TAT NEWS

Newsletter Spring 2012

Travellers Advice Team new national telephone helpline for Gypsies & Travellers **0121 685 8677**. Mondays to Fridays 9.00am - 5.00pm No operator service. Get straight through to an expert .

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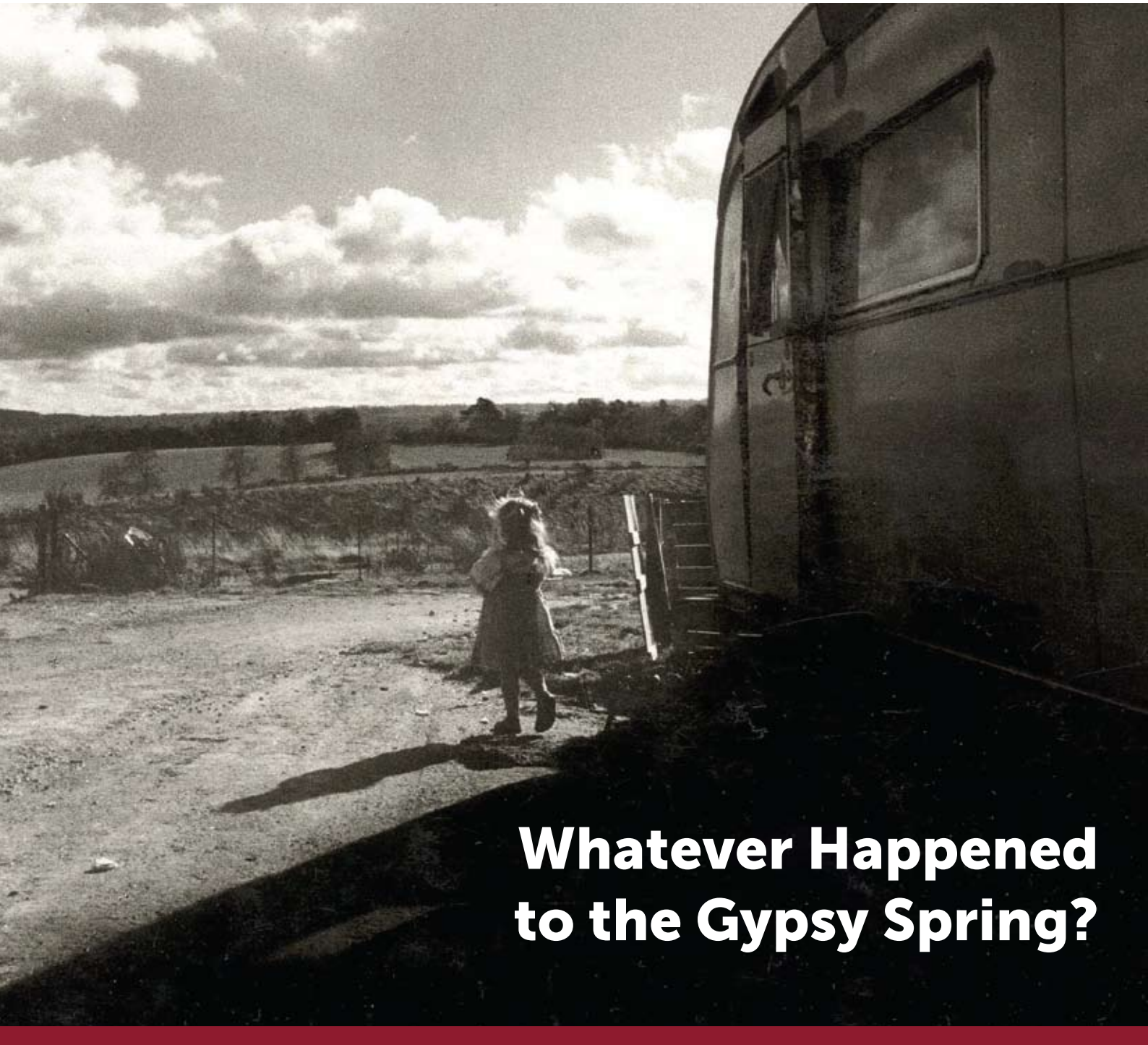

Whatever Happened to the Gypsy Spring?

The Travellers Advice Team (TAT) consists of

Chris Johnson, Team Leader and solicitor

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Sharon Baxter, solicitor and advice line worker

Emma Westwood, administrator

TAT are assisted by all other members of Community Law Partnership (CLP). Especial thanks to Carol Harfield , Craig Keenan, Rose Pritchard and Holly Sherratt. Obviously great thanks to the other Partners at CLP, Rosaleen Kilbane and Mike McIlvaney and to our Practice Manager, Jenny Malone.

A big thank you to our wonderful contributors for this bumper edition

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David Watkinson, GCC

Marc Willers, GCC

Thanks to **Emma Westwood** for organising this edition and thanks to our designer, **Louise Willers**.

This edition is printed by **Fizzy Fish Ltd**.

One does not sell the earth upon which the people walk - Crazy Horse

Contents

Fighting the Good Fight

The whites were always trying to make the Indians give up their life and live like white men – go to farming… and do as they did – and the Indians did not know how to do that, and did not want to anyway… If the Indians had tried to make the whites live like them, the whites would have resisted. - **Big Eagle of the Santee Sioux**

As the Office of the Deputy Prime Minister (ODPM) Circular 01/2006 *(Planning for Gypsy and Traveller Caravan Sites)* began to improve the situation in England and as security of tenure was introduced for the first time on local authority sites, it seemed that we might be entering into the Gypsy and Traveller equivalent of the 'Arab Spring'. However any such hopes have been stalled by the Coalition Government and their dismantling of Regional Strategies (which contained targets for pitch provision) and the replacement of Circular 01/2006. Nevertheless there remains hope that something of a 'Gypsy Spring' may yet be achieved in Wales (see *The Road Ahead*).

The last year has been something of a war of attrition especially with regard to the Coalition Government. However, we would encourage people to keep fighting the good fight because advances and improvements have been made due to people plugging away at the various issues and you will see some of these advancements and improvements mentioned in the articles in this edition of TAT News. Obviously there have also been disappointments and setbacks and you will see those mentioned as well.

Despite what we would see as backward steps in the field of planning law, as fully discussed in this edition, thanks to the wonderful work of expert planning consultants and advisers, permanent and temporary planning permissions are still being achieved. Despite this, the number of Gypsies and Travellers on unauthorised encampments and unauthorised developments has not improved and there is a concern that that situation is going to worsen. The situation at Dale Farm is only the tip of the iceberg in this regard. There is some anecdotal evidence that an increasing number of Gypsies and Travellers have felt forced to move into bricks and mortar accommodation. In many cases it may be unlikely that such a move will prove successful.

In previous editions of TAT News we have had the occasional guest writer but this time we have completely broken the mould by asking an impressive array of experts and campaigners on Gypsy and Traveller issues to write articles for this edition or to comment on articles. Thank you to all those contributors for making this what we hope is an extremely informative and even entertaining edition! Where we do not attribute an article to a particular person or persons, then we are accepting full responsibility for that article!

Shortly before we 'went to press' the Government produced the long awaited finalised version of the planning guidance for Gypsies and Travellers. Despite the vehemence and credibility of the representations made by and on behalf of Gypsies and Travellers, very little has changed from the initial draft (see *Back to the Past?*).

In this year of attrition, two particular matters have specifically affected TAT.

TAT starts new National Telephone Advice Line for Gypsies and Travellers deals with what has turned out to be the last year of our Community Legal Advice funded advice line and introduces what we hope is our much improved self-funded advice line.

No Mad Laws looks at the excellent campaign against those proposals in the Legal Aid Bill which may potentially have a disastrous impact on Gypsies and Travellers seeking legal advice. Though the amendments put forward by the campaign were not ultimately accepted, it will be seen from this article that important advances were made.

We wanted to start early on in this edition with a story that illustrates an advancement brought about by campaigning work. *Government listens to Gypsies and Travellers on squatting* is an excellent example of such an advancement.

The National Federation of Gypsy Liaison Groups (the 'Nat Fed') organised a petition to Parliament calling for a re-consideration of the definition of 'Gypsy' for planning purposes. This led to a debate in the House of Lords. Siobhan Spencer of the Nat Fed addresses this important issue in *Lessons from Canada.*

We have included an article on protest cases (*The Paradox of Protest*). This is not directly to do with Gyspies and Travellers, of course, but:

(a) we thought a lot of you would be interested in it (and it is a very good read);

(b) it is about two European Convention Articles, thus having possible analogies with Gypsy and Traveller cases (for example, Stephen Cottle's article *The Long Journey of Article 8* refers to a protest case).

We are sure that the other articles need no further explanation but present some cutting edge arguments and discussion about the issues involved. Ultimately we hope this edition inspires our readers to 'keep up the good fight'.

CLP WINS AWARD

We would add that CLP received a great boost when we recently won the award of Firm of the Year (4 partners or less) from the Birmingham Law Society. This follows on from being shortlisted in 2011 for Legal Aid Firm of the Year.

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TAT STARTS NEW NATIONAL TELEPHONE ADVICE LINE FOR GYPSIES AND TRAVELLERS

Community Legal Advice (CLA) have decided not to continue the national telephone helpline for Gypsies and Travellers (run by Community Law Partnership (CLP)) after the current contract comes to an end at the end of March. This is a cost cutting measure and CLA state that Gypsies and Travellers in England and Wales will be able to get advice through the national Housing helpline.

Chris Johnson from CLP commented:-

"Telephone advice can be an essential service for certain groups such as elderly people, those with mobility problems, people in rural areas a long way away from advice services and so on. Gypsies and Travellers are one of those groups. They are a small community and spread out across the whole of England and Wales. However, what CLA are failing to recognise is that the law relating to Gypsies and Travellers is extremely specialised. For example, someone advising a Gypsy or Traveller will often need to have knowledge of planning law if that Gypsy or Traveller is seeking to get permission for a Gypsy site. Most Housing providers (understandably) do not have expert knowledge of planning law since they do not have to use such knowledge. Unfortunately, with the best will in the world, the CLA national Housing helpline will not be able to answer many of the questions that will be asked by Gypsies and Travellers phoning that line".

The national helpline for Gypsies and Travellers was first set up as part of the Methods of Delivery Pilot in April 2002 and was, at that time, the only national helpline funded by the LSC (then through Community Legal Service Direct). Two years later, when it was decided to continue with the telephone helpline system, all helplines were made national. CLP has continued to provide the LSC funded helpline to Gypsies and Travellers for the last 10 years.

Speaking generally about telephone advice, Chris Johnson commented:-

"Generally speaking I believe that face to face advice is much to be preferred and is often essential. There are circumstances where telephone advice works really well, as I have already mentioned, but it should always be seen as a complement to face to face advice and not as a replacement for face to face advice. With regard to the current proposals about a Telephone Gateway in certain areas of the law once the Legal Aid Bill becomes an Act, quite frankly I think this is a disastrous proposal".

In response to the decision of CLA not to continue funding, CLP are now setting up their own national telephone helpline for Gypsies and Travellers.

This is a reproduction of an article from Legal Action magazine April 2012

No Mad Laws

The Legal Aid Bill and Gypsies and Travellers

Very soon after the Legal Aid, Sentencing and Punishment of Offenders Bill ('the Legal Aid Bill') started its passage through Parliament in June 2011, in response to those proposals that would clearly have a seriously detrimental effect on Gypsies and Travellers, Gypsy and Traveller organisations and individuals joined together under the banner of the No Mad Laws campaign to challenge these proposals.

In a short time the campaign has achieved a great deal:

1. A petition, both on-line and on paper, was organised and ultimately was handed in to 10 Downing Street. This led to a formal response from the Ministry of Justice. The petition was formally presented in the House of Commons (well done to Gill Brown of London and Gypsy and Traveller Unit and Cathay Birch of Gypsy Message Board for organising that);

2. Postcards were sent to MPs and members of the House of Lords and these helped to gather support for the campaign (well done to the Derbyshire Gypsy Liaison Group and the National Federation of Gypsy Liaison Groups for organising this);

3. Briefing papers were produced and a regular bulletin was circulated;

4. A letter was published in The Times;

5. Amendments were drafted which were taken forward in the House of Lords by Lord Avebury and Baroness Whitaker;

6. Articles were published by Legal Action magazine, the Legal Aid Practitioners Group, the Housing Law website Nearly Legal, Travellers Times and others.

Now that the Legal Aid Act has received the Royal Assent on 1st May 2012, what has the campaign achieved?

A. The Government have clarified that most if not all high court planning appeals and planning injunctions will remain within scope for legal aid;

B. The Government were persuaded to say that judicial review could be used to challenge the decision to go for a county court possession action in the case of an unauthorised encampment – not the most sensible route (see below) but better than nothing.

And the failures?

Non-possession Mobile Homes Act 1983 disputes will not be in scope.

To update readers perhaps the best thing is to re-print part of the latest Bulletin from the campaign:

No Mad Laws Campaign

BULLETIN 15 March 13th 2012

Where have we got to?

Following the relevant amendments regarding Gypsies and Travellers not being pressed to the vote late last night in the Lords (due to lack of numbers as well as previous Government victories on Monday on other amendments) several members of the campaign have asked where this all leaves us.

Clearly now the bits of the Bill that affect Gypsies and Travellers will almost certainly be enacted in the form they are in now.

1(a) Possession actions on rented sites

These sites (apart from local authority sites in Wales!) are under the Mobile Homes Act 1983. The Government has always said that such actions will be within scope under the heading of 'loss of home'.

1(b) Planning matters

The Government have always said judicial review will be within scope and this is the way one would challenge a stop notice or direct action.

At Committee Stage in the Lords Lord Wallace confirmed that high court planning appeals and planning injunctions would remain within scope of legal aid if there may be a risk of 'loss of home'. Since this will normally, if not always, be the case, this means that all such matters remain within scope.

1(c) Evictions from unauthorised encampments

If a public authority takes possession action other than via the county court (e.g. by using section 77 of the Criminal Justice and Public Order Act 1994) then any challenge (e.g. for failure to carry out welfare enquiries) would be by way of judicial review and judicial review remains within scope (see above).

However if the public authority uses county court possession action, then any challenge must be taken by way of defence according to the House of Lords in the case of *Doherty v Birmingham City Council* (as quoted by Lord Avebury during the debate). The Government has refused to accept that legal aid should be available for the defence to a possession action in the county court. However, Lord Wallace stated last night:

However, there is no legal bar on seeking a judicial review of a public authority's decision to bring possession proceedings.

This seems to give the green light to a return to the old system of seeking adjournment of the county court possession action while a judicial review application is lodged in the high court (a much more expensive process as pointed out by Lord Avebury).

As to how this works on the ground, that is anybody's guess. However Kenneth Clarke, the Secretary of State for Justice (yes, you might like to make up a different title for him) has stated that the reforms will not be brought into force until April 2013 so we have a bit of time to work out tactics.

1(d) Non-possession disputes under the Mobile Homes Act (MHA) 1983

Ironically, when Gypsies and Travellers on English local authority sites, after a massive battle, have finally got the protection of the MHA 1983, now they will lose any legal advice on non-possession action disputes (same applies to Wales though the Welsh Government, most unfortunately, have not yet got around to bringing the rights into force on Welsh local authority sites). To say this is disappointing is an understatement since many of the issues involved (e.g. re-siting the mobile home, succession, repairs, rents etc) are not only vital (and, if not resolved, can lead to even more serious problems arising – as pointed out by Baroness Whitaker) but can be very complex.

Thinking caps need to go on as to how this yawning gap in advice provision (joining all the other yawning gaps that the Legal Aid Bill is producing) can be filled – if at all!!

As ever a wonderful job was done by Lord Avebury and Baroness Whitaker.

Two Gypsies and one Irish Traveller instructed TAT to challenge the failure of the Ministry of Justice (MoJ) to carry out a proper Equality Impact Assessment (EIA) with regard to the Legal Aid Bill.

Basically the MoJ's EIA failed to mention Romani Gypsies and Irish Travellers at all despite the fact that, in the previous consultation process, TAT and other organisations had pointed out the potential disastrous consequences for Gypsies and Travellers. Ironically, after lodging the judicial review applications, we entered into an enormous argument with the Legal Services Commission (LSC) as to whether our clients should continue to receive legal aid. The matter had to proceed to the LSC's Special Cases Review Panel. In the meantime the judicial reviews had to be adjourned. Eventually the Panel concluded that all our arguments had sufficient merits apart from :

(i) The challenges were unlikely to have any practical effect – by this time this was true since it was far too late to try to get a proper EIA carried out (which might possibly have persuaded the MoJ to reconsider their position)!

(ii) The (very wonderful) debate in the Lords at Committee Stage on 24th January had covered everything in any case.

Whilst we did not accept (ii), it was indeed now too late and the challenges had to be withdrawn.

Well done to our three clients for their brave efforts.

Goverment listens to Gypsies and Travellers on squatting

Marc Willers, Simon Ruston and Chris Johnson

The Ministry of Justice carried out a consultation process on proposals to criminalise squatting and responded following that consultation (*Options for dealing with squatting – Response to Consultation* 26th October 2011).

Many of those (including the writers of this article) who opposed the complete criminalisation of squatting, pointed out that the vast majority of squatting involves disused or derelict buildings (often ex commercial premises) and that there was already a sufficient array of criminal offences to deal with any problem cases that might arise. Homelessness charities also expressed concern about the effects on vulnerable groups of people. Indeed over 90% of respondents were opposed to the proposals. Nevertheless, the Government has decided to proceed and has stated that:

The new offence will be committed where a person is in a residential building as a trespasser having entered it as a trespasser, knows or ought to know that he or she is a trespasser and is living in the building or intends to live there for any period (p.36).

However, a number of groups (including Cardiff Gypsy & Traveller Project, Community Law Partnership, Garden Court Chambers and the New Traveller Association) had pointed out that any definition of a building which included land adjacent to a building might catch Gypsies and Travellers who, especially in urban areas, may have no alternative but to stop on disused land next to a building. We are pleased to report that the Government has listened to these concerns:

The Government noted concerns of groups representing Gypsies and Travellers that any new offence could criminalise Gypsy and Traveller encampments on land ancillary to the buildings protected by any new offence. Respondents indicated that it was quite common for Gypsies and Travellers to encamp on land outside disused factories and warehouses, particularly in urban areas. The Government has decided to limit

the offence to residential buildings, however, and it will not extend to the land ancillary to those buildings at this stage (p.38).

Well done to all those who responded to the consultation on behalf of Gypsies and Travellers.

The campaign against the complete criminalisation of squatting in buildings continues. For more information, contact Squatters Action for Secure Homes (SQUASH) at http://www.squashcampaign.org/

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An Agreement is an Agreement

David Watkinson and Chris Johnson

After a long campaign and a great deal of pressure, the Mobile Homes Act (MHA) 1983 was introduced onto local authority Gypsy/Traveller sites in England on 30th April 2011.[1]

With regard to existing residents, local authorities then had 28 days to provide a written statement which complied with the terms of the relevant statutory instrument.[2] This written statement needed to be in the form specified in the statutory instrument or in "a form substantially to the same effect."

This statement needs to have

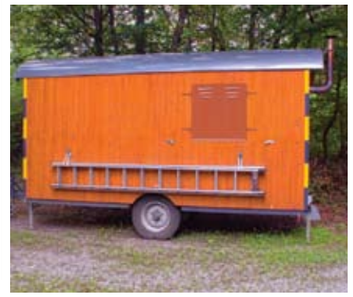
1. Explanatory notes;

2. The terms implied by the MHA 1983 (e.g. as to security of tenure, succession, re-siting of mobile home, repairing obligations etc);

3. The express terms of the agreement.

The easiest way for a local authority to comply with this would be to simply follow the form contained in the statutory instrument and then transfer all the express terms from the existing agreement (other than any terms that are in conflict with the new implied terms) into the new written statement.

However the authors of this article have come across cases where local authorities have altered express terms or added in wholly new express terms without reaching any agreement with residents or without any consultation. In one case a whole new clause about "authorised absence" had been added in (much to the detriment of the residents).



It is vital to remember that any changes to existing express terms or any new express terms must be agreed between the local authority and the residents. It is not acceptable for a local authority to simply hand out new statements with amended or new express terms within them and then take it that those are agreed unless anyone objects. Imposing new terms or amended terms without agreement is unlawful.

We know that many local authorities still haven't "got around" to bringing in the new written statements (this, in itself, is unlawful and could entitle a resident to apply to the Residential Property Tribunal for an order that a statement must be provided).

Make sure you check any new written statements very carefully by comparing them with existing agreements. There will be lots of implied terms listed. It is the express terms you need to check. If in doubt, seek advice.

[1] Most unfortunately, the Welsh Government are yet to introduce the terms of MHA 1983 onto local authority sites in Wales.

[2] The Housing and Regeneration Act 2008 (Commencement No 8 and Transitional, Transitory and Saving Provisions) Order 2011.

The long journey of Article 8

Stephen Cottle

A few unsettled issues regarding Article 8 of the European Convention on Human Rights (ECHR)

The Court of Appeal has observed in relation to Article 8 of the ECHR that "respect for the home is in one sense a 'commonplace'", in that it reflects an aspiration shared by most of humanity. But it is at the same time sufficiently 'special' for it to be given protection as a fundamental right under the European Convention. Further the European Court of Human Rights (ECtHR) has said that Article 8 does not merely restrain public authorities but that "there is ... a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the Gypsy way of life ..."

We know that, contrary to the positive aspect to Article 8, planning authorities which do not have a deliverable supply of sites to meet the accommodation needs of Gypsies and Travellers residing in and resorting to their areas are not facilitating the Gypsy way of life, especially when there is not a square inch within the district where a new residential Travellers' caravan site would accord with development policy because decision makers regard any harm to the local countryside as a reason for refusing permission. Arguably this failure also puts the UK Government in breach of its treaty obligations under the Framework Convention for the Protection of National Minorities which requires contracting states to refrain from policies or practices aimed at assimilation. The difficulties of assimilation experienced by Travelling families living in housing through lack of new sites is under-researched , homelessness officers tending to only look for the exceptional case supported by evidence of psychiatric harm; it does not have to be that bad for it to be reasonable for a Travelling family to say no to conventional housing.

Now the Supreme Court has held that defendants to possession proceedings relating to their home are entitled to ask the Judge to dismiss the claim against them if it would be disproportionate and contrary to their Article 8 rights, there are a number of matters still to be resolved.

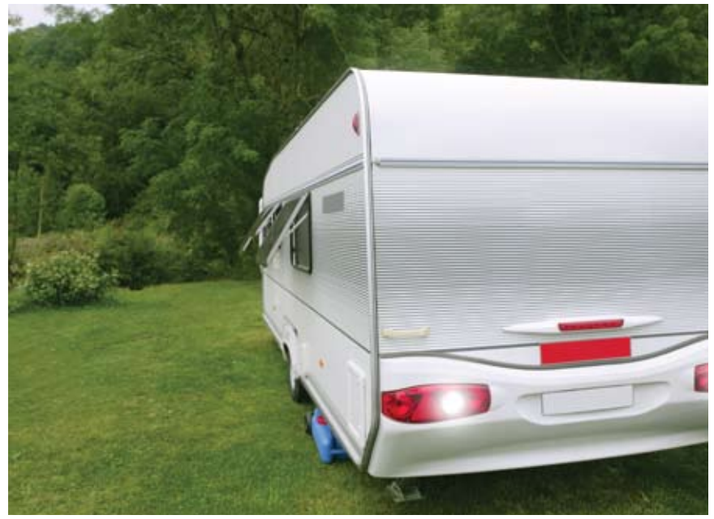
The first point in relation to Travellers is whether they have been on the land long enough. Often they won't have. If they haven't then the impact of eviction , requiring the caravan, which is the home, to be moved is to be measured less by interference with the home as by the future impact on private and family life, including the best interests of the children, that results from being on the side of the road and from the stress of being moved on by the police. As far back as 2001 we were arguing that the court should focus on the future impact of an eviction rather than the links to the land, which authorities were saying we could not rely on if the land was occupied unlawfully. [3] Additionally, If there are characteristics protected under the Equality Act 2010 at stake, the court needs to make a properly informed decision.

The second point is that, when a possession claim gets to court, the evidential burden should be on a public authority that is proposing an interference with Article 8 rights, but the courts don't yet see it that way. This means that the authority bringing the claim does not turn up with the information relied on for taking the decision or it does but goes further and argues that there is no chance that an Article 8 defence could succeed. Some Judges' first instinct is that the Travellers may only be on the side of the road because of the authority's failure to provide sites and therefore want more information about possible alternative sites, if not in the authority's area then in adjacent districts. However, there needs to be a procedural change to the relevant Civil Procedure Rule (CPR) Part 55.8 to make sure that no decision is taken as to whether or not there should be a trial until evidence has been exchanged because quite often the local authority's case turns out to be different to what it first seems and things are said at the first hearing (e.g. scale of alleged nuisance being caused) which are in dispute. A recent case (*Corby BC v Scott* [2012] EWCA Civ 276) suggests that the decision whether or not there should be a trial should be decided after a defence has been put in - but in order to properly do that there needs to be prior disclosure.

And so the sorry saga of moving the same group of extended families round the district at ever increasing costs continues in a vicious circle of misery and hostility without the procedural protection, that Article 8 is meant to carry with it, taking place. To require the authority to set out the evidence it relies on and give the defendants a chance to respond to that is what due process requires. A rule change is required to make sure that that happens. Of course there is a difference between a disused highway depot or a discrete old lay-by and the town hall car park or some other prestigious high profile location where any period of stay is unsustainable.

There is a third point. The Supreme Court has said that a defendant asking the court to dismiss a possession claim concerning residential premises (for example, where a housing authority may be wanting to offer the premises in accordance with its allocation policy and in discharge of its statutory duties, to someone else with higher points) must show a seriously arguable case. There are not the same pressures concerning a piece of land. Different considerations apply in terms of statutory functions but there is scope for political opposition due to those living and working nearby making complaints. In these cases the Travellers may be relying on the lack of sites and arguing that the consequences of eviction for those affected would be too severe, as against the harm that would result from being allowed to remain. The test in CPR Part 55.8 for a trial to take place is whether the court is satisfied that there is a serious issue to be tried. You might think that it is serious if there is some evidence that the positive aspects to Article 8 have not been performed by an authority which has no deliverable supply of sites or an out of date policy that is not fit for purpose and that there are those with educational and or medical needs living on site. Need for sites and lack of policy combined with welfare needs of those living on the land, requiring a balancing exercise to be carried out by the court, has never yet been accepted as a reason for allowing the Travellers to stay put. The problem at the moment is to get to a trial to argue the case. Hence the need for reform or further case law to re-assert the test in CPR Part 55.8 for Travellers and to restrict the seriously arguable threshold to those cases concerning residential premises that have been squatted.

The fourth point that needs to be looked at is that, in a recent Supreme Court case, it was held that allowing a person the benefit of a suspended or postponed possession order, for example time to



move or to find somewhere else, cannot be for more than six weeks because of section 89 of the Housing Act 1980, although the President observed that this inability may oddly be a reason for the Court to refuse to make any order. [4]
In cases concerning trespassers, the courts do not, according to the rule in a 1973 case, have the discretion to refuse a public authority an immediate order for possession (*McPhail v Persons Unknown* [1973] 3 WLR 71 – sometimes known as the rule in *McPhail*) .

Obviously the court as a public authority must ensure any order that it makes is compatible with a defendant's rights under the ECHR but the 1973 rule has not been expressly overruled. Plainly if, as the President in the *Powell* case said, the inability to suspend might mean a Judge refuses any order, this situation is artificial and the nettle should be grasped. If the Judge can suspend then there is more reason for a hearing to decide, based on all the evidence (see points 1 to 3 above), what the appropriate order should be.
The rule that the court cannot suspend against trespassers is practically dead but it remains to be said so and the relationship with the 6 week limit in section 89 of the Housing Act 1980 needs more work.
The last point is the ability of a trespasser on private land to defend on the basis that the court as a public authority can dismiss the possession claim, if an order would be incompatible with his or her rights under Article 8 of the ECHR. In *Khela (by his LPA receiver) v Dainter,* Birmingham County Court, 29th February 2012, a notice , said to be a guaranteed route to recovering possession, was served under the Housing Act 1988 by a private landlord. The matter was defended on the basis that a possession order would be disproportionate. HHJ McKenna has just transferred the matter to the Court of Appeal to decide if the tenant should have been allowed to raise an Article 8 defence. This is topical in the light of the arguments raised on behalf of Occupy London protesters at Finsbury Square which concerned private land and the right to freedom of speech. If the court has jurisdiction to refrain a private landlord from immediately recovering possession against trespassers on account of Article 10 (Freedom of expression), why not also because a possession order would cause unjustified interference with rights under Article 8?

[3] *South Bucks DC v Porter* ; *Wrexham CBC v Berry* ; *Chichester DC v Searle* [2003] 3 All ER 1,HL . In Mrs Porter's case she had received an enforcement notice which she failed to comply with for over 10 years and had lost in the ECtHR before she finally won permanent planning permission.

[4] See *Hounslow LBC v Powell* [2011] 2 WLR 287 @ 62 & 103;see also [2011] EWCA Civ 1291 @ 11 &12. See also *Manchester CC v Pinnock* [2011] UKSC 6.

Article 8 Afloat

Moore v British Waterways Board (BWB)

The dispute concerned the lawfulness of the service by BWB of notices under the British Waterways Act 1983 s8 ('section 8 notices') on certain vessels moored on the Grand Union Canal ('the GUC').

This section states:

1. *In this section- … 'relevant craft' means any vessel which is sunk, stranded or abandoned in any inland-waterway … or which is left or moored therein without lawful authority…*

2. *The Board may remove any relevant craft after giving not less than 28 days' notice to the owner of the relevant craft, stating the effect of this section.*

Hildyard J concluded that the Claimant "cannot show any lawful entitlement to moor vessels permanently" on the GUC (para 160).

However, at the time of service of the section 8 notices, the Claimant lived on one of the vessels – later in the matter he moved to live on another of the vessels. BWB had procedures for how to deal with 'live-aboards' in terms of potential service of section 8 notices. They had not carried out these procedures with regard to Mr Moore, initially because they had not realised that he was living on one of the vessels (though, later on in the matter, this did become apparent to them).

Hildyard J came to the provisional conclusions (at para 233) that:
(i) … in serving section 8 notices BWB failed to abide by its own procedures, and was in breach of legitimate expectations held by the Claimant that in exercising a power admitted by BWB to be draconian and to be used as a last resort BWB would abide by such procedures …

(ii) The Claimant's "Article 8 rights have been infringed."

He invited further submissions before deciding on the appropriate relief.

This brief summary does not do justice to the convoluted nature of the law in this area and to the complex arguments that were presented to the Court (arguments that went back to the Grand Junction Canal Act 1793!). Indeed, Hildyard J commented :
I would not want to leave this long judgment without expressing my concern about the present disparate and complex nature of the legislation that I have had to consider (para 236).

All credit to Hildyard J for providing an excellent summary of the wider law in this area which we recommend to anyone interested in boat cases.

At the end of the day a very important judgment on the need for public authorities to follow their own procedures and on Article 8.

[2012] EWHC 182(Ch), 10th February 2012

Mr Moore represented himself whilst BWB were represented by Christopher Stoner QC.

Well done to Mr Moore on this excellent result.

Back to the Past ?

Chris Johnson and Marc Willers

When the Coalition Government came into power, Eric Pickles, the Secretary of State for Communities and Local Government (CLG) stated that Circular 01/2006 *Planning for Gypsy and Traveller Caravan Sites* would be replaced with 'light touch guidance' and that he would abolish Regional Strategies.

The Department of Communities and Local Government (DCLG) published the replacement draft policy *Planning for traveller sites* (note the use of lower case 't'!) for consultation on 13th April 2011; it was subject to severe criticism by Gypsy and Traveller groups who emphasised the fact that Circular 01/2006 was beginning to have a positive effect on site provision.

Simon Ruston, a Phd student and member of the New Traveller Association, also argued that there should be an oral consultation process due to literacy problems amongst some of the Gypsy and Traveller community and in line with the Government's own consultation policies. This argument was taken up by two Gypsies who instructed CLP to seek legal redress if necessary. In a groundbreaking decision, DCLG agreed to undertake such a process and two sets of oral hearings took place in July/August and September/October. We trust this has now set a precedent, not only for consultations involving Gypsies and Travellers but also for those which concern other disadvantaged and hard to reach communities.

On 25th March 2012 the CLG published its finalised planning policy statement (PPS), now entitled *Planning policy for traveller sites*. Despite the extensive consultation and the strong views expressed by Gypsies and Travellers and their support and representative groups, very little has changed between the draft and the final version.

The PPS emphasises the fact that local planning authorities (LPAs) should assess the accommodation needs of Gypsies and Travellers in their areas:

…local planning authorities should make their own assessment of need for the purposes of planning (para 4).

The PPS is to be read in conjunction with the Government's National Planning Policy Framework (NPPF) which aimed at streamlining and condensing planning policies. The NPPF was published on 27th March 2012 and came into force immediately.

Calls to emphasise the need to rely on Gypsy and Traveller Accommodation Needs Assessments have been ignored. One small victory is that the reference to historical demand in the draft replacement policy has been removed.

[LPAs] *should, in producing their Local Plan:*

a) identify and update annually, a supply of specific deliverable sites sufficient to provide five years' worth of sites against their locally set targets

b) identify a supply of specific, developable sites or broad locations for growth, for years six to ten, and, where possible, for years 11-15 (para 9).

On the Green Belt, the wording remains much the same, emphasising that sites in the Green Belt are inappropriate development (para 14).

Simon Ruston, a Phd student and member of the New Traveller Association, also argued that there should be an oral consultation process due to literacy problems amongst some of the Gypsy and Traveller community and in line with the Government's own consultation policies.

At this early stage it is unclear how the link in with the NPPF will work:

Applications should be assessed and determined in accordance with the presumption in favour of sustainable development and the application of specific policies in the National Planning Policy Framework…(para 21).

Hopefully this might mean, for example, that aspects of the Green Belt policy in the NPPF can be

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utilised. Take, for example, the exceptions to the construction of new buildings in the Green Belt, one of which is:

limited infilling or the partial or complete redevelopment of previously developed sites (brownfield land), whether redundant or in continuing use (excluding temporary buildings), which would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development (para 89).

During the consultation process, the way in which the draft replacement policy dealt with the issue of sites in open countryside was severely criticised by Gypsy and Traveller groups. Unfortunately, those criticisms have been ignored. The PPS states that:

[LPAs] *should strictly limit new traveller site development in open countryside that is away from existing settlements or outside areas allocated in the development plan* (para 23).

There has also been a change in the wording of the policy relating to the grant of temporary planning permission in circumstances where a LPA cannot demonstrate that it has an up to date 5 year supply of sites. The draft replacement policy had suggested that in such circumstances applications for temporary planning permission should be considered 'favourably'. However, the PPS states that:

...if a local planning authority cannot demonstrate an up-to-date five-year supply of deliverable sites, this should be a ***significant material consideration*** *in any subsequent planning decision when considering applications for the grant of temporary planning permission* (para 25 – our emphasis).

The policy in para 25 will only come into operation 12 months after the PPS is brought into force, that is 12 months from 27th March 2012.

We shall have to wait and see how the PPS is interpreted by LPAs, Inspectors and the Courts. Those representing the interests of Gypsies and Travellers remain concerned that LPAs have been given the responsibility for assessing their accommodation needs and making provision to meet those needs. LPAs failed to deliver when they were last given that responsibility by the Conservative Government in 1994 – what makes the Coalition Government think that they will do so now?

Caravan Sites Bill 2012

Introduction

The Caravan Sites Bill had its first reading in the House of Lords on 1st December 2011. The second reading date is awaited. This Bill was introduced by Lord Avebury in direct response to the Ten Minute Rule Bill (the Travellers (Unauthorised Encampments) Bill) introduced by Simon Kirby MP. The latter Bill sought to make the situation even worse for Gypsies and Travellers who have no alternative but to resort to unauthorised encampments.

In terms of the answer to unauthorised encampments and unauthorised developments, it appears that all main political parties (with exceptions like Mr Kirby) are in agreement that the answer lies in ensuring that there is adequate authorised site provision, both permanent and transit.

The Caravan Sites Act (CSA) 1968 introduced a duty on certain local authorities to provide sites for Gypsies and Travellers (brought into force in 1970). This duty was eventually repealed by the then Conservative Government in the Criminal Justice and Public Order Act 1994. On the one hand it is true to say that the some 350 local authority Gypsy and Traveller sites that currently exist, would probably not have been in place (in the vast majority of cases) without the existence of that duty. On the other hand it is also true to say that the failure of successive central governments to ensure that local authorities complied with this duty meant that insufficient sites were built during this period of time leading to the current situation where there is completely inadequate provision of sites.

In terms of the Caravan Sites Bill 2012:

Section 1(1) imposes a duty on English local authorities to provide or facilitate the provision of caravan sites.

Section 1(2) makes it clear that facilitating the provision of sites can include identifying land for such sites where other organisations or other individuals can seek to set up a site.

Section 1(3), in the spirit of the duty to co-operate introduced by section 110 of the Localism Act 2011, enables a local authority to financially assist a neighbouring local authority in the process of provision of sites.

Section 1(4) directs local authorities to have regard to the accommodation needs assessments that have been carried out.

Section 1(5) and (6) seek to ensure that, where a local authority is failing to carry out its duty, the Minister can step in.

The definition of Gypsy and Traveller is taken from the Housing (Assessment of Accommodation Needs) (Meaning of Gypsies and Travellers) (England) Regulations which relate to section 225 of the Housing Act 2004.
Since this Bill does not have the support of the Coalition Government it clearly will not reach the statute book but it is intended to act as a campaigning and policy tool pushing forward the arguments made above and counteracting the disastrous and reprehensible approach exemplified by Mr Kirby's Bill.

TAT NEWS

Dale Farm update

After the final legal challenges failed, in the glare of the media spotlight, the terrible eviction at Dale Farm took place on 19th October 2011. Since then the site has looked like some kind of moonscape and the Travellers have either been camped in a line on the roadside leading to Dale Farm or have been squashed onto authorised pitches.

Keith Lomax of Davies Gore Lomax, solicitor for the residents, states:

There has been some success with planning appeals following the failure of the Council to comply with its own enforcement notices to remove hardstanding on some plots. Creating a bombsite out of it is not removal of it. Whether this will lead to more planning success on the site remains to be seen, and without access to the site it doesn't resolve the problems for the Travellers who have been evicted. However, it's a start.

In a letter of 13th February 2012 to Mr Pickles, the Secretary of State for Communities and Local Government, Thomas Hammarberg, the Council of Europe's Commissioner for Human Rights, referred to Dale Farm (see also *A Right to a Site*):

The events of October 2011 at Dale Farm in Basildon, Essex, where over eighty Traveller families, including children, elderly people and persons with health conditions, were evicted from the site where they had lived for many years, powerfully illustrate these concerns. It is highly regrettable that in spite of positive efforts by the Homes and Communities Agency and the fact that the Traveller community was willing to be relocated locally in culturally adequate alternative accommodation, it was not possible for the relevant local authority to agree to a solution that would be acceptable to and respect the rights of all parties involved. These rights, it should be recalled, include the right of over 100 evicted children to have their best interest treated as a primary consideration in all actions of administrative and judicial authorities, in accordance with Article 3 of the United Nations Convention on the Rights of the Child.

I understand that considerable resources were mobilised for this eviction. However, many of those who have been evicted or who left shortly before the eviction took place, i.e. approximately 400 persons, have returned to the area. They have either moved in with families established in the authorised part of the site or parked their trailers and caravans along the roads leading up to Dale Farm. As a result, Traveller families are currently exposed to health and safety hazards that are not being addressed. I notice that Basildon Council has indicated that there is a possibility of further action to remove these persons from the area.

I call on you to ensure that an end be put to violations of the right to adequate housing of Travellers in Basildon and that local authorities in England are made aware of the United Kingdom's obligation to respect the right to adequate housing of Gypsies and Travellers. It is paramount that all efforts be deployed to identify sustainable solutions, which are acceptable to both local communities, Traveller and non-Traveller, which local authorities are supposed to serve. These efforts must include genuine consultation on how to provide culturally acceptable accommodation to Gypsies and Travellers. I hope that it will still be possible to ensure that Dale Farm is not left to set a negative example for other local authorities around the country on how to provide for the accommodation needs of Gypsies and Travellers.

It is understood that at least one of the evicted Travellers is lodging an application with the European Court of Human Rights.

Tackling inequalities suffered by Gypsies and Travellers

Marc Willers

The Travelling community

It has been estimated that there are between 200,000 and 300,000 Gypsies and Travellers in England alone. The Travelling community in the UK encompasses a number of separate and distinct groups including: Romani Gypsies; Irish Travellers; Scottish Travellers; Welsh Travellers (Kale); New Travellers; Travelling Showpeople (fairground and circus families); and boat dwellers.

Ethnicity

The two largest groups within the Travelling community are the Romani Gypsies and the Irish Travellers. Both groups have been travelling in the UK for hundreds of years and are recognised by the courts and the Government as distinct and separate ethnic groups. Romani Gypsies have been recognised as an ethnic group since 1988, Irish Travellers since 2000 and Scottish Gypsy Travellers since 2008. Welsh Travellers have not yet attained a similar status but it can only be a matter of time until they do so.

Education and Health inequalities suffered by Gypsies and Travellers

Gypsy and Traveller children have the lowest levels of educational attainment and are the most at risk of any ethnic minority groups in the UK. Back in 2003 Ofsted noted that there were between 10,000 and 12,000 Gypsy and Traveller children of secondary school age who were not registered with a local education authority and did not attend school. In addition it found that of those Gypsy and Traveller children who were in school only about 75% regularly attended: the worst attendance profile of any ethnic minority group. As a consequence of these findings Ofsted stated that:

The vast majority of [Gypsy and Traveller] pupils linger on the periphery of the education system. The situation has persisted for too long and the alarm bells rung in earlier reports have yet to be heeded.

Discrimination suffered by Gypsies and Travellers

Although race relations legislation has been in force in the United Kingdom since 1965 and has developed considerably to protect against increasingly subtle forms of discrimination, Gypsies and Travellers are still experiencing discrimination of the most overt kind: 'No blacks, no Irish, no dogs' signs [5] disappeared decades ago, but 'No Travellers' signs, used intentionally to exclude Gypsies and Travellers, are still widespread, indicating that discrimination against these groups remains the last 'respectable' form of racism in the United Kingdom. [6] This is supported by the findings of a 2003 Mori poll conducted in England [7] in which 34 per cent of respondents admitted to being personally prejudiced against Gypsies and Travellers. In 2004, Trevor Phillips, the former Chair of the Commission for Racial Equality (CRE) and now the Chair of the Equality and Human Rights Commission (EHRC), compared the situation of Gypsies and Travellers living in Great Britain to that of black people living in the American Deep South in the 1950s. In 2005, Sarah Spencer, one of the CRE's Commissioners, drew further attention to their plight in an article entitled *Gypsies and Travellers: Britain's forgotten minority:* [8]

The European Convention on Human Rights … was a key pillar of Europe's response to the Nazi holocaust in which half a million Gypsies were among those who lost their lives. The Convention is now helping to protect the rights of this community in the United Kingdom …

The majority of the 15,000 caravans that are homes to Gypsy and Traveller families in England are on sites provides by local authorities, or which are privately owned with planning permission for this use. But the location and condition of these sites would not be tolerated for any other section of society. 26 per cent are situated next to, or under, motorways, 13 per cent next to runways. 12 per cent are next to rubbish tips, and 4 per cent adjacent to sewage farms. Tucked away out of sight, far from shops and schools, they can frequently lack public transport to reach jobs and essential services. In 1997, 90 per cent of planning applications from Gypsies and Travellers were rejected, compared to a success rate of 80 per cent for all other applications … 18 per cent of Gypsies and Travellers were homeless in 2003 compared to 0.6 per cent of the population … Lacking sites on which to live, some pitch on land belonging to others; or on their own land but lacking permission for caravan use. There follows a cycle of confrontation and eviction, reluctant travel to a new area, new encampment, confrontation and eviction. Children cannot settle in school. Employment and health care are disrupted. Overt discrimination remains a common experience … There is a constant struggle to secure the bare necessities, exacerbated by the inability of many adults to read and write, by the reluctance of local officials to visit sites, and by the isolation of these communities from the support of local residents … But we know that these are communities experiencing severe disadvantage. Infant mortality is twice the national average and life expectancy at least 10 years less than that of others in their generation.

A history of persecution

The discrimination faced by Gypsies and Travellers has a historical background that can be traced back to the sixteenth century. When Romani Gypsies first began arriving in England they were generally welcomed for the useful services and entertainment they provided. However, their unconventional way of life soon led them into conflict with both the Church and the State. Henry VIII passed an Act which ordered all 'Egipcions' to leave the country within 16 days and prohibited further immigration, and Elizabeth I passed legislation to impose the death penalty on anyone found to be a Gypsy.

Such extreme forms of discrimination continued unabated until the late eighteenth century when Parliament began to repeal some of the earlier laws. Thereafter Gypsies and Travellers were tolerated by society for about 150 years and allowed to exist in relative peace and carry out their nomadic way of life. During this period they proved their worth as farm labourers, blacksmiths, entertainers and many of them served in the two world wars.

However, the shortage of accommodation after the Second World War bred fresh conflict between the Traveller community and the settled population. The problem was exacerbated when the Government passed the Caravan Sites and Control of Development Act 1960. This gave local authorities the power to close common land to Gypsies and Travellers (which they used with enthusiasm) and the collateral power to provide caravan sites to compensate for the closure of the commons (which they used sparingly). However, by 1968 the Government had recognised the difficulties imposed by the 1960 Act and so passed the Caravan Sites Act 1968, which imposed a duty on county councils to provide sites for Gypsies (described as "persons of nomadic habit of life, whatever their race or origin …") that resorted to or resided in their area.

Many sites were built as a result of the Caravan Sites Act 1968; however, a significant number of local authorities failed to comply with their duty and there remained a significant shortfall in accommodation by 1994 when the Government passed the Criminal Justice and Public Order Act 1994, which repealed the duty to provide sites and gave both local authorities and the Police greater authority to evict Gypsies and Travellers from unauthorised sites. It also published planning guidance that stressed the need for local planning authorities (LPAs) to have effective policies in their development plans to facilitate the provision of private Gypsy sites. However, few LPAs followed the Government's guidance and as a consequence many Gypsies and Travellers have since fought in vain to establish their own sites.

Despite intense pressure from many quarters the last Labour Government resisted calls to reinstate the statutory duty on local authorities to provide sites. Instead it adopted a more cautious approach. In 2004 it passed the Housing Act 2004 which required local authorities to assess the accommodation needs of Gypsies and Travellers and to develop strategies and policies that meet those needs. Those duties remain in force. Then, in 2006, the Labour Government published Circular 1/2006 which provided new planning guidance on the provision of sites for Gypsies and Travellers.

Though progress was slow under Circular 1/2006, there is evidence which demonstrates that it was making a real difference to site provision. However, that progress was brought to a shuddering halt when the Coalition Government replaced Circular 1/2006 on 27th March 2012 with new 'light touch guidance' entitled *Planning policy for traveller sites* (PPFTS).

Unfortunately, the new guidance is based upon the assumption that LPAs will make their own assessment of the accommodation needs of Gypsies and Travellers in the future. History has shown that LPAs have failed in the past to assess the needs of Gypsies and Travellers properly or at all and those representing their interests have a deep concern that, if LPAs are left to their own devices, the continuing lack of provision will persist for the foreseeable future.

The key to tackling inequalities suffered by Gypsies and Travellers

Current statistics show that approximately 25% of all Gypsy and Traveller caravans (that is about 3,500 to 4,000 caravans) are still stationed on unauthorised sites. Those living on such sites are subject to the continual threat of eviction and tend to find it extremely difficult, if not

In addition, shocking health statistics highlight the following:

- Life expectancy is significantly shorter amongst Gypsies and Travellers - one study in Leeds indicated that Gypsies and Travellers were likely to live up to 20 years less than members of the settled community;
- 41.9% of Gypsies and Travellers report having limiting long term illnesses – compared to 18.2 % of the settled population;
- mortality rates at birth and in infancy are significantly higher amongst Gypsies and Travellers;
- 17.6% of Gypsy/Traveller mothers have experienced the death of a child (that's 1 in 6) compared to 0.9% of those in the settled population.

impossible, to continue living their traditional way of life within the law.

There can be no doubt that the shortage of authorised sites and the discrimination suffered by the Traveller community has a direct bearing upon the poor levels of educational achievement and attendance at school and the poor health of Gypsies and Travellers.

Families living on unauthorised sites often face considerable difficulties when trying to admit their children into local schools, and children face disruption to their schooling when their families are evicted. Likewise they suffer difficulties accessing appropriate healthcare and continuity in its provision and the insecurity that they experience gives rise to high levels of anxiety and depression amongst members of the Traveller community.

It is clear that the provision of suitable, good quality, well managed and regulated accommodation is the key to overcoming other social problems experienced by Gypsies and Travellers:

- Local authorities should comply with their duties under the Housing Act 2004 and assess the accommodation needs of Gypsies and Travellers and devise a strategy to meet those needs;
- Sufficient sites with access to water, sanitation and electricity should be provided to meet the accommodation needs of Gypsies and Travellers;
- Improved site conditions on authorised sites are required – many local authority sites are poorly managed and maintained, some are rat infested, others are without suitable amenities;
- Improved site locations are needed – historically sites have been built near environmentally harmful users of land and they are frequently situated in unsustainable locations, far removed from public transport facilities, shops and schools;
- In addition, there needs to be fair and proportionate management of unauthorised encampments and unauthorised developments (i.e. sites created without the benefit of planning permission) – public bodies need to take welfare considerations into account and avoid eviction save in circumstances where the site use is harmful to the environment or in a place of danger or there is somewhere else more suitable for the Gypsies or Travellers to be moved to in the area.

The moral argument for extra provision is unanswerable. The financial argument is also compelling – given the public money spent on the cost of enforcement, including those incurred by local authorities, the police and other public bodies in addition to court costs.

The compassionate use of enforcement powers

Local authorities have a range of enforcement powers with which to tackle unauthorised encampments and developments. Those powers are discretionary and should be excercised in a lawful and proportionate way and only used when it is expedient to do so.

As the great statesman and poet Vaclav Havel once said: "The Gypsies are a litmus test not of democracy but of civil society". Those words seem particularly relevant in this context and ought to serve as a yardstick against which to judge whether enforcement action should be taken in any given case.

The European Court of Human Rights has made it clear in a number of cases that local authorities have a positive obligation to facilitate the Gypsy way of life. Given the difficulties faced by Gypsies and Travellers in our society and the severe shortage of sites it is clear that local authorities should use their enforcement powers with compassion and sensitivity.

Local authorities, having regard to their duties under the Children Act 2004, need to take account of the best interests of children living on unauthorised encampments and developments. Local authorities must also bear in mind their public sector equality duty (set out in section 149 of the Equality Act 2010) and the requirement that they have due regard to the need to advance equality of opportunity and to foster good race relations when deciding whether to take enforcement action.

The moral argument for extra provision is unanswerable. The financial argument is also compelling – given the public money spent on the cost of enforcement, including those incurred by local authorities, the police and other public bodies in addition to court costs.

In order to comply with these duties in a meaningful way local authorities should engage positively with Gypsies and Travellers and their representatives in order to build up trust and encourage cooperation. They should also tackle any prejudiced views expressed by members of the public, the media and those within their own institutions. Local authorities must be creative, imaginative and persuasive when trying to resolve issues relating to the accommodation of Gypsies and Travellers within their areas. By doing so it is likely that they will reach well balanced and reasoned decisions which will improve the position of Gypsies and Travellers and their position in our society.

[5] See, for example, the discussion by McVeigh 'Nick, nack, paddywhack: anti-Irish racism and the racialisation of Irishness' in Lentin and McVeigh, eds, *Racism and anti-racism in Ireland*, Beyond the Pale, 2002, pp136–152.

[6] See, for example, Hawes and Perez, *The Gypsy and the State: the ethnic cleansing of British society*, The Polity Press, 1996, pp148–155.

[7] *Profiles of prejudice: the nature of prejudice in England*, Stonewall, 2003.

[8] [2005] EHRLR 335.

TAT NEWS

The UK Government's response to the EU Framework on National Roma Integration Strategies

Marc Willers and Owen Greenhall

The extensive discrimination faced by Gypsies, Travellers and Roma has been formally recognised by Member States of the Council of Europe since 1969 and there has been no shortage of commitments, declarations and expressions of good intentions by those countries aimed at improving their lives. However, progress has all too often been thwarted at the stage where policies are to be implemented at a national or local level and as a consequence there has been little real improvement.

A recent report by the Fundamental Rights Agency (FRA) of the European Union (EU) found that many Roma[9] experience poor housing conditions and the highest levels of discrimination in access to housing, education, employment and healthcare; and that as a consequence their chances in the labour market are diminished.

Faced with high levels of discrimination in their countries of origin, many Roma from the newer members of the EU have decided to exercise their right to freedom of movement within the EU and head towards other Member States. However, the same report found that Roma encounter problems registering their residence and as a result they face similar difficulties in accessing healthcare, education, public housing and work in their new countries of residence.

Meanwhile, as far-right groups have gained political ground in recent years across Europe, hate speech against Roma has increased markedly, to the extent that it has been adopted by mainstream political parties in some countries. This worrying trend was highlighted in July 2010 when the French Government controversially used Roma migrants from Bulgaria and Romania as scapegoats for a rise in criminality and civil unrest in France. President Sarkozy said that Roma camps were a source of "illicit trafficking, profoundly unfit living conditions, the exploitation of children for the purposes of begging, prostitution or crime" and announced that the Government would dismantle Roma camps and repatriate irregular migrants from Bulgaria and Romania.

Strasbourg Declaration on Roma

It was against this backdrop that, on 20th October 2010, the Council of Europe issued the *Strasbourg Declaration on Roma*, which recognised the fact that Roma across Europe continued to be "socially and economically marginalised" and indicated that its Member States had adopted a list of 31 priorities and steps, aimed at securing non-discrimination, social inclusion and the empowerment of Roma.

EU Framework for Roma Integration

Then, in April 2011, the European Commission

followed suit by publishing *An EU Framework for National Roma Integration Strategies up to 2020* (the 'Framework'). The Framework sets goals for Roma inclusion in education, employment, health and housing across the EU. The Framework states that it is "crucial... to ensure that national, regional and local policies focus on Roma in a clear and specific way, and address the needs of Roma with explicit measures to prevent and compensate for disadvantages they face". To this end, EU Member States were asked to submit by the end of 2011 a National Roma Integration Strategy ('NRIS'), which specifies how they will contribute to the achievement of the Framework goals. The Framework states that NRISs are required to set "achievable national goals for Roma integration" and to identify disadvantaged regions where communities are most deprived. Sufficient funding is to be allocated from national budgets which may be complemented by EU funding with €26.5 billion available to support social inclusion. Importantly, the NRISs were to be designed "in close cooperation and continuous dialogue" with Roma National Government Organisations (NGOs) and other stakeholders.

UK Government's Response

The Government's Ministerial Working Group ('MWG') on preventing and tackling inequalities experienced by Gypsies and Travellers was given the task of addressing the Framework's requirements.

The UK missed the deadline set by the EU for the submission of a NRIS and when asked why it had done so, the Government made the point that the EU's Employment, Social Policy, Housing and Consumer Affairs Council had subsequently accepted that Member States should be given latitude to tailor their approaches to national needs by preparing, updating or developing sets of policy measures within broader social inclusion policies, rather than necessarily producing NRISs.

Subsequently, the MWG did publish a list of 28 "proposed commitments" that each Government Department was planning to make. However, many of those commitments seem to fall well short of the explicit measures that would need to be adopted in order to prevent and compensate for the disadvantages that Gypsies, Travellers and Roma face within our society.

Despite the EU's indication that the NRISs were to be designed "in close cooperation and continuous dialogue" with Roma NGOs and other stakeholders there was little if any real consultation by the MWG with NGOs before the "proposed commitments" were published.[10] Had the MWG conducted meaningful consultation with NGOs representing the interests of Gypsies, Travellers and Roma then "proposed commitments" might have been better framed to tackle the inequalities that they experience. Instead, the "proposed commitments" come in for sustained criticism by those NGOs: for instance, the Irish Traveller Movement in Britain asserts that the Government's position "is very disappointing and unacceptable given the chronic exclusion, poverty and daily discrimination experienced by the majority of GRT communities"; whilst Friends and Families of Travellers go further, writing that the proposals "were, at best, disappointing and, at worst, insulting to the Gypsy and Traveller communities and those that work on their behalf."

Somewhat surprisingly, when the MWG decided how to respond to the Framework it decided to focus on addressing the needs of Romani Gypsies and Irish Travellers and that it would only cover issues affecting Roma where they overlap with those impacting on ethnic Gypsies and Travellers (for example, in regard to education). As a consequence the only "proposed commitments" which relate to Roma in the MWG's list are those advanced by the Department of Education. The MWG's decision not to address the disadvantages experienced by them in our society, save where they coincide with those experienced by Gypsies and Travellers, seems to be wholly contrary to both the spirit and the letter of the Framework and to defy logic. The MWG's decision seems all the more baffling when one notes that studies suggest that the Roma population in the UK may well exceed 300,000. The Roma Support Group has taken this issue up with the Government and has stated that:

This decision was taken despite the fact that the needs of a large Roma population in the UK are perceived by governmental officials as 'distinct'. Excluding Roma from the UK Roma Integration Strategy contradicts the spirit and the basic requirements of the EU Framework which aims at advancing the social and economic inclusion of Roma population. It furthers the political and social marginalisation of Roma in Britain and dismisses the UK Government's commitment to address their needs and aspirations.

Conclusion

The EU Framework ends by stating that "for over a decade the EU institutions have been calling on Member States and candidate countries to improve the social and economic integration of Roma. Now is the time to change good intentions into more concrete actions". Unfortunately, the UK Government's response to date lacks the substance required to build an effective platform for protecting the rights of Gypsies, Travellers and Roma. NGOs and activists need to put pressure on the Government in order to make sure that it complies with both the spirit and the letter of the Framework and makes a real difference to the lives of Gypsies, Travellers and Roma living in our society.

END NOTE

After finalisation of this article, the Department of Communities and Local Government (DCLG) published a 'Progress report by the ministerial working group on tackling inequalities experienced by Gypsies and Travellers'. The report is available at: http://www.communities.gov.uk/documents/planningandbuilding/pdf/2124046.pdf

This report emphasises the 28 commitments mentioned in the above article.

DCLG also published 'Council conclusions on an EU framework strategy for Roma integration up to 2020' which is available at http://ec.europa.eu/justice/discrimination/files/roma_uk_strategy_en.pdf and http://ec.europa.eu/justice/discrimination/files/roma_uk_strategy_annex1_en.pdf

[9] A term used by the EU and the Council of Europe to include Gypsies, Travellers and other related groups including Roma, Sinti and Kale.

[10] By way of example, the Roma Support Group was given a mere 3 days to comment.

Funding for Gypsy and Traveller pitches and for refurbishment

England

In January, the Homes and Communities Agency announced the funding available until 2015:

Thirty-three housing associations, local authorities and other providers are set to deliver around 600 new traveller pitches, as the Homes and Communities Agency (HCA) confirmed successful organisations for [Traveller pitch funding]

A total of £47m funding will be allocated to 71 projects around the country, and will support the provision of new traveller sites and new pitches on existing sites, as well as the improvement of existing pitches.

A further £13m remains available from the Traveller Pitch Funding Programme for additional allocations where schemes are progressed and are able to deliver, and provide good value for money. These will be operated on a rolling basis under which offers will be considered for their value for money, deliverability and meeting local need, as they are developed. Interested providers should contact their local HCA area office to discuss their proposals.

Deputy Chief Executive of the HCA, Richard Hill, said of the allocations:

One of our key aims is to provide homes where people want to live, and the travelling community is a part of that. We are pleased therefore to be able to confirm the funding allocations for this spending period and we will be continuing to work closely with our local partners to deliver the best solutions for this community where they are most needed.

This is a potentially major step forward but as ever, the proof of the pudding ….

Michael Hargreaves of the Irish Traveller Movement in Britain (ITMB) is quoted on the Travellers Times website as saying:

Ministers have encouraged communities to think if they don't want to accommodate Travellers, they don't have to. Yet our research shows that over 80% of those that have received funding for proposed schemes don't have planning permission, which is notoriously difficult to push through in the face of local opposition. Some schemes don't even have a designated site (see the ITMB report *Gypsy and Traveller Site Funding under the Coalition* March 2012).

Wales

The good news on the Welsh Government Gypsy and Traveller Site Grant 2011-2012 is that the coverage of the project costs has been increased from 75% to 100%.

The bad news is that only 3 out of 6 applications were approved for a total of £1,244,210 covering refurbishment works for 3 local authority sites in Carmarthenshire, Merthyr Tydfil and Swansea. No funding has been provided for new pitches. Ironically recently in Merthyr Tydfil a council site was transferred into private ownership.

Lessons from Canada

To be a Gypsy or not to be a Gypsy ?- **That is the question**

Siobhan Spencer

Gypsy people are an ethnic minority group protected under the Equality Act 2010. However the contentious issue of 'gypsy' status for the purposes of planning law undermines their protection as a minority, as 'gypsy'[11] status in relation to land use is not defined by ethnicity, but is determined by work patterns at the time of the application for planning permission.

Homelessness legislation has assisted Gypsy and Traveller people, but the issues now appear very unclear, blurring those that may be statutorily homeless with a want to adopt the gypsy way of life as a 'lifestyle' and those that have a perceived traditional and ethnic right to live in caravans, knowing no other way of life and who are statutorily homeless because there is nowhere legal to place their caravans.

The definition used for the Caravan Sites Act 1968 was transferred from the Divisional Court case of *Mills v Cooper*[12]. The Court had to consider the meaning of 'gypsy' with regard to s127 of the Highways Act 1959. The Court came to the conclusion that Parliament did not intend to discriminate by meaning the Gypsy people as a race, the wording of the Act being "a hawker or other itinerant trader or a gipsy". Lord Parker stated that, although in the context of the Act he felt that the word 'gipsy' means no more than a person living in no fixed abode or with no fixed employment, "I am hoping that those words will not be considered as the words of statute" . [13]

How prophetic! Historically we know there had been discrimination, with regard to the law, for example, the Egyptian Acts from 1530s and beyond and anti-Gypsy wording being placed in a number of Acts through the years. There was no reason to worry about this interpretation until the early nineties, when others tried to claim rights under 'gypsy status'. Unfortunately the resulting case (*R v South Hams DC ex p Gibb* [1994] 4 All ER 1012,CA) damaged the traditional Traveller community by introducing the concept that a Gypsy is someone who travels to seek work, and the case of *Wrexham CBC v Berry* ([2003] EHLR 20) followed where, effectively, it was found that Mr Berry was too old and too ill to be a Gypsy.

We are now at a point in time where there is a system that allows anyone who may choose to take to the road to become a 'gypsy' for the purposes of planning law and, at the same time, the system denies the status to the original Gypsy people as they do not comfortably fit into the 'case law interpretation'.

The Race Relations Act 1976 did not have teeth when it was needed. The Equality Act 2010 means that there can now be a further legal argument to put forward, this time for women, traditionally not workers in the sense of 'moving for an economic purpose' , but do we want more years of endless argument, more years of a pincer movement of Equalities/Homelessness/Planning /Human Rights (Articles 8 and 14) and case law that has defined who and what is a Gypsy and often defined it wrongly? We need to get to grips with this issue.

The Métis history and definition is the closest to the Gypsy cultural group as it stands today. The Métis culture grew up mainly around the Red River area of Manitoba. They have a distinct culture that developed over some 600 years. They are a nomadic group (the word Métis means 'a mix' of Scottish and French Iroquois) along the Red River Valley.

This argument for review is not a racial one. The problem that Native People have had in the USA through, for example, the concept of quantum of blood illustrates that this is not a road to travel down. Basically a certain 'quantity' of Indian blood was required for various treaty rights and is still required for tribal membership. It is worth remembering that the Nazi physician, Robert Ritter, used the original Indian Quantum Blood Chart (issued by the Bureau of Indian Affairs) for his model when studying the

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Roma and Sinti. The consideration of how much Indian blood a Métis has is immaterial. [14]

The Métis have struggled for their cultural identity, usually involving hunting and fishing rights, as in *Powley*.[15] There are ten tests laid out in *Powley* [16], most connected to harvesting and fishing rights but the ones that could be attributed to Gypsies are:

a) Self - identification. The individual must self-identify as a member of the Métis community. However, it is not enough to self-identify as Métis. The individual must also have an ongoing connection to a historic Métis community; [17]

b) Ancestral connection. There is no minimum blood quantum requirement, but Métis rights holders must have some proof of ancestral connection to the historic Métis community whose collective rights they are exercising. Ancestral connection was also defined by the Court as by birth or by adoption;

c) Community acceptance. There must be proof of acceptance by the modern community – there must be evidence of membership of a Métis community. The court stated that the evidence presented must be objectively verifiable.

The term Métis that was affirmed in the Canadian Constitution Act (amendment of 1982) does not encompass all individuals with mixed Indian and European heritage; rather it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs and way of life and are recognisable (hence capital M for the Métis as a cultural people and métis with a lower case 'm' for anyone who has mixed heritage but are not descended from the Métis as a group).

Many Gypsy people are worried that the definition should not be made wider - after all we are an island and many people may have some Gypsy blood. This argument was addressed in Canada for the Métis in the case of *Hopper*. [18]

Evidence was rejected that Mr Hopper had direct lineage to a signatory of a treaty in Massachusetts dating from 1693. The judge stated that if that was "enough to gain status then most Acadians would qualify as Métis" (Acadia is a region that has a high proportion of citizens who have native blood somewhere in their ancestry).

We have had approximately 20 years of this nonsensical interpretation post *Gibb*. There should be a debate with a review of recent history and status addressed with regard to those who are traditionally Gypsies or Travellers. In my view Gypsy status should not be 'lost or acquired'.

The Romany Gypsies kept their heads down when they could, remembering the Egyptians Acts, albeit a distant memory, and the Métis kept their heads down after the Louis Riel rebellion, both groups not daring to reveal themselves to the majority populace. Both groups have kept their languages secret (Romany and Michef). Both have been referred to as the invisible people. Both have had Acts specifically to improve conditions: the Métis Betterment Act in 1938 [19] and the Caravan Sites Act 1968 respectively (the latter, unfortunately, substantially repealed).

My answer would be 'no' to any further legal interpretation, rather I would like to see the indigenous Gypsy and Traveller people of England and Wales with a protective statute, similar to that of the Métis people from Canada.

The law has struggled with the definition of Gypsy and has not had the opportunity to look outside of its own jurisdiction for what may be an answer. It is time that this issue was addressed sensibly and calmly.

[11] Also spelt gipsy in statutes and law reports, and spelt with a lower case 'g' to denote difference from ethnic group

[12] *Mills v Cooper* [1967] 2 All ER 100

[13] *Mills v Cooper* [1967] 2 All ER 100 at 467 B.

[14] *Louis Riel*, the great Métis leader, actually only had 1/8 native blood

[15] *R v Powley* (CanadianSupreme Court) [2003] 2.S.C.R This case modified rights in relation to aboriginal property rights as set out in *R. Van der Peet* [1996] 2 SCR. 507

[16] ibid para 10

[17] Definition of community in this sense is one of a geographical nature and problems can arise from this definition for the Métis. However with regard to Gypsy and Traveller people, there has always been, throughout history, settlements that community members will refer to or family resting places.

[18] *R V Hopper*[2008] 3 CNLR 377 N.B.C.A

[19] An Act Respecting the Métis of the Province 1938

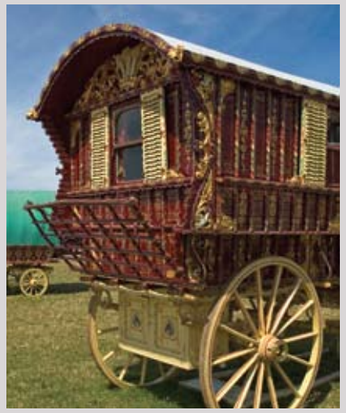
Gypsy status

Medhurst v SSCLG, unreported, Admin Court, 08/12/2011, Clive Lewis QC

For the purposes of Office of the Deputy Prime Minister (ODPM) Circular 01/2006 Planning for Gypsy and Traveller Sites "gypsies and travellers" 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 show people or circus people travelling together as such (paragraph 15).

A Planning Inspector, in rejecting the Appellant's appeal, decided that she did not come within the definition of 'Gypsy' for the purposes of Circular 01/2006 para 15. On appeal to the High Court, Clive Lewis QC, dismissing the appeal, concluded that: the travel carried out by the Appellant and her adult sons was not sufficient to bring her within the 'nomadic habit of life' definition (none of the exceptions applying); the para 15 definition did not breach Article 8 of the European Convention of Human Rights (the right to respect for private and family life and home - applying *Wingrove v SSCLG*); the (as then applied) race equality duty under Race Relations Act 1976 was not breached. Marc Willers for Ms Medhurst had placed reliance on the definition



of Gypsy and Traveller for assessment of needs purposes (see further below).

An appeal to the Court of Appeal has been lodged.

COMMENT

TAT have long argued for an alternative definition of Gypsy and Traveller for planning law purposes: ethnic or nomadic. We believe that the definition for the assessment of needs purposes under the Housing Act 2004 (whilst not perfect) could be used. This is contained in the Housing (Assessment of Accommodation Needs) (Meaning of Gypsies and Travellers) (England) Regulations 2006:

'Gypsies and Travellers' means-

(a) Persons with a cultural tradition of nomadism or of living in a caravan; and

(b) All other persons of a nomadic habit of life...

Taking issue with one point in the excellent and thought provoking article, *Lessons from Canada*, we do not believe that "anyone may choose to take to the road" and "become a 'gypsy'". To get within the current definition you have to have a nomadic habit of life. This cannot be gained overnight. However *Medhurst* illustrates the problem that can arise if there is not a separate ethnic definition and, in *Lessons from Canada* , Siobhan Spencer presents the wider arguments for a 'protective statute'. This follows on from the petition on the subject organised by the National Federation of Gypsy Liaison Groups and the subsequent debate on the matter in the House of Lords tabled by Baroness Whitaker.

A Right to a Site ?

Recent Human Rights reports and related matters

Council of Europe report

The Council of Europe have just released a report *Human Rights of Roma and Travellers in Europe*. The report provides extensive coverage of the discrimination, prejudice, harassment and attacks suffered by Roma in Europe. It is unfortunate that the report does not spend much time at all dealing with the situation of nomadic Gypsies and Travellers in the UK.

This may be linked to the fact that there were no contributors to the report from the UK. Nevertheless those references there are are useful. Especially important is the call for the statutory obligation on local authorities to provide sites to be re-instated. Thus at p156 it is stated:

The Commissioner has made his position plain that in countries where there is a migrant Traveller population, there should be a statutory obligation on local authorities to provide short- and long-term caravan sites that meet basic standards of decency… Furthermore, the housing of Travellers should not be approached through the unique lens of 'halting sites', but possibilities for Travellers to live on private land in caravans must be included in urban planning and made possible in practice.

There is a reference to educational disadvantage in the UK at pp133-134.

At p155 it is stated:

Local councils are reluctant to provide more sites due to extreme resistance from locals… Travellers then have no choice but to use unauthorised land. Local authorities tend to resort to evictions involving legal proceedings instead of mediation or negotiation.

Reference is then made to the Dale Farm eviction (though clearly, at the time of writing this report, the eviction had not actually taken place).

Letter to Mr Pickles

In a letter of 13th February 2012 to Mr Pickles, the Secretary of State for Communities and Local Government, the Council of Europe's Commissioner for Human Rights, Thomas Hammarberg, states:

Ensuring the effective enjoyment of [the right to adequate housing] is particularly important. It is the pre-condition for the enjoyment of other human rights, including the rights to education and health, in respect of which, as you know, Gypsies and Travellers are also at present seriously disadvantaged throughout the United Kingdom. However, a number of serious short comings have been highlighted in the field of guaranteeing the right to adequate housing for this part of the country's population. Although the Strasbourg Court found that Article 8 of the European Convention on Human Rights imposed a positive obligation on the United Kingdom to 'facilitate the Gypsy way of life', access to culturally acceptable accommodation is still out of reach for a considerable number of Gypsies and Travellers. The January 2012 Conclusions of the Committee of Social Rights, which found that the situation in the United Kingdom was not in line with Article 16 of the [European Social Charter] (Right of the family to social, legal and economic protection) on the ground that the right of Gypsy and Traveller families to housing was not effectively guaranteed, also point to a pressing need to make progress in this area.

Mr Hammarberg then makes reference to the abolition of Regional Strategies in the Localism Act 2011 and to the move towards leaving "it entirely up to local authorities to make decisions concerning the accommodation needs of Gypsies and Travellers." He continues:

In December 2011, the Advisory Committee on the Framework Convention for the Protection of National Minorities expressed concern that this policy 'might result in local authorities deciding arbitrarily on whether there is a need for more sites and, in the longer term, in an even greater shortage of sites and possibly more tensions between local communities.'

Later on in the letter, he states:

As a result of the combination of a lack of publicly-run sites and difficulties experienced in obtaining planning permission, Gypsies and Travellers are often pushed towards unauthorised encampment. I understand this to be the case for approximately one quarter of the 60-70,000 Gypsies and Travellers living in the United Kingdom as a whole.

He gives as an example the Dale Farm eviction. He makes a personal plea to Mr Pickles:

I call on you to ensure that an end be put to the violations of the right to adequate housing of Travellers in Basildon and that local authorities in England are made aware of the United Kingdom's obligation to respect the right to adequate housing of Gypsies and Travellers.

In a response of 27th February 2012, Mr Pickles states:

We agree that a shortfall of appropriate sites continues to be a problem in many areas, but the imposition of top-down targets through the regional strategy approach… has failed to resolve this issue. Between 2000 and 2010, the number of caravans on unauthorised developments increased from 728 to 2395. Local authorities are best placed to assess the needs of their communities and so we are placing responsibility for site provision back with them.

A Right to a Site ?

Mr Pickles doesn't mention that the relevant planning circular (Circular 01/2006 *Planning for Gypsy and Traveller Sites*) only came into force in February 2006.

He goes on to refer to funding for sites via the Homes and Communities Agency, the New Homes Bonus and the £50,000 to support a training programme to raise awareness amongst local councillors.

On Dale Farm he states:
The unauthorised traveller site at Dale Farm was the subject of an exhaustive legal process, including consideration of human rights issues, and extension of the compliance period to two years to allow occupiers to find alternative accommodation.

No mention there of the possibility that the local authority in question might try and find alternatives.

He concludes by saying:

At the end of 2010, I set up a Ministerial Working Group to look at ways to tackle the poor social outcomes faced by Gypsies and Travellers in areas such as health, education, accommodation and the criminal justice system.

Gypsy and Traveller organisations will not be very impressed with this given the failure of the Ministerial Working Group to consult and liaise with them.

EHRC report

The Equality and Human Rights Commission (EHRC) Human Rights Review 2012 (March 2012) has produced a range of differing views.

Paddy McGuffin writes in the Morning Star:
The coalition faced damning accusations today over its failure in human rights obligations through the use of draconian counter-terror and deportation measures as well as neglecting marginalised communities ('Government failing to protect civil rights exposed' 5th March 2012).

Meanwhile Quentin Letts writes in the Daily Mail:
Try to imagine a political party with the following manifesto: more rights for gypsies, giving prisoners the vote, being soft on anti-capitalism protesters and making it easier for trade unions to strike. Readers, I can sense your snouts tingling ('Shut down the nincompoop commission' 6th March 2012).

In any event, it is not at all clear that Mr Letts can have read the Review which begins by saying (at p6):

The government largely respects the human rights of people in Britain. Direct abuses by the state against individuals are thankfully rare.

However the Review does identify ten areas where things need improving. We will highlight two of these:

5. Providing a system of legal aid is a significant part of how Britain meets its obligations to protect the right to a free trial and the right to liberty and security. Changes to legal aid provision run the risk of weakening this.

7. The human rights of some groups are not always fully protected… ..

The right to a home respected by Article 8 is something we take for granted, but the review found that the rights of Gypsies and Travellers were sometimes overlooked. Gypsy and Traveller communities face a shortage of caravan sites as some local authorities have failed to invest in site development. The lack of sufficient sites means it is difficult for Gypsies and Travellers to practice their traditional way of life.

Discussion on legal aid takes place at pp35 -40 of the review (though they manage to fail to mention the possible disastrous provisions with regard to Gypsies and Travellers!).

The discussion of Gypsy and Traveller accommodation issues in the light of Article 8 takes place at pp46-53. At p47 it is stated:

*Some Gypsy and Traveller groups and their legal representatives have argued that evictions from unauthorised sites are not lawful as the provision of authorised sites is inadequate… Thus far, these claims have not been upheld in court… **However, legal advice received by the Commission suggests that there may be grounds to challenge that decision*** (our emphasis).

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There is a footnote reference to an opinion of Andrew Arden QC of 2nd August 2011. Given how vital this opinion may be for those acting for Gypsies and Travellers on unauthorised encampments and unauthorised developments, TAT are calling on the ECHR to release the opinion or at least the substance of it.

If we can pick a theme from these human rights reports and the letter from Mr Hammarberg it is an overwhelming call for the return of the duty to provide sites. If only the Government would adopt Lord Avebury's Caravan Sites Bill which is intended to do just that (see *Caravan Sites Bill 2012*).

TAT NEWS

Localism or Nimbyism

The Localism Act 2011

Chris Johnson, Tim Jones, Simon Ruston and Marc Willers

The Localism Act (LA or the Act) received the Royal Assent on 15th November 2011: see http://www.legislation.gov.uk/ukpga/2011/20/contents/enacted. Different parts of the Act will be brought into force at different times. Some parts have been brought into force immediately. Virtually everyone agrees with local democracy but, when it comes to issues affecting Gypsies and Travellers, the fear amongst activists is that localism is in danger of being ambushed by nimbyism.

The Act is 483 pages long and covers a vast range of issues. In this article we are only concentrating on those issues that are of most concern to Gypsies and Travellers seeking site provision. The Government has also published *A plain English guide to the Localism Act*: see http://www.communities.gov.uk/publications/localgovernment/localismplainenglishupdate.

The Act brings into force two key provisions which will have an immediate effect on Gypsies and Travellers, namely those relating to: the abolition of Regional Strategies; and the changes to the law regarding retrospective planning. In addition to these matters, the Act makes provision for local referendums, neighbourhood development orders, the abolition of the standards board, pre-determination by local councillors and the community right to challenge which all have implications for, or could be of interest to, the Gypsy and Traveller communities.

Regional Strategies

Regional Strategies (RSs) contained within them targets for the provision of Gypsy and Traveller pitches within each local authority area. RSs were at the centre of the Office of the Deputy Prime Minister (ODPM) Circular 01/2006 (hereafter Circular 01/2006), *Planning for Gypsy and Traveller Caravan Sites* (which the Coalition Government have now replaced with *Planning policy for traveller sites* – see *Back to the Past?*).

The data currently available shows that Circular 01/2006 resulted in a slow but sure improvement in the granting of planning permission for Gypsy and Traveller sites and in the provision of new local authority pitches.

Section 109 LA 2011 gives the Secretary of State power to revoke RSs and has immediately been brought into force. There was a consultation on the environmental effect of the revocation of RSs, which ended on 20th January 2012. After this date the Secretary of State could revoke some or all of the RSs at any time.

The abolition of RSs will mean that local authorities will no longer be set targets for pitch provision for Gypsies and Travellers by regional bodies who have benchmarked their Gypsy and Traveller Accommodation Assessments (GTAAs). Instead, local authorities will be left to set their own targets. Though their targets will be subject to the scrutiny of a Planning Inspector, there are real concerns that this will not be effective in accurately assessing the soundness of pitch numbers, particularly given the fact that the power of Planning Inspectors to make amendments to local plans has been limited elsewhere in the Act. The concerns are compounded by the fact that over 50 years of experience has shown that, if local authorities are left to their own devices, sites will not be built and planning permissions will not be granted.

Some form of central control such as that provided by RSs is vital in trying to ensure the provision of an adequate number of sites in suitable locations. This is clearly demonstrated by the fact that most of the 350 odd local authority sites in England were built because of the existence of the duty on local authorities to facilitate the provision of sites in the Caravan Sites Act 1968 (repealed in 1994).

That said, the duty on local authorities to assess the need for Gypsy and Traveller sites contained in section 225 Housing Act 2004 remains in place and the evidence on which RS figures were based will remain a material consideration until more up-to-date studies are carried out in accordance with that duty.

The Government has replaced RSs with a "Duty to cooperate in relation to planning of sustainable development" (see section 110 LA 2011). This means that local planning authorities and county councils (who are not planning authorities, but often run public Gypsy and Traveller sites) have to co-operate with each other in "maximising the effectiveness" with regard to activities such as the preparation of development plan documents and the preparation of other local development documents. Gypsy and Traveller campaigners should consider lobbying

the Government for specific guidance for local planning authorities on the duty to co-operate with regard to the provision or facilitation of Gypsy and Traveller accommodation.

Retrospective planning applications

It is worth noting that the original clause proposed by the Government would have made it virtually impossible (or at least extremely difficult) to make a retrospective planning application. However, following submissions made by Lord Avebury (supported by the authors of this article), the Government thankfully stepped back from this extreme position.

Section 123 LA 2011 (brought into force on 6th April 2012) contains the relevant changes. A new section 70C is inserted into the Town and Country Planning Act (TCPA) 1990:

70C Power to decline to determine retrospective application

(1) A local planning authority in England may decline to determine an application for planning permission for the development of any land if granting planning permission for the development would involve granting, whether in relation to the whole or any part of the land to which a pre-existing enforcement notice relates, planning permission in respect of the whole or any part of the matters specified in the enforcement notice as constituting a breach of planning control.

(2) For the purposes of the operation of this section in relation to any particular application for planning permission, a 'pre-existing enforcement notice' is an enforcement notice issued before the application was received by the local planning authority.

Additionally a new section 174(2A) is inserted into the TCPA 1990:

(2A) An appeal may not be brought on the ground specified in subsection (2)(a) if —

(a) the land to which the enforcement notice relates is in England, and

(b) the enforcement notice was issued at a time —

(i) after the making of a related application for planning permission, but

(ii) before the end of the period applicable under section 78(2) in the case of that application.

(2B) An application for planning permission for the development of any land is, for the purposes of subsection (2A), related to an enforcement notice if granting planning permission for the development would involve granting planning permission in respect of the matters specified in the enforcement notice as constituting a breach of planning control.

What this means is that a Gypsy or a Traveller (or anyone else who wants to make a retrospective planning application) cannot do so where there is already an enforcement notice on the land which covers the subject matter of their proposed application. If there is not such a notice, then a retrospective planning application can be made.

However, if such an application is made and the local planning authority serves an enforcement notice relating to the subject matter of the application, within the relevant period for determination of the application (normally 8 weeks), then the applicant will not be permitted to appeal that notice under section 174(2)(a) of the 1990 Act (i.e. on grounds that planning permission should be granted – what is commonly called a ground (a) appeal). Instead, the applicant should proceed with his or her retrospective application and, if necessary, any appeal against the refusal of planning permission.

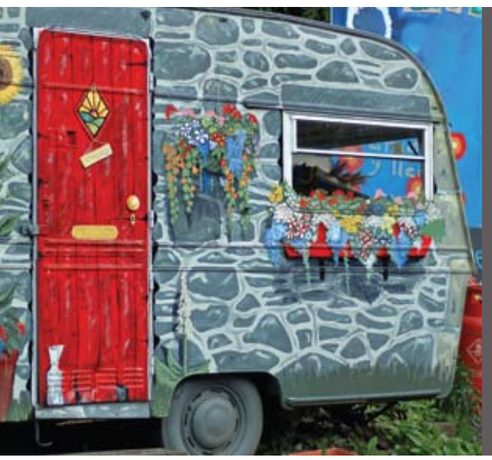
It follows that Gypsies and Travellers with temporary permissions should be advised to make applications to extend those permissions before their temporary permissions expire, rather than make retrospective applications after they have expired.

Neighbourhood development orders

Schedule 9 Part 1 LA 2011 inserts a new section 61E into the TCPA 1990:

(1) Any qualifying body is entitled to initiate a process for the purpose of requiring a local planning authority in England to make a neighbourhood development order.

(2) A 'neighbourhood development order' is an order which grants planning permission in relation to a particular neighbourhood area specified in the order-(a) for development specified in the order, or



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(b) for development of any class specified in the order.

A 'qualifying body' means a parish council or a neighbourhood forum (for the latter see new section 61F TCPA 1990 also inserted by the LA 2011). These two new sections are to be brought into force on such day as specified by the Secretary of State.

Whilst it may be unlikely that parish councils and neighbourhood forums will suddenly open the way for the development of Gypsy and Traveller sites, since this provision is only **permissive** it at least means that neighbourhood development orders cannot be used to block such sites.

Abolition of the Standards Board and pre-determination

Previously, if a local councillor made inflammatory comments about Gypsies and Travellers, a complaint could be made to the monitoring officer at the local authority concerned, and this could be taken to the Standards Board if need be. The Standards Board acted as a watchdog. The LA 2011 has abolished the Standards Board claiming that it is 'too easy for people to put forward ill-founded complaints about councillors' conduct'. Instead, in future, local authorities will be responsible for their own standards regime, by promoting and maintaining high standards of conduct (see section 27 LA 2011). There is, rightly, a strong emphasis on the disclosure of financial interests, and there are criminal offences created to cover misconduct or non-disclosure. This is seemingly at the expense of other kinds of complaints which are described, in the main, as being 'trivial'. However, local authorities still have to amend or draw up their own codes of conduct, which when viewed as a whole, have to be consistent with the following principles—

(a) selflessness;
(b) integrity;
(c) objectivity;
(d) accountability;
(e) openness;
(f) honesty;
(g) leadership (see section 28(1) LA 2011).

These codes will be enforced by local authorities themselves, and there should be involvement of an independent person (section 27(3) LA 2011). It is seriously questionable whether this regime will be effective in dealing with complaints over councillors' conduct, particularly as section 28(4) LA 2011 states that "a decision is not invalidated just because something that occurred in the process of making the decision involved a failure to comply with the code". Taking this into account, it would seem that the new code of conduct regime is likely to be quite impotent.

Our concerns are compounded by a relaxation of the rules on pre-determination. These rules were developed to ensure that councillors came to council discussions - on, for example, planning applications - with an open mind. So a local councillor who had campaigned against a Gypsy or Traveller site would, in the past, have been excluded from voting on whether it should be granted planning permission. Section 25(2) LA 2011 now provides that:

(2) A decision-maker is not to be taken to have had, or to have appeared to have had, a closed mind when making the decision just because —

(a) the decision-maker had previously done anything that directly or indirectly indicated what view the decision-maker took, or would or might take, in relation to a matter, and

(b) the matter was relevant to the decision.

So, worryingly, this means that councillors will be quite able to campaign against Gypsy and Traveller sites and still be able to vote as part of a planning committee taking decisions on such sites.

Whilst it is clear that the scope to make complaints when Councillors are acting in a discriminatory manner towards Gypsies and Travellers has been reduced, it is nevertheless important that these complaints are still made - so that any trends may be picked up by monitoring officers. A number of complaints against a particular councillor will, in theory, be more effective than none. In addition section 28(12) LA 2011 requires the relevant authority (i.e. the local authority concerned) to publicise the adoption, revision and replacement of the code of conduct. Activists may wish to consider putting forward submissions for the inclusion of specific protection for Gypsies and Travellers in local authorities' codes of conduct (section 28(3) LA 2011 does not limit what can be put in a code of conduct).

Community right to challenge

In part 5, chapter 2, the Act has provisions for a "relevant body" (essentially voluntary/community groups, parish councils, or two or more local authority employees) to make an "expression of interest" to a local authority for "providing or assisting in providing a service provided by or on behalf of the local authority". This provision would seem, in theory, to allow Gypsy and Traveller community organisations to apply to take over the management of local authority sites, or perhaps even Gypsy and Traveller services. In addition section 86 LA 2011 allows the Secretary of State to provide advice and assistance (including financial assistance) to facilitate the provision of such services. There should be no reason why Gypsy and Traveller groups could not take advantage of this opportunity.

CONCLUSION

The changes being brought in by the Localism Act and, in particular, the law relating to Regional Strategies and retrospective planning applications, are likely to have a detrimental effect on the provision of Gypsy and Traveller sites. However, a concerted and well directed campaign by Gypsies and Travellers and their supporters has ensured that some of the Government's more harmful proposals have been shelved.

Tribute to **Mungo Jerry**

Jeremy Francis aka 'Mungo Jerry'

10/04/1954 – 26/11/2011

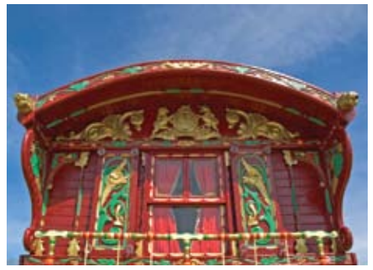
Jerry started living on his boat in 2002, always having been a keen sailor. In June 2008, on his way back from the Isle of Wight, his boat, The Dolphin, began to sink (having previously hit an unknown object) and Jerry was forced to beach at a place called the Warren near Folkestone. In April 2009 Shepway Council insisted he moved from the beach despite his protestations that his boat, which he was in the process of repairing as best as he could with his meagre resources, was not seaworthy. He made it less than 2 miles up the coast before The Dolphin began to sink again. He beached at Abbots Cliff. He built a stone hut on the beach where he could live and re-commenced repair work to The Dolphin. He instructed TAT when possession action was taken against him by Network Rail(NR). The matter was defended on two bases : that NR could not prove that they owned the piece of beach where the boat was beached; that NR were a public authority who should have regard to humanitarian considerations and the fact that Jerry was doing his best to mend his boat and move off.

In the meantime Jerry became something of a local hero. The matter had reached preparation of witness statements when, due to a tragic accident, Jerry died on 26th November 2011.

As part of the preparation of the statements for Jerry we had received some wonderful statements of support from local residents. We reproduce just one of those here as a tribute to Jerry:

On behalf of my family and myself I would like to show my support for Mr Francis in his endeavour on the beach at Dover. He is occupying the spot whilst he is attempting to repair his boat and, although making good progress, needs to be allowed to continue in his efforts. I would like to say that his presence on the beach has greatly enhanced our pleasure when we have visited as he is always welcoming and friendly to anyone who shows an interest in his abode. In addition to this I know that he has helped several people in distress, not least the extremely tragic incident where four souls, including two very young children, were rescued from the sea by him and another person. Unfortunately one child died but the toll would have been much higher if not for their heroic intervention. ...He has cleaned the surrounding area of debris, including three rusting cars that had been pushed over the cliff, which, incidentally, have lain there for some years with no attempt at removal by the landowners.

After Jerry's death a ceremony was held on the beach by his family and friends after which all traces of the encampment (apart from a small memorial) were removed – just as Jerry would have wanted it.



NEW TRAVELLER ASSOCATION

Susan Alexander and Simon Ruston

The New Traveller Association (NTA) was formed last summer in order to respond to the Government consultations on planning for Traveller sites, squatting and the draft National Planning Policy Framework. The NTA made one of a number of submissions regarding squatting which were successful in keeping Gypsies and Travellers out of the reforms which are currently going through Parliament. As well as submitting information to Government, the NTA has been able to keep the community up to date with changes in Government policy via a mailing list.

After achieving its initial aim of ensuring that a New Traveller perspective was provided to the Government on its proposals, the NTA is in the process of working out what the next steps for it are. This will definitely include more national policy work, but the possibilities of being able to work at a local level are also being discussed. For more information please email:

newtravellerassociation@gmail.com

TAT NEWS

Siobhan Spencer

National Planning Strategy Group (NPSG)

The National Federation of Gypsy Liaison Groups (NFGLG) was very pleased to receive funding from Garden Court Chambers to enable the group to co-ordinate meetings with regard to the preparation of policy documents and to lobby with regard to prospective changes in the law.

We have held three meetings so far. At the meeting in December 2011 held in Birmingham at No 5 Chambers (thanks to Tim Jones) it was discussed and agreed that it was important to go ahead with a Non Governmental Organisation (NGO) response to the European Union (EU) declaration that all Member States should produce a strategy for the Roma community (in line with EU policy this Roma Strategy includes Gypsy and Irish Traveller people). The UK has not produced a strategy.

The NPSG is important as it means that there is a mechanism for consulting with groups across the country, not just the NFGLG network but with other groups such as FFT, ITM and the Southern Gypsy Council.

There will be consultation on a draft strategy throughout March. The strategy is entitled at the moment:

A UK Strategy for Gypsies, Irish Travellers and the Roma.

This title was chosen carefully as there are differing needs within the communities, bearing in mind Spain's strapline of a few years ago "all different, all equal".

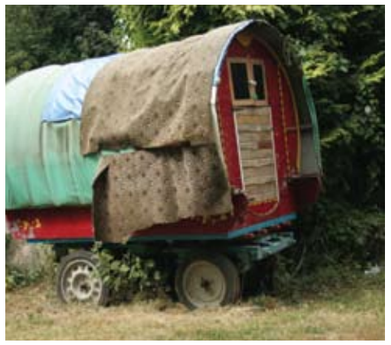
Although the Gypsy people have the same origin as the Roma, the law affects the community in an entirely different way due to the evolving traditional travelling culture that has seen a community evolve separately. This is also the same for Irish and Scottish Travellers.

Roma need assistance with immigration, asylum and housing. The majority of Gypsy/Traveller people would like assistance to obtain a legal base from which to travel.

We are drafting a strategy with the Roma Support Group so that we can have a useful document that, in effect, assists all, does not confuse and sends out the message to Europe that there are minorities within minorities and "one hat" cannot and does not fit all, but where we can agree and undertake joint initiatives - this is a bonus. It was a major concern that in the EU Guidance, *Working together for Roma inclusion: the EU Framework explained*, that nomadic Gypsies were only mentioned twice and one of those was:

… … providing support where necessary to Roma families leaving caravans to live in new social housing developments…

CONGRATULATIONS



Congratulations to NFGLG members One Voice for Travellers and Leeds Gate in obtaining their PQASSO (Practical Quality Assurance for Small Organisations). Derbyshire Gypsy Liaison Group was the first Gypsy group in the country to receive this in November 2010, NFGLG followed in July 2011 and it is one of our aims to try and get a registered office in each region.

Also huge congratulations to Janie Codona of One Voice for receiving the MBE.

TAT Comment Big congratulations from us to Siobhan Spencer herself for receiving a Bachelor of Law degree.

The Paradox of Protest

John and Yoko did it in bed, Fathers for Justice did it dressed as superheroes and the Suffragettes did it chained to the Prime Minister's railings.

Mike McIlvaney

Whether the goal is world peace, access to children, or votes for women, the right to protest is central to any free-thinking society. Thus the Master of the Rolls recently observed that:

The importance of having an unrestricted right to express publicly and strongly a controversial view on a political, or any other topic cannot be doubted: it is the essence of a free democratic society and should be vigilantly protected by the legislature, the executive and the judiciary (Hall and others v Mayor of London [2010] EWCA Civ 817).

But to what extent do we have a right to protest and what are the limits to those rights? Some recent cases provide possible answers to these questions.

The right to protest

Insofar as John and Yoko's protest took place in their own bed on their own land they had an unfettered right to protest – for so long at least as the world's gathered media were prepared to listen. But, whilst the effectiveness of this form of protest was achieved by means of hard cash and fame, most protesters do not have this platform available. For most, effective protest depends on the publicity that attaches to demonstrating in high profile places; thus the recent occupations in the grounds of St Paul's Cathedral and in Parliament Square and the occupations in other high profile public and private spaces which have recently exercised the domestic courts.

So what of the source of the right to protest under domestic law? There is no bill of rights as such in the UK and the common law offers little by way of right to protest. The ownership and control of public spaces is determined by statutory provision and myriad bye laws which impose limits on the right to demonstrate and protest in public spaces. The right to protest on privately-owned land is even more limited though in certain circumstances a property owner will be presumed to have extended an invitation to members of the public to come on to their land or premises for lawful purposes -for example privately-owned shops and shopping centres - and in other jurisdictions the courts have held that proprietors will be expected not to exclude people unreasonably or act in an arbitrary and discriminatory way to persons coming on to their land. However any implied invitation may be revoked at will and a person's right to eject another from their land will normally be unfettered and does not have to justify any test of reasonableness.

Therefore, absent any technical flaws identified in the process of commencing action to remove or restrict a protester, in many cases the protester's only armour against the interests of a landowner or public authority intent on curtailing the protest is the shield provided by Articles 10 and 11 of the European Convention on Human Rights.

Article 10 of the Convention provides:
Everyone has the right to freedom of expression. This right shall include the right to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...

Article 11 provides:
Everyone has the right to freedom of assembly and to freedom of association with others.

The limits to Articles 10 & 11

Protest on private land

In recent 'protest cases' involving occupation of private spaces reliance has been placed on Convention rights to justify the continuance of protests and to defeat court actions. However the courts have been reluctant to interpret these rights as giving any protection to protesters over and above the proprietary rights of those on whose land the protest is being continued.

In *Appleby v UK* (App 44306/98) the European Court of Human Rights (ECtHR) considered whether the rights under Articles 10 and 11 could be applied to private land. Protesters had been prevented from disseminating information in a privately-owned shopping centre protesting against a grant of planning permission to build on a playing field used by the local community. As the centre was privately-owned the applicants sought to argue that the UK Government had a positive obligation to protect the applicant's freedom of expression and assembly, in respect of which it had failed. The court found that there were other ways in which the protesters could have conducted their protest including calling door to door or protesting in the old town centre or on public access paths and held that the State had not failed in relation to any positive obligation it may have had. In the circumstances there was no violation of Articles 10 & 11. It was a question of balancing rights. Also, any rights held by the protesters had to be counterbalanced against the property rights of the owner of the shopping centre under Article 1 of Protocol No 1.

Reluctant to dismiss the possibility that a situation might occur where the State does have a positive obligation to protect a person's Articles 10 & 11 rights in relation to private property, the ECtHR stated:

Where however the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the state to protect the enjoyment of the Convention rights by regulating property rights...

In *Sun Street Property Ltd* [2011] EWHC 3432 (Ch) the High Court considered the application of these principles in relation to privately-owned commercial premises. A group of protesters were in occupation of an unused commercial building owned by a company in the UBS banking group and had turned the premises, located in the heart of the City, into a 'Bank of Ideas' - a community resource with social and political objectives. Finding against the protesters, Roth J held that, when asking the question (raised in *Appleby*) of whether the essence of the protesters' fundamental freedoms would be "destroyed" if the protest was not continued, there could be only one answer:

The individuals or groups currently in the property can manifestly communicate their views about waste of resources or the practices of one or more banks without being in occupation of this building complex.

The protesters' application to set aside a possession order therefore failed.

Even assuming that there could be circumstances where the positive obligation is invoked in relation to private land by the particular factual circumstances, it will be subject to the same qualification imposed by Articles 10(2) and Art 11(2), which are examined below, in the context of protests on public land.

Protest on public land

Domestic law follows Convention law in allowing greater freedom to protests in public space. Thus in *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105 the court held that State authorities have a positive duty to take steps to ensure that lawful demonstrations can take place (where local bye laws said they could not). Articles 10 and 11 were found to be engaged in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23 (where it was held that local bye laws preventing a one weekend per month peace camp against nuclear weapons were in breach of the protestors' Convention Rights) and in *Hall v Mayor of London*[2010] EWCA Civ 817.

The right to protest in public places is, on the other hand, limited by the qualifications imposed by Articles 10 (2) & 11(2). Article 10(2) states:
The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11(2) states:
No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others…

Hall and others v Mayor of London [2010] EWCA Civ 817, concerned a claim for possession against the occupants of a 'Democracy Village' whose views related to the environment, alleged genocide, the wars in Afghanistan and Iraq and issues relating to the use of depleted uranium and who were camped in Parliament Square. The Mayor of London argued for the removal of the protesters, saying that, by being there, they were limiting the

Tips for the would-be protester

Consider the following:

- There is greater protection for protests in public spaces;
- Location is a factor (the more prominent the location, the more potential for infringement of non-protesters' rights there will be, and the greater the justification that will be required);
- The degree of obstruction (Brian Haw, described as somewhat of a "national treasure" by the Court of Appeal, managed to maintain an extremely long protest and in a prominent place opposite the Houses of Parliament due to not obstructing the highway);
- The degree to which other rights are interfered with by the protest. In *Samede* the court rolled off a long list of other interests against which to balance those of the protesters;
- The frequency of the protest. The women of Aldermaston, protesting against nuclear weapons, gathered one weekend each month. This was a factor in the court's finding that their rights under Articles 10 and 11 had been interfered with when eviction was sought;
- A protester's rights under Articles 10 and 11 will usually be engaged. The extent to which a public authority can justify the interference with such rights will depend on the factual circumstances of the case;
- There may be other, 'technical' defences available.

Fear and loathing- Occupy Wall Street demonstrators pose as corporate zombies

protest rights of others. The Court agreed, upholding the removal of almost all the demonstrators (although not Brian Haw, the custodian of the original Parliament Square protest).

In *Samede & ors v The Mayor of London*[2012] EWCA Civ 160, a case involving the tented protest by persons from the 'Occupy Movement' camped in the vicinity of St Paul's Church, the Master of the Rolls derived from *Hall* the principle that:

While the protesters' Article 10 and 11 rights are undoubtedly engaged, it is very difficult to see how they could ever prevail against the will of the landowner, when they are continuously and exclusively occupying public land, breaching not just the owner's property rights and certain statutory provisions, but significantly interfering with the public and Convention rights of others , and causing other problems (connected with health, nuisance and the like) particularly in circumstances where the occupation has already continued for months, and is likely to continue indefinitely.

With this principle in mind, the court upheld an injunction, finding that once the rights of the 'occupation' were balanced against other considerations – including: obstruction of the highway; public nuisance; the Article 9 rights of the worshippers of the church; planning harm; the freedom and rights of others; public safety and the prevention of disorder; and the need to protect the environment – there were other places where the protesters could continue their protest (as per *Appleby*) and the judge had been right to place the rights of the protesters behind these other relevant considerations. The court also took into account the prominence of the protest and the length of time that it had continued, and indicated that, where protesters took part in permanent occupations of public land, " 'case management powers' should be used to remove them promptly, 'ensur[ing] that hearings in this sort of case do not take up a disproportionate amount of court time'".

The importance of the protest

Nor have the courts so far have been willing to give any weight to issues of undoubted public importance or to the strong feelings of moral and ethical outrage expressed by protesters. Thus, in *Samede*, in which protesters expressed a whole range of views in relation to capitalism, banking, global poverty, climate change, social and economic injustice and many more beside, Lindblom J (the judge of first instance) held:

The Convention rights in play are neither strengthened nor weakened by a subjective response to the aims of the protest itself or by the level of support it seems to command...the court cannot – indeed must not – attempt to adjudicate on the merits of the protest... the right to protest is the right to protest right or wrong, misguidedly or obviously correctly, for morally dubious aims or for aims that are wholly virtuous.

Procedural defences

Time is an important commodity for the protester and, whilst the limits outlined may restrict the protester's ability to raise a substantive defence to a claim brought by an aggrieved landowner or public authority, s/he might be able to buy more time if the claimant has fallen foul of procedural rules in relation to court process. Thus the normal rules as to service of orders and proceedings will need to be observed as well as the rules as to notice. *In Sun Street Property Ltd* the private owners of land obtained a possession order against the demonstrators following a hearing of which the protesters only had 45 minutes' notice, and without informing the protesters where they should go to take part in the hearing. This was all the more shocking as the Judge had indicated that they should have an opportunity to participate and the landowner had a phone number for the occupiers. Accordingly, while Roth J in the High Court upheld the possession order, he also stayed the order pending a decision as to permission to appeal, and the Court of Appeal then granted the occupiers permission to appeal ([2011] EWCA Civ 1672), on the question of principle of whether a possession order could be granted without effective notice to the occupiers. The practical result of these procedural defects was that the case settled, with the landowner allowing the demonstrators to remain in the property until the end of January 2012, i.e. more than 2 months after the original possession order had been granted.

Thanks to David Renton of Garden Court Chambers (who acted for the protesters in the *Sun Street Property* case) for his comments on this article.

CONCLUSION

Protest action can be vital in raising awareness for a particular cause. Protest may attract attention from the government of the day, from the media, and the public and can help to bolster support and stimulate debate. The right to protest is considered by most as of fundamental importance and yet the right is limited in numerous respects. The courts will be loath to find that there is a positive obligation on the state to protect a protester's rights in favour of private property interests unless the failure to do so would destroy those rights. Similarly, the right to protest in the public arena will be balanced against other considerations. How effective a protest is depends on the exposure it achieves. The degree of exposure will be determined by the prominence of the location and the duration of the protest. However the greater the exposure and prominence, the more intrusive, and the longer the period over which the protest is sustained, the more likely it will be kept in check by the courts. Thus in *Hall* , Lord Neuberger considered that: "the greater the extent of the rights claimed under Articles 10 (1) and 11 (1) the greater the potential for the exercise of the claimed right interfering with the rights of others and the greater the risk of the claim having to be curtailed or rejected by virtue of Article 10 (2) and 11(2)". In other words, the more effective the protest is the less likely there will be a right to it. A modern day John Lennon might therefore advise the would- be protester, with long- term aspirations of high profile protest, to demonstrate from his bed. He might well be right. This is the paradox of protest.

Remembrance Day

In the Foreword to the recent Council of Europe report (see *Right to a Site?*), Thomas Hammarberg writes:

Only a few thousand Roma in Germany survived the Holocaust and the Nazi concentration camps. They faced enormous difficulties when trying to build their lives again, having lost so many of their family members and relatives, and having had their properties destroyed or confiscated. Many had their health ruined. For years, when some tried to obtain compensation, their claims were rejected.

For the survivors, no justice came with the post-Hitler era. Significantly, the mass killing of Roma people was not an issue at the Nuremberg trial. The genocide of the Roma was hardly recognised in public discourse.

In remembrance of those Gypsies and Travellers who

fought for Britain in the Second World War and in other conflicts, the Romany and Traveller Family History Society in conjunction with Derbyshire Gypsy Liaison Group and the National Federation of Gypsy Liaison Groups took part in the march past at the Cenotaph in London on 13th November 2011. This was the first time that a Romani Gypsy organisation had taken part in this event.

Welfare Enquiries

Stephen Cottle and Chris Johnson

Hughes v Somerset CC , Bristol County Court, 16/06/2010, HHJ Denyer on appeal from District Judge (DJ) Stockdale.

The delay in reporting this matter was due to the local authority appealing to the Court of Appeal. A compromise has now been arrived at and that appeal has been withdrawn.

Mrs Hughes is a Gypsy and possession action was taken against her for being on land owned by the local authority without permission. The local authority failed to make any or any proper welfare enquiries in breach of government guidance but, despite this, the DJ made a possession order. Mrs Hughes appealed against that order because of failure to take account of a relevant matter (government guidance on unauthorised encampments) and under Article 8 of the Convention. HHJ Denyer gave permission to appeal against that order.

The Rat Infested Barn

It was in a planning case (*Clarke v SSETR & Tunbridge Wells BC* [2001] EWHC 800 Admin) that the concept of 'cultural aversion to conventional housing' (in the context of a planning inspector taking account of an offer of bricks and mortar accommodation) first appeared.

Burton J stated that, if such an aversion were established, then "bricks and mortar, if offered, are unsuitable, just as would be the offer of a rat-infested barn" (at para 34). The concept was first employed in relation to homelessness in the case of *R(Price) v Carmarthenshire CC* [2003] EWHC 42 (Admin).

Following the threat of eviction at Dale Farm, a large number of the Travellers made homeless applications. *Sheridan & ors v Basildon BC* [2012] EWCA Civ 335, involved the first of these cases to reach the Court of Appeal(CA) following the offers of bricks and mortar accommodation to the Travellers. It was argued in all the three cases that were heard by the CA that the offers were unsuitable.

In the case of Mrs Flynn this was "put largely on cultural grounds" (para 7) but there was no psychiatric evidence. Psychiatric evidence was produced for Mr and Mrs Sheridan (who, though still married, lived separately).

In the case of Mr Sheridan, Patten LJ (giving the leading judgment of the CA) stated:
Although he referred to not wanting to live in bricks and mortar, he did not suggest in terms that this would have a serious impact on his mental health in itself. The recurring theme in all his reported complaints is that, without the close support of his wife and family, he would be unable to manage his medication and his life would collapse.

With regard to Mrs Sheridan, the psychiatrist, Dr Slater, stated:
I believe that if Mrs Sheridan and the children were forced to move into any bricks and mortar accommodation, she would experience significant depression and anxiety, even if the house was of high quality. Her sense of dislocation would relate to losing her familiar location, a heightened sense of isolation from her culture and the loss of ready access to support she currently enjoys … It is possible that her distress about what she would see as an impossible situation might drive her to deliberately harm herself, although I believe that any such act would not be with the intention of killing herself.

The Travellers also relied on a report from a planning consultant, Alison Heine, who examined the failure of Basildon BC to provide sufficient pitches and who also suggested 10 possible locations for sites. In their homelessness review decision, Basildon BC did respond on each of these sites.

Patten LJ referred to the two leading Court of Appeal cases on this subject, starting with *Codona v Mid-Bedfordshire DC* [2004] EWCA Civ 925. In that case, Auld LJ stated (at para 59):
[The local authority] was driven, therefore, as a short-term measure, to offer short-term accommodation of a bed and breakfast nature. In doing so, it was clearly acting as a matter of last resort and with the clear understanding … that the duration of their stay in such accommodation was to be kept as short as possible.

The other Court of Appeal case is *Lee v Rhondda Cynon Taf CBC*. Longmore LJ stated (at paras 16 & 17):
Mr Knafler [for Ms Lee] submits that it was not lawful and adequate because [the local authority] did not consider whether they should acquire an alternative site. … Homelessness applications are expected to be determined within a short timeframe … If a new site is to be acquired for stationing a caravan for residential purposes, that will usually mean a new use which will typically require planning permission. That will require determination by the local authority planning committee … All this is, in my judgment, inconsistent with the manner in which homelessness applications are expected to be dealt with by the housing department, and especially since they are expected to be dealt with with a degree of promptness …

All this is not to say that there might not be unusual circumstances in which a local housing authority might be expected to do more than consider availability and sites within their own area. If, for example, there was a question of an applicant being at risk of suffering psychiatric harm it might well be that the local authority should take that consideration into account, specifically in deciding what, or what further, enquiries they should make.

Patten LJ stressed that there is a line which denotes a minimum standard, sometimes known as the *Wednesbury* line (after a famous case about 'reasonableness'):

If the only accommodation available falls below this line then a lack of resources or inability to provide more suitable accommodation is no answer (para 32).

Patten LJ rejected the arguments concerning failure of the local authority to provide sufficient pitches and the question of looking for alternative sites:

It seems to me to be completely unrealistic to expect a housing officer on a s202 review to conduct a general inquiry into strategic questions about the preparation of a homelessness strategy and the adequacy of site provision (para 56).

In any event, Alison Heine's report had been considered.

On the question of 'cultural aversion', Patten LJ concluded:
A cultural aversion to bricks and mortar is not enough to make the offer of such accommodation Wednesbury unreasonable even if (as in Mrs Sheridan's case) it may risk bouts of depression. It is reasonable for those to be treated if they occur in just the same way as she has sought and obtained treatment for depression in the past.

… The answer to the s204 appeals of both Mr and Mrs Sheridan is that the risk of depression … is the consequence not of the offers of accommodation which have been made but of the applicants' removal from Dale Farm.

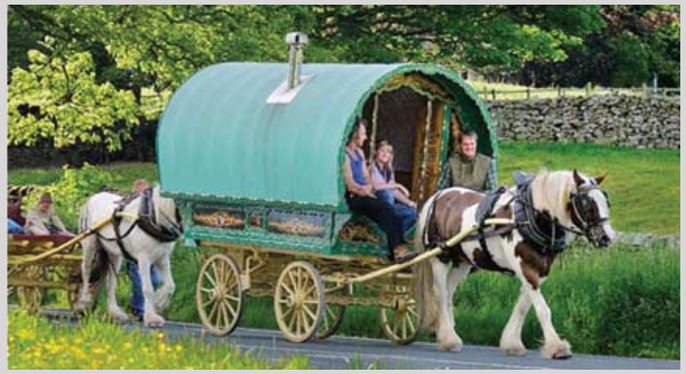
COMMENT

Especially in the case of Mrs Sheridan this seems a rather amazing conclusion for two reasons:

a) The Court of Appeal seem to be saying that the fact that harm may occur may still not make the offer unsuitable because of the availability of care from the NHS once that harm occurs;

b) The Court of Appeal are also getting their facts wrong – the psychiatric evidence in Mrs Sheridan's case was that she would be caused psychiatric harm if she had to live in bricks and mortar accommodation and not just because she would have to leave Dale Farm.

Nevertheless it is now absolutely clear how important the psychiatric report in these cases will be.



The Road Ahead

Travelling to a Better Future is the report published by the Welsh Government (WG) in September 2011 and described by them as "the first strategic national Gypsy and Traveller policy document developed in the UK" (p.6).

We are pleased that this framework starts with a clear statement of the WG's equality and diversity values and principles, and that Gypsies and Travellers are seen as an integral part of the Welsh community, whose needs and aspirations should be catered for. We are also pleased that this report has identified the issues that contribute to the vulnerability and exclusion of Gypsies and Travellers and the key policy areas that must be addressed to combat that vulnerability and exclusion. It is most unfortunate that the Westminster Government are not adopting a similar approach.

A group of organisations including TAT have joined together to present a response to this report and especially to look at what can be done to improve the situation for Gypsies and Travellers in Wales in terms of provision of accommodation. The response is entitled *The Road Ahead*.

We are delighted that this response is being led by Julie Morgan, Member of the Welsh Assembly for Cardiff North. Many readers will remember Julie when she was an MP at Westminster and Chair of the All Party Parliamentary Group on Gypsy Roma Travellers. The launch of *The Road Ahead* took place at the Welsh Assembly building in Cardiff on 20th March 2012. It was a very successful meeting and many Gypsies and Travellers took part. Julie Morgan now intends to set up a Cross Party Working Group on Gypsies and Travellers.

There will be important consultations being conducted in 2012 by the WG on:

a) The Mobile Homes Act 1983 and how it will apply on Welsh local authority sites;

b) The Welsh unauthorised encampment guidance.

TAT urges all groups and individuals who are working with Gypsies and Travellers in Wales to take part in these consultations.

Landmark victory for Roma living in shanty town

Chris Johnson and Marc Willers

Yordanova & ors v Bulgaria, European Court of Human Rights (ECtHR), application no. 25446/06, 24th April 2012.

Introduction

In *Yordanova* the ECtHR found that the threatened forcible eviction of a Roma 'shanty town' by the relevant municipal authority was a breach of Article 8 of the European Convention on Human Rights (ECHR).

Our courts must take account of judgments of the ECtHR when determining any question which has arisen in connection with a right protected by the ECHR and advocates representing Gypsies and Travellers will doubtless rely on the decision in *Yordanova* when arguing that any decision to evict or remove their clients from land is disproportionate in terms of Article 8 of the ECHR.

This article explains the facts and the reasoning of the European Court's decision in *Yordanova*. It also comments on the potential ramifications of the decision for Gypsies and Travellers facing eviction from unauthorised encampments or developments.

The facts

At the end of the 1960s and in the 1970s the applicants or their parents and grandparents moved to Batalova Vodenitsa (BV), a neighbourhood of Sofia. They built their homes on State land without any authorisation. Some 200 to 300 Roma now live there. Most of the buildings are single-storey houses. There is no sewage or plumbing. The applicants' houses do not meet the basic requirements of the relevant construction and safety regulations. Under the relevant domestic law the applicants cannot obtain ownership of the land they occupy. Over the years a large number of complaints about this settlement have been made by non-Roma residents of BV.

In September 2005 the Mayor of Sofia ordered the forcible removal of the Roma living in the settlement under the Municipal Property Act. In the same month, the municipal authority agreed they would offer alternative housing to the Roma residents (no offers of alternative housing have, in fact, been made since then). Attempts were made by the applicants to challenge the removal order in the Bulgarian courts but these attempts were unsuccessful. The Bulgarian courts found that the fact that the applicants had not shown a valid legal ground for occupying the land was sufficient to establish that the removal order was valid.

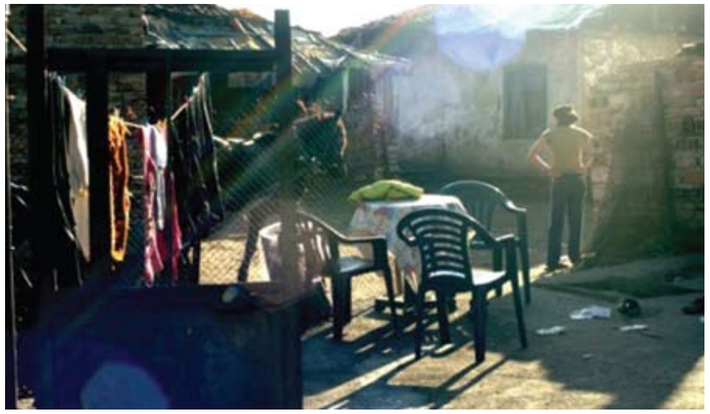
In June 2008 the municipal authorities, relying on the removal order, served notices on the applicants requiring them to leave their homes failing which they would be forcibly evicted. The Roma residents applied to the ECtHR for relief and the European Court made an interim order that the applicants should not be evicted pending receipt by the ECtHR of detailed information about any arrangements to secure alternative housing. In July 2008, the District Mayor stated she had suspended enforcement of the removal order. In the same month the National Council for Cooperation on Ethnic and Demographic Issues indicated that the Roma residents of BV should not be evicted until a solution was found. However, no alternative housing was made available to the Roma residents and the matter proceeded to a final determination by the ECtHR.

Consideration of potential breach of Article 8

(a) Length of time

The ECtHR stated (at paras 120-121):

There is no doubt that the authorities are in principle entitled to remove the applicants, who occupy municipal land unlawfully…The Court notes, however, that for several decades the national authorities did not move to dislodge the applicants' families or ancestors and, therefore, de facto tolerated the unlawful Roma settlement in Batalova Vodenitsa. In its view, this fact is highly pertinent and should have been taken into consideration…The principle of proportionality requires that such situations, where a whole community and a long period are concerned, be treated as being entirely different from routine cases of removal of an individual from unlawfully occupied property.



Comment Clearly each case will be determined on its own facts. There have been instances in the UK where unauthorised developments have been in existence for lengthy periods of time (for example, Dale Farm) where a similar conclusion may be reached. Unauthorised encampments tend to be more short-lived. Nevertheless it may be possible to argue that similar considerations apply in circumstances where a Gypsy or Traveller has been resorting to a particular local authority area for a significant period of time and has been subject to frequent evictions in that area.

(b) Addressing proportionality

The ECtHR stated (at paras 122-123):

Under the relevant domestic law, as in force at the time, the municipal authorities were not required to have regard to the various interests involved or consider proportionality… Relying on this legal framework, the municipal authorities did not give reasons other than to state that the applicants occupied land unlawfully and, in the judicial review proceedings, the domestic courts expressly refused to hear arguments about proportionality and the lengthy period during which the applicants and their families had lived undisturbed in Batalova Vodenitsa…In cases such as the present one, this approach is in itself problematic, amounting to a failure to comply with the principle of proportionality.

Comment The Supreme Court judgments in the cases of *Pinnock and Powell* (see *The long journey of Article 8*) have finally made it clear that a defendant in an eviction action, even if the claimant has an apparently absolute right to possession, can question the proportionality of the decision to evict. However, if the only means of challenging a particular decision is by way of judicial review it may be questionable whether that is a sufficient remedy. Thus in *Manchester CC v Pinnock,* Lord Neuberger stated ([2011] HLR 7 at 129 para 45(b)):

[A] judicial procedure which is limited to addressing the proportionality of the measure through the medium of traditional judicial review (i.e., one which does not permit the court to make its own assessment of the facts in an appropriate case) is inadequate as it is not appropriate for resolving sensitive factual issues.

(c) Unsanitary conditions

The ECtHR stated (at para 124):

The Court further observes that it is undisputed that the houses of most applicants do not meet basic sanitary and building requirements, which entails safety and health concerns. It considers, however, that in the absence of proof that alternative methods of dealing with these risks have been studied seriously by the relevant authorities, the Government's assertion that the applicants' removal is the appropriate solution is weakened and cannot in itself serve to justify the removal order.

Comment This point has a particular relevance in unauthorised encampment cases in the UK. Local authorities often refer to the lack of basic services at an encampment. The decision in *Yordonova* makes it clear that such arguments should not justify eviction in cases where the local authorities have failed over the years to ensure that there is adequate pitch provision.

Landmark victory for Roma living in shanty town

(d) Alternative accommodation and homelessness

The ECtHR stated (at paras 125-126):

Indeed, the Bulgarian authorities have recognised... that a wide range of different options are to be considered in respect of unlawful Roma settlements...In addition, it is noteworthy that before issuing the impugned order the authorities did not consider the risk of the applicants' becoming homeless if removed. They attempted to enforce the order in 2005 and 2006 regardless of the consequences and, while they signed an agreement containing an undertaking to secure alternative shelter, they later disregarded it and declared that the risk of the applicants' becoming homeless was 'irrelevant'.

Comment The UK courts have been reluctant to make the link between eviction and homelessness. The ECtHR in *Yordanova* see that link as being essential.

(e) An underprivileged community

The ECtHR stated (at paras 128-129):

[I]n the Court's view, there would appear to be a contradiction between, on the one hand, adopting national and regional programmes on Roma inclusion, based on the understanding that the applicants are part of an underprivileged community whose problems are specific and must be addressed accordingly, and, on the other hand, maintaining, in submissions to the Court, as the respondent Government did in this case, that so doing would amount to 'privileged' treatment and would discriminate against the majority population...Such social groups, regardless of the ethnic origin of their members, may need assistance in order to be able effectively to enjoy the same rights as the majority population. As the Court has stated in the context of Article 14 of the Convention, that provision not only does not prohibit a member State from treating groups differently in order to correct 'factual inequalities' between them but, moreover, in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of Article 14...

Comment This is clearly highly relevant to Gypsies and Travellers, especially those on unauthorised encampments and developments (see *Tackling inequalities suffered by Gypsies and Travellers* and see also the ECtHR judgment in *Thlimmenos v Greece,* application no. 34369/97).

Indeed, the Bulgarian authorities have recognised … that a wide range of different options are to be considered in respect of unlawful Roma settlements …
In addition, it is noteworthy that before issuing the impugned order the authorities did not consider the risk of the applicants' becoming homeless if removed.

(f) No right to housing

The ECtHR stated (at para 130):

The above does not mean that the authorities have an obligation under the Convention to provide housing to the applicants. Article 8 does not in terms give a right to be provided with a home... However, an obligation to secure shelter to particularly vulnerable individuals may flow from Article 8 of the Convention in exceptional cases.

(g) Attitude of the applicants

The ECtHR stated (at para 131):

It is also true that the applicants have not been active in seeking a solution...It appears that they are reluctant to seek social housing at least partly because they do not want to be dispersed, find it difficult to cover the related expenses and, in general, resent the radical change of their living environment that moving into blocks of flats would entail. However, Article 8 does not impose on Contracting States an obligation to tolerate unlawful land occupation indefinitely.

Conclusion regarding the 2005 removal order

The ECtHR stated (at paras 133-134):

In general, the underprivileged status of the applicants' group must be a weighty factor in considering approaches to dealing with their unlawful settlement and, if their removal is necessary, in deciding on its timing, modalities and, if possible, arrangements for alternative shelter. This has not been done in the present case... In sum, the Court finds that the respondent Government failed to establish that the removal order of 17 September 2005 was necessary in a democratic society for the achievement of the legitimate aims pursued.

Comment This judgment bears a lot of resemblance to the landmark judgment of Sachs J in the South African Constitutional Court in *Port Elizabeth Authority v Various Occupiers* [2004] ZACC 7. The South African case involved a refusal to grant a possession order against another unlawful 'shanty town' and, once again, great emphasis was placed on the failure to look at alternatives.

Events post the removal order

The ECtHR stated (at para 136):

Although the mayor of the relevant district suspended the applicants' removal temporarily, it is significant that...there has been no decision to re-examine the order of 17 September 2005 or tie its enforcement to the implementation of appropriate measures to secure respect for the applicants' Article 8 rights.

Complaints from neighbours

The ECtHR stated that the authorities were under a duty to act in response to neighbours' complaints. However, it was also noted (at para 142):

Some of the neighbours' complaints...also contained illegitimate demands, such as to have the applicants 'returned to their native places'.

Final conclusion and remedy

The ECtHR stated (at para 144):

The above considerations are sufficient for the Court to reach the conclusion that there would be a violation of Article 8 in the event of enforcement of the deficient order of 17 September 2005 as it was based on legislation which did not require the examination of proportionality and was issued and reviewed under a decision-making procedure which not only did not offer safeguards against disproportionate interference but also involved a failure to consider the question of 'necessity in a democratic society'.

In terms of remedy, the ECtHR stated (at paras 166-167):

[T]he Court expresses the view that the general measures in execution of this judgment should include such amendments to the relevant domestic law and practice so as to ensure that orders to recover public land or buildings, where they may affect Convention-protected rights and freedoms, should, even in cases of unlawful occupation, identify clearly the aims pursued, the individuals affected and the measures to secure proportionality...In so far as individual measures are required, the Court is of the view that the execution of the present judgment requires either the repeal of the order of 17 September 2005 or its suspension pending measures to ensure that the authorities have complied with the Convention requirements...

The applicants were not awarded damages. The Bulgarian Helsinki Committee, who assisted the applicants, donated the costs they were awarded by the ECtHR to the applicants.

Endpiece

Thanks to Garden Court Chambers for part funding this edition.

Thanks also to an anonymous donor for a donation to TAT News costs.

We are determined to keep TAT News as a free publication but, even with the generous help of Garden Court, it does cost CLP a lot of time and expense.
All donations are gratefully accepted and are placed in a separate account just for the costs of TAT News.

CLP will soon be entering the 21st century by setting up a website. Hopefully you should be able to find us on the web by the time you get this edition.

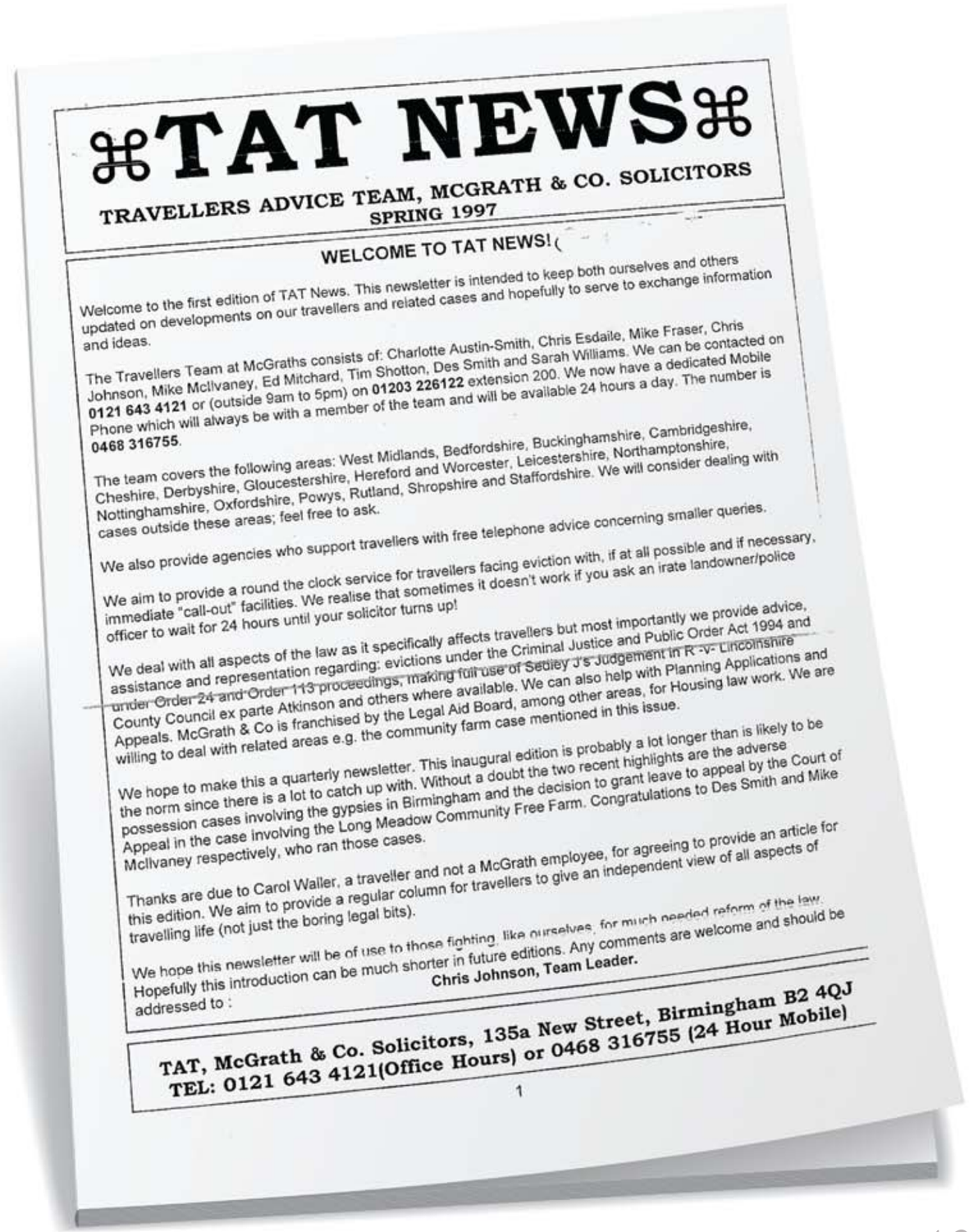
The CLP Housing Team deal with cases in the Midlands including, of course, for Gypsies and Travellers in housing. Please telephone 0121 685 8595.

We don't have space here to list all the wonderful Gypsy and Traveller support and campaigning groups that exist around England and Wales. If you are trying to locate a national or local group please e-mail us at office@community-lawpartnership.co.uk and we will try to help.

TAT News is 15 years old this year. It has come on a bit since the smudgy first edition which we reproduce the front cover of on the opposite page.
TAT started off, as you will notice, at McGrath & Co solicitors (being set up there in 1995) and moved to CLP when the firm was set up in January 1999. TAT has taken some of the leading cases in this area of the law including four cases in the House of Lords and Supreme Court. We continue to push the boundaries of the law.

Kushti bok to all our readers

DON'T AGONISE, **ORGANISE!**



⌘TAT NEWS⌘

TRAVELLERS ADVICE TEAM, MCGRATH & CO. SOLICITORS
SPRING 1997

WELCOME TO TAT NEWS!

Welcome to the first edition of TAT News. This newsletter is intended to keep both ourselves and others updated on developments on our travellers and related cases and hopefully to serve to exchange information and ideas.

The Travellers Team at McGraths consists of: Charlotte Austin-Smith, Chris Esdaile, Mike Fraser, Chris Johnson, Mike McIlvaney, Ed Mitchard, Tim Shotton, Des Smith and Sarah Williams. We can be contacted on **0121 643 4121** or (outside 9am to 5pm) on **01203 226122** extension 200. We now have a dedicated Mobile Phone which will always be with a member of the team and will be available 24 hours a day. The number is **0468 316755**.

The team covers the following areas: West Midlands, Bedfordshire, Buckinghamshire, Cambridgeshire, Cheshire, Derbyshire, Gloucestershire, Hereford and Worcester, Leicestershire, Northamptonshire, Nottinghamshire, Oxfordshire, Powys, Rutland, Shropshire and Staffordshire. We will consider dealing with cases outside these areas; feel free to ask.

We also provide agencies who support travellers with free telephone advice concerning smaller queries.

We aim to provide a round the clock service for travellers facing eviction with, if at all possible and if necessary, immediate "call-out" facilities. We realise that sometimes it doesn't work if you ask an irate landowner/police officer to wait for 24 hours until your solicitor turns up!

We deal with all aspects of the law as it specifically affects travellers but most importantly we provide advice, assistance and representation regarding: evictions under the Criminal Justice and Public Order Act 1994 and under Order 24 and Order 113 proceedings, making full use of Sedley J's Judgement in R -v- Lincolnshire County Council ex parte Atkinson and others where available. We can also help with Planning Applications and Appeals. McGrath & Co is franchised by the Legal Aid Board, among other areas, for Housing law work. We are willing to deal with related areas e.g. the community farm case mentioned in this issue.

We hope to make this a quarterly newsletter. This inaugural edition is probably a lot longer than is likely to be the norm since there is a lot to catch up with. Without a doubt the two recent highlights are the adverse possession cases involving the gypsies in Birmingham and the decision to grant leave to appeal by the Court of Appeal in the case involving the Long Meadow Community Free Farm. Congratulations to Des Smith and Mike McIlvaney respectively, who ran those cases.

Thanks are due to Carol Waller, a traveller and not a McGrath employee, for agreeing to provide an article for this edition. We aim to provide a regular column for travellers to give an independent view of all aspects of travelling life (not just the boring legal bits).

We hope this newsletter will be of use to those fighting, like ourselves, for much needed reform of the law. Hopefully this introduction can be much shorter in future editions. Any comments are welcome and should be addressed to :

Chris Johnson, Team Leader.

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