Lisa Smith v Secretary of State for Levelling Up, Communities and Housing [2022] EWCA Civ 1391

The case in which the Court of Appeal ruled that the planning policy definition of the term *'gypsies and travellers'* was discriminatory and unlawful

Marc Willers KC, Garden Court Chambers

- *Planning policy for traveller sites* (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 drafted 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]

However, the definition was amended in 2015 to remove the words *'or permanently'*.

As a consequence, 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.

Lisa Smith (LS) is a Romani Gypsy who lives 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.

Planning appeal: 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 healthcare 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 Court of Appeal (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].

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 then 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]

Implications of the decision: After the Court of Appeal's decision in 2022, planning decision-makers at first instance and on appeal had to take it into account when determining the *'Gypsy status'* of applicants/appellants.

The fact that many of the Gypsy and Traveller Accommodation Assessments adopted by local planning authorities had been based upon 2015 PPTS definition (and had consequently may have excluded Gypsies and Travellers on a basis which was discriminatory and unlawful) gave rise to the reasonable suspicion that they had significantly underestimated the required number of pitches.

In the event, good sense prevailed when the government published a revised version of the PPTS in December 2023 - in which the definition of the term *'gypsies and travellers'* reverted to the version in the 2012 PTTS, namely that it means:

> *Persons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family's or dependants' educational or health needs or old age have ceased to travel temporarily or permanently, but excluding members of an organised group of travelling showpeople or circus people travelling together as such.*

Latest Developments in Gypsy and Traveller Law - Wide Injunctions

Owen Greenhall, Garden Court Chambers

Bromley LBC v Persons Unknown [2020] EWCA Civ 12

"there are now 38 of these injunctions in place nationwide. It would be unrealistic to think that their widespread use has not led to something of a feeding frenzy in this contentious area of local authority responsibility."

i) injunctions force G&T out of boroughs imposing greater strain on others.

ii) Caused LAs without injunctions to seek them forthwith.

Bromley LBC v Persons Unknown [2020] EWCA Civ 12

"Order sought amounted to… a de facto borough-wide prohibition of encampment and upon entry/occupation for residential purposes … in relation to all accessible public spaces in Bromley except cemeteries and highways"

"The absence of any alternative sites… was plainly relevant"

"cumulative effect of other injunctions was material consideration"

"It is a matter for the LA carefully to consider the temporal and geographical range of the order sought"

Bromley LBC v Persons Unknown [2020] EWCA Civ 12

"there is an inescapable tension between the article 8 rights of the gipsy and traveller community…and the common law of trespass. The obvious solution is the provision of more designated transit sites for the gipsy and traveller community."

"borough-wide injunctions are inherently problematic. They give the gipsy and traveller community no room for manoeuvre"

Bromley LBC v Persons Unknown [2020] EWCA Civ 12

"the gypsy and traveller community have an enshrined freedom not to stay in one place but to move from one place to another. An injunction which prevents them from stopping at all in a defined part of the UK comprises a potential breach of both the Convention and the Equality Act 2010"

Bromley LBC v Persons Unknown [2020] EWCA Civ 12

If LA seek injunction:

i) "of the utmost importance to seek to engage with G&T"
ii) Welfare assessments (children) and
iii) "up-to-date EIA is always important" (impact varies between boroughs)

"if the appropriate communications, and assessments…are not properly demonstrated, then LA may expect to find its application refused."

From Enfield to Wolverhampton (via Barking)

Enfield LBC v Persons Unknown [2020] EWHC 2717 (QB)

Nicklin J reviews injunctions in light of *Canada Goose*

Barking and Dagenham LBC v Persons Unknown [2023] Q.B. 295

CA upholds newcomer injunctions contrary to *Canada Goose*

Wolverhampton CC v London Gypsies and Travellers [2023] UKSC 47

Interveners: i) London Gypsies and Travellers (LGT),

ii) Friends Families and Travellers (FFT) and

iii) the Derbyshire Gypsy Liaison Group (DGLG)

Protective costs award made

Question: Can final injunctions be made against newcomers?

Wolverhampton CC v London Gypsies and Travellers [2023] UKSC 47

UKSC:

- rejected attempts to classify newcomer injunctions in line with previous legal remedies
- a “wholly new form of injunction” [para 144]
- They are binding against the world including those not party to proceedings

Wolverhampton CC v London Gypsies and Travellers [2023] UKSC 47

"Any applicant for the grant of an injunction against newcomers in a Gypsy and Traveller case must satisfy the court by detailed evidence that there is a compelling justification for order sought"

This requires the consideration of whether LA:

(i) complied with obligation to provide lawful stopping places?
(ii) exhausted all reasonable alternatives to an injunction;
(iii) taken appropriate steps to control unauthorised encampments using other measures
(iv) must be strong probability that tort to be committed and will cause real harm

Wolverhampton CC v London Gypsies and Travellers [2023] UKSC 47

"We have considerable doubt as to whether it could ever be justifiable to grant a Gypsy or Traveller injunction which is directed to persons unknown, including newcomers, and extends over the whole borough or for significantly more than a year. It is to be remembered that this is an exceptional remedy, and it must be a proportionate response to the unlawful activity to which it is directed. Further we consider that an injunction which extends borough-wide is likely to leave the Gypsy and Traveller communities with little or no room for manoeuvre."

Wolverhampton CC v London Gypsies and Travellers [2023] UKSC 47

- Important to give advance notice of injunction applications to groups representing G&T
- Could "see the benefit" of giving costs protection in the High Court
- Considerations in G&T context are not the same as those in protest cases.

Wendy Smith v Secretary of State for the Home Department

Ollie Persey, Garden Court Chambers

18 Sep 2024

Who is Wendy Smith?

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 transit sites.

What was she 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).

- 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 to restrain '*unauthorised encampments'*.

- No return periods extended from 3 months to 12 months: criminal offence.

What was the concern?

- Chilling effect upon Gypsies and Travellers living nomadic way of life
- Effectively driving Gypsies and Travellers off the road, due to shortage of authorised encampments
- Joint Committee on Human Rights:

  "… 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 " such a significant manner. The provision of more authorised sites would also benefit landowners, who are quite rightly concerned about the present situation."
- National Police Chiefs Council (NPCC):

  "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."

Discrimination against Gypsies and Travellers

- 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.
- In 2023, the Centre on the Dynamics of Ethnicity published its Evidence for Equality National Survey report, 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.

Chilling effect

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:

"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."

This had been tried before…

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'.*

Impact of Irish measures

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 …*

Article 14 ECHR Challenge

- Government had conceded that it was race discrimination (at least indirect) and the battleground was justification.
- 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

The Judgment

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.

The Judgment

… 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]

Statutory Guidance as a safeguard

[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." [34]

Declaration of Incompatibility granted!

The case that nearly never was…

- Refused legal aid
- Had to lodge without legal aid and seek a stay
- Refused permission on the papers
- Refused permission at an oral renewal hearing… until the Judge asked for a further hearing and changed his mind(!)