provided with the thesis. The current consequences of the definition are set out in the conclusion of the previous chapter. Objective four has been met through the detailed examination of specific case law throughout the previous three chapters.

The purpose of this chapter is to answer in full the research question through reference to the literature review and the empirical work. To begin with, the chapter sets out the perpetual relevance of discourses of authenticity to statutory definitions and access to accommodation. It then examines the themes identified in the literature review in the light of the empirical work. Furthermore, the chapter identifies seven key new factors which have emerged from the empirical work. Following this, a statement of the significance of the research is provided, with reflections on the research process.

## **9.1 The perpetual relevance of discourses of authenticity to statutory definitions and access to accommodation**

Chapter Three set out the historical approaches of Foucault and Said when considering issues such as power, control and ‘the other’. With regard to Gypsies and Travellers, the work of Mayall was identified as demonstrating the historical questioning of the authenticity of Gypsies and Travellers. The empirical work has followed these approaches by undertaking a historical examination of the impact of discourses of authenticity on the application and development of statutory definitions of Gypsies and Travellers, and consequently their access to accommodation. A key consideration identified in the literature review was that discourses of authenticity have been persistent over time. This has been fully reflected by the empirical evidence.

It should also be appreciated that ‘discourses of authenticity’ is very much a plural concept. There are a number of different strands weaving in and out of the analytical narrative, but all linked through a common denominator of authenticity which is persistent throughout the study period. The most prominent of these strands is the legacy of the drafting of the Highways Act 1959 where an offence which could only be applied to ‘gypsies’ and not ‘other people travelling’ was enacted (see section 5.1.1). This

then led to the decision of the Court of Appeal to uncouple the word 'gipsy' from its ethnic meaning in *Mills v Cooper* where a man claiming not to be a 'gipsy' was found as such (see section 5.4.1). Consequently, the definition in section 16 of the Caravan Sites Act 1968 referred only to 'gipsies' (see section 5.5.1). The analytical narrative largely consists of case law with regard to the interpretation of this definition. In this way, one particular statutory interpretation of authenticity has been persistent across the range of the study. There are other examples of this, for instance the decision of the Court of Appeal in *Wrexham* with regard to the 'gypsy status' of an Irish Traveller too ill to travel (see section 7.8.2) impacted not only on the following cases, but led to a change in the definition in Circular 01/06 (see section 8.3.1). What this demonstrates is the multiplicity of different but intrinsically connected discourses of authenticity impacting on statutory definitions, and consequently access to accommodation for Gypsies and Travellers. Thus discourses of authenticity not only shape the decisions of the courts, but also shape the reality of access to accommodation for Gypsies and Travellers in future instances. The way in this has occurred is illustrated by the A0 graphic representation provided with the thesis, this clearly shows how different cases have informed each other.

In addition to this, it is useful to note that part of the reason for the persistence of discourses of authenticity is that they are 'fluid' in nature. One such example is the contrast between the negative judicial attitudes towards New Travellers in the eighties and nineties evident in *Bird*, *Ex Parte Dutton*, and *Ex Parte Gibb* (see sections 6.5.1, 6.10.2, and 7.1.1), to the acceptance of such persons evident in *Massey and Thompson* (see sections 8.5.2 and 8.7.2). This example demonstrates that discourses of authenticity alter over the course of time, and are impacted upon not only by legal factors, but also by those in the social sphere, in this instance the less controversial status of New Travellers in wider society.

The central theme that has emerged throughout the study period is the historical lack of suitable accommodation for Gypsies and Travellers noted throughout. The analytical narrative not only identifies the impact of discourses of authenticity, it also highlights the history of the under provision of suitable accommodation. As such discourses of authenticity need to be seen as one of a number of factors which impact upon access to accommodation. The impact that they have is only on one area of the law



as it relates to Gypsies and Travellers. In this way, they need to be situated in the wider picture of a historical under provision. This point is addressed in further detail below.

Having noted the perpetual relevance of discourses of authenticity to statutory definitions, the fluidity evident within this, and the wider perspective of the historical under provision of sites, the original conceptions of authenticity identified in Chapter Three are now discussed in the light of the empirical evidence.

## **9.2 Questions of origins, ethnicity, culture and the consequent impacts on access to accommodation**

Questions of origins, ethnicity and culture also evolve over time. Whilst Chapter Three separates out the literature with regard to origins and ethnicity, the conflation of these two factors in the empirical evidence means that it is appropriate to deal with them together. The cases which are of prime relevance are those which cover ethnic minority status. This began with the creation of the Mandla criteria (see section 6.3.1) with regard to the interpretation of the legal definition of a racial group which in turn impacted upon the recognition of Romani Gypsies and Irish Travellers in *CRE v Dutton and O'Leary* (see sections 6.7.2 and 7.5.1). The ethnic origins of these groups informed the decision to afford them the legal status of a racial group. The consequences of these findings of ethnic authenticity have been variable, and three points can be identified as of relevance. First, the case of *Chapman* (see 7.6.1) placed a “positive obligation imposed on the Contracting States by virtue of Article 8 [of the European Convention of Human Rights] to facilitate the gypsy way of life”. This case has been cited in many subsequent cases, as the analytical narrative has shown. Whilst the ruling of the European Court of Human Rights (ECtHR) has given weight to accommodation cases, it is important to note that Article 8 is a qualified right (see section 7.3.1) and as such whilst there is a positive obligation on the UK Government to facilitate the Gypsy way of life, this does not extend to the provision of sites. Therefore it is hard to assess how much impact the ruling of the ECtHR has had on the access to accommodation, as it is a consideration that decision makers must take into account as opposed to one which has a direct outcome.

The second area in which discourses of authenticity have had an impact is domestic race relations and (latterly) equalities statute. Whilst it is clear from *CRE v Dutton* and *O’Leary* that the status of Gypsies and Travellers has had an impact in matters of discrimination such as access to public houses, like *Chapman*, the actual impact of the public sector [race] equality duty considered by the Court of Appeal in *Baker* (see section 8.5.1) on access to accommodation would appear to be limited. In the same way as *Chapman* and the considerations of Article 8, whilst the ethnic status of Romani Gypsies and Irish Travellers must be taken into account by a decision maker, it is not a determinative consideration.

Finally, the concept of aversion to bricks and mortar in homeless legislation, as developed in *Clarke*, *Price*, *Codona*, *Thompson* and *Sheridan* (see sections 7.6.2, 7.8.1, 8.1.4, 8.7.2 and 8.9.1) was initially reliant on the notion of culture. Whilst this is technically different to notions of ethnicity, for the purposes of statutory definitions cultural considerations are broadly the same as those of ethnicity. What the development of this strand of case law shows is that the original emphasis on “cultural” aversion to bricks and mortar was uncoupled two cases down the line by Auld LJ in *Codona*. There are two implications of this uncoupling. The first is that the ethnic status of Gypsies and Travellers now has no bearing on whether they should be provided with appropriate accommodation in the form of a site (in the context of a homelessness application). The second point is that there is now an emphasis on the harm that would be caused to the Gypsy or Traveller in question by the occupation of bricks and mortar. Whilst this would appear to have been positive for those facing psychiatric issues, as the case of the New Traveller in *Thompson* bears out, the bar has now been set at an exceptionally high level by the Court of Appeal in *Sheridan*. Aversion to bricks and mortar as a marker of statutory authenticity itself is now not easily achievable, and the cultural aspect of this legal construct is now only a historical factor.

### **9.3 Hierarchies of authenticity**

The hierarchy of authenticity first noted by Power (2004) is only evident in two elements of the analytical narrative, government reports and the New Traveller cases with regard to section 6 of the Caravan Sites Act 1968.

First, some of the reports such as Caravans as Homes, the MHLG report, and Defining a Gypsy (see sections 5.1.2, 5.4.2 and 6.4.1) have an explicit sense of hierarchy. These reports should all be seen as a product of their time, and it is clear that such notions of hierarchy do not enter governmental discourse in modern times. The key point to note, however, is that despite the clear differentiation between groups, there is no impact on access to accommodation. As noted in the MHLG report:

“From the Ministry’s view these distinctions were of little practical importance: information was needed about the entire traveller population in caravans, huts and tents, who in large measure follow a common way of life, making the same demands on land, and meeting the same obstacles in their search for sites” (Ministry of Housing and Local Government Welsh Office, 1967, p.3).

A link can be made here to the Egyptian Acts of the 1500s discussed in section 0. The groups all presented the same issues for the state, and as such were dealt with in the same manner.

Second, the lack of meaningful differentiation in the reports mentioned above is in marked contrast to the judicial treatment of New Travellers in the succession of cases starting with Bird and ending with Ex Parte Gibb. The importation of the Ex Parte Gibb interpretation requiring an economic purpose into Circular 18/94 concerning unauthorised encampments (see section 7.1.2) transferred hierarchical dicta of the courts into policy. This at the time had consequences for New Traveller’s access to accommodation, although Sedley J (as he was then) held that “considerations of common humanity” should be applied to all unauthorised campers in Ex Parte Atkinson (see section 7.1.2).

The contrast between the two examples of hierarchy outlined above reveals the differences between the operation of such notions in the context of policy and the courts. In policy, the early reports had little or no real impact on the law with regard to access to accommodation. In contrast, the judicial treatment of New Travellers in the succession of court cases would indicate that the use of hierarchy by the courts is able to have a significant impact on access to accommodation, and eventually inform government

policy. Furthermore, it was the decision of Sedley J in *Ex parte Atkinson* which reversed this trend in the context of welfare considerations regarding unauthorised encampments. Therefore, it is the judiciary in this instance which has the greater impact on access to accommodation with regard to the notion of hierarchy. The reason for this lies in the purpose of both the reports and the rulings of the court. In the case of the reports, there was no direct impact on accommodation matters. The reports were for the purposes of research, and to inform government policy. In contrast, the courts are faced with matters with direct implication for access to accommodation, in the case of the succession of New Traveller cases, the duty of local authorities under section 6 of the Caravan Sites Act 1968 to provide sites, and then in the case of *Ex Parte Atkinson*, the welfare needs of the Travellers concerned. This would suggest that it is the significance of the outcome which has the greatest bearing on the application of discourses of authenticity by decision makers.

## **9.4 The ‘other’**

The notion of hierarchy is in itself a form of differentiating the ‘other’, a concept discussed in Chapter Three. There are two points to consider when discussing the relevance of the notion of the ‘other’ to discourses of authenticity. The first is the contrast between the acceptable and unacceptable Gypsy or Traveller. The second is the need for the decision maker to “feel the other” (McVeigh, Interview 2011).

### **9.4.1 Differentiating characteristics of the same ‘other’**

In Chapter Three the discourse of the genuine Gypsy (or Traveller) was discussed, that is the romanticised perception of the ‘real’ Gypsy, one who is most definitely the ‘other’ but yet acceptable. In the analytical narrative the most explicit example with a significant impact on access to accommodation is again the succession of New Traveller cases already mentioned above. In these cases, despite the definition in section 16 of the Caravan Sites Act 1968 not having an ethnic or cultural criterion, the courts found the authenticity of the New Travellers in question lacking. Such people would have been seen to be the ‘other’, but an ‘other’ which was less acceptable than ethnic Gypsies and Travellers. The reasons for this are complex, but the emergence of New Travellers from

sedentary society and the controversial nature of their way of life at the time are factors that led to their differentiation from other nomadic communities. However, the evidence in the analytical narrative is more complex than basic differentiation between groups. There are a number of cases where ethnic authenticity is found by the decision maker, but other factors such as ill health in the case of Wrexham (see section 7.8.2), or lack of nomadism in Medhurst (see section 8.8.1) lead to the courts finding a lack of authenticity for the purposes of planning. In this way, the differentiation is no longer between different 'others', it is between separate characteristics of the same 'other'. The weight afforded to each characteristic is determinative of its impact on access to accommodation. The analytical narrative demonstrates that the notion of differentiating the other has had some impact during the eighties and nineties. The notion of the 'other' which is now of greater significance is the differentiation of characteristics of the same 'other'.

#### **9.4.2 Feeling the 'other' and the implications of the 'other' in reverse**

The second element of the notion of the 'other' evident in the analytical narrative is that of the need for the decision maker to 'feel the other' noted by Robbie McVeigh (interview 2011). The cases of Bungay and Clarke-Gowan (see sections 6.9.1 and 7.7.1) are indicative of this. In Bungay, the Gypsy family in question are described as speaking Romani, undertaking traditional Gypsy work in a horse and cart, and living in the same caravan. This in contrast to the claimant in Clarke-Gowan, who is said to undertake work described as that of a sub-contractor in the building industry, use his touring caravan as a guest house and not a home, and live in accommodation which was described as being a "single unit with a masonry extension to one side housing living accommodation and entrance hall". In Bungay, the judge was able to observe a family whose way of life was clearly differentiated to that of sedentary society. In Clarke-Gowan, the claimant was found to be too much like a member of sedentary society to be afforded 'gypsy status'. The impact on accommodation of the 'other' in this instance is perhaps not what might have been expected. Being distinguished as the 'other' with regard to planning matters allows access to accommodation. The significant factor is how the 'other' is constructed. The construction in Clarke-Gowan in effect limits the form of employment that those claiming

‘gypsy status’ can choose. This has particular relevance for ethnic Gypsies and Travellers as its implication is that such people who want to live in culturally consistent accommodation are limited in the life choices that they can make. No other ethnic minorities in England and Wales are limited in their employment choices through adherence to a cultural tradition. In this way, the notion of the ‘other’ operates in reverse with regard to access to accommodation, but simultaneously excludes those failing to present themselves as sufficiently different from the settled population.

## **9.5 New factors affecting the impact of discourses of authenticity on statutory definitions of Gypsies and Travellers**

Having covered the main points drawn from the literature with regard to conceptions of authenticity identified in Chapter Three, this chapter now turns to examine seven new factors which have emerged from the empirical work. These factors are practical and procedural issues that have had a greater impact than had been anticipated by the literature review.

### **9.5.1 Transferable identity**

The first finding relates to the notion of transferable identity. The primary instance of this is in Powell (see sections 6.7.1 and 6.7.4). The Romani Gypsies in question were adopting a statutory identity which was at odds with their social identity as not having ‘gypsy status’ would have in theory ensured that they had security of tenure (although a large part of the case turned on the use of the land by the local authority in the first place). In a similar way, the Showpeople in Hammond (see sections 6.6.2 and 6.7.3) were claiming ‘gypsy status’ in order to have the benefit of permissive planning policy which allowed development in the Surrey Green Belt. In both instances it was expedient for the persons concerned to adopt a different statutory identity. In this way, authenticity in the context of legal and planning matters is variable according to what statutory identity is most expedient. There is a further point because of the definition in section 16 of the Caravan Sites Act 1968 referring only to ‘gypsies’ those persons of nomadic habit of life who are not ethnically Romani have to prove ‘gypsy status’. Therefore, the entire history of the

definition since its inception in 1968 is one where only a (albeit significant) proportion of those who fulfil it have the social identity of a Gypsy.

### **9.5.2 The importance of whom is assessing statutory authenticity**

The second key new finding is with regard to the importance of whom is assessing the authenticity of a Gypsy or Traveller. The significant point is the importance of the role of the decision maker. The most explicit example of this is the difference of approach of Sullivan J and Auld LJ in Wrexham (see sections 7.7.2 and 7.8.2). The difference is simple, Sullivan J found it to be “inhuman pedantry” to find an Irish Traveller too ill to travel not to have ‘gypsy status’ whereas Auld LJ took a more rigid view of the case law. This demonstrates how critical the role of the decision maker in assessing authenticity is. The decision maker must of course have regard to the relevant statute, policy and case law, but it is their interpretation that has a significant impact on access to accommodation for Gypsies and Travellers. At the level of a planning application or appeal, this interpretation will have limited bearing on other cases, so the impact is at a micro level. However, the decision of the courts above and including the High Court has macro level effects, the most dramatic examples in the analytical narrative being the Court of Appeal’s rulings in *Mills v Cooper*, *Ex Parte Gibb* and *Wrexham* (see sections 5.4.1, 7.1.1 and 7.8.2).

### **9.5.3 The impact of wealth upon challenging authenticity**

The third key finding relates to the financial resources that such persons making ascriptions have. There are two cases in the analytical narrative in which third parties sought judicial review of ‘gypsy status’. In *Bungay* (see section 6.9.1) a local resident who was concerned about the impact of a relocated Gypsy family on the value of his property sought review of the decision to afford the family ‘gypsy status’, whilst a local group in the *Friends of Fordwich* case (see section 8.2.1) sought to suggest that a Gypsy family did not have ‘gypsy status’ due to the accommodation they lived in (a mobile home which had been extended). The key point here is that third parties, and indeed local authorities who wish to challenge ‘gypsy status’ by way of judicial review must be adequately resourced. In the *Friends of Fordwich* case, the defendants Mr Jones and his mother Mrs

Jones (the defendants / appellants) were publicly funded<sup>71</sup> so were able to gain access to legal representation. If they had not been able to access such representation through legal aid, they would have had to privately fund such a case. This effectively means that it is only those in receipt of legal aid (put simply the poorest) or those with enough finance to fund legal representation (put crudely the richest) who are able to respond to such challenges to 'gypsy status'. There is therefore a monetary value placed on being able to prove statutory authenticity.

#### **9.5.4 The unintended consequences of decisions**

The fourth key finding is that there were significant unintended consequences of different decisions within the analytical narrative. The first of these is the decision by the drafters of the Highways Act 1959 to leave out the phrase "other people travelling", and the subsequent case of *Mills v Cooper* and the enactment of the Caravan Sites Act 1968 (see sections 5.4.1 and 5.5.1). The consequences of this series of events are multiple and have been highlighted during the course of the analytical narrative. Amongst these consequences are those which may not have been originally intended. First, whilst it is unclear from the evidence, it is probable that the drafters of the Highways Act 1959 were not intending to create law which only applied to an ethnic minority, and this proposition is supported by the conclusion reached by the Court of Appeal in *Mills v Cooper* that "gipsy" meant no more than a person leading a nomadic life with no fixed abode. In *Mills v Cooper*, Parker LCJ explicitly stated at 466:

...I am hoping that those words will not be considered as the words of a statute, but merely as conveying the general colloquial idea of a gipsy.

The next year the phrase "persons of nomadic habit of life" as a definition of "gipsies" was imported into the statute the next year as section 16 of the 1968 Act. As well as the problematic nature of non Romani Travellers having to describe themselves as "gipsies", the attempts by New Travellers to argue they fulfilled the definition in *Ex Parte Gibb* (see section 7.1.1) is the second significant example of unintended consequences. This is the

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<sup>71</sup> This is to say that they were in receipt of legal aid



case where the Court of Appeal laid down the economic purpose as a marker of authenticity. As noted previously, the intention of the Court was to exclude New Travellers from the benefits of the section 6 Caravan Sites Act 1968 duty of local authorities to provide sites. The outcome 18 years later is very different to that intended as the analytical narrative has demonstrated. Gypsies and Travellers who are able to demonstrate an economic purpose to their nomadism, be it at the present time or previous to the permanent or temporary cessation of travelling for reasons of education, old age or ill health are able to fulfil the definition in annex 1 of Planning Policy for Traveller Sites. However, ethnic Gypsies and Travellers unable to provide evidence of this are unable to have access to accommodation consistent with their cultural heritage. Once again it is highly probable that this was not the intention of the Court of Appeal at the time of *Ex Parte Gibb*. Both the drafting of the Highways Act 1959 and *Ex Parte Gibb* are examples of where decision makers did not consider the long term effect of their actions. In particular, *Ex Parte Gibb* is a prime example of how the micro level considerations of a judicial response to a particular group of people has much larger macro level implications, which it is evident were not considered by the Court of Appeal. It is demonstrable of the way in which discourses of authenticity operate within case law, and the fluid nature of consequences for access to accommodation.

#### **9.5.5 Legalistic constructions of authenticity**

The fifth key finding to have emerged from the analytical narrative relates to the legalistic approach of law and decision makers. There are three examples of this evident in the analytical narrative. First, the focus by the drafters of the Highways Act 1959 on the consolidation of the existing legislation with regard to Highways matters led to a provision which would have perhaps been better applied to 'any person' as opposed to the specific groups targeted by section 127 (see section 5.1.1). Second, the strict construction given to the definition by Auld LJ in *Wrexham* was made by a rigid interpretation of the relevant statute and guidance. Finally, the contrast between the approach of the planning Inspectors in *Cooper* and *Doran* meant that the Inspector whose decision on 'gypsy status' in favour of the Gypsies and Travellers concerned had been supported by reference to the appropriate statute and guidance was not challenged by the Court, yet

the decision of a Inspector made on the basis of what could be described as 'compassionate grounds' was found to be *Wednesbury* unreasonable (see sections 8.1.1 and 8.1.2). The point is that a ridged legalistic approach taken to the interpretation of statute and policy has significant implications for the assessment of authenticity of Gypsies and Travellers in the Courts. This approach to statute and policy can work for or against the Gypsies and Travellers concerned as the decisions in *Cooper* and *Doran* demonstrate.

### **9.5.6 The problematic nature of nomadism**

The sixth key finding is the impact of questions of nomadic authenticity upon statutory definitions. There are three aspects to this issue: the inability of a proportion of Romani Gypsies and Irish Travellers to fulfil the case law construction of a nomadic habit of life; the contradictory use of nomadism in security of tenure and planning cases and; the barriers to nomadism created by legislation.

Due to the construction of the land use definition which occurred during the period between the Highways Act 1959 and the Caravan Sites Act 1968 mentioned above, nomadism is the key marker of statutory authenticity, and as such is the prime consideration for decision makers accessing eligibility for planning permission. As mentioned previously, this can act as a constraint for ethnic Gypsies and Travellers who, like in the case of *McCann* (see section 8.6.1,) find travelling too much of a hardship, or who may wish to undertake employment not consistent with the case law construction of a nomadic lifestyle as in *Clarke-Gowan* where the defendant Gypsy was found to be more like a building sub-contractor than a 'gypsy' (see section 7.7.1). Furthermore, the evidence in *Connors v UK* at is that there has been an "apparent shift in habit in the gypsy population which remains nomadic in spirit if not in actual or constant practice" (at paragraph 93 of the judgment). The point is that nomadism is the rationale for the special treatment of Gypsies and Travellers, yet alongside this is the issue of the protection of two ethnic minority groups a significant proportion of which do not fit the case law interpretation of 'nomadic habit of life'.

There is also a stark contrast between the use of nomadism at a macro level to deny security of tenure to Gypsies and Travellers on local authority sites (see *Albert Smith*

and *Connors v UK* at sections 7.7.4 and 8.1.3) and then how on a micro level a lack of nomadism can be used to deny planning consent in individual cases (the most recent being *Medhurst*, see section 8.8.1). In this way, discourses of authenticity can be used in contradictory fashion in ways which have direct implications for the secure enjoyment of, or access to accommodation.

There is a final point on nomadism with regard to its facilitation by the state which was identified by the ECtHR in both *Chapman* and *Connors*. The dissenting opinion in *Chapman* at O16 noted that:

It is also apparent that the legislation and planning policies which have been introduced over the last half century have drastically reduced the land on which gypsies may station their caravans lawfully while travelling. Following the latest legislation, the Criminal Justice and Public Order Act 1994, unauthorised campers—persons who station a caravan on the highway, on occupied land without the owner's consent or on any other unoccupied land—commit a criminal offence if they fail to comply with directions to move on.

A similar view is expressed by the ECtHR in *Connors* (see section 8.1.3). These views are echoed by the comments of Marc Willers with regard to the economic purpose required by *Ex Parte Gibb*:

*“The whole problem with the idea of travelling for an economic purpose is all the criminal legislation, the CJPOA 1994, is geared to stopping people from travelling. You've got this major battle for those who are trying to establish Gypsy status, at the same time as they are being prevented from travelling, which makes a mockery of it all really”*  
(Interview 2011).

All three of these considerations have rendered nomadism a problematic notion, for Romani Gypsies and Irish Travellers it is a lack of nomadism which may prevent them from living in a culturally consistent manner, whilst for nomadic Gypsies and Travellers

(including New Travellers) nomadism has been made increasingly difficult by the legislation of successive governments.

### 9.5.7 The hierarchy of acceptability

The final finding concerns the notion of a hierarchy of acceptability. This is intrinsically tied to the conceptions of nomadism discussed immediately above. It is also markedly different to the conceptions of hierarchy discussed above, and is therefore presented as finding in its own right. It is not a finding which has emerged from the documentary evidence, rather it is a notion highlighted solely by solicitor Chris Johnson:

*"I think there's another hierarchy, in terms of how the judges deal with Gypsies and Travellers. And you start off with Mrs Porter, who they're much more sympathetic too, because she owns her own land [the case of Mrs Porter concerned injunctions against an elderly Gypsy lady living on her own land]. And then you move down to Mr Doherty [v. Birmingham City Council, a case concerning the eviction of a tenant of a council site]. They're still not as sympathetic as with Mrs Porter, but he was a licensee for many years on the council site, still is. So, okay, he's there, and then at the bottom of that hierarchy, are the ones on the roadside - trespassers. And trying to get a judge on side in a trespasser's case can be extremely difficult, just because they're a trespasser, never mind anything else, never mind making good arguments really, they're trespassers. Which is ironic really, because they're nomads. And there aren't any stopping places. What are they going to do, you know? And is the person who owns their own land and never moves off it a nomad? And is the person on the council site who stays there and never moves off it, (not that I'm making any point of it) are they nomads? Who are the nomads? The nomads are the people who are out on the roadside." (Interview 2012).*

Mr Johnson makes the point the people who would in fact be found to be the most authentic when assessed by the case law construction of a nomadic habit of life, are in fact found to be the least 'acceptable' by the courts. Again, the multiple and often contradictory nature of conceptions of authenticity and statutory definitions is evident.

As noted above, the hierarchy of acceptability is a finding which has emerged from the interviews as opposed to the literature or the documentary evidence. This is because it is specifically tied up with the type of case being examined. The analytical narrative is focused on cases which deal specifically with statutory definitions of homelessness applications. The bulk of these cases are judicial reviews of planning inspector's decisions. With regard to unauthorised encampment cases, the only cases examined are *Mills v Cooper*, the succession of New Traveller cases on the duty in section 6 of the Caravan Site Act 1968 (*Bird to Ex parte Gibb*) and *Ex Parte Atkinson*. It is notable that with the exception of *Ex Parte Atkinson*, all these cases were negative for the Gypsies and Travellers concerned. The dynamic that Mr Johnson refers to is something that could only be examined across a range of different decisions. It is probable that hierarchy of acceptability is evident across such range. The issue with the present research is that the selection of decisions examined focus solely on a very narrow point/s of law. In order to test the hierarchy of acceptability properly, an examination of all Gypsy and Traveller High Court and above decisions over a particular period of time would allow a thorough examination. This is a possible area of further research.

## **9.6 The futility of the definitions and their application, the right of anyone to be nomadic and substantive equality**

It is perhaps Mr Johnson's comment above with regard to the lack of stopping place which gets to the crux of the relationship between the definitions and access to accommodation. This is something which was noted by barrister David Watkinson:

*"...because the problem which runs through all this, is the aim of provision of accommodation by way of sites for those of nomadic habit of life. Sadly there is no definition that is really going to achieve that. What's going to achieve that is actual provision" (Interview 2011).*

Whilst Mr Watkinson does not make reference to considerations of ethnicity, the same sentiment is applicable to the provision of culturally consistent accommodation for Romani Gypsies and Irish Travellers. The lack of suitable accommodation is the key issue

highlighted by the evidence noted in Chapter Two. There are multiple and complex reasons as to why there is an under provision of sites. The empirical evidence gathered has highlighted one radical solution which removes the need for any kind of assessment of statutory authenticity. The comments of the then chair of the Gypsy Council, Charles Smith in the House of Commons ODPM: Housing, Planning, Local Government and the Regions Committee Gypsy and Traveller Sites Thirteenth Report of Session 2003–04 cited above at section 8.1.5 set out an alternative to the use of a definition of the purposes of land use: have no definition at all and allow any person/s who may wish to live in a caravan and / or be nomadic to do so. Such a proposition is one echoed by Helen Jones, the Chief Executive of a Gypsy and Irish Traveller support organisation:

*“...its simply a question of human rights, and being nomadic is only one aspect of it. My belief is that any human being should be able (indeed supported by fair share of resources) to live in any way they chose, provided that their choices are balanced against fairness and potential harm. To me that is the only acceptable consideration to apply”  
(correspondence 2011).*

The proposition that anyone should have the right to live nomadically and / or in a caravan is one which on the face of it seems highly attractive. Certainly some of the media discourse around Gypsies and Travellers focuses on the perception of unfairness between Gypsies and Travellers and the settled community, due to the positive outcomes that planning policies offer the former. Such discourse is reflected in the Coalition’s recent consultation preceding Planning Policy For Traveller Sites (see section 8.9.2):

There is a perception among many that currently policy treats traveller sites more favourably than it does other forms of housing and that it is easier for one group of people to gain planning permission particularly on sensitive Green Belt land. This has led people to believe that the system is unfair and this has led to tension and undermined community cohesion. (DCLGa, 2011, p.7).

Aside from the (perceived) potential of a reduction in tension between the nomadic and settled communities, a lack of definition would also in theory put an end to the debate in the courts as to what constitutes a Gypsy or Traveller for the purposes of land use evident throughout the analytical narrative.

Therefore, there would appear to be logic in suggesting an end to the (land use) definition. However, upon closer examination there are a number of factors which render the proposition problematic. First, there is the question of substantive equality for (in particular ethnic) Gypsy and Traveller communities, something which Helen Jones goes on to acknowledge:

*..“we should be aiming towards an ideal world in which we act with integrity and allow decisions to be made on balance of fairness and least harm. In the current situation, the balance of fairness and least harm should fall in favour of Gypsy and Traveller people quite naturally because of their own cultural history and the harm that has been caused by majority exclusion. Because we live in a world where the balance of power is far from ideal, fair, or causing least harm, a pragmatic response has to be to attempt to provide most fair and equitable protection from harm”.*

This pragmatic approach is echoed by barrister Marc Willers:

*“...the idea that anybody should be being entitled to establish a site is out of the question – particularly at a time when we haven’t got enough accommodation for Romani Gypsies and Irish Travellers” (Interview 2011).*

This lack of suitable accommodation is the primary reason why a definition is necessary: the issue is that the way that the land use definition has been constructed and applied has excluded those who should be included. Furthermore, the multiplicity of accommodation available to those in the settled communities needs to be taken into account. This as Marc Willers notes includes park homes:

*“The settled community can go and buy a park home tomorrow, and those sites are much more likely to get planning permission than a Gypsy or Traveller site because there is none of the opposition in terms of who it is that’s going to occupy the site, and what their lifestyle is going to be like, and the prejudices that come with all of that. Whereas the only thing that would ordinarily count against park homes as I understand it is that they take up quite a lot of room, and can visually have quite a negative impact. If you’ve got 50 park homes on a ridge overlooking a valley, it’s all very nice for the people that live in the Park Homes, but it’s quite visually damaging. Providing that they are located in a situation where they can get over that kind of objection, they tend to get granted permission, and Gypsies and Travellers get very upset about the fact that Park homes seem to be located all over the country, but if they try and move on or put their names down for them, instantly without being told a reason, they get rejected. Although there isn’t enough housing in the UK, the settled community can still find rented accommodation, and there are plenty of Park homes. If they want and can afford to rent somewhere then they can. I know there’s a lot of homeless people but at the same time, for those that can afford to rent they can, whereas if a Romani Gypsy or Irish Traveller tries to rent a pitch on a Gypsy site, they’ve got to look very hard to find one, let alone find a pitch that’s available, and I mean that’s the difference between Gypsies and Travellers and the settled population. We have housing strategies, we have targets to meet in terms in housing throughout the country, I know there’s been a down turn in the housing market, there’s been a lack of housing built, but there is still that accommodation available for the settled community”*  
*(Interview 2011).*

This reinforces the actual or potential importance of the definition in achieving substantive equality for Gypsies and Travellers. It is the notion of substantive equality which was arguably the motivation for the creation of the Caravan Sites Act 1968, and subsequently the (albeit amended) definition which has persisted ever since. It is one



which has many difficulties of application and requires the inclusion of ethnic Gypsies and Travellers in order to address the obligation of the UK government to facilitate the traditional way of life of such people. The principle of the definition is however one which is necessary in addressing the high level of inequalities faced by Gypsies and Travellers highlighted in Chapter Two.

However, the effectiveness of the current Coalition Government's policies with regard to Gypsies and Travellers is called into question by barrister Stephen Cottle:

*"If you have, what I regard as the Coalition Government's concept of anti-discrimination provision, which is symmetry of provision - everything is equal - then you don't get substantive equality, which is addressing the inequality catching up with the historical lack of provision" (Interview 2012).*

The comments of Mr Cottle echo those of David Watkinson above, **the definition is irrelevant without provision**. The definition is only the first stage in achieving substantive equality, the second and seemingly more challenging stage for the state is to facilitate the provision of sites.

## **9.7 The role of statutory definitions in the control of Gypsies and Travellers**

The section above has highlighted the issues around statutory definitions and (the lack of) substantive equality for Gypsies and Travellers seeking to access accommodation. These issues need to be placed in the context of the theoretical framework set out in Chapter Three.

### **9.7.1 The overt and covert use of statutory definitions as a form of control in the context of the provision of sites and nomadism**

The statutory definitions which are associated with land use need to be seen as part of the problematic issue of the actual provision of sites. They are symptomatic of the societal exercise of control over Gypsies and Travellers. There are two broad types of

control evident within the analytical narrative. The first is clearly observable, and can be termed as the negative application of discourse of authenticity. This includes every case where the decision maker found against the Gypsies and Travellers concerned, with immediate negative outcomes on a micro level. However, as the case of Powell (where the dicta of the House of Lords set out that Gypsies and Travellers were able to return to a permanent base and still have 'gypsy status') illustrates, the outcomes of such decisions on a macro level can be positive. Even so, the majority of negative decisions made by the courts have had the effect of severely restricting access to accommodation on both a micro and macro level.

The second type of control is perhaps less obvious, and could be described as the covert control of access to accommodation. Such a notion takes a Foucauldian approach in so far as the exercise of power is not readily recognisable. There are two points to note.

First, the requirements of each of the definitions place Gypsies and Travellers in the intense system of documentary accumulation noted in Chapter Three. Planning permission for Gypsy and Traveller sites is the only form of planning where the applicant must provide an intensive amount of detail about their personal life. The assessment of accommodation need required by s225 of the Housing Act 2004 requires that a significant amount of information be collected about the lives and accommodation preferences of Gypsies and Travellers. Finally, in order to be provided with a site when making a homelessness application, Gypsies and Travellers must now provide documented evidence of mental disorder. All of these definitions are in effect a form of control.

The second point concerns the purpose of the government policy that the planning definition was devised for. The Caravan Sites Act 1968 was enacted to provide sites following the closure of many traditional stopping places. The provision of sites is in itself a form of control as ultimately, the (mainly unrealised) aim of all government policy since this time has been to ensure that Gypsies and Travellers are confined to designated pieces of land, and in effect end nomadism. Although lip service is often paid to the need for Transit sites, it is notable that in the experience of the researcher, the majority of local authorities concentrate on the provision of permanent pitches. There are a number of moments within the analytical narrative where the outcomes of a decision or policy on a macro and micro level are positive for the Gypsies and Travellers concerned. However, it

should be borne in mind that these are still part of a system of control which seeks to restrict Gypsies and Travellers to controlled space.

The overt and covert uses of discourses of authenticity within statutory definitions are supplemented by a number of other pieces of statute or policy such as the Criminal Justice and Public Order Act 1994 (see section 7.1.2) which aim to restrict nomadism. The paradox of the demand of the planning system to prove a nomadic habit of life and the restrictions placed on those trying to do is noted by some of the evidence in the analytical narrative. Primarily, this is through the observations of those interviewed. Only two court decisions within the narrative, *Chapman v UK* and *Connors v UK* (see sections 7.6.1 and 8.1.3) note the difficulties that Gypsies and Travellers have in maintaining a nomadic lifestyle. It is notable that these are decisions at a European level, and it would appear that on the whole, with the exception of Sedley J (as he was then) in *Ex Parte Atkinson* (see section 7.1.2), the legal and planning system fails to acknowledge the paradoxical nature of 'gypsy status'.

### **9.7.2 The approach taken by the research to the nature of site provision as control**

The identification of the covert and overt use of power through the means of statutory definitions demonstrates how discourse can be utilised as a means of control, as was originally noted in Chapter Three. However, the research has up until now taken the view that the provision of sites is positive for Gypsies and Travellers. Whilst it is of course true that site provision is in itself a subtle form of control, the researcher takes the pragmatic view that authorised sites would enable Gypsies and Travellers to at least maintain their traditional way of life in respect to the occupation of caravans, as per Chapman. It also perhaps a preferable option to continuous eviction. In practical terms, the decision of the researcher not to concentrate on the deeper question of whether site provision is a form of control is that in order for the research to have relevance to the world beyond academia, it needed to situate itself within the confines of the system by accepting some of its premises. In this way, it is accepted that the discourse around site provision has exerted control over the research itself.

## **9.8 Overall conclusion, the significance of the research and advancement of the literature**

### **9.8.1 Overall conclusion**

The research has set out the impact of discourses of authenticity on statutory definitions, and has demonstrated that when combined with provisions of law restricting nomadism there has been a largely negative impact on the ability of Gypsies and Travellers to access accommodation. As a consequence, it is possible to conclude that discourses of authenticity have had a significant impact on statutory definitions which are the framework in which Gypsies and Travellers are able to legally access accommodation. This conclusion needs to be seen in the context of the last 52 years where government policy has sought to assimilate Gypsies and Travellers into bricks and mortar accommodation, or to at least settle them on permanent sites. The impact of discourses of authenticity on statutory definitions and consequently access to accommodation has been a fundamental part of this process.

### **9.8.2 The significance of the research and the advancement of the literature**

The significance of the research is that it has been successful for constructing, for the first time, a theoretical framework and subsequent critical narrative regarding discourses of authenticity in the context of Gypsies and Travellers, statutory definitions and access to accommodation. The significance is two-fold, and the advancement of the literature occurs in the same way.

First, the significance of the work is the theoretical framework. Whilst the various parts of the framework have been in existence for many years, and have been referred to in various pieces of Gypsy and Traveller academic literature, the present research has brought these considerations together for the first time in the context of statutory definitions and consequent access to accommodation. In particular, the work takes forward the work of Richardson (2006a, 2006b) on the role of discourse and power in the context of Gypsies and Travellers. The present work takes these notions forward by its specific application to statutory definitions.

Second, the thesis takes forward the literature with regard to statutory definitions. There has been academic work on statutory definitions before, but aside from Fraser (1961, 1968) in the 1960s the only other academic focus has been on the effect of New Travellers on statutory definitions (see Geary and O'shea, 1995, Sandland, 1996, Barnett, 1995, and Clark and Dearling, 1999). This is the first time that a comprehensive study has been undertaken which has taken account of the various different issues that the subject presents. In particular, the work advances the literature by looking at the effect of statutory authenticity on the lives of ethnic Gypsies and Travellers.

The notion of statutory authenticity has not been addressed in as much detail with regard to the contemporary situation for Gypsies and Travellers. By setting out for the first time the evidence with regard to the development and application of statutory definitions of Gypsies and Travellers and their consequences with regard to access to accommodation, it has provided a resource for other scholars to criticise and reinterpret the evidence. It has also provided a comprehensive record and detailed analysis of all the significant cases with regard to statutory definitions in modern times. No such record existed before this, and as such the research will provide a useful resource for both academics and practitioners.

## **9.9 Reflections on the research**

Finally, it is useful to reflect on weaknesses of the research, potential improvements to the research and further areas of potential study.

### **9.9.1 Weaknesses of the research**

There is one significant weakness of the research, which is the absence of an account of what happens at a local level. The analytical narrative is only examining access to accommodation in the context of a number legal and policy documents. In reality, the impact on actual Gypsies and Traveller's access to accommodation is only observable in the specific cases which have ended up in the courts. What is not so readily observable is the reality on the ground. In this way the actual impact of discourses of authenticity on statutory definitions and consequently access to accommodation on a micro level has not been observed. It is only the theoretical constructs of the law on a macro level that are

set out. What has been observed is the limitations and constraints theoretically placed on Gypsies and Travellers when being classified by the state in order to access accommodation. This weakness could potentially be addressed through further research (see below).

### **9.9.2 Potential improvements**

Given more time and resources it would have also been useful to have conducted a wider range of interviews. This would have been either key persons from a national level such as legal professionals or civil servants, or an extension of the research to local levels. Three interviews were conducted at a local level in Brighton and Hove, but on reflection it was considered that as a local level matter, it was incongruous with the rest of the narrative, which had considered matters only with national significance in England and Wales.

Another improvement would have been to attempt to conduct an analysis of media discourse throughout the study period concurrently with the empirical work. This would have potentially have given an interesting comparison and contrast between the two forms of discourse. It would have also potentially highlighted where the different forms had impacted upon each other. In particular, the media discourse around New Travellers in the eighties and nineties would provide a useful context for the various court decisions during this time. However, given the word limitations of the research, this would have lessened the detail possible on the existing material.

Finally, further exploration of the historical nature of discourses of authenticity would have presented an even more detailed explanation of the nature of discourses of authenticity. The notion of discourses of authenticity is applicable to societal discourse on a more general level, and the research focuses solely on its operation with the legal sphere. A more general study would have undoubtedly produced some interesting and relevant findings. However, again the scope for this was not possible.

### 9.9.3 Potential future areas for research

All the improvements identified above are also potential areas for future research. In addition to these, the lack of a local level analysis identified above is a potential area for future research. As mentioned before, work was begun on the local level with the example of Brighton and Hove, where the line between New Travellers and homeless is blurred. The council have created the term 'van dwellers' within which New Travellers and non-travellers living in vehicles are categorised. Within this case study there are two interesting points. The first is the creation of the term 'van dweller', and the inherent lack of authenticity that is put upon those classified as such. There has been a small level of litigation on this issue. The second is the nature of people living in vehicles largely in urban areas who do not travel as such. A comparison with other urban areas such as Bristol (which experiences similar phenomena) could potentially yield interesting results.

Another future area of research could be an examination of the hierarchy of acceptability noted in above. An examination of the courts' treatment of a range of cases would potentially yield interesting results. Such a selection of cases would need to include planning judicial reviews, planning injunctions, Mobile Homes Act 1983 cases (with regard to local authority sites), homelessness application judicial reviews, discrimination cases and evictions from unauthorised encampments. Such a spread over a specific time period of 1-3 years and a specific number of courts (e.g. the High Court to the ECtHR) would potentially yield interesting results.

Looking beyond England and Wales, an investigation and / or comparison with the situation in Scotland and the Republic of Ireland would be of merit. Both these jurisdictions have their own issues with regard to Gypsies and Travellers, statutory authenticity and access to accommodation. This comparison would be particularly of interest as Scottish Travellers have now been afforded ethnic minority status and the ethnic status of Travellers in the Republic of Ireland is disputed within governmental discourse. Further afield, a comparison with the situation of the Roma and other nomadic people in mainland Europe could yield interesting results.

What has become clear during the course of the research is that the notion of discourses of authenticity is something which has applicability in a number of different contexts. It is certainly a concept that others may wish to extend and / or critique.

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## Chapter 10 - Appendices

### 10.1 Interview with Stephen Cottle

How should non nomadic New Travellers be treated?

SC: If you've got a treaty obligation for the framework for the protection of national minorities, and you've got it recognised domestically and internationally, that the minority, racial groups are to have their way of life facilitated, then the non-ethnic, non-nomadic new age traveller is very low down the list, and will only get the benefit of the very basic humanitarian concerns.

So I don't have any difficulty in there being less required of a public authority with non-nomadic new age travellers. If you've got a nomadic new age traveller then they should be regarded in the same way as ethnic Gypsies, for the purposes of the Local Authority's Accommodation Assessments. There shouldn't be any difference, because the idea is to facilitate the particular way of life for the particular group following that way of life.

Point on 'van' being a defining characteristic

SC: So, I don't see why van should be the defining characteristic. The issue is whether or not they have a nomadic way of life, and whether they've got a particular accommodation need. All those that have a nomadic habit of life with a particular accommodation need, should have their accommodation needs assessed. Full stop.

Points on Berry

SR: Why do you think the decision of the Court of Appeal was so dramatically different the High Court?

SC: Lord Justice Auld was minded to construe the definition in a very strict way.

Therefore, to get inside his mind is difficult, but if the benefit, if you can call it that, of having Gypsy and Irish traveller dedicated policies, has got nothing to do with ethnicity, it's only to do with those people who happened be earning a living by travelling. So as soon as you stop travelling, you fall outside the purpose of the benefit within the policies. That's his logic. So it only attaches to those people who are actively hawking, going around asking if they want drives redone or fences put up, and only applies to those people who otherwise have got no transit sites. And soon as they're not working, they can pack up and disappear, which completely denies their cultural integrity and their ethnic backgrounds and who they are, it's completely ahistorical; entirely form, as opposed to substance. Its shallow.

I think that the idea was, it goes to back to *Mills v Cooper*, which is that the status is irrespective of race or creed, and therefore it's got nothing to do with ethnicity, it's only to do with whether or not you're currently travelling, and if you're not currently travelling then get lost. But Lord Justice Clarke qualified it, paragraphs 61, 62, 63, and said that looking at the Shrewsbury case of Bungay you can actually not travel for a very long period of time, as long as you haven't abandoned it, and then you've got the Cooper case, where the economic purpose was fulfilled by a few fairs, and the rest of the time they're living on benefit. So there were a few chinks. There was the Maidstone and Dunn case. So it wasn't all bad news. But it was for the purposes of Mr Berry, because it was just plain downright wrong, denying his accommodation need because of his ethnicity and his cultural history, which was that conventional housing was not appropriate. That's why we said it doesn't have to be construed inconsistently with giving expression to Article 8 rights, the private and family life, and that completely went over Lord Justice Auld's head. Just didn't register with him at all, that there was no necessity to construe it so strictly, and actually consistent with Article 8 he should construe it more broadly, so the policy did apply to somebody that had a particular accommodation need, that didn't stop just because they were unable to work. There are also the disability implications. Its indirect discrimination, isn't it? Because you're maintaining a requirement, that only active people

can comply with, and a proportion of disabled people cannot comply with. So it's wrong. We were off to the European Court.

Mr Berry did end up getting planning permission, because his health got better. He had just suffered a coronary, and it was looking very bad, then the inspector, who is the chief inspector of planning in Wales at the time, very nice man, decided that he was acting as a sort of mentor to his sons, so therefore he was still involved in his sons' earnings.

SR: That's a helpful construction isn't it?

SC: Well also, the point is, even if you've got two disabled parents, you've got one actively earning son, then it's still a gypsy site, even for the purposes of Berry.

SR: That's the bit I found really strange, that he couldn't find it in him to take that into account?

SC: Unfortunately he wasn't capable of giving us a positive judgement.

SR: Absolutely. So, thinking about Gibb, how much of an impact do you think Gibb has had on this whole scenario with status?

SC: Well, it definitely caused a number of people to suffer setbacks in their planning applications and their planning appeals. But there was a decision by Inspector Felix Boune, who said that, "well actually, if you construe the policies for controlling future gypsy sites with the criteria they set out as only applicable to those who are actively travelling, and you've got somebody from an ethnic minority with an undoubted accommodation need, who's not actively travelling, so that policy doesn't apply to them, then their needs are never going to be met, which means I might as well give them a permanent permission, because they're never going to come under a policy. So actually, more oddly, it exaggerated some people's case for permanent permission.

But the annoying thing in Berry, was that they [the LPA] were arguing that [Mr Berry wasn't] a gypsy, but that we should be satisfied with an offer on the site of their gypsy site, and that really, really annoyed me. How on earth can anybody say, "you're not a gypsy for the purpose of the planning, but you are a gypsy for the purpose of meeting your accommodation need." And it made it plain, that obviously it's within the discretion of the local authority as to the width and scope of their Gypsy and Traveller policy, as to who it should apply to. So therefore they could decide that it applied to non-economically active gypsies. So the whole period post-Berry was fraught with inconsistencies.

Point on references to gypsy status in Baker and further points on fulfilment of equality duty by applying Circular 01/06

SC: Well, when I read this inspector's decision – I thought, it's like saying well, she knows she's dealing with a guy who's Caribbean, and who's black, so therefore this decision maker must have had the equality duty in mind. It does not follow. And if the equality duty is a statutorily implied relevant consideration that decision makers must address, then I thought that the absence of any stopping place for Irish travellers within Bromley, meant there was an inequality of opportunity, which should have been addressed. And what Dyson LJ said, was that if you're implementing a policy that itself has itself been assessed [in a equalities impact assessment], for the purposes of the Race Equality Act duty then in force, as 01/06 expressly was, then because the policy epitomises trying to achieve equality, then you need to do no more than apply the policy. So what he's saying [regarding gypsy status] isn't really the central point of the case.

And what we were saying is that in the balancing exercise, one other matter that should have gone into the scales was the inequality of provision, and he's saying that you can infer from the fact that she mentioned the lack of sites available to the appellants that she did consider it.

I think that the main point of it is that if you read paragraph 43, “Thirdly, in paras 26 - 29, the Inspector explained in detail why the five authorised sites in Bromley are not available to the Appellants at the present time. Once again, this is relevant because it shows that she recognised the disadvantages facing the Appellants” and it was in paragraph 42, the inspector referred to the circular, and this is the recognition of the inequality of opportunity. So that was where we lost, because we were saying that the recognition of inequality of opportunity hadn’t been factored in, and they’re saying no, it had, because they were implementing 01/06.

SR: How effective do you think the public sector Equality Duty actually is?

SC: If you have, what I regard as the coalition government’s concept of anti-discrimination provision, which is symmetry of provision - everything is equal - then you don’t get substantive equality, which is addressing the inequality catching up with the historical lack of provision. So, if the equality duty is properly understood, then it can be used as one of the factors to weigh in favour [of a planning consent]. The point is that equality implications are material considerations to planning matters. Full stop. As a matter of law they are. If you regard it as symmetry of provision, and you’re saying that gypsies should be treated no differently than anyone else, then you start from a different premise, and therefore the equality duty doesn’t really add much, because you’re not trying to discriminate against them by refusing permission.

So, the answer to the question is, that in the right hands, it’s a potentially powerful weapon, because it’s trying to achieve substantive equality, and certainly if you had disabled as a protective characteristic as well, it’s trying to achieve a particular outcome, that facilitates rather than obstructs the persons way of life, and therefore you would be looking for something to tide them over which would make roadside encampments politically and legally unacceptable. But that’s a value judgement isn’t it?

## 10.2 Interview with Chris Johnson

Point on the NTs / happy accident of 'nomadic habit of life'

CJ: You have to take account of the needs of the New Travellers. They're entitled to have their needs taken into account. And in a way, nomadic habit of life is a nice little accident, because actually it was fine for them, so it best fits them okay, but it doesn't fit all of the ethnic gypsies. That's the problem.

Point on Powley

CJ: Siobhan [Spencer] argues in a very good article that there should be some kind of protective statute, which I think in the context of the UK context is just not A) going to happen or B) going to work. She's referring to especially a case called Powely, which is a great case. The Metis (The Powelly's were Metis) are protected under the Canadian constitution. But that's not how it works here, so, they'd have to rewrite the whole of the constitution in order to make that work. It's very interesting and it certainly has parallels. Personally I think that's something that maybe in the future people can arrive at that, but for the moment I think the realisable thing is the Housing Act 2004 definition.

Point on ethnic or nomadic

CJ: Ethnic or nomadic, that's the answer to it. However how do you define ethnic?  
Nomadic, the current definition looks fine.

I think the arguments about just ethnic ignores the complexity on the ground of the whole thing. I've got clients who you would describe as New Travellers. They travel with New Travellers, but they're ethnic, because one or more of their parents were Gypsies or Irish Travellers. They were brought up in housing, because of course, most of the Gypsy and Irish Traveller population live in housing because of what's happened over the years.

So I've got these people that go on the road, even though their parents are no longer on the road, they were brought up in a house, and they joined the New Travellers. So they are part of the New Traveller community, but they're ethnic. And then, I've got a client at the moment, a second generation New Traveller who was born on the road, who tried living in a house for about 6 months, because of difficulties when she was having a child, but she couldn't cope with it as that was her only experience of bricks and mortar.

Where do you draw the line really? Though Irish Travellers go back before the Irish famine in the 1840s, it is an undoubted fact that a lot of people went on the road, and become subsumed in the Traveller community, and that happens all the time.

Our friends who lived down the road from us the old guy just died, he was a Romany Gypsy, lived in a bender. But his daughter married a gorgio. If you meet Paul, he lives in a barrel top with her. They've kind of moved up in the world. You'd think Paul was a Gypsy, he has got a neckerchief, and he's great with horses, and he built the barrel top himself, so he's become very much part of the community.

But I'm not trying to argue that we should forget about the ethnicity which is an absolutely vital part of it, I'm just saying that, what it boils down to I think is why don't we have a situation where the needs of everyone are met (I'm not talking about someone who goes on the road tomorrow being given the same opportunities). So I'm talking about a situation where the ethnic Gypsies and Travellers are properly catered for, which I think needs the Housing Act definition, but New Travellers are also catered for, and I think it's fine for them with the nomadic definition really, and I think they're fine with that.

Point on Gibb

And the other thing I would pick out from Gibb is that some ethnic Gypsies and Travellers will say that in Gibb the [New] Travellers were trying to make out that they were Gypsies,



when of course that's not what they were doing. What they were doing was trying to squeeze themselves within the definition that they had to deal with. That was forced on them by the law. I've never come across a New Traveller who says "I want to be called a Gypsy". To a certain extent they don't care what they're called. More often they prefer to be called New Travellers than New Age Travellers because "New age" has that kind of hippie, dream catcher kind of, you know, dancing around...

Point on named protected statute or Housing Act definition

You could have a definition for Romany Gypsies, Irish Travellers, Scottish Travellers, Welsh Travellers etc. But then you'd have a bit of a problem, because then it'd be like, right, how do we decide who is one? Although the Housing Act definition is not the perfect definition, it's not really an ethnic definition in a sense, it's about a tradition of living in caravans. So it fits nomadic or ethnic Gypsies and Travellers. It works and it's a nice simple way of working it. Because if you start saying only Gypsies or Irish Travellers etc, then you're back into "okay, what is a Romany Gypsy? Who is a Romany Gypsy?". In fact, all due to credit to whoever wrote that, because it's a brilliant short hand for including everyone without entering into "have you got a specific language? What history have you got? Your parents? Your grandparents? What are your customs? Do you have specific traditions or culture?" Which happened in *CRE v Dutton*, *O'leary v Allied Domecq*, and the *McClennan* case in Scotland, for the purposes of the Race Relations Act, an enormous analysis of the whole history of culture of the Gypsy and Traveller people. But we don't really need to do that.

Point on how to use HA definition for the purposes of planning

CJ: Well I think it's difficult, because of course there's a difference between a extremely good moral argument and the practicalities on the ground. And the simple reason why neither the Labour Government nor the coalition Government want to let that in is because of all the Gypsies and Travellers in housing. They would see it as opening the

floodgates. All of those could go... "I'm in there now. Me as well. You've got to take care of me." Which some of them are at the moment saying, "I want to be taken account of". And attempts have been made by CLP, Davies Gore Lomax, and others on cultural aversion to bricks and mortar. But that's proving really really difficult, because of the way the Courts are digging at them. And the biggest problem, the latest problem is the Sheridan v Basildon case. Obviously we're going to keep plugging away at it, but what it's doing, to a certain extent, is putting us into a corner a bit, where we're trying to fight out this corner. We have to find a Gypsy or a Traveller, who if you put them into a house they'd actually commit suicide. It's moving a long way away from a situation where the campaigners and the lawyers could say, if someone's in a house and they say "I need a pitch, not a house. I'm a Gypsy or Irish Traveller" and actually that will be sufficient. That's their tradition and that's their way of life, and if they say "that's what I need, not this house", then they shouldn't have to really produce a psychiatric report and go to Court to prove it.

Point on the uncoupling of cultural from aversion to bricks and mortar in Codona

CJ: In Thompson v Mendip, Ms Thompson could then say "I've got an aversion" which she really did have. And for the Court to decide well yes she did, and therefore the offer of bricks and mortar to her even though she was New Traveller was unsuitable. So yes, it meant that she didn't have to prove the cultural bit of it. And I think that's very fair for New Travellers because there are a lot New Travellers like my current client I was telling you about who is 2<sup>nd</sup> generation, who has a clear aversion to conventional housing. So it's good that that kind of concept is good for them, but they can't say "actually no, you can't just turn around and because I'm a New Traveller you can turn round and give me a house".

Homelessness Supreme Court point

We're still plugging away at the homelessness side of things at the moment it hasn't proved to be the route through that we hoped it would be. I think the homelessness thing needs to go to the Supreme Court, but you'd need to obviously have the case to take it to the Supreme Court. So I think the lawyers out there are now going "I want the case. I want to go to the Supreme Court."

#### Psychiatric report point

Understandably, especially amongst ethnic Gypsies and Travellers, all this psychiatric evidence causes quite a bit of annoyance actually. And it's very difficult to explain "you're just an ordinary person. We're going to get a psychiatrist to do a report on you." That's not how you explain it, by the way. You say "Now, this is going to sound really strange, but because aversion is a matter of the mind, and because of how the courts have interpreted this, we need - even though you're perfectly sane, there's nothing wrong with you - we need to get a psychiatrist to talk to you." And to be fair, as long as you explain it properly, clients appreciate what you're saying. They don't think you're saying they're mentally ill. But it is a bit odd.

#### Hierarchy of acceptability

CJ: I think there's another hierarchy, in terms of how the judges deal with Gypsies and Travellers. And you start off with Mrs Porter, who they're much more sympathetic too, because she owns her own land. And then you move down to Mr Doherty v. Birmingham City Council. They're still not as sympathetic as with Mrs Porter, but he was a licensee for many years on the council sites, still is. So, okay, he's there, and then at the bottom of that hierarchy, are the ones on the roadside - trespassers. And trying to get a judge on side in a trespasser's case can be extremely difficult, just because they're a trespasser, never mind anything else, never mind making good arguments really, they're trespassers. Which is ironic really, because they're nomads. And there aren't any stopping places. What are they going to do, you know? And is the person who owns their own land and

never moves off it a nomad? and is the person on the council site who stays there and never moves off it, are they? (not that I'm making any point of it) but are they nomads? Who are the nomads? The nomads are the people who are out on the roadside. They're the real nomads. And in fact some of the New Travellers say that we don't want any sites at all, we don't want permanent sites, we don't want transit sites, we don't want emergency stopping places, we just want to travel. Now, ultimately that's not going to work. But if you reach the kind of Nirvana where there were all those things everywhere, then we would be out of a job because that's what we're working towards. But if the Local Authority or the Police go "Actually, you can go over there, you're allowed to stay there" that's the end of the argument isn't it?

### **10.3 Interview by correspondence with Helen Jones**

SR - I think the best place to start would be to examine the words involved. Since our meeting I have learnt that on statute (in this case the 1960 Caravan Sites Act) the word 'gipsies' (note the small g) is used for the purposes of the definition;

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

In Circular 01/06 the following definition is used (again note the small g and t);

"For the purposes of this Circular "gypsies and travellers" means

Persons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family's or dependants' educational or health needs or old age have ceased to travel temporarily or permanently, but excluding members of an organised of travelling show people or circus people travelling together as such".

So we have a disparity between what an act of parliament and guidance. The key point to consider here is not the extra provisions in 01/06, re: education, health and old age, but the difference in terms used. The point is that 'travellers' don't actually exist in law, only 'gipsies', so 'travellers' are referred to by the law as 'gipsies'. This is because Circular 01/06 is in theory just 'guidance' and as a consequence the courts / planning inspectors / local authorities will in many cases use the legal term as opposed to the terms found in the guidance. I found this very interesting, as I think it reveals a lot about how the terminology has created much confusion. With this in mind, I would like to ask you for your thoughts on what the terms 'Gypsy' and 'Traveller' should refer to. Following our conversation, I would also like to look further into how the ideas of ethnicity, culture and nomadism are coupled with these terms.

HJ - This is a bit of an open question which quite honestly I haven't got time to detail an answer. In simple and quick words my answer is that the words Gypsy (correct spelling and capitalized in all circumstances please) and Traveller (preferably nuanced by the user as Irish Traveller, Scottish Gypsy Traveller etc) should only ever be used to describe people of Gypsy/Traveller (Irish, Scots, whatever) ethnicity as best described by Mandela criteria although Gypsy/Traveller people may wish to nuance this further without my help.

As my dear colleague says – *“full stop about it!”*.

We're creative people, if there are other things we need to describe we can find the words.

SR- Ok, so how should the group commonly referred to as “New Travellers” refer to themselves / be referred to?

HJ - Personally I find nothing offensive about the word hippie, as I have said before I think the fine history of personal responsibility and activism that launched this word is well overdue for reclamation. If I speak about the way I lived when I was younger (with

occasional later lapses!!) I call it 'hippying' about. That's me and I appreciate others would disagree, but, they are people that I can't really say are part of any category which they or I would be likely both sign up to.

So how about 'modern nomads'? (I would say 'current nomads' but it sounds a bit like something from Mr Kipling)

SR - What issues does the presence of the group commonly referred to as "New Travellers" present to ethnic Gypsies or Travellers?

HJ - The main issue I can see is the confusion around identity, and the perceived Identity of Gypsies and Travellers, in the minds of the majority. The confusion around identity has also, at least historically, been very much within the views of the 'modern nomads' of Gypsies and Travellers and they have reflected that outwards also.

There are other smaller matters which you could describe as territorial.

SR - When we met we discussed the idea that everyone should be allowed to live a nomadic lifestyle, could you outline this on paper?

Only with several weeks and a bursary! No its simply a question of human rights, and nomadic is only one aspect of it. My belief is that any human being should be able (indeed supported by fair share of resources) to live in any way they chose, provided that their choices are balanced against fairness and potential harm. To me that is the only acceptable consideration to apply. There is a developing technique called things like 'appreciative enquiry' which to me should be the format of any planning decision making. It encourages mutual respect and compromise.

SR - What is your opinion on the definition which is used for the Housing Act 2004 section 225?

HJ - See below

SR - What should the definition look like in an ideal world?

HJ - In an ideal world policies such as the housing act would be written in such a way as that responsible authorities are under a duty to find out from scratch who they are providing to. Not just ticking boxes about certain named groups or protected characteristics but being in a continual process of engagement assessment and review. That would remove the need for 'catch all' definitions which inevitably exclude someone and return the duty to act with integrity and equity back onto statutory bodies, not on vulnerable people to be able to shout loud enough over the din to get themselves heard.

SR - Leaving aside any thoughts regarding "New Travellers" themselves, do you think that there should be an acceptance in law for those with a 'nomadic habit of life regardless of race or origin'?

HJ - As above there should in practice be acceptance of anything which on balance causes least possible undue harm to other creatures or the natural environment.

SR - If traditional nomadic communities were afforded special status in law (regardless of nomadism), would there be a problem with non ethnic people of nomadic habit of life being able to gain planning permission for sites?

HJ - I hope I don't seem to be a bit slap dash in responding to this, it isn't meant to be. I don't mean to sound naïve or over simplify. My answer to this is that we should be aiming towards an ideal world in which we act with integrity and allow decisions to be made on balance of fairness and least harm. In the current situation, the balance of fairness and least harm should fall in favour of Gypsy and Traveller people quite naturally because of their own cultural history and the harm that has been caused by majority exclusion.

Because we live in a world where the balance of power is far from ideal, fair, or causing least harm, a pragmatic response has to be to attempt to provide most fair and equitable protection from harm. For Gypsy and Traveller people right now that does mean that a protective legal statute such as other minority groups in other countries have achieved would be extremely reassuring. A site is just a home, why should it be regarded any differently to any other home, other than to assess its potential for fairness and least harm?

## 10.4 Interview with Tim Jones

SR: [with regard to the definition] How important, or how pivotal, is the role of the decision maker at each point?

TJ: Well it depends very much on the nature of the decision. The challenge to the decision maker must be on a matter of law. For example, if a decision maker finds that someone has abandoned a nomadic habit of life for one reason other than the three specified in the definition in central Government policy, and there is some evidence to justify it, it would be very difficult to challenge it. As things stand, it really depends on whether the nature of the decision is characterised as a matter of fact or a matter of law.

Points on Gibb and Wrexham

TJ: Essentially, the Court of Appeal in *Ex parte Gibb* introduced this economic purpose for nomadism and that seemed to be under a misplaced apprehension that the Gypsy community did not include within it, people who were retired, people who were unable to work because of disability, or people who carried out the traditional role of a woman or indeed the role of a single mother. I don't think the Court of Appeal even considered these issues privately. And then of course we get to *Wrexham v. Ex parte Berry* where one has what was rightly described in the first instance as a nonsensical or inhumane position of considering someone who had ceased to travel for economic purposes



because of ill health as being no longer within the definition. I don't for one minute believe Parliament ever intended that to be the case when they first introduced the definition or that Government intended it to be the case when they introduced it into planning policy.

Points that will be raised in Medhurst

TJ: the absolutely critical thing is this [definition] is discriminatory against women. How that is expanded upon and what legal coat hangers (as it were) are hung on would be a matter for sitting working through the details of the provisions. It will certainly include the equality duty and I would anticipate there would also be reference to the race directive because this relates to accommodation which in the case of race is covered by EU law, even though other forms of EU discrimination law don't apply to accommodation, so I anticipate that will be brought in as well. Human rights are going to be brought in, because it is a discriminatory provision that relates to the Article 8 right to a home, so there's Article 8 in conjunction with Article 14 of the European convention that also comes into play. That comes into play if there's no other remedy available in English law. It's a back up.

Points on challenging the definition on a macro as well as micro level

TJ: I would hope to get the Court's sympathy on a macro level, and I would hope to say it at the beginning that one must see the wood from the trees. But I'd also expect the Court to want proper legal arguments which you could describe as the micro level, but I don't think one could deal with it solely on a micro level, one has to start with the overview, and go down to the finely tune legal arguments as to why there are grounds for the Court to intervene.

Options available to the Court of Appeal if it finds the definition to be lacking.

TJ: Well the first thing of course is that in any planning appeal they quash your decision and the matter is remitted to the Secretary of State to re-determine, and the Secretary of State must re-determine it in the light of the Court's judgement. And so it would be re-determined bearing in mind a proper interpretation of the definition of "gypsy", that is a legal interpretation.

The Court can effectively say what it thinks appropriate in its judgement and that may amount to saying that the literal wording of the policy is wrong. This could mean that either they then go on to say that the literal wording should be interpreted in the following way, despite the fact it's not the literal meaning, or they could take a slightly stronger step and say it really ought to be rewritten. What they won't do in these proceedings is make an order against the Government, other than quashing its decision. They won't order the Government to rewrite it however they can phrase things in such a way that it can be very difficult for the Government to do anything apart from rewrite it.

Point on how a change in the definition might best be achieved

TJ: I think, in the short term, the best prospects are through the courts, after all there was a lot of lobbying immediately before the new Gypsy and Traveller policy, and if lobbying was going to succeed I would have expected it to succeed then, so in the short term I would expect the courts to be a better prospect. We've yet to see the effect of lobbying in Wales, assuming of course that they produce a new policy and alters its definition. Of course when one part of the UK adopts a new definition, other parts will consider whether they ought to also do the same thing. So there's a prospect there as well.

Points on section 225 definition and the Metis case

TJ: As far as the definition is concerned, it's probably the best that anyone's come up with so far. I know people are unhappy with it, but my usual response is "I'm afraid you've got to write a better one if you want a better definition". The Canadian case is interesting and

I think that will go to the first limb of the Housing Act definition, as to who exactly are traditional travellers, the second of course deals with those who are nomads, and that's a separate matter. As far as the first limb is concerned, it is imprecise and it is important to know who is covered by "people who have a cultural tradition of travelling", both to understand what is meant by the definition for the Housing Act and the assessments, and also bearing in mind that Chapman referred to traditional lifestyle, so one has to wonder what exactly is meant by that. At one stage it was relatively simple as by and large one could say that all Romany Gypsies and Irish Travellers had a cultural tradition, possibly excluding those who were many generations away from travelling, and one could say no New Travellers had. Now you're in a situation where we've got 3<sup>rd</sup> generation New Travellers, and the boundary is a lot less clear than it was.

Point on whether someone who is within the planning definition but not of ethnic status can rely on Chapman

TJ: Well I think that is wrong too. First of all, decisions the European Court of Human Rights cannot be based on a definition in any one legal system. I have no doubt that the majority of the Court, when they talk of Gypsies would have been thinking of Roma, or they would've been briefed on the special situation in the United Kingdom and Ireland which in some ways is very different from the continental mainland. So no doubt the Court had traditional Gypsies in their mind when they are going over that judgement, and you can't just import the UK definition. I think the problem in intellectual sense of how you analyse things, is at what point do New Travellers reach a point where we say they have a tradition of travelling as well as they get into the 3<sup>rd</sup> generation. I don't think that's clear.

Point on Chapman being broader and narrower than the definition

It seems to me that the Chapman case in referring to traditional travellers is both broader and narrower than the definition. That is that it's broader in a sense that someone like

Mrs McCann would be a traditional gypsy even though she fell outside the definition for planning terms she would be covered by Chapman. Whereas, certainly a New Traveller who had very recently become a New Traveller (first generation), would find it hard to argue that they had a tradition of travelling.

#### Points on Massey

TJ: Yes, the decision in Massey [at the planning appeal stage] was that some of the New Travellers had satisfied the definition, and they had an economic purpose. I personally was happy that some hadn't and the concern of the Derbyshire Gypsy Liaison group was that an over broad definition would mean that there would be yet more people searching for a very limited number of sites, and there shouldn't be an over broad definition of Gypsies and Travellers. So there was no challenge to the Inspector's finding that some of the New Travellers fell within the definition. However, the traditional Gypsies represented by the Derbyshire Gypsy Liaison group didn't want a broad definition to include people who hadn't been travelling for long enough or hadn't established an economic purpose to their travel, because that would've just meant yet more people chasing after the inadequate number of pitches.

The rate of provision is way below what it should be almost everywhere, and certainly there is a perception among Gypsies and Irish Travellers, that somehow people can get in and take pitches which ought to be for them. But in a way, it is the same situation with other ethnically disadvantaged groups, for example a project that was set up for the benefit of potential black architects following the death of Steven Lawrence which now allows those from other ethnic minorities in. Some people say "why is it now being used for those who don't come within that category?" It's the old positive action attitude.

Point on length of nomadic habit of life

TJ: I think there's a problem too with how long before one establishes a nomadic habit of life. Clearly in some locations, for very good reasons, people are seeking pitches in areas where they wouldn't be allowed to build houses. Its one thing to do that if someone has a tradition, and that may be a tradition for ethnic reasons, and maybe because you're a 3<sup>rd</sup> generation New Traveller. But to say someone could leave their house, and within a few months set up a caravan in the green belt, is going to increase the level of opposition to meeting the need for caravan sites in the green belt.

## 10.5 Notes from interview with Dr. Robbie McVeigh

### Ethnicity

- Its important to have awareness of the different constructions of awareness, eg the Barth end of things and the legal discourse.
- Once you start to deconstruct different forms of ethnicity they are all flawed.
- The deconstruction of ethnicity is wider than just Travellers, the same principles can be applied elsewhere.
- In the case of New Travellers, the continuous suggestion of ethnic minority status might lead somewhere. With regard to 2<sup>nd</sup> / 3<sup>rd</sup> generation NTs, that's when authenticity properly kicks in.
- In the case of Irish Travellers, claims of ethnicity did not emerge from the community, it was from activists etc.
- However, ethnicity is often the first defence for IT.

### Pathological ethnicity

- eg feral youth.
- Once you regard people as feral / vermin then that's pre genocidal.

### Authenticity

- This can be take different forms, eg the traditional travellers vs. Big fat gypsy wedding type stereotypes.

- Authenticity denial is less defined than ethnicity denial, but it real.

### **NI RRA**

- The NI RRA 1989 includes Irish Travellers after much campaigning by Traveller support groups. The word 'traditional' was inserted to ensure the exclusion of New Travellers.
- There is a relationship between designation and RRA, if a quota has been fulfilled, then is it then discrimination to not allow other ethnic Travellers to settle in area. (NEED TO LOOK INTO THIS IN THE NI CONTEXT, in England, that argument couldn't be made as it would be the non ethnic planning definition).
- The right to nomadism has to be a relevant political concept, such an argument must be worthwhile in the context that it is being made in .

### **O leary decision**

- Case regarding a no travellers sign
- Defence attempted to discredit RM because of involvement in Rosemary Ellis campaign.
- Chris Paris was defence witness.
- Matrix chambers prosecution barrister.
- There was authenticity discourse with academics, choices of others above RM.
- Key point is that as in Dutton with Peter Mercer, legal discourse is most persuaded when presented by 'the other'. People need to 'feel the otherness'.

### **Ethnic minority status**

- Read the Rastafarian case, as his will show what authenticity isn't legitimated. (construction of the non ethnic minority).

### **UN**

- This is important.
- CERD accept self ascription for group ethnic identity.
- This is more of a problem for Irish Gov, who are very sensitive on HR issues.
- In the past no UK NGOs would go to CERD. Then the Committee on the administration of justice (NI version of liberty) presented arguments to CERD re: IT ethnicity.
- Tactically CERD is v important.

### **Travellers and the state**

- The threat posed by Travellers to the state is real.

- “the law constructs the reality of your life in a way that makes it unlawful”.
- Once you define people as unlawful there are a whole ream of consequences.
- The state / social workers need people who need them, ie they need victims.

### **Nomadism**

- By allowing non nomadic non ethnic minority people in “you lose what is significant about your own struggle”.
- Most of the law around nomadism isn’t facilitating nomadism.
- There needs to be a right to nomadism that’s effective as RR legislation.
- International labour organisations have the beginnings of an infrastructure for the right to nomadism.
- This needs to be given teeth.
- Right to nomadism should have never been attached to ethnicity.
- First step is to see it as a right that people should have.
- The first response to this will be a denial of authenticity.
- Counter response is that everyone should have that right.
- The contribution of NTs was important as people brought a politics to it.
- In Sweden and Norway there is a right to camp, traditional stopping places are a key point.

### **Wider implications**

- The powerful taking stuff of the powerless is in action in traveller stuff.
- AD is part of a bigger more profound process re: the nature of the state.
- Travellers often become the easiest way to read this.

### **International comparisons**

- No recourse to public funds
- This is constructing a category of people with no rights.
- So there is a right to exist but no recourse to public funds.
- “This notion is increasingly normalise but politically problematic.
- The treatment of Roma in other countries is characterised by this.
- In UK the kids are allowed into school, in Finland with ‘better’ education system, they are not allowed in (is this why they have better results than UK??).

### **Imagining the possible**

- “Part of it is a imagining of what a good infrastructure to facilitate nomadism would look like”.
- Eg constant evictions isn’t the ideal.
- Caravan club type suggestion was made in NI, response was that was too good for Travellers.

## 10.6 Interview with David Watkinson

SR: I guess the best place to start is the beginning. The thing I find really interesting in *Mills v Cooper*, is that the definition essentially gets uncoupled from ethnicity. And I kind of feel that everything else flows from there, and that's the starting point, and the first thing I'd like to get your view on is the significance of that, and whether at that point, the judges were thinking, well we can't have the Highways Act looking like a racist piece of legislation, and how that particular case has informed everything else I suppose.

DW: I think one of the main reasons why the uncoupling took place was because of the sheer difficulty of identifying Gypsies as a particular racial group, or as composed of a number of racial groups. It is a real difficulty, and had the courts gone down that road, they would have been faced with dealing with cases which the outcome would have been uncertain as they would have attempted to apply a racial test, and one of the themes of the application of legislation is that courts are quite keen to have a definition which works, or at least can be applied with a fair degree of precision. The point is to have a definition which can be applied without a great deal of difficulty. It isn't to say that you don't get the definitions which are difficult to apply, and you might call what the Court of Appeal came up with in *Gibb* as a classic example of that kind. What they produced was indeed a definition which does have difficulties of application.

Where making legislation work comes into this, is what we were then applying was the definition of nomadic habit of life in the Caravan Sites Act 1968, and of course the Caravan Sites Act 1968 put a duty on the local authorities to secure accommodation for Gypsies residing in, or resorting to, their area. I think the Court's concern in that case was, if we were going to make this legislation work, then we do not want to over burden local authorities with too extensive an obligation so we need to put a limit on the definition of 'habit of life', in order to make it easier for local authorities to comply with their



obligation. So I think that's the policy thinking behind that if you like, but when you do that, when you start getting away from the broad definition which might seem to be the one which they are told to go with, the question then is, what limit do you put on? And that was a problem and they solved that problem by working from the dictionary definition of the nomad looking for pasture, and making the modern equivalent of looking for work or means of livelihood. That definition itself has its problems of application and when I'm conducting public enquiries and I'm addressing the Inspector on the definition, I make two points. The first is, what it says in Gibb is 'make or seek livelihood', so first point is, you don't actually have to achieve your means of livelihood by your pattern of travel, just so long as you're looking for it, that's enough to get within the definition. The second thing is that if you look at the contrast that's made between those who wander aimlessly, and those who have some purpose to their travel, so it doesn't need to be the only purpose of the travel, the making or seeking of livelihood. Of course the gloss I'm putting on it, which has never been contradicted in the public enquiries, is that makes it much easier for those claiming 'gypsy' status to come within the definition, than a stricter application.

SR: From reading Dutton and from reading Gibb, one of the things that I've picked up is (I've seen this kind of phrase in a few other cases) where they say what was the parliamentary draftsmen originally thinking, you know, what was the mischief they were trying to legislate against, and this brings me onto the point about whether the words 'gypsy' within all this is problematic, because I kind of feel that half the problem that people have with the definition is because new Travellers are claiming to use – well not claiming, but –end up using the word "gypsy", and I've been trying to think of a way round it, and the only way I do it myself is whenever I'm writing stuff about status and it's for new Travellers and I just phrase it as traveller status, but I remove the word gypsy and try and sort of push that as much as I can. But, the thing I got from these cases is that, I don't know, maybe I've read it from my own mind as a new traveller, but thinking well you know they just want authentic Gypsies to be looked after here rather than new Travellers, and do you feel there is an element of that as well, or do you feel it was just on

that kind of purely technical point of how could all local authorities fulfil their statutory duties if there's too many people asking them to do that?

DW: Well, I speculate here, I actually doubt whether the 1968 Act draftsman had New Travellers in mind but what has happened is that because of the decoupling of ethnicity, the definition that has been produced fits those who do not have an ethnic or racial origin. In a sense, the legislators and authorities have got stuck with that, because they can't go back to the racial origin part of the definition, without then running into another morass of difficulty of application, which they set out to avoid in the first place. But there is no doubt in my mind that the definition covers new Travellers, and the controversy is that the traditional Gypsies do regard themselves as having a racial ethnic background, which can be traced back 100s of years, and that is part of their identity as Gypsies, and find a real difficulty in accepting that there can be a statutory definition of 'gypsy', which doesn't take that into account. Time and again, I've had it when a traditional Gypsy's status raises an issue in public enquiries or in injunction proceedings and I've said to the client 'you know they're challenging your status as a gypsy' and you get 'well I can't see how they can get away with that one!' This obviously comes up when the authorities are questioning, whether the purpose of travel is for making or seeking livelihood, but the traditional Gypsy will regard himself as a Gypsy, whether he is travelling for that purpose or not. You can of course get the situation where somebody who is a traditional Gypsy, can be found not to be a 'gypsy' for the statutory purposes, because of an application of the definition. I've had one or two like that, much to the bewilderment of the client. So it can work that you can have someone that's a New Traveller accepted as meeting the definition of a 'gypsy' and a traditional Gypsy, not meeting the definition.

You're quite right, that some of the heat of the debate would be taken out if New Travellers were able to describe themselves as Travellers rather than as 'gypsies', but the problem here is there actually is no statutory provision, which says 'Gypsies and Travellers'. It certainly comes in the planning circular, but as far as statute is concerned, there is only one term and that is "gypsy". The definition of 'gypsy', as interpreted in Gibb covers New Travellers. The term 'traveller' itself is not, as the lawyers say, a term of art,

it's a popular term, a term used by Gypsies to describe themselves, which has then been taken to apply to New Travellers. Actually it has no statutory basis, so if there was heat to be taken out of the debate, it would be useful for the term 'traveller' to be given a statutory basis.

SR: So an amendment to the 1960 Act definition then essentially?

DW: Yes, or whatever, because if we were going through that, I think that would be a point to an overhaul of Gypsy and Traveller legislation. There is one final piece of the jigsaw of statutory definition, and that's the Race Relations Act, because now we've got this curious factor that in spite of the racial element having been uncoupled, from the definition of *Mills v Cooper* in the 1968 Act, you do have a racial / ethnic origin application to Gypsies for the purposes of the Race Relations Act. If the Race Relations Act is to have any application in Gypsy/Traveller cases at all, then it has to be applied to persons who are of particular ethnic origin, and there is specific case law which says 'what are the qualifications for a group?' and there are groups of Gypsies, if you like, who can meet that definition, and the Irish Travellers are the classic example of that, and they are not the only example. So, in order to give the Race Relations Act a role, the courts have applied the tests of racial ethnic origin to groups of 'gypsies', as the cases have come up. The corollary of it is that there will be 'gypsies' and groups of 'gypsies', who will not fall into the Race Relations Act definition as it's applied.

But all these shades, what you can see, is limitations and dividing lines being put onto the various definitions in order to meet the particular purposes of the various Acts and statutory instruments, which of course makes it extremely interesting for lawyers to argue, and researchers to research into, but it is confusing for people on the ground, the people to whom it's being applied.

Points on difference of approach in cases.

DW: Issues are decided on a case by case basis so what you have is a definition which is broad in terms that we have been talking about, but will be applied on the facts of particular cases which judges or planning inspectors etc. are dealing with. There are bound to be inconsistencies in that kind of situation, and the problem is partly that we lay down a definition you can't anticipate every case that is going to turn up subsequently. So it has to be broad, and if it's going to be broad, then there are going to be occasions when it looks like it's been applied too strictly in one case, and too indulgently in another. Each course really has its own problem because if you then tighten the definition you'll have people falling out of scope whom the legislation would probably intended to keep in. So, there's not an easy way through there and it's a problem which affects every area of legal definition and application, which is total consistency and is probably incapable of achievement when you're dealing with broad definitions of a wide set of different circumstances.

Point on planning definition and statute definition for purposes of injunctions

The problem wouldn't be solved by including the statutory instrument definition in the planning definition, as we would still have the statute definition. For example, we find ourselves in the position of arguing a case on the basis of the planning definition at a public enquiry. But then at a later stage, if planning permission is refused and the local authority applies for an injunction to clear people off the site, then you're not in a planning permission position. The definition you're then applying is the statute definition. I wouldn't say that it's raised insurmountable problems, because funnily enough, it actually hasn't, but it's there. So you could find someone found to be a 'gypsy', for the purposes of the planning circular, but not a 'gypsy' for the purposes of enforcement.

So, we need the statute altered as well, if we're going to get a consistency of definition, if not consistency of application.

Point on the un coupling of cultural from aversion to bricks and mortar in Codona

I think that's a good thing, because one of the difficulties in arguing cultural aversion is what is the culture that you're actually referring to, whereas what you are really talking about is people who can't live in bricks and mortar without suffering mental harm. It is that which makes bricks and mortar accommodation offered to them unsuitable. Certainly, if you keep it to aversion, it is easier to apply than if you were adding cultural onto it as well. I think the Court of Appeal in *Codona* probably did a service removing cultural from aversion to bricks and mortar.

Point on right of any person to be nomadic in a vehicle or a caravan.

There couldn't be an objection to anyone being nomadic or living in a caravan, so long as the person concerned was able to lawfully accommodate themselves. Then I think it's the crunch, because the problem which runs through all this, is the aim of provision of accommodation by way of sites for those of nomadic habit of life. Sadly there is no definition that is really going to achieve that. What's going to achieve that is actual provision.

## **10.7 Interview with Marc Willers.**

Difference between how Romany Gypsies and New Travellers have to prove status

You need to go a lot further to get Gypsy status as a New Traveller, partly because you've got to show that you have a nomadic habit of life. In other words, you haven't just decided to go off travelling that year, you've been doing it for a consistent period, and that habit is easier to show if you have a cultural, traditional background, behind you. Perhaps as a child of someone who travelled, and then you have done a bit yourself.

Whereas a New Traveller has to have actually travelled, I think, for a few years before they can really prove that.

Gibb

In the South Hams ex parte Gibb case, we've got New Travellers trying to get within the definition. What the Court of Appeal was basically saying was that it's not just a case of wandering for no particular purpose, you've got to be wandering for an economic purpose. There is a real requirement for some recognisable purpose, as opposed to just simply going on your travels for no good reason. Actually when you read the judgment, they're not excluding the possibility that people will get within the definition who aren't travelling for an economic purpose, they're saying, I think, by and large, that's what you need to show.

Cooper

Mrs Cooper goes to the fairs and what she does is she sells little furry things that go on fridges, and stuff like that, little crafty things, she doesn't make very much, but makes more than some pin money. Considering her yearly income, it may be with benefits and the like, its a substantial proportion, but its not that much really, a couple of hundred of quid rather than thousands, but she was deemed to be entitled to Gypsy status, as that was the extent of her travelling, and that's what she did when she travelled. It wasn't just for the purposes of meeting people at the fairs.

Is lack of sites an acceptable justification for not travelling?

When we get to the case of McCann, the appellant was basically saying "it's too difficult to travel, there's no sites, its dangerous out there". She also had the argument, "I'm a single women how can you expect me to travel". Frankly, I don't think she should have lost her case in front of a planning Inspector on Gypsy status. I don't think you should be

debarred from having Gypsy status because you've stopped travelling because of a lack of sites, and because there are no halting or stopping places, and your being moved on continuously. That ought to be acceptable as a reason for stopping travelling.

The whole problem with the idea of travelling for an economic purpose is all the criminal legislation, the CJPOA 1994, is geared to stopping people from travelling. You've got this major battle for those who are trying to establish Gypsy status, at the same time as they are being prevented from travelling, which makes a mockery of it all really.

Wingrove and the article 8 argument

If any of these or other people like McCann or Wingrove take their case to the European Court of Human Rights, the European Court itself might say that the definition, and the requirement to show that you are travelling for an economic purpose in order to be able to establish a Gypsy site and live in accordance with your traditional way of life, places too high a burden on the individual. I'm keen to take such a case to the European Court. We didn't do so in the McCann case because we won on other grounds, or in the Wingrove case, because the appellant went back to another Inspector, with a fresh application and we convinced that Inspector that she was entitled to Gypsy status.

The article 8 argument is the way to unravel all this...article 8 would be able to tip the scales the other way. If you're going to recognise and respect the traditional way of life, the integral part of which Chapman says is living in caravans, it's the living in the caravans that really needs to be accommodated. If they travel away then fair enough, if you want to live in your caravan why do you need to show that you travel? So it is quite frustrating in those two cases that the courts wouldn't accept that.

Why a definition is needed

I think there needs to be a definition because otherwise even I could apply for a site licence, and then benefit from all the positive advice which is designed to really tackle the accommodation needs of people that actually have either a traditional way of life or a way of life that necessitates living in caravans.

What the definition should be called

If you get rid of the Gypsy status definition, so that it doesn't entitle people who are not Romany Gypsies or perceived to be Romany Gypsies getting some sort of status that entitles them to be able to apply for a caravan site you remove the heat from the issue. You could call it nomadic status, but that doesn't cater for people who maybe aren't nomadic anymore. although you could say that if nomadism is inherent in their traditional way of life, they come in the definition because of their traditional way of life. Others come in because they are actually living a nomadic habit of life. So just changing it to nomadic status would certainly reduce the tension that the definition brings.

I don't think you would find that Gypsies would be annoyed by changing Gypsy status to nomadic status, because, providing they fall within the definition, because of their cultural traditional ethnic background, then there should be no chance that their thinking that others are taking their clothes, and they're still entitled to call themselves Romany Gypsies. It just distinguishes their ethnicity from their planning status. The thing is that it's really difficult to explain to Romany Gypsy clients, and also Irish Travellers what this Gypsy status is all about. I would very much prefer it if they took away the word 'Gypsy' from the status. If there has to be any statutory definition that gets you within any positive, or hopefully what will still be positive advice, keep out the word 'Gypsy', keep out the word 'Traveller', because you've got people who say "I'm not a Traveller I'm a Gypsy", and then you've got people who say "I'm a Traveller, but I'm an Irish Traveller or a New Traveller", and I think it would make sense if you have in the definition 'people of a ethnic nomadic habit of life, including Romany Gypsies or Irish Travellers, plus people of nomadic habit of life, or with a cultural tradition of travelling'. You could be a New



Traveller who has been on the road for all of your life, perhaps with your parents, I understand that there are second of third generation New Travellers now.

#### Housing Act definition

So the definition should be as wide as it had been made for the purposes of the Housing Act 2004, because that caters for everybody, and that's what we've been arguing for years. I remember when the circular was coming out that we argued that it should include all people with an ethnic and cultural requirement for living in caravans and all those that travel (whether it be for economic purposes or not, those that have a nomadic habit of life).

I don't really understand why that definition isn't being imported into the new planning guidance, and wasn't originally adopted for the circular. Apart from the fact that it could be argued to open up the flood gates a bit, I know that. But it honestly doesn't really make sense to me that when you're assessing the needs of Gypsies and Travellers residing in or resorting to your area under section 225 of the Housing Act, you're meant to be creating a positive strategy to meet those needs but then if someone comes along who fits into the Housing Act definition, that doesn't necessarily entitle them to Gypsy status.

If the definition in the Housing Act was imported into the planning system, which is what we've been arguing on all along, the fear of the government and local authorities is that all the Gypsies and Travellers are going to come out of their houses. The reality of that is I don't think that is going to happen, because I think a lot of Irish Travellers and Romany Gypsies have moved into housing and they have accepted it. But there are some people who are still suffering living in bricks and mortar, having being forced into it because of a lack of sites, and they want to get back onto site. I think the reality is that it's not a great number. I think that it might be half again the number of caravans that we can't already accommodate, but is that really going to break the bank? I don't really think it is.

## What the definition should look like

So you would need a definition that included all the Romany Gypsies who wanted to live in caravans, all the Irish Travellers that wanted to live in caravans, and other ethnic groups for example, people who say I'm a Scottish Gypsy Traveller. Those that are recognised or would be recognised, plus those who are actually living a nomadic habit of life, plus those can show that there is a cultural tradition within their own family background, of travelling; because again it may be that you find there are New Travellers who carry on wanting to live in a Showman's wagon or whatever it may be, but actually find it just as difficult as Mrs McCann or whoever it may be, to move around, but who couldn't live in bricks or mortar. I think the definition in the Housing Act is not far off that.

## Why shouldn't anyone be entitled to live in caravans? / settled community

Well anybody can live in a caravan. Anybody can have a nomadic habit of life, but you're going to be moved, just like the Gypsies and Travellers are moved on now. But the idea that anybody should be being entitled to establish a site is out of the question – particularly at a time when we haven't got enough accommodation for Romany Gypsies and Irish Travellers. Because in that situation, Romany Gypsies and Irish Travellers are going to say well we were here first, and we haven't been accommodated and New Travellers might say that to.

The settled community can go and buy a park home tomorrow, and those sites are much more likely to get planning permission than a Gypsy or Traveller site because there is none of the opposition in terms of who it is that's going to occupy the site, and what their lifestyle is going to be like, and the prejudices that come with all of that. Whereas the only thing that would ordinarily count against park homes as I understand it is that they take up quite a lot of room, and can visually have quite a negative impact. If you've got 50 park homes on a ridge over looking a valley, it's all very nice for the people that live in the Park Homes, but it's quite visually damaging. Providing that there located in a situation

where they can get over that kind of objection, they tend to get granted permission, and Gypsies and Travellers get very upset about the fact that Park homes seem to be located all over the country, but if they try and move on or put their names down for them, instantly without being told a reason, they get rejected. Although there isn't enough housing in the UK, the settled community can still find rented accommodation, and there are plenty of Park homes. If they want and can afford to rent somewhere then they can. I know there's a lot of homeless people but at the same time, for those that can afford to rent they can, whereas if a Romany Gypsy or Irish Traveller tries to rent a pitch on a Gypsy site, they've got to look very hard to find one, let alone find a pitch that's available, and I mean that's the difference between Gypsies and Travellers and the settled population. We have housing strategies, we have targets to meet in terms in housing throughout the country, I know there's been a down turn in the housing market, there's been a lack of housing built, but there is still that accommodation available for the settled community.