IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
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CO-1183-95
CO-1256-95

Royal Courts of Justice
Strand
London WC2

Thursday, 31st August 1995

B e f o r e :

MR JUSTICE SEDLEY

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REGINA v LINCOLNSHIRE COUNTY COUNCIL
and
WEALDEN DISTRICT COUNCIL

EX-PARTE: ATKINSON
EX-PARTE: WALES
EX-PARTE: STRATFORD

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(Computer Aided Transcript of the Stenograph Notes of
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Official Shorthand Writers to the Court)

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MR D WATKINSON and MR C HUTCHINSON (instructed by The Public Law Project) appeared on behalf of the Applicants.

MR R LANGHAM (instructed by Sharpe Pritchard, London WC1) appeared on behalf of the Respondent Wealden District Council.

MR P GROUND QC (instructed by Lincolnshire County Council) appeared on behalf of the Respondent Lincolnshire County Council.

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

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Thursday, 31st August 1995

J U D G M E N T

MR JUSTICE SEDLEY: **The issues.** In each of the three cases before me a local authority, in the exercise or purported exercise of its powers under the Criminal Justice and Public Order Act 1994, has given removal directions to the applicants and others, who in each case have been unlawfully camped on land in the locality, and has then sought and obtained from the local justices removal orders against those who had not by then left. The following issues arise in all three cases:

(1) Whether the local authority, in deciding to give a removal direction, has taken into account the right things at the right stage.

(2) Whether, if there has been a failure under head (1) the defect has been cured by due consideration at a later stage.

(3) Whether, if any of the decisions was defective and the defect not cured in time, the decision of the local authority should in the exercise of the court's discretion be struck down.

If the local authority's decision falls, it is not disputed that the justices' removal order must fall too.

In relation to the applicants in ex parte Stratford a further issue arises:

(4) Whether a removal direction affects persons who arrive on the land after the date when it

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is

given.

The law

Sections 77 to 79 of the Criminal Justice and Public Order Act 1994 are cross-headed 'Powers to remove unauthorised campers'.

Section 77 provides:
(1) If it appears to a local authority that persons are for the time being residing in a vehicle or vehicles within that authority's area-

(a) on any land forming part of a highway;

(b) on any other unoccupied land; or

(c) on any occupied land without the consent of the occupier,

the authority may give a direction that those persons and any others with them are to leave the land and remove the vehicle or vehicles and any other property they have with them on the land.

(2) Notice of a direction under sub-section (1) must be served on the persons to whom the direction applies but it shall be sufficient for this purpose for the direction to specify the land and (except where the direction applies to only one person) to be addressed to all occupants of the vehicles on the land, without naming them.

(3) If a person knowing that a direction under sub-section (1) above has been given which applies to him -

(a) fails, as soon as practicable, to leave the land or remove from the land any vehicle or other property which is the subject of the direction, or

(b) having removed any such vehicle or property again enters the land with a vehicle within the period of 3 months beginning with the day on which the direction was given,

he commits an offence and is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(4) A direction under sub-section (1) operates to require persons who re-enter the land within the said period with vehicles or other property to leave and remove the vehicles or other property as it operates in

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relation to the persons and vehicles or other property on the land when the direction was given.

(5) In proceedings for an offence under this section it is a defence for the accused to show that his failure to leave or to remove the vehicle or other property as soon as practicable or his re-entry with a vehicle was due to illness, mechanical breakdown or other immediate emergency.

.....

Section 78 provides:
(1) A magistrates' court may, on a complaint made by a local authority, if satisfied that persons and vehicles in which they are residing are present on land within that authority's area in contravention of a direction given under section 77, make an order requiring the removal of any vehicle or other property which is so present on the land and any person residing in it.

(2) An order under this section may authorise the local authority to take such steps as are reasonably necessary to ensure that the order is complied with and, in particular, may authorise the authority, by its officers and servants -

(a) to enter upon the land specified in the order; and

(b) to take, in relation to any vehicle or property to be removed in pursuance of the order, such steps for securing entry and rendering it suitable for removal as may be so specified.

.....

(5) Where a complaint is made under this section, a summons issued by the court requiring the person or persons to whom it is directed to appear before the court to answer to the complaint they be directed -

(a) To the occupant of a particular vehicle on the land in question; or

(b) To all occupants of vehicles on the land in question, without naming him or them.

Section 79 provides:

(1) The following provisions apply in relation to the service of notice of a direction under section 77 and of a summons under section 78, referred to in those provisions as a 'relevant document'.

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(2) Where it is impracticable to serve a relevant document on a person named in it, the document shall be treated as duly served on him if a copy of it is fixed in a prominent place to the vehicle concerned; and where a relevant document is directed to the unnamed occupants of vehicles, it shall be treated as duly served on those occupants if a copy of it is fixed in a prominent place to every vehicle on the land in question at the time when service is thus effected.

(3) A local authority shall take such steps as may be reasonably practicable to secure that a copy of any relevant document is displayed on the land in question (otherwise than by being fixed to a vehicle) in a manner designed to ensure that it is likely to be seen by any person camping on the land.

.....

It is relevant to situate this new and in some ways draconic legislation in its context. For centuries the commons of England provided lawful stopping places for people whose way of life was or had become nomadic. Enough common land had survived the centuries of enclosure to make this way of life still sustainable, but by section 23 of the Caravan Sites and Control of Development Act 1960 local authorities were given power to close the commons to travellers. This they proceeded to do with great energy, but made no use of the concomitant power given to them by section 24 of the same Act to open caravan sites to compensate for the closure of the commons. By the Caravan Sites Act 1968, therefore, Parliament legislated to make the section 24 power a duty, resting in rural areas upon county councils rather than district councils (although the latter continued to possess the power to open sites). For the next quarter of a century there followed a history of non-compliance with the duties imposed by the

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Act of 1968, marked by a series of decisions of this court holding local authorities to be in breach of their statutory duty, to apparently little practical effect. The default powers vested in central government, to which the court was required to defer, were rarely if ever used.

The culmination of the tensions underlying the history of non-compliance was the enactment of the sections of the Act of 1994 which I have quoted. There follows, in section 80(1), the wholesale repeal of the material part, Part II, of the Caravan Sites Act 1968. But the section keeps in being, inter alia, the powers under section 24 of the Act of 1960 for district councils to provide caravan sites for anybody, not merely gypsies. Apart, however, from the enhancement (by section 80(2) of the Act of 1994) of local authorities' section 24 powers to provide working space and facilities for gypsies, being a gypsy now carries no special rights or expectations except in the terms of a departmental circular (Department of the Environment 18/94; Welsh Office 76/94) issued on the 23rd November 1994 and captioned 'Gypsy sites policy and unauthorised camping'.

The circular makes reference to the then recent decision of the Court of Appeal in R v South Hams District Council ex parte Gibb (The Times, 8th June 1994), limiting the statutory definition to persons whose movement is linked to their livelihood. It 'offers guidance on the provisions in sections 77 to 80' of the Act of 1994 'which affect gypsies and

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unauthorised campers'. The present applicants do not contend that they come within the meaning of 'gypsy' for the purposes of the circular, which in paragraphs 6-9 and 14-26, focuses on the new situation of gypsies following repeal of the Act of 1968. The commended policy in relation to gypsies is summarised in paragraph 9:

'The Secretaries of State continue to consider that local authorities should not use their power to evict gypsies needlessly. They should use the powers in a humane and compassionate fashion and primarily to reduce nuisance and to afford a higher level of protection to private owners of land.'

There then follow four paragraphs cross-headed 'Local authorities' obligations under other legislation', and it is common ground that this guidance is relevant to persons such as the applicants.

`10. Social services departments and local housing authorities are reminded of their obligations under Part III of the Children Act 1989 (local authority support for children and families); and Part III of the Housing Act 1985 (Housing the homeless). The Secretaries of State expect authorities to take careful account of these obligations when taking decisions about the future maintenance of authorised gypsy caravan sites and the eviction of persons from unauthorised sites.

11. Local education authorities should bear in mind their statutory duty to make appropriate educational provision available for all school-age children in their area, whether resident temporarily or permanently. .....[This] Duty embraces traveller children. Local education authorities should take careful account of the effects of an eviction on the education of children already enrolled or in the process of being enrolled, at a school. Where an authority decides to proceed with an eviction, and any families concerned move elsewhere in the same area, alternative education arrangements must be made in accordance with the requirements of the law appropriate to the children's ages, abilities and aptitudes.

12. The Secretaries of State so expect local authorities who decide to proceed with evictions to liaise with other local authorities who may have statutory responsibilities to discharge in respect of

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those persons who are being evicted.

13. Local authorities should also bear in mind that families camped unlawfully on land may need or may be receiving assistance from local health or welfare services. When they have decided to proceed with an eviction, they should liaise with the relevant statutory agencies, particularly where pregnant women or newly born children are involved to ensure that those agencies are not prevented from fulfilling their obligations towards these persons.'

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 sections 77 to 79 of the Act of 1994 would be to leave relevant matter out of account and so jeopardise the validity of any consequent step. The concession is rightly made because those considerations in the material paragraphs which are not statutory are considerations of common humanity, none of which can properly be ignored when dealing with one of the most fundamental human needs, the need for shelter with at least a modicum of security.

The statutory duties to which, by common consent, regard must be had include those mentioned in the paragraphs of the circular which I have quoted. Section 17 of the Children Act 1989 places a duty on county councils (see section 105) to safeguard and promote the welfare of children in need, if appropriate by giving

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assistance in kind or - exceptionally - in cash. Section 20 extends the duty to the provision of accommodation for children in need whose carer is prevented from providing the child with suitable accommodation or care. Part III of the Housing Act 1985 creates a series of duties involving major public expenditure in relation to persons who unintentionally become homeless. The Education Acts require local education authorities to make provision for what is in law the compulsory education of school-age children. Additionally statute requires local provision to be made for the availability of health and welfare services, so that it is necessary for local authorities contemplating removal proceedings to bear in mind the potential need of those affected for access to health or welfare services. None of these issues is likely, except in an extreme case, to be determinative but all are potentially relevant. Whether they are in fact relevant in any one case and at any one time can only be ascertained by some form of inquiry. This much is common sense.

It is next necessary to consider what is the purpose of the powers which sections 77 to 79 of the Act of 1994 have vested in local authorities. On behalf of Lincolnshire County Council Mr Patrick Ground QC has submitted that the question is whether the material encampment ought to be tolerated. 'Encampment' is a convenient description of what section 77 is directed at. Because the choice under that section is whether or not to give a direction, and because abstaining from

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giving a direction amounts to tolerating the encampment for the time being, it is not an unreasonable description of the discretion to say that it offers a choice between tolerating and not tolerating the encampment. But it is important that the verb, which does not appear in the statute, should not acquire a life of its own. A particular encampment may or may not be considered by others living in the locality to be a nuisance; if it is, then words like 'tolerate' and 'intolerable' are deployed, and those who have to take responsible decisions in the name of the local authority must take care to distinguish between such language and the language of the statute, which does not predicate the power to give a removal direction upon the occurrence or absence of nuisance or, therefore, on tolerating or not tolerating it.

It follows, in my judgment, that while the sentiments of others living in the locality will of course be relevant matters to be taken into account in coming to a decision, so will the objective appraisal of the situation made by those responsible for taking the local authority's decision - a decision which in the end must always be a straightforward choice between giving and not giving a removal direction under section 77 or, following the making of a removal direction, between making or not making a complaint to local justices under section 78 or, where justices make a removal order, between enforcing and not enforcing it under section 78(2).

In none of the present cases is any complaint made

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against the justices who made removal orders under section 78(1). Their evidence demonstrates that the basis for the making of the orders was in each case properly established before them. If, therefore, their orders are to be struck down it can only be because one or more of the removal directions the existence of which is a pre-condition of the justices' jurisdiction under section 78 was not validly given. (More debatably, it may also be because the decision of the local authority to make a complaint to the justices was similarly vitiated; but the pattern of events in the present cases is such that if the challenge to the removal directions fails, the challenge to the decision to go to court cannot succeed in its place).

A second and separate question of law is whether persons and vehicles who were not on the land at the date of the section 77 removal direction are affected by it. The arguments are these. Mr Langham for Wealden District Council submits that the effect of section 77(2) is to make a removal direction to all intents and purposes an order in rem. Moreover, section 79(2) permits substituted service by fixing a relevant document in a prominent place if it is impracticable to serve it personally; and as a back-up the local authority is required by section 79(3) to do what it can to display relevant documents on the land so as to bring them to the attention of those camped there. Thus section 77 has two distinct effects: (a) the making and substituted service of the direction creates a requirement to leave; but (b) criminal liability for not

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leaving depends on knowledge of the direction, which is not established by mere proof of substituted service. It is contravention of a direction, not knowledge of it, which then attracts the magistrates' jurisdiction under section 78(1). But if a newcomer to the encampment does have or acquire actual knowledge of the direction, then there is no reason why he or she should not be criminally liable as well. By section 78(5) a summons to answer a complaint of non-compliance with a removal direction can be directed to the occupant or occupants of one or more vehicles on the land in question, without naming them, which presupposes that the eventual removal order can bind all those in occupation at the time when it is made.

For the applicants, Mr Watkinson submits that the material sections have a clear policy, consonant with the ordinary principles of criminal justice, of exposing to a draconic order only those who are on the land in contravention of a removal direction, and that the provisions for substituted service in section 79(2) and (3) do nothing to dilute the requirement of section 77(2) that notice of a removal direction 'must be served on the persons to whom the direction applies'. Section 78(5), he submits, likewise does nothing to answer the question to whom a removal direction applies: it simply replicates the further provisions of section 77(2) for addressing a relevant document to a person whose name is not known by reference instead to their vehicle. Mr Watkinson draws a contrast between these provisions and the provision of section 63(4) which provides in

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relation to a direction by a senior police officer to leave land on which preparations for a rave (the word has not quite got into the statute book: the drafter has put it in the shoulder-note to the section) are being made:

'Persons shall be treated as having had a direction under sub-section (2) above communicated to them if reasonable steps have been taken to bring it to their attention.'

Thereafter failure to leave, or leaving and re-entering, without reasonable excuse constitutes an offence.

Since this is a pure question of construction I will set out my conclusion on it now. If, as is common ground, the local authority has an initial discretion whether to give or not to give a removal direction in relation to an encampment in its area, it must necessarily apply its mind to the people who 'are for the time being residing' there in order to decide whether to direct them to leave. Nothing in section 77(1) compels the local authority to evict all or none of the occupiers. If, for example, an encampment which it was thought necessary to remove included a heavily pregnant woman dependent on the local maternity or midwifery service to deal with anticipated complications on delivery, it would be entirely proper for the authority to give a direction which did not apply to that woman and the vehicle which was her home. The reason would be that even though the authority might itself give her a direction without any intention of enforcing it until it was humane and medically safe to do so, once service brought the making of the

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direction to her knowledge she would be guilty of an offence if she and those sharing her vehicle failed as soon as practicable to leave the land, and she could be privately prosecuted by any individual aggrieved by her presence. It follows, in my view, that an important element in the discretionary powers given to local authorities is a duty to think about individuals - both those encamped and those resident in the locality - and to strike a responsible balance between competing and conflicting needs. In other words section 77(2)is not intended to operate in rem but in personam.

The scheme of operation of the legislation is correspondingly that personal service of a removal direction is required by section 77(2) 'on the persons to whom the direction applies', who can only logically be persons encamped on the land at the time the direction is given. The remainder of section 77(2), like section 78(5), deals not with the mode of service but with the content of the direction, allowing it not to name the occupants of the vehicles to whom it is addressed. It is section 79(2) which makes the sole provision for substituted service by allowing the removal order, if and only if 'it is impracticable to serve' it on the named or unnamed individual to whom it is directed, to be fixed to the relevant vehicle or vehicles instead. The ancillary provision of section 79(3) is not a form of substituted service but a back-up to the separate provisions for personal or substituted service. I accept Mr Watkinson's submission that the drafter of this legislation can be seen from section

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63(4) to have had well in mind the distinction between personal or substituted service and deemed service.

This in turn explains why section 77(3) criminalises a person who knows that a removal direction 'has been given which applies to him'. The last four words would be otiose if every removal direction applied automatically to everybody thereafter coming on to the land. Moreover, as Mr Langham accepted, it follows from his submission that section 77(3) makes not only re-entry but entry on to the land by a person who knows of the direction a criminal offence in perpetuity, for the moment any person with a vehicle enters land in order to reside on it, knowing that in the past a removal direction has been given in relation to it, he or she would commit an offence by failing as soon as practicable to leave the land. If Parliament had intended removal directions to 'sterilise' the land specified in them against any future unauthorised encampment with vehicles, it would not have chosen this obscure way of doing it. It had available to it a ready precedent in the provisions of section 12 of the Caravan Sites Act 1968 for the designation of areas, subject to strict antecedent controls, as areas where encampment was to be an automatic offence. It is also to be noted that knowledge of a direction, which is the precondition of criminality under section 77(3), is independent of service: if the words 'which applies to him' are collapsed, as Mr Langham's submission seeks to collapse them, into his proposition that a removal direction automatically applies to everyone coming on to

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the land, then persons to whom the direction is not addressed and on whom it is not served will be equally and permanently affected by it once they learn of it.

I hold, therefore, that a removal direction under section 77 of the Act of 1994 can apply only to persons who are on the land at the time when the direction was made, and so can be contravened only by such persons.

The facts

There is little if any dispute about the enquiries made at different stages by the respective local authorities into the situation of the various applicants. The dispute is about whether their enquiries were too little, too late or both. There is much more evidence, which it has not been necessary to go through, about local ill-feeling and allegations of serious nuisance. The reason why it has not been necessary to analyse and come to conclusions about it is that it is common ground that such input is a relevant element in the local authority's decision-making process and that it is for the authority and not the court to gauge the weight of these complaints. In the present cases there is no challenge to the way in which the local authority has dealt with local complaints. What is in issue is whether they have gone properly about weighing up the applicants' situations.

(a) Lincolnshire

The removal direction, relating to a section of highway known as Ermine Street, was made by the county council on the 2nd June 1995. It was followed on the 23rd June 1995 by a successful application to the

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Grantham justices for a removal order. Use was made of the provisions of the Act in order to address the direction to 'the occupier' of each vehicle or, in the case of the summons, 'the occupiers' of the vehicles collectively. For some reason the removal direction chose to describe Ermine Street as 'unoccupied highway', which led to a submission before the justices that the direction specified none of the three categories of land set out in section 77(1). The justices after deliberation concluded that the phrase came within the description 'unoccupied land'. Since paragraph (b) of the sub section actually refers to 'any other unoccupied land' following paragraph (a) 'any land forming part of a highway', it is difficult to see how they could have reached this conclusion if the land was indeed part of a highway; but no point is taken on it in the present pleadings and I need say no more about it.

The principal evidence for the county is given by its assistant director of highways, Roger Thompson. From his affidavit it is clear that by the date of the making of the removal direction on the 2nd June, no contact had been made with the persons unlawfully encamped on the land and no information had been obtained about who they were or what their situation or needs were. A simple process had been gone through: one or two days earlier the county had been notified of a large encampment of travellers with vehicles on Ermine Street and of local objection to it. The area and divisional surveyors sought from County Legal Services and obtained the issue of removal directions, which were

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served partly on the 3rd June and partly on the 5th June, requiring those served to leave within 48 hours. Further information led to the serving of further removal directions on the 10th June, requiring removal within 24 hours. It is not apparent by what delegation of functions the county council's powers were being exercised but no point is taken on this.

It was following the service of notice of the removal direction or directions and the failure of all those affected to leave that, from the 5th June onwards enquiries and negotiations were initiated about the individuals on the site. At the same time complaints by local residents and farmers were coming in through a number of organs of the local authorities. On the 6th June the county was told that there was a pregnant woman among those on the site who needed longer than the others to leave. A representative who contacted the council was put in touch with the council's gypsy liaison officer in the social services department. ' It was considered at that time' says Mr Thompson, 'that if there were 'vulnerable people' at the location with immediate emergencies, that they should be treated with tolerance.'

There followed on the 7th June a meeting between Mr Thompson and others to discuss how to proceed. It was decided to take the views of elected members. Circular 18/94 was expressly raised in the discussion. Information was received about a second pregnant woman on the site. Interest and pressure from other quarters grew, and on the 13th June Mr Thompson was asked to arrange a visit to the travellers with a senior elected

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member, a social worker and an education welfare officer. They were assisted by a briefing note previously prepared by County Legal Services, which referred to the Circular and the two pregnant women on the site, among other things.

`The purpose of the proposed visit was two-fold', says Mr Thompson. 'First it had been decided by the Acting Chief Executive following consultation with Elected Members that the travellers should be given a further period in which to vacate the site, but that they were to be informed that the county council expected them to have moved by mid-day on Monday 19th June 1995. Second, the County Council wanted to offer any assistance it could provide to help to resolve any welfare, child or other problems which the travellers might have. In short, it had determined that in view of complaints it would require the travellers to vacate the site but it would give them a few further days to do this and would provide any relevant assistance.'

The sentence which I have underlined forms an important element in the applicants' case.

Mr Thompson goes on to describe the visit to the site and the discussions with the travellers on it. These did not produce any requests for social service or education welfare assistance; nor did they result in any promise to leave. Complaints continued to come in about noise and nuisance and on the 19th June complaints were laid before the justices resulting in the making, four days later, of removal orders which included provision under section 78(2) for the local authority to take such steps as were reasonably necessary to ensure that the order was complied with. Mr Thompson deposes that careful consideration was given to the timing of any enforcement action.

`It was felt unreasonable to expect them to move the same day as the order was obtained. Furthermore, it was noted that experience elsewhere indicated that once an order had been obtained they would move on of their own accord. It was therefore decided to give them until

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10.00 am on Saturday 24th June to leave. If they had not left of their own accord by then an eviction operation should be carried out.

.....

It was recognised that an eviction operation could pose a number of problems as outlined below.

(i) Homelessness - some people might be made homeless as not all the vehicles were mobile. Arrangements were, therefore, made via the District Council to have a housing officer on standby.

(ii) Social/welfare - there might be particular social or welfare problems such as pregnancy. Arrangements were made for a social worker to be on standby.

(iii) Vehicle mobility - there might be vehicles which might not start. Arrangements were made for vehicle mechanics and towing vehicles to be available together with supplies of petrol and diesel to assist in getting vehicles mobile and providing fuel.

.....

Arrangements were made to try to prevent the travellers merely moving a short distance to other land in the locality.'

On the 24th June 1995 Ebsworth J granted a stay of enforcement of the removal order, and on the 11th July Buxton J gave leave to move for judicial review with directions for expedition.

It is Mr Ground's submission, on the basis of the above evidence, that by the 13th June 1995, when the chief executive decided to seek a removal order from the justices, all relevant matters had been taken into account, and were thereafter kept under constant review. Mr Watkinson contests this. He points out that neither Mr Thompson, to whose evidence I have referred, nor Annette Wood nor Richard Drabble (both of County Legal Services) depose to any fuller consideration of the situation of the individuals on the site than is

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indicated by Mr Thompson's evidence up to and including the 2nd June when the removal direction was given. Even in the period from the 7th June when enquiries undoubtedly started, to the 13th June when the chief executive decided to seek a court order, the enquiries were still rudimentary. It was only on the latter date that the decision to visit the site was made, but by the following day when it was carried out the decision to obtain a removal order had already been made. It is not enough, Mr Watkinson submits, to have the circular in mind: what was necessary was to consider the factual situation in relation to it. As to this, the applicants' evidence suggests a far more perfunctory inquiry on the 14th June than does that of the respondent county council.

My findings are these. By the date when it gave a removal direction under section 77(1) Lincolnshire County Council had undertaken no meaningful enquiries whatever into the situation and possible needs of the persons to whom the intended direction would apply. At that stage, therefore, it had failed in its elementary duty to 'take reasonable steps to acquaint [itself] with the relevant information' (per Lord Diplock, Secretary of State for Education v Tameside MBC [1977] AC.1014, 1065). That there were reasonable steps to be taken is shown by what then happened. I do not accept Mr Watkinson's submission that the decision to apply for a removal order, which was not done until the 19th June, had been a fait accompli from the 13th June when the chief executive decided to make the application. The

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enquiries which were made between those dates were in my judgment proper and sufficient to discharge the obligation of the council to inform itself of the relevant factors relating to the travellers, and there is nothing to demonstrate that, had something material emerged, the decision of the chief executive could not and would not have been modified.

(b) Wealden District Council

It was on the 10th February 1995 that Wealden District Council gave a removal direction to all occupants of vehicles on land known as Phie Forest Garden in Crowborough, East Sussex. (By contrast with Lincolnshire County Council, the form used by Wealden District Council does not attempt to allocate the land to any of the three categories spelt out by section 77(1); but again no point is taken before me on this). On the 22nd March 1995 the Lewes and Crowborough justices, on the application of the district council, made a removal order which included powers of entry and removal under section 78(2).

In a letter of 20th April the district council undertook to the applicants' solicitor that it would take no action to evict Ms Griffiths or Ms Wales pending receipt of replies from the statutory agencies to whom it was writing. On the 27th April it rejected any delay in the case of Ms Flannery and Ms Blockley but agreed not to evict Ms Hester the following day, and to look more closely into her circumstances and medical condition. An undertaking was also given to Ms Bowers (not one of the applicants) that she would not be

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evicted until her medical condition and those of her immediate family had been reviewed, and in any event not for six weeks after the birth of her baby. By the 28th April, when council officials went to the site to evict the travellers, all had left apart from Ms Hester and Ms Bowers, who were protected by undertakings. But the eviction was stayed by an order of this court granted the day before, together with leave to move.

Of the six applicants bringing the two notices of motion against the district council, it is common ground that only Tracy Wales was on the site on the 10th February, so that she alone of the applicants was served with the direction. Christine Nuttall, a principal solicitor employed by the district council, deposes that the decision to give a removal direction was made under delegated powers by the head of environmental services, Donald Cudd. Mr Cudd for his part gives no account at all in his affidavit of what went into his decision to give the direction. He does not even refer to the departmental circular. Nor is there any account of attention being paid to the relevant questions about the travellers between the service of the removal notice and the making of the removal order some six weeks later. On the latter occasion an undertaking was voluntarily given to the justices that the order which they were making would not be implemented for 14 days. The undertaking does not, however, appear on the order; nor does the order itself contain a 14-day moratorium. But consistently with the undertaking the travellers were notified that they must comply with the order by the 5th

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April.
'The site was not cleared by that date,' says Ms Nuttall. 'Accordingly, on that date a meeting was held to discuss arrangements for carrying out an eviction. I attended the said meeting together with representatives of the environmental and services department, the police and social services. The meeting considered various representations received from local travellers' support groups together with a letter from solicitors representing one of the travellers who had attended at the magistrates' court, Ms Bowers. It was agreed at that time that eviction should be planned for the following week in accordance with the usual procedures.

.....

When considering carrying out an order under section 78 in this way, the council naturally considers carefully the particular circumstances of individuals in accordance with the Department of the Environment Circular 18/94. In appropriate cases it does not exercise its rights against specific individuals. It was for precisely this reason that ..... I gave undertakings in respect of Ms Wales and Ms Griffiths that 'no action will be taken by Wealden District Council to evict Lisa Griffiths and Tracey Wales pending the receipt of replies from such agencies'. The council has extended this undertaking and will not seek to enforce the court order against Ms Wales, her child and the father of her child until the end of September 1995.'

The reason for these specific undertakings was that the dialogue which had followed the making of the removal order had alerted the district council for the first time to the fact that there were two pregnant women among the travellers on the site. The correspondence exhibited to the respondent council's evidence demonstrates that, following the making of the removal order by the justices, a series of in-depth enquiries were made about the situation and needs of the travellers. A letter went from the head of environmental services to the local health authority seeking information about Ms Bowers and about Ms Wales' child who was being treated at a local hospital for a

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skull defect. A further letter went to the county education officer to say that there were believed to be 7 young children on the site, though it was not known whether they were of school age. The letter set out the background and went on:

`My purpose in writing to you is to ensure that all authorities have had due regard to their obligations under other legislation. I enclose an extract from Circular 18/94 ..... In our view such authorities are expected to investigate appropriately whenever unauthorised encampments occur to ensure that children are protected and other welfare services are provided as necessary.

Paragraphs 12 and 13 require the authority responsible for eviction to liaise with these other authorities before evicting travellers from any particular site. We do not believe that this should prevent eviction but due consideration should be given to travellers, especially children and pregnant women.

We have declared to the travellers that it is our intention to carry out a court order for eviction if they do not remove themselves by 23rd April 1995. The council would not remove particular travellers where strong medical or other grounds were put forward. It should not be forgotten, however, that the travellers are a concern to the local community, are damaging the local woodland and are causing unnecessary noise nuisance from time to time especially overnight.

In view of the council's proposed eviction I should be pleased to receive a report from the Education Department on any aspect you consider to be relevant.'

A similar letter went to the director of social services for the county. The responses indicated that there were not any extant childcare concerns and no children of school age on the site. The health authority confirmed the chronic condition of Ms Wales' daughter and the specialised treatment needed for it. The letter went on:

'In the meantime it is hard to state clearly what the child's need for health services will be over the immediate and more distant future.

The general practitioner is performing an important role

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as communicator and referral pathway to ensure the child receives optimal care. It is crucial that the outcome of the Great Ormond Street appointment is fed back to the family, and this process becomes impossible if the family lose contact with the local GP who will co-ordinate subsequent action. Eviction threatens continuity of care which is so very necessary under the circumstances.'

Meanwhile, on the 19th April, a visit was made by a social worker and a community worker to the site together with two members of the local travellers support group. The report, which went to Mr Cudd and was considered by him, contains a thorough and sensitive appraisal of the difficulties faced by four of the six present applicants. It highlighted the fact that eviction, if it became confrontational, could be traumatic for small children, so that consideration should be given to offering childminding off the site if eviction occurred, or separate transport by mini bus to wherever the vehicles were moved to. The report also recorded that social services did not consider that the children would be in need or likely to suffer significant harm if they were moved to lay-bys; but it acknowledged that the lack of alternative sites placed the travellers in a difficult and stressful position.

Concern about Ms Wales' daughter prompted her solicitor to bespeak an independent social worker's report. The report of Sarah Cemlyn, dated 6th June 1995, describes in detail the concerns about the child's health and development and the potential impact on these of repeated eviction. She concludes:
`In my view if Ms Wales is evicted from Phie Forest Garden with no suitable alternative site available, her daughter Chelsea Barwell will become a child 'in need' under the Children Act 1989.

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If eviction were to proceed, the local authority would be under a clear duty to provide appropriate service for Chelsea and her family under section 17(6) of the Children Act 1989. This service would be a safe, secure and accessible stopping place for their caravan and for the supportive group of other families with whom she has been residing.'

On the 7th and 8th June questionnaires were completed on the site in order to make personal assessments of those potentially in difficulty or in need. In an affidavit sworn on the 6th July Mr Cudd recounts the visit of the environmental health manager, Mr Trepas, to the site on the 7th and 8th June to gather the information and then sets out the considered attitude of the council, as at that date, to the eviction of Ms Hester, Ms Stratford, Ms Blockley and Ms Flannery. The report of the social worker, Jill O'Callaghan, on her visit to the site on the 7th June together with Mr Trepas concludes:

'In my opinion the position remains unchanged from the time of the last visit. Whilst there are children on site who would be eligible for services under section 17 of the 1989 Children Act, no specific services are being requested or appear to be appropriate at this stage. The families' circumstances do not appear at present to create a situation in which children could be said to be suffering or likely to suffer significant harm.'

In relation to Ms Wales the council offers the court an undertaking not to enforce the removal order against her, her child and her child's father until the end of September 1995. In relation to Ms Hester the council undertakes to this court not to seek to enforce the removal order against her until six weeks after the birth of her expected baby. In relation to the other four applicants the council has formed the view that there are no special grounds for not enforcing the

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removal order.

In my judgment the enquiries made and the evaluative exercise undertaken by Wealden District Council in the aftermath of the making of the removal order by the justices brought into full and proper consideration those matters which public law regards as relevant to the material decision-making process. But, as with Lincolnshire, none of this was done before a decision to give a removal direction was taken; and, unlike Lincolnshire, Wealden District Council continued to ignore these considerations until after they had obtained a removal order from the justices. It may well be, as Mr Watkinson submits, that the reason for the absence of any inquiry before the giving of a removal direction is to be found in a letter from Mr Trepas to Ms Bowers dated 22nd March 1995, which includes this passage:

'The Council's policy was formulated under the Criminal Justice and Public Order Act 1994 in respect of people camping on private land without the consent of the owner. The Department of the Environment's Circular 18/94 advises local authorities on policies regarding encampment on land in their ownership but gives no advice in respect of land in private ownership. The Council must therefore respond to complaints received from the landowner and any by residents affected by the encampment.

However, should the Council be made aware of any particular circumstance which may necessitate campers remaining on the land for a particular period, this information would be passed on to the landowner for his consideration. It must be remembered that the Council has a duty to respond to the wishes of landowners as failure to do so would imply a licence to reside on private land against the wishes of the owner.'

Mr Langham has not sought to defend the reasoning in this letter, wrong and muddled as it is. Instead he

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points to a letter from Mr Cudd dated 4th April 1995, which says:

'When Mr Trepas replied to Ms Bowers on the 22nd March he did overlook to mention paragraphs 12 and 13 of Department of the Environment Circular 18/94 and he apologises for this. The letter was not received by him until 4.30 pm on 21st March and he drafted an immediate reply in view of the fact that the court hearing was set for the following day. At that time Mr Trepas was not aware that any of the travellers were pregnant and Ms Bowers' letter made no mention that she or any other member of the group was pregnant.'

But whether or not it was Mr Trepas's error that caused it, the fact is that the district council omitted entirely to inform itself of potentially relevant matters both before giving a removal direction and before seeking a removal order.

Conclusions

Mr Ground submits that provided that the material considerations are taken into account at some point before a removal order is enforced, the statute and the public law obligations arising out of it are satisfied. Mr Langham, adopting the submission, adds that the giving of undertakings is an acceptable way of differentiating, in this situation, between individuals whose cases are special and others; they create a legitimate expectation which can be given legal effect (R v Brent LBC ex parte McDonagh 21.HLR.494). Mr Hutchinson, replying on behalf of the applicants, puts his case on the principal issue in the proposition that eviction begins with the making of a removal direction. As soon as the direction has been served, and provided that service achieves its expected objective of bringing the removal order to the knowledge of those on the site,

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any person failing to leave as soon as practicable commits a criminal offence and can be prosecuted for it by anybody.

It seems to me that Mr Hutchinson's point is the critical one. The die is cast by the giving and service of a removal direction. Not only does this criminalise anybody who, knowing of it, fails to go or, having gone, returns to the site; it has and is intended to have the effect of making people leave rather than face criminal prosecution under section 77(3) or eviction following a removal order under section 78. The evidence is, as one would have expected, that in many cases the giving and service of a removal direction causes the illegally encamped travellers to go. Even if this is the effect on a minority of them, there is every possibility that among them will be some of the most vulnerable - those who are in need of medical or social services or have sick or disturbed children and who, for that very reason, cannot risk the trauma of forcible eviction. This is why in my judgment Mr Watkinson is correct in his submission that it is at the initial stage of deciding whether or not to give a removal direction, and to whom to give it, that it is necessary for the local authority to consider the relationship of its proposed action to the various statutory and humanitarian considerations which will be called into play, and to make both provision and decision accordingly.

If, of course, the situation of any of those affected then changes significantly for the better or the worse, it will be for the local authority to keep

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them under review as it moves from removal direction to removal order and from removal order to eviction. If at any of these stages the situation of individuals changes the local authority's chosen course may change with it. I do not suggest for a moment that the exercise has to be repeated three times: simply that it must be carried out at the start and thereafter reviewed insofar as changes of circumstance
call for review.

The giving of undertakings, while appropriate and valuable where a removal order has been made and the only question is when to enforce it, cannot possibly serve as a substitute for the assembly and consideration of relevant information at the relevant time.

Relief

Assuming, rightly in the event, that the argument thus far were to go against him, Mr Ground makes a final submission that in the exercise of my discretion I should grant no relief because everything that had to be taken into account was eventually taken into account by Lincolnshire County Council, and the outcome demonstrates that nothing would have been gained by the applicants had the right matters been considered at what I have held to be the right time. Mr Langham for Wealden District Council adopts the submission.

In the two proceedings against Wealden District Council, my holding of law on the question of who is affected by a removal direction entitles all the applicants but Ms Wales to relief ex debito justitiae. I find it difficult to see how the court, by refusing

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relief, can create an appearance of jurisdiction where there was none.

So far as Ms Wales and the Lincolnshire applicants are concerned, the issue is different. To refuse relief where an error of law by a public authority has been demonstrated is an unusual and strong thing; but there is no doubt that it can be done. The principles involved have been valuably discussed by Sir Thomas Bingham MR in his paper 'Should public law remedies be discretionary?' [1991] P.L.64. Here it is necessary to distinguish the case of Ms Wales from the Lincolnshire cases. It turned out on investigation that Ms Wales was entitled to consideration, in view of her domestic situation, which called for a modification of the proceedings and steps being taken against her. This being so, hindsight demonstrates that there was substance in the obligation resting, as I have held that it rested, on the local authority at the initial stage. It would accordingly be wrong, in my judgment, to ignore the fact that the want of due process had a palpable effect on the outcome. There is no injustice in these circumstances in granting an order which will require the local authority to carry out its functions in proper form.

In Lincolnshire, by contrast, due but belated inquiry into all the relevant matters has established that there is nothing which would have made a difference even if the right things had been done at the right time. Mr Hutchinson on behalf of the applicants, draws my attention to Professor Wade's proposition (

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Administrative Law, 7th edition, page 718) that:
'Such a discretionary power may make inroads upon the rule of law, and must therefore be exercised with the greatest care. In any normal case the remedy accompanies the right.'

For the reasons I have given, however, this is not a normal case, for the court can say with confidence what the outcome of due process would have been. But Mr Hutchinson goes on to submit that to refuse relief in such a case would remove any pressure on local authorities in the future to comply with their duties as I have held them to be. 'They could issue a direction,' Mr Hutchinson submits, 'and then only consider relevant matters in respect of those who continue in occupation.' This is true, and I bear it very much in mind; but I do not think it just to assume that local authorities, properly advised, would take advantage of a refusal of relief in a case where the grant of it could only delay the proper making of an order, so as to take their chance on getting away with an unlawful procedure on another occasion. Indeed, it would seem to me that the argument which is available to Mr Ground will not be available to any future local authority which commits the same error because it will be doing so in the knowledge that it is acting unlawfully. It is in this way, I think, and not by granting ultimately pointless relief that the court in the Lincolnshire case can best exercise its supervisory function now and for the future.

In the Lincolnshire case, accordingly, I will grant a declaration in suitable form - as to which I will

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welcome counsel's assistance - but in the exercise of my discretion I decline to grant certiorari. In the Wealden cases I will grant an order of certiorari to quash the District Council's decision of the 10th February 1995 to make a removal direction under section 77 of the Criminal Justice and Public Order Act 1994 and a further order to quash the removal order pursuant to section 78 of the same Act made by the Lewes and Crowborough Justices on the 22nd March 1995. The grounds upon which I do so appear from this judgment and need not be spelt out in the orders. Those applicants who have now left the land should remember that the quashing of the direction and order does not constitute a licence to them or anybody else to trespass on it afresh.

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