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High Court declares provisions in the Police Act incompatible with the rights of Gypsies and Travellers

Marc Willers KC and Ollie Persey, barristers at Garden Court Chambers, set out the background to the successful challenge brought by Wendy Smith, who is a Romani Gypsy, to new powers given to the police to move Gypsy and Traveller families from unauthorised encampments and prohibit their return within 12 months. The authors explain that it is the chronic shortage of authorised permanent and transit sites which is the real cause of unauthorised encampments. Despite the police confirming this fact and indicating that the new powers were unnecessary, and despite concerns being expressed by both the Council of Europe and the Joint Committee on Human Rights that the new powers would exacerbate the difficulties faced by Gypsies and Travellers in pursuing their nomadic way of life, they were enacted by parliament in 2022. However, the High Court has now recognised that extending the no-return period to 12 months not only puts Gypsies at a particular disadvantage but also, and of itself, compounds that disadvantage. The High Court therefore declared these powers to breach the prohibition on discrimination in the European Convention on Human Rights. The authors express the hope that a new parliament will review the new powers in their entirety and recognise that rather than criminalising the Gypsy and Traveller way of life, meaningful investment in lawful encampments is what is required.

Introduction

Wendy Smith, a Romani Gypsy, brought a successful claim for judicial review challenging amendments to the Criminal Justice and Public Order Act 1994 (CJPOA 1994) which had been inserted by Part 4 of the Police, Crime, Sentencing and Courts Act 2022 (PCSCA 2022). In *The King on the application of Wendy Smith, claimant, and the Secretary of State for the Home Department, defendant, and (1) Friends, Families and Travellers, (2) Liberty, interveners* [2024] EWHC 1137 (Admin), May 14, 2024, Ms Smith challenged the new provisions on the basis that they constituted unjustified race discrimination against Gypsies and Travellers and sought a declaration of incompatibility that the provisions violated Article 14 of the European Convention on Human Rights (ECHR) (the prohibition on discrimination) read with Article 8 ECHR (the right to a private and family life).

Her claim succeeded: Swift J took the significant and unusual step of granting a declaration of incompatibility under s4 of the Human Rights Act 1998 (HRA 1998) on the basis that the introduction of *'12 month no-return periods'* (an increase from three months laid down in the original provisions in the CJPOA 1994) to prevent Gypsies and Travellers returning to unauthorised encampments was a discriminatory and disproportionate interference with their nomadic way of life and therefore unlawful.

The claim was supported by interventions from Friends, Families and Travellers (FFT) and Liberty. FFT provided crucial evidence of the systemic impact of the legislative reforms on Gypsies and Travellers.

The claimant

Wendy Smith is a Romani Gypsy. She lives in a caravan and had never lived in bricks and mortar accommodation. Her local authority has allowed her, her ex-partner and her son and daughter-in-law to reside in a layby since the start of the Covid-19 pandemic. Prior to that she was subject to frequent evictions. She was concerned at the effect that the legislative reforms would have on her and her family's traditional and cultural way of life, as they have *'no choice'* but to remain living on unauthorised encampments due to a lack of authorised permanent and transit sites.

The legislative reforms

The PCSCA 2022 received Royal Assent on April 28, 2022 and came into force on June 28, 2022. Part 4 of the PCSCA 2022 is concerned with unauthorised encampments. The focus of the challenge was on the new offence of *'residing on land without consent in or with a vehicle'* in s60C CJPOA 1994 and the 'strengthening' of existing powers.

Part 4 PCSCA 2022 operates by way of amendments to Part 5 CJPOA 1994. It adds to and extends the existing police powers contained in that legislation to restrain unauthorised encampments. Those existing powers are, in summary, as follows:

1. Under s61 CJPOA 1994, if a senior police officer reasonably believes that two or more persons are trespassing on land with the common purpose of residing there, that reasonable steps have been taken by or on behalf of the occupier to ask them to leave, and that either:
   i. any of those persons has caused damage to land or property on land or used threatening, abusive, or insulting words of behaviour towards the occupier (or the occupier's family member, employee, or agent) or
   ii. those persons have between them six or more vehicles on the land,

   then the officer may direct those persons to leave the land and remove any vehicles or other property they have on the land. A person who fails to leave the land as soon as reasonably practicable or who, having left, re-enters within the period of three months, commits an offence.
2. Pursuant to s62 CJPOA 1994, if a direction has been given under s61 and the person to whom it applies fails to remove their vehicle from the land or enters the land as a trespasser with a vehicle within three months, then the police may seize and remove the vehicle.
3. Under s62A CJPOA 1994, if a senior police officer reasonably believes that a person and one or more others are trespassing on land with the common purpose of residing on the land, the trespassers have at least one vehicle and one or more caravans, there is a suitable pitch on a relevant caravan site for that caravan or each of those caravans, and the occupier or a person acting on his or her behalf has asked the police to remove the trespassers, then he may direct the person to leave the land and/or to remove any vehicle and other property from the land. A person who fails to leave the land as soon as reasonably practicable, or who enters any land in the area of the relevant local authority as a trespasser before the end of three months with the intention of residing there, commits an offence: ss63(1) and (2) CJPOA 1994. If a constable reasonably suspects that a person to whom a direction has been given under s62A(1) CJPOA 1994 has, without reasonable excuse, failed to remove any vehicle on the land or entered any land in the area of the relevant local authority with a vehicle as a trespasser before the end of three months with the intention of residing there, then the constable may seize and remove the vehicle: section 62C CJPOA 1994.

The focus of the challenge was on the new offence of *'residing on land without consent in or with a vehicle'* in s60C CJPOA 1994 and the 'strengthening' of existing powers.

As originally enacted, s61 CJPOA 1994 provides that if a person to whom a direction has been given under s61 re-enters the land as a trespasser within a period of three months, he or she will commit an offence. However, s84(4) and (5) PCSCA 2022 extends that period to 12 months. This same extension to 12 months also applies to s62 (power to seize the vehicle of a person to whom a direction under s61 CJPOA 1994 has been given where he or she enters the land with a vehicle within the prohibited period), s62B (commission of an offence where a person to whom a direction under s62A(1) CJPOA 1994 has been given enters any land in the area of the relevant local authority within

the prohibited period as a trespasser with the intention of residing there), and s62C (power to seize the vehicle of a person to whom a direction under s62A(1) CJPOA 1994 has been given where he or she enters the land with a vehicle within the prohibited period) by virtue of s84(6-8) PCSCA 2022.

The 'chilling effect' on Gypsies and Travellers

It was the claimant's case that the impugned statutory provisions were introduced against a backdrop of a systemic shortage of authorised permanent and transit pitches for Gypsies and Travellers.

The new s60C CJPOA 1994 offence prevents those required to leave land from returning to it for 12 months (as opposed to three months under existing powers). This exacerbated the difficulties faced by Gypsies and Travellers in finding sites and pursuing their nomadic way of life.

...there are other ways of tackling unauthorised encampments – for example, a statutory duty on local authorities to provide adequate authorised encampments – which would achieve the same aim without interfering with human rights in such a significant manner.

Following legislative scrutiny of Part 4 of the PCSC Bill, the Joint Committee on Human Rights produced a report (HC/478/HL Paper 37, July 2, 2021) in which it identified:

> *… significant concerns with the justification behind this new offence and consider[ed] that there are other ways of tackling unauthorised encampments – for example, a statutory duty on local authorities to provide adequate authorised encampments – which would achieve the same aim without interfering with human rights in such a significant manner. The provision of more authorised sites would also benefit landowners, who are quite rightly concerned about the present situation.*

The legislation under challenge in this claim was introduced following two consultations. The first, entitled *'Powers for dealing with unauthorised developments and encampments'*, ran from April 5, 2018 to June 15, 2018 and had 2,198 respondents. The second, entitled *'Strengthening police powers to tackle unauthorised encampments'*, ran from November 5, 2019 to March 5, 2020 and had 26,337 respondents. The defendant Secretary of State principally relied on the 52% majority support for criminalisation of encampments from the first, far smaller consultation.

Evidence from the National Police Chiefs' Council (NPCC) indicated that it considers the new powers to be unnecessary:

> *The lack of sufficient and appropriate accommodation for Gypsies and Travellers remains the main cause of incidents of unauthorised encampment and unauthorised developments by these groups.*

Following the defendant's 2019 consultation, FFT sent Freedom of Information Act 2000 (FOI) requests to all 45 police forces, 40 Police and Crime Commissioners in England and Wales, the NPCC and the Association of Police and Crime Commissioners. Of these, 50 police bodies confirmed that they did not respond to the 2019 consultation, 6 did not respond to the FOI request within the stipulated 20 working days, and 23 police bodies confirmed they had responded directly to the consultation. Of those 23, 16 police bodies shared a copy of their submission with FFT.[1] In summary:

- only 21.7% of police respondents agreed with the defendant's proposals to criminalise unauthorised encampments;
- 93.7% of police bodies called for site provision as the solution to unauthorised encampments;
- just 18.7% of police respondents agreed with the defendant's proposals to give police power to seize vehicles;

1 www.gypsy-traveller.org/wp-content/uploads/2020/10/Full-Report-Police-repeat-calls-for-more-sites-not-powers-FINAL.pdf

- only 43.7% of police respondents agreed with the defendant's proposals to increase the length of time in which those on encampments would be unable to return from three months to 12 months.

A 2017 survey of Gypsies, Roma and Travellers in the UK found that 91% of respondents had experienced discrimination and 77% had experienced hate speech or hate crime.[2] In 2023, the Centre on the Dynamics of Ethnicity published its Evidence for Equality National Survey report,[3] which showed that 62% of Gypsies and Travellers had experienced a racially motivated assault. This was higher than any other minority group in the country.

The challenged statutory provisions were clearly designed with Gypsy and Traveller people in mind, and on the defendant's own analysis, had a disproportionate impact on them. The foreword to the 2019 consultation stated:

> *The Government recognises that the proposals contained in this consultation are of interest to a significant minority of Gypsies, Roma and Travellers who continue to travel. The Government's overarching aim is to ensure fair and equal treatment for Gypsy, Roma and Traveller communities, in a way that facilitates their traditional and nomadic way of life while also respecting the interests of the wider community.*

[The Advisory Committee] is also profoundly alarmed that the UK is pursuing a course of action which is knowingly discriminatory against the minority which is most exposed to discrimination in the country.

The Council of Europe's Advisory Committee on the Framework Convention for the Protection of National Minorities produced its fifth opinion on the United Kingdom, which was adopted on December 8, 2022 and found, with reference to the PCSC Bill that:

> *The criminalisation of unauthorised sites and **the potential to seize property has sewn fear among communities**. **The Advisory Committee considers that any benefits to wider society resulting from these measures have not been adequately substantiated**. For instance, the Government's evidence shows that in a minority and decreasing number of cases, unauthorised development occurs on land which Gypsies and Travellers do not own; the larger number of such developments being on land owned already by Gypsy or Traveller individuals, which would not be trespass and would rather be dealt with through the planning system. It is also profoundly alarmed that the UK is pursuing a course of action which is knowingly discriminatory against the minority which is most exposed to discrimination in the country. The Advisory Committee considers that this, taken with the systemic site shortage and definition and in the absence of substantive measures to promote the culture of the minority, threatens one of the tenets of Gypsy and Traveller identity and runs counter to the UK's obligations under the Framework Convention. The Advisory Committee observes that in the UK issues around planning dominate the discussion about Gypsies and Travellers. It is therefore of great urgency to work progressively and in partnership with minority representatives to resolve any issues and ensure appropriate provision of culturally adequate accommodation, in light of the positive examples highlighted by some of the Advisory Committee's interlocutors.* [para 106]
>
> *The Advisory Committee urges the authorities to take priority measures to address the accommodation needs of persons belonging to Gypsy, Roma and Traveller minorities, including through reverting to the pre-2015 definition of "Gypsy" for planning purposes in England, obliging local authorities to provide the sites they have identified through needs assessments, and continuing to work to increase the number of sites and pitches, both transit and permanent. **They should also reconsider***

2 https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/360/full-report.html

3 www.ethnicity.ac.uk/research/projects/evens/

> ***the implications of the criminalisation of unauthorised sites and the seizure of property in light of the risk of forced assimilation this poses to the minorities***. [para 107] (Emphasis added.)

As noted by FFT in its intervention before the High Court, the impugned statutory provisions were expressly modelled on Irish legislation from 2002. The evidence from Ireland over the past two decades demonstrates the severe chilling effect that criminalising the use of unauthorised encampments has had. A 2017 report by the European Commission cites a national survey which shows that fewer *'Travellers are travelling now. Only 1 in 10 respondents said that they still travel, versus 1 in 3 when asked in 2000. For those who had travelled, but no longer do so, 19% said they stopped as they are not allowed to do so by the law and 18% said it was because there are less places to travel now (which is a direct result of the change in the law)'*, with the Irish Traveller Movement attributing the criminalising of trespass as being *'largely responsible for the decrease in the number of families living in unauthorised sites, a decline in nomadism and the increase and continuation of families sharing accommodation'*.[4]

A 2019 report commissioned by the Irish Department of Housing, Planning and Local Government found that the anti-trespass legislation was having

> *… a severe impact on members of the Traveller community who continue to live in caravans. This is the case where there has been a failure by local authorities to implement and provide appropriate provision in terms of permanent halting sites and, in particular, catering for transient provision recognising the nomadic traditions of the Traveller community …*[5]

The claimant argued that the provisions were excessive and not offset by any meaningful action by the government to address the chronic shortage in authorised sites, which was the *real* cause for unauthorised encampments that the legislation purported to address.

The legal arguments

By the time of the High Court hearing, it was common ground between the parties that the impugned statutory provisions had a disproportionate impact on Gypsies and Travellers. There was therefore *at least* indirect race discrimination, and the Court should *at least* adopt the strictest level of scrutiny when considering the question of justification. It was also not in dispute that where discrimination is based on a *'suspect ground'*, which includes race, this ordinarily requires *'very weighty reasons'* to be advanced by way of justification: see *A and B v Criminal Injuries Compensation Authority* [2021] UKSC 27; [2021] 7 WLUK 99 at para 85.

The focus of the arguments was therefore on whether the provisions could be justified. It was the claimant's case that the provisions had a significant *'chilling effect'* on Gypsy and Traveller communities exercising their nomadic way of life as Gypsies and Travellers will invariably comply with a direction to leave a site forthwith even if that direction was given unlawfully. The claimant argued that the provisions were excessive and not offset by any meaningful action by the government to address the chronic shortage in authorised sites, which was the *real* cause for unauthorised encampments that the legislation purported to address. The criminalisation of unauthorised encampments, the dearth of authorised permanent and transit site provision and other measures such as the increasing use of injunctions had left Gypsies and Travellers with no *'room to manoeuvre'*: *Wolverhampton City Council and others v London Gypsies and Travellers and others* [2023] UKSC 47; Briefing [2024] 1078 at para 225. Moreover, it was argued that the powers were unnecessary as there was no cogent evidential basis for their enactment, with the police expressly rejecting the necessity of these *police* powers and the evidence in support of them being highly selective and taken from a misleading consultation.

4 https://rm.coe.int/complaint-no-100-2013-european-roma-rights-centre-v-ireland-response-b/1680483a05

5 www.paveepoint.ie/wp-content/uploads/2019/07/Expert-Review-Group-Traveller-Accommodation.pdf

High Court

Swift J found the 12-month no-return periods in all three provisions constituted unjustified race discrimination in circumstances where there was a lack of authorised transit site provision on which Gypsies and Travellers could camp lawfully. The judge held:

> *The Claimant submits that the decision to extend the non-return periods is largely unexplained, and that the mismatch between the 12-month period and the 3-month maximum stay at a transit pitch is a matter calling for explanation as it means that Gypsies will no longer be able avoid the risk of criminal penalty by resort to transit pitches. The position might be different if transit pitches were readily available: moving between several different pitches over the course of a 12-month period would be a feasible option. But the evidence shows this is not the position. The Claimant's submission is that the increased protection to land owners given by the 12 month no-return periods places a disproportionate burden on Gypsies. It expands the scope of the criminal penalties and at the same time makes it more difficult to comply with the law.*
>
> *… I accept this submission. The point here is not simply that the no-return periods have been extended. That of itself does revisit the balance struck between the property rights of landowners and occupiers and the interest of Gypsies, but if this point stood alone the likely success of the submission that the change produced a disproportionate outcome would be in the balance. The matter that is decisive in the Claimant's favour is that the extension of the no-return period of itself narrows the options available to comply with the new requirement. Resort to a transit pitch will no longer suffice as the maximum stay on a transit pitch is 3 months. The under supply of transit pitches renders it much less likely that the opportunity exists to move from one to another. In this way, extending the no-return period not only puts Gypsies at particular disadvantage but also and of itself, compounds that disadvantage*… [paras 54-55]

Importantly the judgment recognised that the right of Gypsies and Travellers, protected by Article 8 and 14 of the ECHR, to live in accordance with their traditional way of life cannot be further restricted without cogent justification.

Although Swift J did not accept the claimant's submission that s60C of the CJPOA 1994 in its entirety was unlawful, he was clear that the police must comply with statutory guidance limiting the use of s60C before taking a decision to exercise the new enforcement power, as that guidance included important safeguards to protect Gypsies and Travellers. For example, at para 34 of the judgment, the judge held that:

> *[The] guidance includes a requirement to follow the operational advice issued by the National Police Chiefs' Council, 'Operational Advice on Unauthorised Encampments'. Any officer following this operational advice would not act precipitately. This ought to be sufficient to filter out the possibility of malicious or discriminatory action by the legal occupiers of land.*

Conclusion

Importantly the judgment recognised that the right of Gypsies and Travellers, protected by Article 8 and 14 of the ECHR, to live in accordance with their traditional way of life cannot be further restricted without cogent justification. None had been advanced by the defendant. Following the general election, a different parliament will have to consider the compatibility of new enforcement provisions brought in by the PCSCA 2022 with the ECHR. It is hoped that parliament will take this opportunity to review the new powers in their entirety and that it can be persuaded that the aims of the legislative reforms are better served by meaningful investment in lawful encampments rather than by criminalising the Gypsy and Traveller way of life.