

What's wrong with the concept of Gypsy status?

In this article Marc Willers assesses if the Government's proposal for 'Gypsy status' is compatible with the European Convention on Human Rights.

What's wrong with the concept of Gypsy status?

by Marc Willers

1. Government planning policy requires that Romani Gypsies and Irish Travellers must demonstrate that they have what has been termed 'Gypsy status' before they can obtain planning permission for a caravan site. In order to prove an entitlement to Gypsy status a person must show that s/he travels for an economic purpose or has ceased to do so on grounds of old age, ill-health, or for the education of children. In this blog I provide a brief history of the evolution of the concept of 'Gypsy status' and assess whether the current definition is compatible with the European Convention on Human Rights.

The evolution of the concept of Gypsy status

2. When Parliament first legislated on the provision of caravan sites for Gypsies and Travellers it defined 'Gypsies' not on grounds of ethnicity but as meaning:

'... 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'.

3. Significantly, in *Greenwich LBC v Powell* (1989), Lord Bridge of Harwich stated that a person could be a statutory Gypsy if he led a nomadic way of life only seasonally.

4. The definition was widened further by the decision in *R v Shropshire CC ex p Bungay* (1990). The case concerned a Gypsy family that had not travelled for some 15 years in order to care for its elderly and infirm parents. An aggrieved resident living in the area of the family's recently approved Gypsy site sought judicial review of the local authority's decision to accept that the family had retained their Gypsy status even though they had not travelled for some considerable time. Dismissing the claim, the judge held that a person could remain a Gypsy even if he or she did not travel, provided that their nomadism was held in abeyance and not abandoned.

5. That point was revisited in the case of *Hearne v National Assembly for Wales* (1999), where a traditional Gypsy was held not to be a Gypsy for the purposes of planning law as he had stated that he intended to abandon his nomadic habit of life, lived in a permanent dwelling and was taking a course that led to permanent employment.

6. Then, in *R v South Hams DC ex p Gibb* (1994), the Court of Appeal considered the statutory definition further and qualified it by holding that there should be some recognisable connection between the travelling of those claiming to be Gypsies and the means whereby they made or sought their livelihood:

'... the definition of 'Gypsies' ... 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 ...'

7. The latter part of the Court of Appeal's interpretation of the statutory

definition of 'Gypsy' involves a consideration of whether the individual concerned travels to seek or make their livelihood and this point has been considered further in a number of cases.

8. For example, in *Maidstone BC v Secretary of State for the Environment and Dunn* (2006), it was held that a Romani Gypsy who bred horses and travelled to horse fairs at Appleby, Stow-in-the-Wold and the New Forest, where he bought and sold horses, and who remained away from his permanent site for up to two months of the year, at least partly in connection with this traditional Gypsy activity, was entitled to be accorded Gypsy status.

9. More recently, in the Court of Appeal case of *Wrexham CBC v The National Assembly for Wales and Berry* (2003), Auld LJ gave the following guidance to decision makers on the approach that should be taken when determining the issue:

'(2) Whether applicants for planning permission are of a 'nomadic way of life' as a matter of planning law and policy is a functional test to be applied to their normal way of life at the time of the determination. Are they at that time following such a habit of life in the sense of a pattern and/or a rhythm of full time or seasonal or other periodic travelling? The fact that they may have a permanent base from which they set out on, and to which they return from, their periodic travelling may not deprive them of nomadic status. ...

(3) Where, as here, a question is raised before a Planning Inspector as to whether applicants for planning permission are 'gypsies' for the purpose of planning law and policy, he should: (i) clearly direct himself to, and identify, the statutory and policy meaning of that word; and (ii) as a second and separate exercise, decide by reference to that meaning on the facts of the case whether the applicants fall within it ...

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

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

10. Whilst those points set out in the Wrexham judgment seem perfectly logical matters for the decision maker to take into account, the Court of Appeal's conclusion in that case - namely that an elderly Romani Gypsy who had been forced to retire from travelling for work on grounds of old age and ill health should no longer be entitled to Gypsy status - led to the Government issuing a revised definition of Gypsy status in Circular 1/06.

11. Paragraph 15 of Circular 1/06 states that:

'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.'

and anyone seeking permission for a Gypsy site who falls within that definition is entitled to Gypsy status and can rely upon the advice in Circular 1/06.

12. It is clear that the Circular 1/06 definition of Gypsy status focuses upon 'nomadism' rather than 'ethnicity'. Whilst it enables those that have given up a nomadic habit of life for reasons of health, education and old age to claim entitlement to Gypsy status it does not cater for those ethnic Gypsies and Travellers who have given up a nomadic habit of life for other reasons but would wish to continuing living in caravans and/or have a 'cultural aversion to bricks and mortar'.

13. In both *McCann v SSCLG and Basildon* (2009) and *Wingrove v SSCLG and Mendip DC* (2009) an argument that the Circular 1/06 definition breaches Article 8 of the European Convention on Human Rights (the 'Convention'), in that it fails to accord the traditional way of life of ethnic Gypsies and Travellers (an integral party of which involves living in caravans) sufficient respect, was rejected. The same point was also rejected in the case of *Medhurst v SSCLG and TMBC* (2011) unreported – though the decision in that case is subject to appeal.

What's wrong with the current definition?

14. It will be appreciated that the current definition places ethnic Gypsies and Travellers in a 'catch 22' situation. They have to demonstrate that they travel for an economic purposes (or have ceased doing so on one of the 3 specific grounds) in order to be afforded Gypsy status and benefit from the positive advice in Circular 1/06 - at a time when, in the absence of sufficient stopping places and in the face of the draconian legislation contained in the Criminal Justice and Public Order Act 1994, it is extremely difficult to pursue a nomadic habit of life (whether seasonally or at all).

15. The requirement that a Romani Gypsy or Irish Traveller has to show that s/he is living a nomadic habit of life (or has ceased doing so on one of 3 specific grounds) does not cater for those ethnic Gypsies and Travellers who have taken up settled employment and ceased travelling for that reason but wish to continue living in accordance with their traditional way of life.

16. As a consequence a Romani Gypsy or Irish Traveller will placed in the invidious position of being forced to choose between pursuing employment which would necessitate living in one place (perhaps as a teacher, healthcare professional or lawyer) or foregoing such employment so as to be able to seek planning permission for a Gypsy site.

17. Thus, the concept of Gypsy status can be seen to restrict those ethnic Gypsies and Travellers who wish to continue living in caravans to low paid and manual work of the sort that has

traditionally been undertaken by members of the Travelling community. Ethnic Gypsies and Travellers should not be placed in such a predicament and should have the ability to pursue any career they choose without fear of being disenfranchised when it comes to seeking planning permission for a Gypsy site.

18. In addition, it seems to me that the current definition renders it very difficult for a Romani Gypsy or Irish Traveller to obtain Gypsy status and benefit from the positive advice in Circular 1/06 when seeking planning permission if s/he has been forced into conventional bricks and mortar accommodation due to the scarcity of lawful sites and has ceased travelling for that reason.

19. Moreover, the requirement indirectly discriminates against single women who cannot bring themselves within the 3 specific grounds because they are very unlikely to travel for work (for both cultural and practical reasons). In my view there is no justification for them being subjected to such treatment.

20. Notwithstanding the decisions in McCann, Wingrove and Medhurst I take the view that the current definition of Gypsy status does not pay sufficient respect to the traditional way of life of those ethnic Gypsies and Travellers falling within the categories that I have identified above.

21. There is, in my view, no necessity for the current restriction on the width of the definition (after all the meaning of 'Gypsies and Travellers' used for the purposes of assessing need in compliance with section 225 of the Housing Act 2004 is wider and includes 'persons with a cultural tradition of nomadism or of living in a caravan') and I consider it to be incompatible with Article 8 of the Convention. Given the fact that the current definition also discriminates against women then I consider that it could also be argued that it offends Article 14 of the Convention.

In conclusion, I would suggest that the Government amends the definition of the term 'gypsies and travellers' in Circular 1/06 (and any replacement planning guidance) so that it conforms with the Housing Act 2004 definition and expressly includes all 'persons with a cultural tradition of nomadism or of living in a caravan' as well as those who are able to show that they have a nomadic habit of life or have ceased travelling for one of the 3 permissible grounds.

I would also suggest that it is about time that the Government uses capitals when referring to Gypsies and Travellers in policy and legislation!

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