

Case Name: *R (On the Application of The Ramblers' Association) v Secretary of State for Environment, Food and Rural Affairs* [2025] EWHC 537 (Admin) (11 March 2025)

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Commentary: The Ramblers' Association ("the Claimant") sought a judicial review of the Secretary of State for the Environment, Farming and Rural Affairs' decision (made by an inspector appointed on his behalf) to refuse to confirm the Cumbria County Council (Parish of Hayton: district of Council) Definitive Map Modification Order (No.1) 2021 ("the Order"), made pursuant to section 53(2)(b) of the Wildlife and Countryside Act 1981 ("WCA 1981"). The Order would have had the effect of adding footpaths and a bridleway to the Definitive Map and Statement ("the DMS") in woodland known as Hayton Woods in Cumbria. The Claimant only sought to challenge the footpaths, not the bridleways.

Mrs Justice Lang allowed the claim for judicial review. She agreed with the Claimant's submission that no reasonable landowner would have concluded, from the absence of public use in the period of restrictions, that the public assertion of the right had been withdrawn, and that the inspector misdirected herself by focusing on the landowner's objective state of knowledge during the 4-month intermission, instead of his objective state of knowledge over the whole 20-year period.

The inspector's order decision

The Inspector was not satisfied that a statutory presumption of dedication as a footpath after 20 years of public use had arisen, applying section 31(1) of the Highways Act 1980 ("HA 1980"), as she agreed with the submission of Roxlena (the owner of much of the land over which the paths crossed) that the use had not been for twenty years as it had been interrupted by the food and mouth disease outbreak in 2001. The defendant local authority contacted the court on 16 October 2024 to state that it would not be contesting the claim, as it had reviewed its position and concluded that the Inspector's decision should be quashed.

In her order decision, the inspector correctly identified the main issue as whether, on the balance of probabilities, there were public rights of way that should be recorded on the DMS along Order routes, and whether dedication of the way as a public footpath had occurred through public use. Following an Inquiry and a site visit, she decided that she was not satisfied that the use by the public had been enjoyed without interruption for the full 20-year period, as its use was interrupted by the 2001 outbreak of foot and mouth disease. The Inspector held that this meant that the requirements of section 31 had not been met, and so the presumption of statutory dedication had not arisen. This was 'an-other matter' to whether the break in public enjoyment of the footpaths also amounted to an interruption in use for the purposes of section 31.

Analysis

After setting out the relevant statutory framework, Lang J emphasised that every element of section 31(1) needed to be met to raise a presumption that the routes have been dedicated as public footpaths: the character of the way must be capable of dedication as a public footpath; the public must have enjoyed the right of way as a footpath over a full period of 20 years, without interruption, immediately prior to its status being brought into question; and such use must be of right, meaning without secrecy, force or permission. If all of those criteria are met, the statutory presumption of dedication arises, but can be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner during the relevant 20-year period to dedicate the way for use by the public.

The Grounds of Challenge

Counsel for the Claimant submitted that an intermission, in the sense of a mere absence of continuity, caused by foot and mouth disease, could not in itself mean that the public had not enjoyed the right of way over the 20-year period. The intermission was of a comparatively short duration and was capable of “explanation”, and it would be unreasonable for any landowner to conclude that the public assertion of the right had been withdrawn, just as it would be in cases where a route was blocked by a broken-down vehicle or a fallen tree, or by flooding or frozen conditions. It was submitted that the correct test, which the Inspector did not apply, was whether the public use over a 20-year period, when viewed as a whole, was sufficient to bring home to the mind of the reasonable landowner that the public were asserting a continuous right.

It was also submitted that the Inspector erred in applying a de minimis test, which led her to focus on the four-month foot and mouth period rather than the whole of the 20-year period, and this approach was also inconsistent with authority.

Roxlena, which appeared as the Interested Party in the High Court proceedings, submitted that the critical issue in was whether a way over land has been “actually enjoyed by the public ... for a full period of 20 years,” which was a discrete and objective question of fact for the Inspector’s evaluation, separate and conceptually distinct from the question of whether any given cessation of use in that period amounts to an “interruption.” The Claimant wrongly conflated the distinction between the questions of intermission and interruption. The fact that the cause of the intermission was not “physical and actual” was irrelevant to the question whether it was capable of founding a finding that the use had not been continuous for 20 years.

On Ground 2, Roxlena submitted that on a fair reading of the Order Decision as a whole, the Inspector did not assume that the use was automatically insufficient because the intermission was more than de minimis, and that such a conclusion could only be reached by submitting the wording of the Order to hypercritical scrutiny.

The Court's conclusions

The Judge first set out the history of the legal concept of prescription in various authorities, which showed that the correct interpretation of "actual enjoyment" is not to be read retrospectively so as to mean only actual use: it would be impossible for a footpath to be in continuous use, 24 hours a day, every day, for 20 years.

Lang J concluded that "interruption", within the meaning of section 31(1) HA 1980, requires a positive act, a "physical and actual" interruption, which interferes with the enjoyment of the way. It is not a mere intermission in use by the public. The circumstances of the interruption are relevant to the question whether there is an intention by the landowner to challenge the public's enjoyment of the way. In the case of foot and mouth restrictions, it is likely to be highly relevant if restrictive notices were put in place, not with the intention on the part of the landowner to prevent the public from using the way, but in observance of the legal restrictions being put in place temporarily for public health reasons. The Inspector had wrongly identified the *de minimis* as "the crux of the matter" in finding if actual enjoyment had ceased. Elsewhere in her decision letter, she directed herself correct that "mere cessation of use may not break continuity of actual enjoyment" but then applied the incorrect *de minimis* test regardless.

Lang J then considered whether and to what extent the Inspector's application of the wrong test resulted in a flawed approach which was capable of affecting the outcome. As the inspector had evaluated the evidence of use and actual enjoyment during the four-month break period during the foot and mouth disease outbreak, she avoided the mistake of assuming that, as the break was more than *de minimis*, it automatically amounted to a break in the continuity of actual enjoyment. However, by focusing solely on the four-month period, rather than, she failed to make an evaluative judgment as to as to whether there was actual enjoyment over the whole 20-year period as required by the authorities.

Lang J also accepted the submissions of the Claimant on the issue of the relevance of the subjective state of mind of walkers and the landowner. The correct test was to ask is how the conduct of the person asserting the right would appear to the putative reasonable landowner. Objectively ascertainable facts which place the public's conduct in context are relevant to answer that objective question. The Inspector asked herself the wrong question, focussing on the landowner's objective state of knowledge during the four-month intermission, instead of over the whole 20-year period.

Factual findings

After identifying the above errors in the inspector's approach, Lang J also noted that the inspector made a number of factual findings:

- Hayton and the surrounding area was severely affected by the foot and mouth outbreak in 2001.
- Residents were highly conscious of the risk of disease spreading through people movement in rural areas and they were keen to act responsibly.
- Measures were imposed to stop the spread. The Foot-and-Mouth Disease (Amendment)(England) Order 2001 came into force on 27 February 2001. The order gave power to inspectors appointed by the Ministry of Agriculture, Fisheries and Food (or a local authority) to close public footpaths and prohibit entry onto land by displaying, or causing to be displayed, a notice to that effect at every entrance to the land.
- Public access to the three existing public rights of way crossing Hayton Woods was prohibited by order made by Cumbria County Council on 28 February 2001.
- Such restrictions did not directly apply to the Order routes as they were not dedicated public highways.
- The woods remained accessible from the public highway at points 8 and 9.
- Use of the Order routes must have been affected by the closures where they connected with the existing foot paths which were closed. Use of many of the paths would necessitate a person re-tracing their steps. Some sections lying in between the public paths would have been inaccessible altogether.
- Given the network of inter-linking paths, the availability of the Order routes for walkers would have been limited. In all likelihood, the passage along most of them would have been prevented by the closure of the three public paths.
- Closure of the three public paths clearly had a deterrent effect and people kept out of the woodland.
- All but one of the witnesses gave evidence that they did not enter the woods while the restrictions were in place. One witness continued to use them throughout.

In light of those findings, as well as the fact that it would have been obvious to the landowner that the restrictions to the public rights of way were temporary, Lang J accepted the submission of the Claimant that no reasonable landowner would conclude, from the absence of public use in the period of restrictions, that the public assertion of the right, as demonstrated by public use, had been withdrawn. The judge also agreed with the defendant's concession that it was not reasonably open to the Inspector to find that the reasonable landowner could not know that a continuous right to enjoyment was being asserted that ought to be resisted.

For these reasons, the claim for judicial review was allowed.

Case summary prepared by Gregor Donaldson