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Briefings

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Planning definition of Gypsies and Travellers unlawfully discriminatory

Smith v Secretary of State for Levelling Up, Housing and Communities & Ors [2022] EWCA Civ 1391; October 31, 2022

Implications for practitioners

The Court of Appeal held that the definition of *'gypsies and travellers'* in the government's *Planning policy for traveller sites (PPTS)* was unlawfully discriminatory.

The case has significant consequences for practitioners representing Gypsies and Travellers in planning cases. Decision-makers will not be able to apply the definition without careful consideration as to whether it would result in unlawful discrimination in that particular case.

The decision will also be of interest to practitioners of discrimination law more widely. The CA confirmed a number of principles of general importance, including that:

- **a discrimination claim brought by an alleged victim such as the appellant, Lisa Smith (LS), is not an *ab ante* challenge (i.e. a challenge to the lawfulness of legislation or policy in the abstract, brought at the outset and before such legislation or policy has been tested in practice), and does not therefore have to overcome the high hurdle applicable to such cases;**
- **when considering whether discrimination is justified, the relevant aim is that of the measure in question and not (for example) the broader policy containing the measure; and**
- **when deciding whether a measure is proportionate, what matters is what happens in practice.**

Facts

PPTS contains the government's policy as to how the need for Gypsy and Traveller sites should be assessed and how applications for planning permission for such sites should be determined. It applies to *'gypsies and travellers'* as defined in Annex 1 of the policy. As originally promulgated in 2012, that definition had been:

> *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 showpeople or circus people travelling together as such.* [emphasis added]

The definition was amended in 2015 to remove the words *'or permanently'*, with the result that Gypsies and Travellers who were forced to cease travelling permanently due to ill-health or old age would no longer fall within the PPTS definition and as a consequence could no longer rely upon its policies when seeking planning permission for a caravan site.

LS was a Romani Gypsy who lived with her family in caravans on a privately-owned site with temporary planning permission. In 2016, an application was made for the planning permission to be made permanent. This was refused by the local planning authority. LS appealed to the Secretary of State's Planning Inspector, who dismissed her appeal. The Inspector found that LS could not rely upon the positive planning policy

contained in PPTS because she had ceased travelling for health reasons and did not meet the definition of *'gypsies and travellers'* contained in Annex 1 of that policy.

LS applied for a statutory review of that decision. She argued that the decision was flawed because the definition was unlawfully indirectly discriminatory against elderly and disabled Gypsies and Travellers, who were more likely to have to stop travelling on the grounds of ill-health or old age.

High Court

LS's application was dismissed by Pepperall J at first instance. The judge held that although the definition was discriminatory – as conceded by the Secretary of State – the discrimination was justified and thus lawful.

Court of Appeal

LS appealed against that decision and the CA allowed her appeal on all grounds.

Pepperall J had held that the test which applies to *ab ante* challenges, as set out in *Christian Institute and others v Lord Advocate* [2016] UKSC 51, applied to LS's application and that she faced a *'high hurdle'* in making out her case. The CA found that this was wrong: LS was not bringing an abstract or theoretical challenge because she was personally affected by the policy definition and therefore the *ab ante* test did not apply. The Secretary of State had conceded that the definition was discriminatory and therefore the burden was on him to justify the discrimination [para 59].

The CA also held that the judge had been wrong to find that LS could not rely on race discrimination. Race had been an *'inherent element of this case from the outset'* [para 62].

... the effect of the definition was unlawfully discriminatory and therefore the decision to refuse her planning permission must be quashed.

In addition, the CA held that the judge had erred in his treatment of the legitimate aim by focusing too much on the aim of PPTS as a whole rather than the aim of the definition. Moreover, there was uncertainty *'about what the aim actually was or was said to be'* [para 81].

Finally, the CA concluded that the judge had also erred in respect of the proportionality exercise. Whether *'the planning system "taken as a whole is capable of being operated" in an appropriate way'* was not the correct test: what matters was how the planning system operated in practice [paras 114 and 115].

The CA proceeded to determine for itself whether the definition was justified and found that it was not.

First, it was not in pursuit of a legitimate aim. Whilst the stated aim was fairness, the evidence did not demonstrate that this was in fact the objective of the measure. The *'acknowledged likely effect'* of the definition change was to *'reduce the number of Gypsies and Travellers who can obtain permanent or temporary planning permission'*, which could not be a legitimate aim [para 99].

Second, in any event the measure was not proportionate. The harshness of the measure was *'clearly spelt out'* in the government's own S149 EA public sector equality duty analysis, which showed that:

- The definition change could separate family members from each other;
- Those most likely to be affected were the elderly and disabled and also (potentially) women;
- There was a risk of an increase in homelessness and unauthorised camping.

The CA concluded that *'in its application to* [LS's] *appeal before the inspector'*, the effect of the definition was unlawfully discriminatory and therefore the decision to refuse her

planning permission must be quashed. As to future cases where the definition was engaged, the court stated that:

> *… it will be for the decision-maker – whether a local planning authority or an inspector – to assess when striking the planning balance what weight should be given, as material considerations, to the relevant exclusion and to such justification for its discriminatory effect as obtains at the time, and also to undertake such assessment as may be required under Article 8 of the Convention.* [para 139]

Comment

The CA's decision means that the definition cannot now be applied routinely and without consideration of whether it is unlawfully discriminatory. Indeed, in light of this decision it is hard to see how the definition can lawfully be applied in other cases where elderly and disabled Gypsies and Travellers are seeking planning permission for a Traveller site.

It may also be difficult to apply the definition even in other cases. In one post-*Smith* decision by a Planning Inspector (Appeal Ref: APP/V1505/W/21/3266538, 14 December 2022), the Inspector observed:

... the decision will have significant implications for local planning authorities' assessments of need.

> *There is justification for the site to be occupied by Gypsies and Travellers to safeguard the supply of the site for this purpose and as such a condition is necessary to restrict occupation. In order to avoid discrimination to the elderly or disabled, the condition should include those Gypsies and Travellers who have ceased to travel permanently. Even though I am not aware that any of the current occupants have ceased to travel due to age or disability, that may not always be the case and to apply such a condition restricting their occupation of the site would, in the light of the 2022 judgement, be unlawfully discriminatory.*

In addition to this, the decision will have significant implications for local planning authorities' assessments of need. Assessments which are based on the 2015 definition may have excluded Gypsies and Travellers on a basis which was unlawfully discriminatory and may thus have significantly underestimated the required number of pitches.

As another Inspector stated (Appeal Ref: APP/L1765/W/21/3271015):

> *35. However, the recent Court of Appeal decision, the thrust of which found that the PPTS definition change in 2015 was unlawfully discriminatory, is an important material consideration. The PPTS 2015 remains extant policy, and it remains uncertain what the full repercussions of the recent caselaw will be. Nevertheless, it is likely to have implications for how needs assessments should be conducted in the future and casts considerable doubt on whether previous needs assessments based upon the PPTS 2015 definition can be taken as an accurate reflection of need without being tainted by discrimination.*
>
> *36. Therefore, although the balance of evidence presented to me does not clearly demonstrate that the Council has a shortfall of pitches against the targets in the development plan, that evidence and policy is predicated upon a definition of gypsies and travellers that has been severely undermined by recent caselaw.*

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