

THE LAW RELATING TO GYPSIES AND TRAVELLERS

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1. Introduction

Gypsies and Travellers² first arrived in England and Wales in or about 1500. Over the centuries they have been subjected to much prejudice and discrimination. However, by the beginning of the twentieth century, while remaining effectively excluded from education and proper health care, they had at least arrived at a position where they were able to find places to stop for reasonable periods of time. For example, they were allowed to stop on the enormous areas of common land across the two countries.

In one of the leading cases concerning the eviction of Gypsies and Travellers,³ Sedley J. (as he then was) gave a useful potted history of the last century as it related to Gypsies and Travellers:

'For centuries the commons of England provided lawful stopping places for people whose way of life was or had become nomadic. Enough common land survived the centuries of enclosure to make this way of life sustainable, but by section 23 of the Caravan Sites and Control of Development Act 1960 local authorities were given power to close the commons to Travellers. This they proceeded to do with great energy, but made no use of the concomitant power given to them by section 24 of the same Act to open caravan sites to compensate for the closure of the commons. By the Caravan Sites Act 1968, therefore, Parliament legislated to make the section 24 power a duty...for the next quarter of a century there followed a history of non-compliance with the duties imposed by the Act of 1968, marked by a series of decisions of this court holding local authorities to be in breach of their statutory duty; but to apparently little practical effect. The default powers vested in central government, to which the court was required to defer, were rarely if ever used.'

This Chapter begins by examining the most extreme situation faced by some Gypsies and Travellers today, eviction from unauthorised encampments. Some 20% or more of Gypsies and Travellers⁴ remain on unauthorised roadside encampments due to the continuing (and increasing) lack of stopping places and sites and due to the failure of the planning laws in many cases to provide a realistic method for Gypsies and Travellers (where they can afford to do so) to set up their own sites. We then move on to the related

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²As we go through the chapter we will discuss the legal definition of 'Gypsy' where it is relevant.

³ *R v Lincolnshire CC ex p Atkinson, Wealden DC ex p Wales & Stratford* (1996) 8 Admin LR 529, The Times September 22nd 1995.

⁴ According to the Office of the Deputy Prime Minister's Gypsy Count.

subject of homelessness and to discuss the situation with regard to Gypsies and Travellers on official caravan sites.

When the then Conservative Government, introduced the Criminal Justice and Public Order Act 1994 ('the 1994 Act' - which repealed the duty on local authorities to provide sites) it stated that future provision should be made by Gypsies and Travellers setting up their own sites. In this Chapter we will also discuss the difficulties faced by Gypsies and Travellers trying to obtain planning permission and the planning powers of local authorities. We conclude the Chapter with a discussion of racial discrimination, education and health law as they apply to Gypsies and Travellers.

2. Evictions from Unauthorised Encampments

Since the introduction of the 1994 Act and the removal of the duty to provide sites, the role of government guidance has come to the fore when advising Gypsies and Travellers on the law relating to evictions from unauthorised encampments.

Under sections 77-80 of the 1994 Act, local authorities may direct persons who are unlawfully residing in vehicles on land in their own area to leave. These powers extend to privately owned land. It is an offence to fail to comply with such a direction or to return within 3 months. A magistrates' court can make a removal order authorising the local authority to enter the land and remove the persons and vehicles.

Section 77 provides:

'(1) If it appears to a local authority that persons are for the time being residing in a vehicle or vehicles within that authority's area -

(a) on any land forming part of a highway;

(b) on any other unoccupied land; or

(c) on any occupied land without the consent of the occupier,

the authority may give a direction that those persons and any others with them are to leave the land and remove the vehicle or vehicles and any other property they have with them on the land.'

Section 61 of the 1994 Act provides a potentially even more draconian power for the police to remove Gypsies and Travellers where the landowner or occupier has taken reasonable steps and where one of three criteria are satisfied. Failure to obey such a direction or returning to the land in question within three months is not only an offence but can result in arrest and impoundment of vehicles (i.e. the Gypsies' and Travellers' homes), even before a magistrates' court order has been obtained.

Section 61 provides:

'(1) If the senior police officer present at the scene reasonably believes that two or more persons are trespassing on land and are present there with the common purpose of residing there for any period, that reasonable steps have been taken by or on behalf of the occupier to ask them to leave and -

(a) that any of those persons has caused damage to the land or to property on the land or used threatening, abusive or insulting words or behaviour

towards the occupier, a member of his family or an employee or agent of his, or
(b) that those persons have between them six or more vehicles on the land, he may direct those persons, or any of them, to leave the land and to remove any vehicles or other property they have with them on the land.'

2.1. Department of the Environment (DoE) Circular 18/94.

Faced with such severe provisions (as well as other methods of eviction further discussed below), it is essential that Gypsies' and Travellers' advisers try to ensure that government guidance is followed. In the *Atkinson* case,⁵ the judge made it clear that local authorities ought to comply with the guidance in Circular 18/94⁶ before deciding whether or not to evict Gypsies and Travellers from an unauthorised site.

The Circular makes it clear that, whilst it is a matter for local discretion to decide whether it is appropriate to evict an encampment, the Secretary of State believes that local authorities should consider using their powers to do so wherever Gypsies and Travellers are causing a level of nuisance which cannot be effectively controlled.

The Circular also makes it plain that it would usually be legitimate for a local authority to exercise its powers whenever Gypsies and Travellers who are camped unlawfully refuse to move onto an authorised local authority site where there are vacancies. However, where there are no such sites and the authority reaches the view that an unauthorised encampment is not causing a level of nuisance which cannot be effectively controlled, the Circular states that the authority should consider providing basic services, such as toilets, a refuse skip and a supply of drinking water.⁷

The Circular then goes on to outline how local authorities should exercise their powers, making it clear that they should be used in a humane and compassionate way, taking account of the rights and needs of the Gypsies and Travellers concerned, the owners of the land in question and the wider community whose lives may be affected by the situation.⁸ Local authorities are reminded of their obligations under Part III of the Children Act 1989 (regarding the welfare of 'children in need'), Part III of the Housing Act 1985 (now Part VII of the Housing Act 1996, regarding duties to homeless people) and also their responsibilities regarding the provision of education for school-age children.⁹ It also states that local authorities should bear in mind possible assistance from local health and/or welfare services.¹⁰

In order to ensure a balanced decision is taken by a local authority that is contemplating the eviction of Gypsies or Travellers from an unauthorised encampment, the local

⁵ See footnote 2.

⁶ In fact the DoE no longer exists and responsibility for Traveller and Gypsy matters lays with the Office of the Deputy Prime Minister. The equivalent in Wales is the identical Welsh Office Circular 76/94.

⁷ DoE Circular 18/94, para. 6.

⁸ Ibid, para. 9.

⁹ Ibid, paras. 10 & 11.

¹⁰ Ibid, para. 13.

authority should have in place some form of enquiry process and some method of evaluating and considering the relative merits of the information gleaned.

2.2. The Good Practice Guide

In 1998 the government produced guidance entitled ‘Managing Unauthorised Camping: A Good Practice Guide’ (produced by the Department of the Environment, Transport and the Regions (DETR) and the Home Office (HO)).¹¹ This has now been replaced by ‘Guidance on Managing Unauthorised Camping’ (hereafter ‘the Guidance’).¹² Both sets of guidance were the result of research commissioned by the Government from the University of Birmingham.

Following the *Atkinson* case, it was clear that the process of information gathering and consideration applied to local authorities when considering potential eviction action under section 77 of the 1994 Act.¹³ However, the question then arose as to whether other methods of eviction using civil procedures in the county court or high court,¹⁴ byelaws, highways legislation, planning enforcement powers or even common law powers of eviction were also subject to the principles of Circular 18/94? From late 1995 to late 1998 there followed a series of conflicting and confusing high court decisions, all attempting to answer this question.¹⁵

The confusion was resolved by the Good Practice Guide¹⁶ (and has been maintained by the Guidance) – local authorities should make welfare enquiries and take into account considerations of common humanity regardless of the eviction process being deployed. Through its widespread use, the Good Practice Guide became an essential tool for advisers on both sides and there have been some clear signs of improvement in practice throughout England and Wales as a result. It is hoped that that trend will continue with the new Guidance.

The Guidance calls on local authorities, the police and other relevant agencies and bodies to have written policies on the issue of unauthorised encampments. Some quotes from the Guidance follow:

‘5.4. Unauthorised encampments are almost always, by definition, unlawful. However, while there are insufficient authorised sites, it is recognised that some unauthorised camping will continue. There are locations, however, where encampment will not be acceptable under any circumstances. Each encampment location must be considered on its merits against criteria such as health and

¹¹ The Good Practice Guide was amended in October 2000, when the whole of Chapter 5 was re-written.

¹² The Guidance came into effect on 27th February 2004.

¹³ DoE Circular 18/94 specifically referred to the 1994 Act powers.

¹⁴ Now contained in Civil Procedure Rules (CPR) Part 55. Note that action should only be taken in the high court in exceptional circumstances.

¹⁵ *R v Kerrier DC ex p. Uzell Blythe* (1996) JPL 837; *R v Brighton & Hove Council ex p. Marmont* (1998) 30 HLR 1046; *R v Hillingdon LBC ex p. McDonagh* (1998) 30 HLR 531; *R v Leeds City Council ex p. Maloney* (1999) 31 HLR 552.

¹⁶ Confirmed in the case of *R (Martin Ward) v London Borough of Hillingdon*, CO/4139/2000, 15th February 2001, Stanley Burnton J.

safety considerations for the unauthorised campers, traffic hazard, public health risks, serious environmental damage, genuine nuisance to neighbours and proximity to other sensitive land-uses.

5.5 ... Identification of possible 'acceptable' sites could assist local authorities and the police in the management of unauthorised encampments in circumstances where there are no available pitches on authorised sites. If the unauthorised campers refuse to move from an unacceptable location, eviction processes (including appropriate welfare enquiries) should be commenced.

5.7. Local authorities may have obligations to unauthorised campers under other legislation (mainly regarding children, homelessness and education). Authorities should liaise with other local authorities; health and welfare services who might have responsibilities towards the families of unauthorised campers. Some form of effective welfare enquiry is necessary to identify whether needs exist which might trigger these duties or necessitate the involvement of other sectors, including the voluntary sector, to help resolve issues. The police and other public bodies who might be involved in dealing with unauthorised encampments do not have comparable duties but must still, as public servants, show common humanity to those they meet.

5.8. The Human Rights Act (HRA) applies to all public authorities including local authorities (including town and parish councils), police, public bodies and the courts. With regard to eviction, the issue that must be determined is whether the interference with Gypsy/Traveller family life and home is justified and proportionate. Any particular welfare needs experienced by unauthorised campers are material in reaching a balanced and proportionate decision. The human rights of members of the settled community are also material if any authority fails to curb nuisance from an encampment.

5.9. Case law is still developing with regard to the sorts of welfare enquiries, which the courts consider necessary to properly taken decisions in relation to actions against unauthorised encampments. Cases are testing the requirements under different powers ... Very generally, court decisions to date suggest:

- All public authorities need to be able to demonstrate that they have taken into consideration any welfare needs of unauthorised campers prior to making a decision to evict.

- The courts recognise that the police and other public bodies have different resources and welfare duties from local authorities. Generally the extent and detail of appropriate enquiries is less for police and non-local authority 'public authorities'.

*- In the case of local authorities, the onus of making welfare enquiries appears to be greater when using Criminal Justice and Public Order Act 1994 s77, where the use of the section can result in criminal sanctions, than when using landowners' civil powers against trespass. Local authorities should, however, make thorough welfare enquiries **whatever powers they intend to use** [authors' emphasis]*

5.10. Because local authorities have appropriate skills and resources to enable them to make (or to co-ordinate) welfare enquiries, it is considered good practice for local authorities to respond positively to requests for assistance in making enquiries from the police or other public bodies.'

The Guidance gives some specific examples of welfare needs to be considered¹⁷:

‘Advanced pregnancy: a period shortly before and after birth in normal circumstances; longer on medical advice if there are complications.

Ill health: indicators might include a hospital appointment booked; in-patient treatment of a close family member; period during which a condition can be diagnosed, stabilised and a course of treatment started.

Educational needs: children in school if within 4 weeks of the end of term or if access to special education has been gained.’

Even if there are not the most pressing welfare concerns, any group of Gypsies or Travellers will have a need for some consideration due to the lack of suitable sites and due to the lack of any duty to provide sites at this time. Though the 2000 amendment of the Good Practice Guide removed any trace of the word ‘toleration’,¹⁸ if there is no significant nuisance or disruption caused then toleration may be required.

2.3. Police Evictions

The Guidance also contains important recommendations for the police to refer to when considering whether to use their powers under section 61 of the 1994 Act¹⁹. Even without the Guidance, several high court cases had indicated that the police must have regard to ‘considerations of common humanity’. For example, one notable case, ***R v The Commissioner of the Metropolitan Police ex p. Small***,²⁰ is now quoted in the guidance on the 1994 Act produced by the Association of Chief Police Officers(ACPO).²¹

The Guidance has reinforced this approach, advising that local authorities and the police should draw up joint policies towards unauthorised encampments and highlighting that, whilst section 61 is a legitimate power to use against encampments in appropriate circumstances, it would not be appropriate for it to be the first response in every case. It is made clear that the decision to use section 61 must be an operational one, taken by the senior police officer at the scene, on the basis of whether ‘triggers’ are evident. Appropriate triggers might include: individual criminal activity; serious breaches of the peace; disorder or significant disruption to the life of the local community.²²

The police should not adopt ‘blanket policies’ either for or against the use of section 61.

In the case of ***R (Josette Fuller & ors) v The Chief Constable of the Dorset Constabulary***²³ it was made clear that the landowner must provide a deadline before the police can seek to apply section 61 and it was decided that the use of section 61 had been

¹⁷ In Box 18 at p.31 of the Guidance.

¹⁸ Previously in the title of Chapter 5 of the GPG.

¹⁹ See above.

²⁰ QBD, 27th August 1998, Collins J. – unreported leave application.

²¹ The latest version produced in 2000.

²² The Guidance, para.6.8.

²³ (2002) 3 All ER 57.

unlawful in circumstances where the borough council and the police gave the Travellers notice to leave the land at the same time and with the same termination date. However, it was also decided that section 61 was not in itself incompatible with the Human Rights Act 1998.

Home Office Circular 45/94 effectively reiterates the position set out in the guidance that due consideration should be given to welfare needs and personal circumstances when the police decide whether or not to evict Gypsies or Travellers from a site. The Circular indicates that the senior officer at the scene may wish to take account of the personal circumstances of the trespassers, 'for example, the presence of elderly persons, invalids, pregnant women, children and other persons whose well-being may be jeopardised by a precipitate move.'

The Anti-Social Behaviour Act 2003 has introduced a new section 62A into the 1994 Act.²⁴ Section 62A exists alongside section 61, i.e. the police can use either power provided that the necessary criteria are met. Section 62A states as follows:

'(1) If the senior police officer present at a scene reasonably believes that the conditions in subsection (2) are satisfied in relation to a person and land, he may direct the person:

- (a) to leave the land;*
- (b) to remove any vehicle and other property he has with him on the land.*

(2) The conditions are -

- (a) that the person and one or more others ('the trespassers') are trespassing on land;*
- (b) that the trespassers have between them at least one vehicle on the land;*
- (c) that the trespassers are present on the land with the common purpose of residing there for any period;*
- (d) if it appears to the officer that the person has one or more caravans in his possession or under his control on the land, that there is a suitable pitch on a relevant caravan site for that caravan or each of those caravans;*
- (e) that the occupier of the land or a person acting on his behalf has asked the police to remove the trespassers from the land.*

(3) A direction under subsection (1) may be communicated to the person to whom it applies by any constable at the scene.

(4) Subsection (5) applies if -

- (a) a police officer proposes to give a direction under subsection (1) in relation to a person and land, and*
- (b) it appears to him that the person has one or more caravans in his possession or under his control on the land.*

(5) The officer must consult every local authority within whose area the land is situated as to whether there is a suitable pitch for the caravan or each of the caravans on a relevant caravan site which is situated in the local authority's area.'

²⁴ Introduced by Part 7 of the 2003 Act. Brought into force on 27th February 2004.

There are a number of differences between section 62A and section 61, which will be highlighted below.

As with section 61, it appears that a single Gypsy or Traveller, travelling on his or her own, would not be caught by the new section. The pitch must be 'suitable', though there is no further definition of the word 'suitable' and case law is awaited. No doubt questions of how far away the pitch is and whether the Gypsy or Traveller in question might have some very good reason for not accepting this pitch will come into play. Additionally the ODPM emerging guidance on section 62A indicates that transit sites should have facilities, i.e. water, sanitation and refuse collection, in order to be 'suitable'.

Furthermore, the Guidance, at para.4.8 states:

'There must be close working between site managers and local authority and police officers dealing with unauthorised camping over allocations of pitches on sites. Site managers may be aware of issues around Gypsy/Traveller group and family compatibility, which must be taken into account when allocating pitches on residential sites.'

It should also be mentioned that the specific guidance on the use of the new police powers is currently out to consultation.²⁵

The pitch must be on a 'relevant caravan site' which is defined as:

'...a caravan site which is -

- (a) situated in the area of a local authority within whose area the land is situated, and*
- (b) managed by a relevant site manager.'*²⁶

'Relevant site manager' is defined as:

- '(a) a local authority within whose area the land is situated;*
- (b) a relevant social landlord.'*²⁷

It appears that the occupier no longer has to take reasonable steps to ask the Gypsies/Travellers to leave though it is unclear how this squares with the *Fuller* case (see above). As with section 61, there is no need for written notice.

Consultation in some areas may involve two local authorities having to be contacted by the police, e.g. both a county council and a district council.

²⁵ Issued on 27th February 2004 with a deadline for submissions of 21st May 2004. It is likely that the finalised guidance will be produced in the autumn. This guidance is described above as the 'emerging guidance'.

²⁶ 1994 Act s.62A(6).

²⁷ Ibid.

A person commits an offence if s/he knows that a direction under section 62A(1) has been given which applies to him/her and:

- (a) he fails to leave the land as soon as reasonably practicable, or*
- (b) he enters any land in the area of the relevant local authority as a trespasser before the end of the relevant period with the intention of residing there.*²⁸

The 'relevant period' is 3 months from the day on which the direction is given.²⁹

'Relevant local authority' is defined as:

- (a) if the relevant land is situated in the area of more than one local authority (but is not in the Isles of Scilly), the district council or county borough council within whose area the relevant land is situated;*
- (b) ...the Council of the Isles of Scilly;*
- (c) in any other case, the local authority within whose area the relevant land is situated.*³⁰

A person guilty of an offence under section 62A is liable on summary conviction to imprisonment for a term not exceeding 3 months or a fine or both.³¹ A constable may arrest a person committing an offence under this section.³² A constable may also seize and remove any vehicles.³³

It is a defence to show: you were not trespassing, or you had a reasonable excuse for failing to leave the land or entering other land, or you were under the age of 18.³⁴

As is the case with section 61, section 62A will normally be effective without the need to take the matter to court, since the threat of arrest and impoundment of their homes will usually (and understandably) be sufficient to persuade the Gypsies/Travellers to move.

Any unlawful use of either sections 61 or 62A may be challenged by way of judicial review and could include an application for an injunction (e.g. to prevent the three month ban being put into effect).

2.4. Evictions by Government Departments and other Public Authorities

It will be noted that the Guidance quoted above makes it clear³⁵ that all public authorities must make some welfare enquiries or, if enquiries by the local authority in question are relied on, take some account of humanitarian considerations. This will include bodies

²⁸ Ibid s.62B(1).

²⁹ Ibid, s.62B(2).

³⁰ Ibid, s.62E(6).

³¹ Ibid, s.62B(3).

³² Ibid, s.62B(4).

³³ Ibid, s.62C.

³⁴ Ibid, s.62B(5).

³⁵ At paras. 5.7 to 5.9.

such as the Forestry Commission, the Highways Agency, the Ministry of Defence and potentially even organisations such as Network Rail.

Circular 18/94 indicates that, where Gypsies and Travellers are unlawfully encamped on Government-owned land, it is for the local authority, with the agreement of the land-owning department, to take any necessary steps to ensure that the encampment does not constitute a hazard to public health. It also indicates that Government departments should act in conformity with the advice that unauthorised encampments should not normally be allowed to continue where they are causing a level of nuisance which cannot be effectively controlled, particularly where local authority authorised sites are available.³⁶ The converse of this, of course, is that ‘toleration’ should be considered if nuisance or annoyance is not being caused.

2.5. Private landowners.

There are no such obligations on private landowners to take account of humanitarian considerations when deciding whether to take eviction action against an unauthorised encampment. However, if using common law powers of eviction (by ‘reasonable force’), the Guidance does suggest the following:

*‘Police should always be notified of an eviction and called in to stand by to prevent a breach of the peace;
If police advise that it is inappropriate to carry out an eviction, it should always be delayed until an agreed time.’*

If a landowner (or his or her agents or employees) exceeds the use of ‘reasonable force’, then s/he may face an action for criminal damage, trespass to person or property or assault. If such an action were being taken, failure of the landowner to have regard to the Guidance may be relevant.

If the relevant local authority or police force are called in by a landowner to carry out eviction action using the 1994 Act, they will, of course, have to have regard to the Guidance and carry out the necessary welfare enquiries.

2.6. The Human Rights Act 1998.

The most relevant Articles of the European Convention on Human Rights for the purposes of unauthorised encampments are 6, 8, 14 and Article 1 of the First Protocol.

In the case of *Chapman v UK*³⁷ the European Court of Human Rights held that a home set up without lawful authority could still be a ‘home’ within the terms of Article 8. This is further confirmed in the Guidance.³⁸ When a public authority is considering whether an

³⁶ This advice also applies to the National Assembly of Wales - see Welsh Office Circular 76/94 para. 8.

³⁷ (2001) 33 EHRR 18.

³⁸ See para. 5.8.

interference with the right to respect for home and family life is ‘necessary in a democratic society’, they will have to ask themselves whether:

- i) there is a pressing social need for it; and
- ii) it is proportionate to the aim pursued.

‘Proportionality’ brings into play other matters with regard to unauthorised encampments beyond the (sometimes formulaic) duty to carry out welfare enquiries. Public authorities will need to ask themselves a number of questions before deciding whether to take eviction action. For instance: is the land that the Gypsies or Travellers are residing on ‘inappropriate’? If they are moved on, where will they go and are there any alternative temporary/transit sites available? What provision of sites has the relevant local authority made for Gypsies and Travellers in its area? Thus it can be seen that the HRA has had the effect of broadening the scope of those matters that a public body ought to take into account before taking the step of using eviction powers.

3. Homelessness.

Under the Housing Act 1996, a Gypsy or Traveller is homeless if s/he does not have a lawful place to put his or her caravan or living vehicle.³⁹ If a homeless person is in priority need⁴⁰ and not intentionally homeless⁴¹ then a local authority will have a duty to ensure that the individual is provided with accommodation.⁴²

In *R (Margaret Price) v Carmarthenshire County Council*,⁴³ Mrs Price had made an application as a homeless person to the local authority since she had no lawful place where she could pitch her caravans. After considering the matter, the local authority offered Mrs Price a house and sought her family’s eviction from their encampment on local authority land which had, up until then, been tolerated by the council. Newman J quashed the decision to evict, stating that:

‘In order to meet the requirements and accord respect, something more than ‘taking account’ of an applicant’s gypsy culture is required. As the courts in Chapman stated, respect includes the positive obligation to act so as to facilitate the Gypsy way of life without being under a duty to guarantee it to an applicant in any particular case.’

³⁹ Housing Act 1996 Act, s.175.

⁴⁰ Housing Act 1996 Act s.189 defines the term ‘priority need’ to include: those with dependant children, pregnant women, those fleeing domestic violence, people who are very ill, the elderly, those who are seen as ‘vulnerable’ and others.

⁴¹ Defined as someone who ceases to occupy accommodation which it would have been reasonable for him/her to continue to occupy due to an act or omission by that person. Housing Act 1996 Act s.191.

⁴² Housing Act 1996 Act s.193. There are also interim duties. ‘Accommodation’ must be ‘suitable’ (s.206).

⁴³ [2003] EWHC 42 (Admin), Legal Action March 2003 pp.30-31.

The judge examined the way in which the local authority had dealt with the issue of Mrs Price's 'cultural aversion to conventional housing'⁴⁴ and found that the local authority's approach had been flawed because: it had placed too much weight on the fact that she had seemingly been prepared to give up her traditional way of life to live in conventional housing in 2001; and, it had used this fact as sufficient reason for totally disregarding her 'aversion to bricks and mortar' when considering whether the offer of conventional housing would be 'suitable' in her case. However, the judge also found that: if the local authority reached the conclusion that Mrs Price's cultural commitment to traditional Gypsy life was so powerful as to present great difficulty in her living in conventional housing, it was not bound by a duty to find her an authorised pitch or site; but that her cultural aversion to conventional housing was a significant factor in determining how far the local authority should go to facilitate her traditional way of life.⁴⁵

Local authorities who receive such a homeless application, must make an assessment of the Gypsy's or Traveller's aversion to conventional housing and must then see whether they can 'facilitate the Gypsy way of life'. The latter, it is argued, should involve a serious and extensive consideration of land/pitches/sites in the area (and not just land owned by the local authority in question). Local authorities should already be undertaking this exercise as part of the homelessness strategies and reviews that each local authority is obliged to put into place every five years.⁴⁶

Other issues are likely to arise in due course as a result of *Price* style homelessness applications. What is the position for New Travellers? What about the question of intentional homelessness decisions where the Gypsy or Traveller left conventional housing in the past due to their inability to reside in such accommodation? What about the question of 'local connection' i.e. if an applicant does not have a local connection with the local authority they apply to, they may be referred to another local authority where they do have such a connection?⁴⁷

One issue has recently been resolved. In the case of *Myhill & Faith v Wealden District Council*,⁴⁸ it was argued on behalf of the single homeless Travellers involved that, due to the much greater likelihood of homelessness amongst Gypsies and Travellers due to the lack of authorised stopping places, due to the greater difficulty in finding 'accommodation' and due to the possibility of criminal prosecution while on unauthorised encampments, they should be seen as being 'vulnerable' and thus 'in priority need'. This argument was rejected both by the county court judge and by Buxton

⁴⁴ As referred to in the planning case of *Clarke v Secretary of State for the Environment, Transport and the Regions & Tunbridge Wells BC* (2002) JPL 552, see paras. 30-34.

⁴⁵ The Court of Appeal has now addressed this issue in the case of *Leanne Codona v Mid-Bedfordshire District Council* – judgement awaited at the date of publication.

⁴⁶ As brought in by the Homelessness Act 2002 - the first review ought to have been completed by the end of July 2003.

⁴⁷ 1996 Act s.199.

⁴⁸ (2004) EWCA Civ 224, refusal by Court of Appeal to grant permission to appeal from the decision of Mr Recorder Elvidge in the Tunbridge Wells County Court. Legal Action April 2004 p.34.

LJ in refusing permission to appeal to the Court of Appeal. Buxton LJ, relying on the test of ‘vulnerability’ provided in the case of *R v Camden LBC ex p Pereira*,⁴⁹ stated:

‘The focus [in the Pereira case] is quite clearly on the ability of the individual to deal with the condition of homelessness, rather than on the question to which statistics and oral arguments in this case go, of how likely it is that persons when they become homeless will remain such.’

In terms of interim accommodation, it is often argued by advisers that, if the Gypsies or Travellers concerned are on land owned by the same local authority to whom the homelessness application has been made, and, if that land is not ‘inappropriate’, that they should be allowed to remain there whilst their application is determined (perhaps in fulfilment of the interim accommodation duty⁵⁰).

Given the relative novelty of a lot of these arguments,⁵¹ it can be very important for Gypsies and Travellers to obtain advice and assistance throughout this homelessness process.

4. Official Caravan Sites

The 1994 Act removed the duty on certain local authorities to provide sites (whilst retaining the power to do so⁵²). Since the implementation of the 1994 Act, the shortage of suitable accommodation for Gypsies and Travellers has been exacerbated by the closure of many sites and the reduction in numbers of pitches on some of those sites that remain open by many local authorities.

Residents on official sites⁵³ are often referred to as ‘licensees’ but can be called ‘tenants’. Regardless of this they enjoy negligible security of tenure. The Caravan Sites Act 1968 provides that, with regard to ‘protected sites’,⁵⁴ any notice to quit must be of not less than four weeks duration⁵⁵ and possession can only be obtained with a court order.⁵⁶ However, this is the extent of ‘security’. Unlike the case where a local authority seeks possession of conventional housing rented to a secure council tenant there is no requirement of ‘reasonableness’ before a possession order is granted.⁵⁷

In two cases Gypsies and Travellers have challenged the lack of security of tenure provided by the relevant legislation on the basis that it is discriminatory and incompatible

⁴⁹ (1998) 30 HLR 317, CA.

⁵⁰ Housing Act 1996 Act s.188.

⁵¹ And given the high rates of illiteracy or poor literacy amongst the Gypsy/Traveller community.

⁵² Caravan Sites and Control of Development Act 1960 (the ‘CSCDA’), s.24.

⁵³ Note that this does **not** include mobile home owners who live on licensed sites covered by the Mobile Homes Act 1983 and who enjoy much better security of tenure.

⁵⁴ 1968 Act s.1 defines ‘protected sites’ as sites that require a licence under Part 1 of the CSCDA.

⁵⁵ 1968 Act, s.2.

⁵⁶ Ibid, s.3.

⁵⁷ See Housing Act 1985.

with the HRA. In the first, *Somerset County Council v Isaacs*,⁵⁸ comparison was made with the Mobile Homes Act 1983. In the second, *R (Albert Smith) v LB of Barking & Dagenham*,⁵⁹ comparison was made with the regime for council tenants in conventional housing under the Housing Act 1985. In both cases the courts rejected the arguments of the Gypsies and Travellers, accepting the Government's position that the introduction of security of tenure would undermine the nomadic lifestyle of the residents and non-nomadic people might take up pitches on sites. Advisers continue to doubt the validity of this reasoning and it is hoped that a further challenge to this discriminatory position might be possible in the future.

Problems of disrepair on sites might be susceptible to action as a statutory nuisance.⁶⁰ Alternatively, though having less obvious protection than council and other tenants in conventional housing, it may be possible for residents to take county court action either by relying on the terms of the licence agreement or possibly on implied terms. Unfortunately, many residents are put off from taking action by their lack of security of tenure and their fear that they may be evicted.

5. Wide Possession Orders

It was for many years the practice of many landowners, such as the Forestry Commission, to obtain possession orders against Gypsies and Travellers not only covering the specific piece of land they were living on but also all other land in their ownership in a large radius around the site in question.⁶¹ However, in the recent case of *Drury v The Secretary of State for the Environment, Food and Rural Affairs*,⁶² the Court of Appeal made it clear that strong and clear evidence of the likelihood of trespass on the other areas of land is required and that such wide orders should only be made in 'exceptional circumstances.'

⁵⁸ (2002) EWHC 1014 Admin.

⁵⁹ (2003) EWCA Civ 385.

⁶⁰ Environmental Protection Act 1990, s.82.

⁶¹ Sometimes covering 20 or even 30 miles.

⁶² Legal Action April 2004 p.34.

6. Gypsy Travellers, Planning and Human Rights.

6.1. Introduction

The historical under-provision of authorised Gypsy caravan site provision has been exacerbated by the implementation of the Criminal Justice and Public Order Act 1994 ('the 1994 Act') which made an already bad situation worse, by withdrawing the statutory duty placed on local authorities to provide Gypsy caravan sites whilst at the same time giving draconian eviction powers to both the police and local councils to evict Travellers on unauthorised sites

The current government policy towards Gypsy caravan sites – Circular 1/94 *Gypsy sites and planning* – favours private over public site provision. 1/94 states that Gypsies and Travellers should be 'encouraged' to purchase land themselves and apply to legitimise their own sites through the planning system.

The bi-annual count of Gypsy caravans, conducted on behalf of the Office of the Deputy Prime Minister ('ODPM') reveals a continuing high level of unmet need for further sites: of the 14,700 caravans counted in the July 2003 count, for example, 3,979(27%) had no lawful site.⁶³ In the most recent policy document on the issue, the ODPM Guidance on Unauthorised Camping (see further above), the ODPM recognises that the policy of private provision is failing to yield sufficient lawful sites through the planning system.

In theory, requiring Gypsies and Travellers to enter the planning system would seem an equitable approach but, for this policy to be credible, there has to be some real prospect of obtaining planning consent for private sites and this is far from evident. Both the European Court of Human Rights and our own House of Lords have cast doubt on the effectiveness of the policy:

'In the case of Gypsies, the problem [i]s compounded by the features peculiar to them: their characteristic [nomadic] lifestyle debarred them from access to conventional sources of housing provision. Their attempts to obtain planning permission almost always met with failure: statistics quoted by the European Court⁶⁴ ...[found that] 90% of applications made by Gypsies had been refused

⁶³ ODPM Count of Caravans and Gypsy Families, July 2003. Very recently, the government explicitly recognised that Gypsies' accommodation needs remain unmet: 'we are aware that there is currently a shortage of local authority sites for Gypsies and Travellers which inevitably contributes to illegal encampments ... we are still doing all that we can to persuade local authorities of the importance of supplying sites that sufficiently reflect the needs and the number of visiting Gypsies ... and the importance of working closely with Gypsies who wish to purchase their own land for site development ...' (letter dated 6th January 2003 from Mr. Bulford at the ODPM introducing the Draft Framework Guide on Managing Unauthorised Gypsy/Traveller Encampments, ODPM and the Home Office).

⁶⁴ *Chapman v UK* (2001) 33 EHRR 399 page 420, para 66.

*whereas 80% of all applications had been granted. But for many years the capacity of sites authorized for Gypsies had fallen far short of that needed...*⁶⁵

There are systemic failures with the current policy of private site provision. For example, 1/94 suggests that Local Planning Authorities ('LPAs') should undertake a Quantitative Assessment of the need for further Gypsy caravan sites in their administrative area and use this as the basis for identifying suitable locations where the land use requirements of Gypsies and Travellers can be met in the Plan period. If appropriate locations are not possible to find, then LPAs should set clear, realistic criteria for the establishment of such sites.

However, the guidance in 1/94 has failed in its aim to provide more caravan sites for Gypsies and Travellers because very few local authorities have identified suitable locations for such sites and many of those that have adopted criteria based policies rely upon unrealistic and unclear criteria. The emphasis on the plan-led approach to the planning system further militates against success of Gypsy applications at local level. In some authorities, for example, policies will preclude sites in the Green Belt when most of the land in their area is Green Belt.⁶⁶ ODPM research into the background to the problem of large-scale unauthorised encampments suggested that these were consequent upon wider questions of planning policies and site provision. The report suggested that criteria-based policies in local plans made such provision extremely difficult, especially in areas of planning restraint.⁶⁷

Research on the effectiveness of 1/94 suggests that the policy has not yet solved the issue of unauthorised encampments; nor does the evidence indicate that it is likely to so do in the foreseeable future:

*'... Gypsy site policies [in development plans] provide little locational certainty and most local authorities do not know where to expect private Gypsy site development locations. The identification of potential Gypsy site locations within Development Plans has still not been taken up by local authorities. The criteria-based policies preferred by local authorities have provided little certainty for applicants when deciding where best to locate new Gypsy sites and thereby limited the capability of the plan-led system. Five [now nearly ten] years on from the introduction of 1/94, the increase in private site provision had not even off-set the decrease in public site provision: At the current rate it will take 10 years for caravans on unauthorized sites to decrease to zero. During the same time if the pace of private and public site provision does not increase, provision will not be made for new families wishing to live on authorised caravan sites ...'*⁶⁸

⁶⁵ *South Bucks v Porter, Wrexham CBC v Berry and Chichester Dc v Keet and Searle*, (2003) UKHL 26, (2003) 2 WLR 1547, HL, 19th May 2003.

⁶⁶ For example in Dacorum BC area where some 90% of available land is Green Belt or similar; South Gloucestershire has 80%+ GB (see *O'Connor v First Secretary of State and Bath and North East Somerset Council & ors* (2002) EWHC 2649, the decision of Field, J, Queen's Bench Division of the High Court, 19th November 2002).

⁶⁷ Niner et al, (1998) in Morris and Clements, (2002) Op Cit.

⁶⁸ Williams/ACERT (1999) in Morris and Clements, Op Cit.

The Local Government Association (LGA) has also expressed doubts as to whether the current arrangements alone will meet the need that already exists and therefore that legislative reform is necessary:

*'The LGA believes that site provision can only really be improved by re-instating a statutory duty on local authorities to 'make' or 'facilitate provision supported by a central subsidy...'*⁶⁹

Recently, the House of Commons' Select Committee on the Housing Bill 2003 took evidence from a number of Gypsy/Traveller organisations and other relevant bodies, thereafter recommending to the government that nothing short of the re-introduction of the statutory duty would suffice:

*'The duty on LPAs to provide sites...was repealed by the CJA 1994. This has **increased** the number of travellers living on unauthorised sites causing problems both to travellers and the settled community ... We recommend that the statutory duty to 'make' or 'facilitate' the provision of sites for Gypsies is introduced as soon as possible ... (our emphasis).'*

6.2. Who is a Gypsy?

The question of who is a Gypsy has remained one of the most enduring of sedentary obsessions that has attended Gypsies' long experience of discrimination in Europe.⁷⁰ Nowhere is this more apparent than in the field of jurisprudence. The lead case on Gypsy status before the Human Rights Act 1998 (HRA) was passed was that of ***R v South Hams DC ex parte Gibb et al***,⁷¹ a case which considered whether the Travellers involved could be accepted as Gypsies for the purposes of the former site provision duty found in the (now partly repealed) Caravan Sites Act 1968. Gypsies are defined in law as 'persons of a nomadic habit of life, whatever their race or origin.'⁷² In assessing Gypsy status, the Court of Appeal found the following matters to be relevant:

1. a tradition of travelling
2. travelling in a group
3. travelling with an economic purpose.

The Court of Appeal held that:

'...the definition of 'Gypsies'...imports the requirement that there should be some recognisable connection between the wandering or travelling and the means whereby the persons concerned make or

⁶⁹ Cited in Recommendation of the ODPM Select Committee on the Housing Bill 2003.

⁷⁰ For a full analysis of Gypsies' experience in Europe over the last 1500 years see Kenrick, D and Puxon, G, *The Destiny of Europe's Gypsies*, Routledge and Kegan Paul, London 1972.

⁷¹ (1994) 4 ALL ER 1012, (1995) QB 158.

⁷² CSCDA 1960 s24 as amended by the 1994 Act s80.

seek their livelihood. Persons, or individuals, who move from place to place merely as the fancy may take them and without any connection between the movement and their means of livelihood fall outside these statutory definitions...'

The latter part of the definition involves a consideration of whether the individual concerned travels to seek or make their livelihood. Unfortunately, the **Gibb** judgment has often lead to local planning authorities ['LPAs'] going out of their way to try to 'prove' that the Gypsies or Travellers who live in their area are not statutory 'Gypsies', seemingly as a means of frustrating the purpose of circular 1/94, which seeks to meet the land use requirements of Gypsies.

The Welsh Assembly's Equality of Opportunity Committee has recognised this tendency and has argued that the weaknesses in the planning system are indicated by the increasing consideration of the provisions of the HRA in relation to legal action being taken by Gypsies and Travellers on planning issues. The Committee has noted the:

*'...apparent obsession with finding ways to prove that an individual is not a 'Gypsy' for the purposes of the planning system. This approach is extremely unhelpful...and there can be no doubt that actual mobility at any given time is a poor indicator as to whether someone should be considered a Gypsy or a Traveller.'*⁷³

6.3. Too ill to be a Gypsy?

In tandem with defining who is a Gypsy, the courts have also had to address the question of whether an individual can lose her/his Gypsy status, particularly in relation to cases where ill health has led to Gypsies and Travellers not being able to travel. Despite the issues being considered in both the High Court and the Court of Appeal, some matters are still far from clear.

In **Wrexham CBC v the National Assembly for Wales and Berry**,⁷⁴ a Planning Inspector had allowed a planning enforcement Appeal for a traditional Gypsy family in Wrexham, only to see the decision challenged in the High Court on the grounds that the elder breadwinner in the family, Mr Berry, was no longer a Gypsy because he had become too ill to continue to travel for work.

In his judgment, the judge decided that he could not see anything in **Gibb** to suggest that, had the Court of Appeal been confronted with what might be described as a "retired" Gypsy, it would have said that he had ceased to be a Gypsy because he had become too ill and/or too old to travel in order to search for work. He believed:

⁷³ Equality of Opportunity Committee, 19th June 2003.

⁷⁴ (2001) EWHC Admin 2414.

‘such an approach would be contrary to common sense and common humanity ... It would be inhuman pedantry to approach the policy guidance ... upon that basis ...’

6.4. Still too ill to be a Gypsy?

Soon after **Berry** was heard, the High Court once again considered a challenge to Gypsy status in a planning matter in the case of ***O’Connor v the First Secretary of State and Bath & NE Somerset***.⁷⁵ This time the case involved an Inspector’s decision that the Traveller concerned was **not** a Gypsy because she had become too ill to travel.

The judge decided that it was not enough, as the Inspector did in this case, to focus on the travelling currently being undertaken or likely to be undertaken in the future, but the Inspector should instead consider such circumstances as:

- ≠# the person's history
- ≠# the reasons for ceasing to travel
- ≠# the person's future wishes and intentions to resume travelling when the reasons for settling have ceased to apply and
- ≠# the person's attitude to living in a caravan rather than a conventional house.

The Government made no appeal to this decision; indeed (see below), the Court of Appeal has recently approved the ***O’Connor*** decision, which remains good law despite a successful challenge by the local authority concerned to the **Berry** case.⁷⁶

Both ***O’Connor*** and **Berry** derive from the case of ***R v Shropshire CC ex p Bungay***⁷⁷ that was decided in 1991. **Bungay** involved a Gypsy family that had not travelled for some 15 years in order to care for their elderly and infirm parents. An aggrieved local resident in the area of the family’s recently approved Gypsy site sought judicial review of the local authority’s decision to accept that the family had retained their Gypsy status even though they had not travelled for some considerable time. Dismissing the case, the judge held that a person could remain a Gypsy even if s/he did not travel, provided that their nomadism was held in abeyance and not abandoned.

In the later case of ***Hearne v National Assembly for Wales***,⁷⁸ a traditional Gypsy was held not to be a Gypsy for the purposes of planning law as he had stated that he intended to abandon his nomadic habit of life, live in a permanent dwelling and was taking a course that led to permanent employment.

It has already been stated above that the **Berry** case was recently subject to an appeal to the Court of Appeal where the matter of Gypsy status was the defining issue. In finding

⁷⁵ (2002) EWHC 2649, Field J.

⁷⁶ **Berry** was subsequently overturned in the Court of Appeal and permission to appeal to the House of Lords was refused in February 2004. An application to the European Court of Human Rights is now in the process of being lodged.

⁷⁷ (1991) 23 HLR 195.

⁷⁸ Court of Appeal, *The Times*, 10 November 1999.

that the Inspector had failed to adequately grasp the nettle of Mr Berry's nomadism, the court set aside the planning permission granted, since it found there was no prospect of Mr Berry resuming a travelling life due to his by-then chronic ill-health; his nomadism could not be said to be in abeyance (as in **Bungay**) but had been abandoned (as in **Hearne**):

'... depending on the circumstances of a particular case, a person may continue to have a 'nomadic habit of life' even though he is not travelling for the time being and may not do so for some considerable time, perhaps because of illness or the educational needs of his children, provided he has not abandoned his nomadic habit ... it is possible in principle for a person to retain his Gypsy status for planning purposes even though it may be some time before he can resume travelling, provided that he can show that he has not abandoned his 'nomadic habit of life.'

6.5. Challenging **Berry**

An appeal was lodged in the House of Lords against the Court of Appeal's decision in **Berry**, partly on the grounds that those representing Mr Berry⁷⁹ believe the decision is unworkable in practice and partly because there is no evidence whatsoever that the draftsman of the definition ever intended a person's state of health to determine his/her status as a Gypsy, lesser still that the European Court of Human Rights would regard the need to protect the traditional lifestyle of a Gypsy such as Mr Berry as being at an end the moment he became to ill to travel.⁸⁰ Unfortunately, leave to appeal was refused and the matter is now being taken to the European Court of Human Rights.

Finally, there is a problem in applying the Court of Appeal's judgment in **Berry** to a situation where a major breadwinner in an extended family becomes ill and thereby unable to travel, when his family does not. For example, what of Mrs Berry and/or her children? Are they to lose their Gypsy status solely because their husband/father has become seriously ill? What of their own nomadic habit life?

It can be argued that the Court of Appeal in **Berry** read the definition too narrowly and misconstrued the case law. In **Bungay**, for example, (which, like **O'Connor**, remains good law) there is a need to look at **whose** nomadism was held to be in abeyance – not the elderly parents as they never travelled again, but their offspring. Similarly, in **Berry**: whilst Mr Berry senior may be too ill to travel, the same cannot be said for his offspring or, for that matter, his wife. There is no evidence that their nomadic habit of life has been abandoned, why then are they not Gypsies?

⁷⁹ The Travellers Advice Team at the Community Law Partnership, solicitors in Birmingham.

⁸⁰ See *Chapman v UK* (2001) 33 EHRR 399.

6.6. Other material planning considerations

Once Gypsy status has been established, it is necessary to raise other material considerations, including the personal circumstances and needs of the Travellers applying for planning permission. Recently, the Courts have confirmed the relevance of Gypsies' personal circumstances to planning and enforcement matters.

6.7. Personal Circumstances

In the *Atkinson* case (see 2.1 above), the court had examined the scope of circular 18/94 in relation to local authorities' duties when considering evicting Travellers by using powers under the 1994 Act from unauthorised sites. In the circular, councils are reminded of their statutory duties concerning the health, education and welfare of those on unauthorised sites and urged to use their new powers '*in a humane and compassionate fashion.*' The judge found that, over and above these statutory considerations, there were: '*considerations of common humanity, none of which can be properly ignored when dealing with one of the most fundamental of human needs, the need for shelter with at least a modicum of security.*'

In a planning case that was heard soon afterwards,⁸¹ the court held that in deciding whether or not to take enforcement action, local authorities should have regard to the personal circumstances of the Traveller occupiers and that such considerations should hold equal weight when considering breaches of planning controls.

A significant part of Gypsies' and Travellers' personal circumstances relates to the issue of the education of their children, many of whom have historically underachieved, most often as the result of the lack of secure and lawful sites. In recent times the need to consider this aspect of personal circumstances has been reinforced by the courts, with the judgment in the case of *Basildon DC v SSETR*.⁸² In this case the judgment stressed that the education needs of children is an important aspect of wider land use considerations in the provision of Gypsy sites and that there is considerable public interest in the planning system for providing stable educational opportunities for Gypsy and Traveller families.

6.8. Need

In coming to a decision that balances the protection of the planning system alongside nomadic people's rights, account must be taken of **need**. Need in this context has two meanings: firstly, the need for accommodation consistent with a nomadic lifestyle; and secondly, 'need' in the sense of the state providing sufficient justification to refuse planning permission and to take enforcement action against Gypsies and Travellers.

⁸¹ *R v Kerrier DC, ex parte Uzell et al* (1996) JPL 837.

⁸² (2001) JPL 1184, Ouseley J.

In *Hedges-v- the Secretary of State and E. Cambridge DC*⁸³ there is judicial authority for the proposition that the need for sites is an independent material consideration to be taken into account in arriving at decisions concerning sites for nomadic people. The issue of need has proved determinative in Gypsy planning appeals before the Inspectorate, as well as in the High Court when challenging or defending the Inspectorate's decisions.

6.9. Conventional housing & Gypsies

In the case of *Clarke v Secretary of State for the Environment*,⁸⁴ the judge held that a Planning Inspector, in breach of Articles 8 and 14 of the European Convention, took into account in his planning decision the previous offer of conventional housing to a traditional Gypsy family. The family had found the offer unacceptable having never lived in a house in their lives. The court laid down some guidelines for approaching this factor in future cases:

'If [an immutable antipathy to conventional housing] be established then, in my judgment, bricks and mortar, if offered, are unsuitable, just as would be the offer of a rat infested barn. It would be contrary to Articles 8 and 14 to expect such a person to accept conventional housing and to hold it against him or her that he has not accepted it, or is not prepared to accept it, even as a last resort factor.'

The Court of Appeal upheld this decision.⁸⁵

6.10. The Human Rights Act 1998

The House of Lords decision in the case of *South Buckinghamshire District Council v Porter and others*⁸⁶ must surely be the high watermark of Gypsy planning case law involving the HRA to date.

The case involved a number of Gypsies who were living in mobile homes on land that they occupied in breach of planning control. Injunctions had been granted requiring them to move off site, with the threat of imprisonment for failure to comply. The Gypsies appealed to the Court of Appeal against the grant of the injunctions.

At the heart of the appeal lay Article 8 of the ECHR and the question of whether in these cases the interference was "necessary in a democratic society", i.e. whether the injunction answers to a 'pressing social need' and, in particular, whether it was 'proportionate' to the 'legitimate aim' pursued.

⁸³ (1996) 73 P & CR 534.

⁸⁴ (2001) EWHC 800 (Admin).

⁸⁵ (2002) EWCA Civ 819.

⁸⁶ (2003) 2 WLR 1547, (2003) UKHL 26, 22nd May 2003, HL.

The previous case law had held that the court had no role to play in deciding whether an injunction was appropriate, nor could the court consider matters of hardship that would befall the families once the injunction was granted and they were forced off their land, nor the (usually non) availability of suitable alternative sites, health issues or educational requirements of the Gypsy and Traveller children. In effect, the court's role was reduced to one of a 'rubber-stamp' as those matters were taken as previously considered and given effect by the LPA.

In allowing the appeal the Court of Appeal held that considerations of hardship and availability of alternative sites was not '*entirely foreclosed*' at the injunction stage and to ignore these issues would not be consistent with the Court's duty to act compatibly with convention rights:

'Proportionality requires not only that the injunction be appropriate and necessary for the attainment of the public interest objective sought – here the safeguarding of the environment – but also that it does not impose an excessive burden on the individual whose private interests – here the Gipsy's private life and home and the retention of his ethnic identity – are at stake.'

The local authorities that had sought the injunctions appealed to the House of Lords where judgment was given at the end of May 2003. In a unanimous decision, the House of Lords dismissed the councils' appeals and the Court of Appeal's decision upheld in its entirety. In its judgment the House of Lords recognised that the previous approach, even under domestic law was "too austere" and that a more balanced approach was necessary as the previous approach seemed to suggest that even great hardship was irrelevant.

6.11. Planning Law – The Way Forward

The HRA has led to a series of far-reaching legal cases concerning Gypsies and Travellers and the planning system that, in the main, have supported Gypsies' and Travellers' attempts to continue to follow their traditional way of life.

Perhaps most significantly, the House of Lords in **Porter** held that the vulnerable position of Gypsies as a minority group deserves more sympathetic attention than had hitherto been the case and stated that:

'... there is force in the observation attributed to Vaclav Havel, no doubt informed by the dire experience of central Europe that "[the treatment of] the Gypsies [is a] litmus test not of a democracy but of civil society itself.'

7. Racism and Discrimination

Travellers are, arguably, the most racially discriminated people in our society.⁸⁷

However, Travellers that can show that they are members of a distinct ethnic group can use the Race Relations Act 1976 (the RRA), supplemented by the Race Relations (Amendment) Act 2000 (the RRAA), to combat the racism they encounter in many, if not all, walks of life.

Unfortunately, Travellers that are not members of an ethnic minority cannot claim the protection of the RRA and RRAA but they may at least be able to use the European Convention on Human Rights to tackle discriminatory acts committed by public bodies in circumstances where those acts impinge upon their enjoyment of their rights protected by the Convention.

7.1 The Race Relations Act 1976

The RRA makes it unlawful to discriminate directly or indirectly against anyone ‘on racial grounds’ and prohibits discrimination by way of victimisation in the areas of employment, education, training and housing. The term ‘on racial grounds’ means ‘on grounds of colour, race, nationality or ethnic or national origins’.

The RRA also prohibits discrimination on racial grounds by those providing goods and services to the public, for example: hotels, shops, banks, insurance companies, financial services, cinemas, theatres, bars, restaurants, pubs, those providing transport and travel services, public authorities, utility providers such as electricity, gas and water companies, and trades and professions.

7.2 The Race Relations (Amendment) Act 2000

The RRAA has extended the scope of the RRA to outlaw acts of discrimination in all other public functions carried out by public bodies. The RRAA also places a general duty on public authorities to work towards the elimination of unlawful discrimination and to promote equality of opportunity and good relations between persons of different racial groups in the carrying out of their functions.

7.3 Racism and the Police

The RRAA imposes the general duty on police forces to carry out their functions with due regard to the need to eliminate unlawful discrimination and to promote equality of opportunity and good relations between persons of different racial groups. In addition the

⁸⁷ See, for example, the results of the survey ‘Politics of Prejudice’ in which 34% of respondents stated they felt prejudiced towards Gypsies and Travellers - at www.C21project.org.uk.

RRAA makes chief constables vicariously liable for acts of racial discrimination by police officers under their direction and control.

In the case of *Smith & Smith v Cheltenham Borough Council, Avery, Lambert, and Hogg (1999)* which was decided before the RRAA was in force⁸⁸ the Court considered an action brought by a Gypsy woman and her daughter against: a local authority for breach of contract and Sections 20 and 21 of the RRA (discrimination in the provision of goods and services); and against individual police officers for breach of Section 33 of the RRA (which provides that 'A person who knowingly aids another person to do an act made unlawful by this Act shall be treated for the purposes of this Act as himself doing an unlawful act of the like description'). The women had hired the Pittville Pump Rooms for the daughter's wedding reception so as to cater for about 150 guests and paid a deposit on the booking. They then went ahead with other wedding arrangements, including catering and the printing of invitations. Based on several allegations of disorder in recent years, and rumours about the forthcoming wedding, the police became concerned that the wedding celebrations might lead to public disorder; they liaised with the local authority, including the manager of the venue, to voice these concerns. The local authority called the mother to a meeting and attached conditions to her hire of the venue, including a requirement that entry should be by ticket only, and that a further (hefty) deposit should be paid. Both women were very upset and booked an alternative venue (where the event took place without incident).

The Judge hearing the case stated: 'I find that there is no foundation for the assertions of the police that the Gypsy problems of 1997 were linked to the Smith family. The truth is that as soon as the word "Gypsy" appears assumptions are made that large numbers will descend and cause trouble.'

The Judge went on to comment that: the mother had been given no opportunity to comment on allegations; that the council had made up its mind before it spoke to her; and they were in breach of contract as they had no right to impose extra conditions. As a consequence the Judge awarded damages.

As to the RRA issue, the Judge held that the women 'were treated in an unfair and highhanded manner which seems to be in complete contrast with the way in which, for example, the organisers of the Hunt Ball, an event known to pose serious risks of disorder, were treated'. In the circumstances the Judge found the local authority to be in breach of Sections 20 and 21 of the RRA, and awarded damages.

In respect of the claims against the individual police officers, the Judge held that 'the police did not act well over this wedding', and that the women had cause for complaint against them. However, he found the police had not knowingly aided the local authority to do an act made unlawful, as no officer was made party to the decision taken by the local authority. This element of the judgment was then the subject of an appeal;⁸⁹ the

⁸⁸ *Smith & Smith v Cheltenham Borough Council, Avery, Lambert, and Hogg* (1999) (CN755478) (unreported) Bristol County Court.

⁸⁹ *Hallam and Avery and Another* (2000) TLR, 7 February.

Court of Appeal upheld the Judge's decision and, in doing so, stressed the importance of the role of 'knowledge' under Section 33 of the RRA.

Clearly, in any future case involving alleged discrimination by the police, advisers will need to consider: whether Section 33 has been breached; and, in addition, whether it can be said in any given case that the police have breached their duty to carry out their functions with due regard to the need to eliminate unlawful discrimination and to promote equality of opportunity and good relations between persons of different racial groups.

Examples of some of the policing situations that would warrant such an analysis include:

- ⌘ Raids on sites in pursuit of crime and disorder considerations, in which all vehicles are searched (unless there is a reasonable suspicion that all of the vehicles may be implicated in the ends the raid seeks to achieve). Police operations concerning a suspect or suspects in a house would not usually involve all other houses in the vicinity, so it is possible that such 'blanket' raids could be shown to be discriminatory.
- ⌘ Excluding Gypsies and Travellers from the ethnic monitoring of the use of discretionary powers (such as 'stop and search').
- ⌘ Escorting recently-evicted Gypsies and Travellers to County boundaries.
- ⌘ Evicting all Gypsies and Travellers from an unauthorised encampment on the grounds of criminal or anti-social behaviour, when prosecution of a few members of a group would be appropriate on those grounds.
- ⌘ Failure to properly investigate an alleged racist attack on a member of the Gypsy or Traveller communities.

7.4 Race Equality Schemes

In an effort to assist public authorities (including the police) to comply with the general duty to work towards the elimination of unlawful discrimination and to promote equality of opportunity and good relations between persons of different racial groups in the carrying out of their functions, the RRA provides that they must also prepare and publish a racial equality scheme - that is, a scheme showing how they intend to fulfil their general duty. Thereafter, race equality schemes should be subject to review every three years.

A race equality scheme should include details of all those functions of the public authority that have been assessed as relevant to the performance of its duty to work towards the elimination of unlawful discrimination and to promote equality of opportunity and good relations between persons of different racial groups and the scheme should indicate what steps have been taken by the authority to:

- ⊘ assess and consult on the likely impact of its proposed policies on the promotion of race equality;
- ⊘ monitor its policies for any adverse impact on the promotion of race equality;
- ⊘ publish the results of such assessments and consultation;
- ⊘ ensure public access to the information and services which it provides; and
- ⊘ train staff about the application of the general and specific requirements imposed by the RRAA.

7.5 Race Equality and Schools

Schools also have a general duty to promote race equality. Once again that duty is reinforced by specific duties designed to help schools meet the general duty. Each school must:

- ⊘ prepare a written statement of its policy for promoting race equality – a ‘race equality policy’;
- ⊘ assess the impact of the school’s policies, including its race equality policy, on pupils, staff and parents of different racial groups including, in particular, the impact on attainment levels of such pupils; and
- ⊘ monitor the operation of such policies including, in particular, their impact on the attainment levels of such pupils.

The fulfilment of these duties should be monitored by inspection bodies - including the Commission for Racial Equality, OFSTED and the Audit Commission. The CRE is able to issue a compliance notice to a public authority that it believes to be failing to fulfil any specific duty laid down and, if necessary, to seek a court order to enforce the notice. The CRE will also be empowered to issue Codes of Practice to provide guidance to public authorities on how to fulfil their general and specific duties.

7.6 Ethnic Minority

To bring a race discrimination case, a Gypsy or Traveller must first show that s/he is a member of a distinct ethnic group.

In the case of *CRE v Dutton*⁹⁰ the Court of Appeal held that Romany Gypsies were an ethnic minority within the meaning of the RRA having considered evidence of their shared history, geographical origin, distinct customs and language.

More recently in *O’Leary v Allied Domecq*,⁹¹ a case brought by the CRE on behalf of Irish Travellers, the County Court accepted that Irish Travellers are also a distinct ethnic group and the Government now accepts that Travellers of Irish Heritage should be recognised as members of an ethnic group under the RRA.⁹²

⁹⁰ (1989) 2 WLR 17.

⁹¹ (2000) unreported.

There are currently no reported cases relating to Travellers of other ethnic origin but there seems to be no reason why Scottish or Welsh Travellers should not argue that they are members of separate ethnic groups. Whether such an argument is accepted is likely to depend upon the assessment of expert evidence.

7.7 Discrimination

If a Gypsy or Traveller's race discrimination claim is to succeed then s/he must also show that s/he has been discriminated against in one or more ways that are unlawful.

The RRA provides that **direct racial discrimination** occurs when it can be shown that treatment of a person was less favourable on racial grounds than that of others in similar circumstances. The RRA is concerned with people's actions and the effects of their actions, not their opinions or beliefs. Racial discrimination is not the same as racial prejudice. It is not necessary to prove that one person intended to discriminate against another; only to show that less favourable treatment was received as a result of what was done. Racist abuse and harassment are forms of direct discrimination. A sign in a pub window stating 'No Gypsies or Irish Travellers' would amount to direct discrimination.

The RRA provides that **indirect racial discrimination** occurs when a person from a certain racial group can show:

- that the proportion of persons of the same racial group who are able to comply with a requirement or condition is considerably smaller than the proportion of persons not of that racial group who can comply with it; and
- the requirement cannot be justified on non-racial grounds.

By way of example, a pub or restaurant that refuses to serve 'travellers' would commit indirect discrimination because fewer Romany Gypsies and Irish Travellers could comply with the requirement than people of other racial groups and the requirement cannot be justified on non-racial grounds. Similarly, a rule that employees or pupils must not wear headgear could exclude Sikh men and boys who wear turbans in accordance with practice within their racial group and would amount to indirect discrimination.

In 2000 the European Union published the **Race Directive** (the RD). The purpose of the RD is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin with a view to promoting the principle of equal treatment in the member states.

The RD provides a different definition of indirect discrimination to that set out in the RRA, namely that: indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim

⁹² See, for example, the Race Relations (Northern Ireland) Order 1997 which expressly recognises Irish Travellers as an ethnic group.

are appropriate and necessary. Significantly, unlike the definition in the RRA, the RD's definition does not require proof by statistical evidence, nor does it depend upon proof that the disadvantage has already occurred.

All the member states, including the United Kingdom, must implement the RD by 19th July 2003 and in June 2003 the Government issued a statutory instrument amending the RRA in an effort to comply with that requirement.⁹³

Victimisation occurs if a person is treated less favourably because they have complained about racial discrimination or supported someone else who has made such a complaint.

7.8 The Human Rights Act 1998 and Article 14 of the Convention

A victim of discrimination will also be able to bring a claim under the Human Rights Act 1998 (HRA) provided that the act of discrimination has some impact upon the enjoyment of the rights and freedoms set out in the European Convention on Human Rights.

Article 14 of the Convention provides that:

‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’

Discrimination under Article 14 means a difference in treatment that has no reasonable and objective justification.

The HRA makes provision for the courts to award damages to compensate individuals for breaches of their Convention rights. Such claims should be brought within 12 months of the alleged breach.

Significantly, the protection afforded by Article 14 is not limited to members of distinct ethnic groups and could be used by both Traditional and New Travellers who consider themselves to be subject to discrimination.

Thus, for example, a school's refusal to admit the child of a Gypsy, an Irish Traveller or a New Traveller to a school on discriminatory grounds would have an impact upon the right to education protected by Article 2 of Protocol 1 of the Convention and could give rise to a claim for damages for breach of Article 14 of the Convention.

⁹³ The Race Relations Act (Amendment) Regulations 2003.

7.9 Travellers and the Media

Travelling people often suffer from negative and stereotyped articles about them in the press. Despite guidance to editors from bodies such as the CRE⁹⁴ and the National Union of Journalists, the press at national and local levels consistently portray Gypsies and Travellers in an inflammatory, prejudicial, distorted and misleading fashion.

The press are subject to a self-regulation system by which they undertake to comply with a Code of Practice that is enforced by the Press Complaints Commission (PCC) from whom a copy of the Code can be obtained. If you have a complaint about an item in a newspaper or a magazine that you believe breaks a clause of the Code of Practice, first write a letter of complaint to the editor. This is usually the quickest way of obtaining a correction or apology for inaccuracies. Give the editor at least 7 days to reply, but do not wait longer than a month. If you are unhappy with the editor's response to your letter, then write a letter of complaint to the PCC.

If you wish to complain about a television programme you find offensive contact the Broadcasting Standards Commission and use the standards complaints procedure.

8. The Right to Healthcare

Everyone has a right to healthcare provided by the National Health Service: see Sections 1 and 3 of the National Health Service Act 1977. What this means in practice is that no hospital should ever turn away someone who is the victim of an accident or illness, whoever that person may be and whether or not they have paid any national insurance contributions.

8.1 Traveller Health Research

In 1995 the International Minority Rights Group identified the following particular concerns about the health of the Gypsy population in this country:

- €# Life expectancy of Gypsies is poor and significantly less than the sedentary population;
- €# The Gypsy birth rate is high and perinatal mortality, stillbirth mortality and infant mortality is significantly higher than the national average;
- €# There are numerous chronic illnesses suffered by Gypsies (e.g. respiratory and digestive diseases, rheumatism);
- €# Many Gypsies have an unbalanced diet, leading to deficiencies;
- €# Smoking is very common amongst Gypsies;
- €# Gypsies have little, if any, dental care with access to such care being more difficult as a result of many dental practices opting out of the NHS.

⁹⁴ The CRE guidance on 'Travellers, Gypsies and the Media' is available at <http://www.cre.gov.uk/media/guidetj.html>.

In 2001 a 2 year study of the health of Gypsies and Travellers (funded by the Inequalities Programme, Department of Health) was begun by the Sheffield Adult Mental Health Collaborative Research Group Project. Preliminary research by the Project has already shown that:

- ⌘ Gypsies and Travellers health status is poorer than matched urban deprived residents in terms of perceived overall health;
- ⌘ Gypsies and Travellers suffer significantly higher levels of anxiety and depression than those from comparison groups; and
- ⌘ both statutory health service providers and members of the Traveller community reported difficulties in access to appropriate services.

8.2 Access to Healthcare

There are a number of reasons why Gypsies and Travellers experience difficulty in gaining access to all types of health provision.

High on the list is the fact that many Gypsies and Travellers are still subject to a life of continual eviction in circumstances where there are not enough suitable places for them to camp.

The bureaucracy associated with the Health Service also causes many Gypsies and Travellers problems. For example, the completion of forms and the provision of information, such as dates of birth and history of previous healthcare, required by the Health Service causes difficulties for illiterate Gypsies and Travellers.

In addition some Gypsies and Travellers still experience discrimination at the hands of healthcare professionals. It seems that there is a general lack of cultural awareness on the part of service providers that can lead to discrimination and prejudice. For example, there are some GP surgeries that are still reluctant to register Gypsies and Travellers without a permanent address – a reason that seems to be wholly discriminatory in nature.

For all those reasons Gypsies and Travellers still tend to go to casualty departments or walk-in centres when they have an accident or illness. Unfortunately, as a consequence, Gypsies and Travellers suffer a lack of consistency in health care provision, including a lack of information, advice, support and preventative healthcare.

Where Gypsies and Travellers can expect to be able to stay in an area for more than a few weeks it is obviously sensible for them to try to register with a local GP if they have any health problems that need attention.⁹⁵

⁹⁵ Lists of doctors should be available at main Post Offices or NHS Direct, a 24 hour service that can be contacted by telephone on 0845 4647. Alternatively, information can be provided by health visitors or obtained from the National Association of Health Workers for Travellers, c/o Joanne Davis at Balsall Heath

8.3 Health and the European Convention on Human Rights

The Convention does not include an express right to medical treatment. However, it is clear that there could be circumstances where the failure to provide such treatment or the withdrawal of services could amount to a breach of Article 2 (the right to life) and/or Article 3 (the prohibition on inhuman and degrading treatment) of the Convention.⁹⁶ Likewise, negligent medical treatment could also engage Articles 2 and 3.

Health authorities, special health authorities, NHS Trusts, regulatory bodies and local authorities all have a duty as 'public bodies' to comply with the provisions of the European Convention on Human Rights. It also seems arguable that GPs should be considered to be public bodies when treating NHS patients.

8.4 Medical Records, Privacy and the Convention

In *Z v Finland*⁹⁷ it was held that the collection of medical data and the maintenance of medical records fell within the sphere of private life protected by Article 8 of the Convention. In addition it was said that medical confidentiality was a 'vital principle' crucial to privacy and also to preserving confidence in the medical profession and the health services in general. As a consequence it was held that: '... any state measures compelling communication or disclosure of such information without the consent of the patient call for the most careful scrutiny ...'.

The Data Protection Act 1998 covers all 'accessible public records' and, therefore, all social services and health records. The Act gives a right of access by individuals to any personal information held by an authority about them and requires disclosure of information to be made promptly and in any event within 40 days. However, there are a number of exceptions to the duty to provide disclosure. For example, disclosure need not be provided of material that would be likely to prejudice criminal investigations or ongoing social work.

If disclosure is refused by an authority then an appeal should be made either to the Data Protection Commissioner or the refusal can be challenged in court. As Article 8 applies to medical records it should be possible to challenge any restriction on patient access to them where it can be said that the restriction is unnecessary or disproportionate.⁹⁸

Health Centre, 43 Edward Road, Balsall Heath, Birmingham B12 9LP, telephone no. 0121 446 2300 or on its website at NAHWT@dial.pipex.com.

⁹⁶ For example, see *D v UK* (1997) 24 EHRR 423.

⁹⁷ (1997) 25 EHRR 371.

⁹⁸ *Gaskin v UK* (1989) 12 EHRR 36.

8.5 Environmental Health

Another area of concern to Gypsies and Travellers and healthcare practitioners alike is the link between the poor living environment and the general poor state of health of those in the Travelling community.

It is not only those living on the roadside that suffer health problems associated with their environment. Many Gypsies and Travellers living on permanent sites may, paradoxically, experience even worse conditions and resultant health complaints. Permanent sites are generally found in isolated and generally poor areas (by or sometimes under, roads, or railways and often near rubbish dumps or on former industrial sites) where health problems can stem from poor air quality, drainage and the contamination of land.

One particular problem for those Gypsies and Travellers without an authorised site results from the lack of access to fresh water. A variety of health problems can result from the lack of water and poor sanitation including skin diseases, Gastro-enteritis, Hepatitis and other infections.

Whilst there is no statutory duty on local authorities to enable the provision of water to unauthorised encampments, Circular 18/94 advises local authorities to consider tolerating the presence of Gypsies and Travellers on temporary or unofficial sites and to examine ways of minimising the level of nuisance on such sites and local authorities should be encouraged to comply with the advice in Circular 18/94 by providing basic services such as toilets, a refuse skip and a supply of drinking water.

Alternatively, it may be possible to persuade a local authority to provide water in circumstances where there are children 'in need' living on the site, i.e. children who are unlikely to achieve or maintain or to have the opportunity of achieving or maintaining a reasonable standard of health or development, without the provision of services by a local authority or their health is likely to be significantly impaired or further impaired without the provision of such services.⁹⁹

⁹⁹ Section 17 of the Children Act 1989.

9. The Right to Education

Everyone has the right to education and LEAs have a statutory duty to ensure that education is available for all children of compulsory school age (5 to 16 year olds) in their area, appropriate to their age, abilities, aptitudes and any special educational needs that they might possess. LEAs also have a duty to give parents in the area the opportunity to express a preference as to which school they wish their child to attend.

These duties apply to all children residing in the area, whether permanently or temporarily and, therefore, includes Gypsy and Traveller children residing with their families on temporary or unauthorised sites.

Most Local Education Authorities (LEAs) provide specialist Traveller Education Support Services who help Travelling pupils and parents to access education and provide practical advice and support to schools taking in Travelling pupils.

Although Travelling children of school age have the same legal right to education as anyone else, it is obviously practically difficult to claim or seek these rights without a permanent or legal place to stop. When a Gypsy or Traveller family with children of school age move into an area they should contact the local Traveller Education Support Service for assistance.

The National Association of Teachers of Travellers produces an annual booklet listing the local Traveller Education Support Services, and can also provide information about books and other education resources just for Travelling children.¹⁰⁰

Children should be educated in accordance with their parents' wishes so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure. LEAs have a duty to respect parents' religious and philosophical convictions. 'Respect' means more than simply 'acknowledge' or 'take into account' such views but does not require the LEAs to cater for all parents' convictions and there is no absolute right to choice of school or language of teaching.

9.1 Admissions to School

Gypsy and Traveller children should be admitted to schools on the same basis as any other children. However, Gypsy and Traveller parents should be aware that some schools may still rely upon admissions policies that disadvantage their children: for instance, an admissions policy which gives preference to children whose older brothers and sisters have already attended the school could be argued to unfairly disadvantage and unlawfully discriminate against Gypsy and Traveller families who have recently moved into the area.

¹⁰⁰ Contact NATT: by post c/o the Advisory Service for the Education of Travellers at room 125, Cricket Road Centre, Cricket Road, Oxford, OX4 3DW; by telephone on 01865 428 089; or visit their website at www.natt.org.uk.

9.2 Attendance at School

Parents have a duty to ensure that their children of compulsory school age receive efficient full-time education suitable to their age, ability and aptitude and any special educational needs that they may have either by regular attendance at school or otherwise. Failure to do so is an offence and can lead to prosecution. Schools must report unauthorised absences and LEAs have a responsibility to prosecute parents in appropriate cases.

Gypsy and Traveller parents are protected from conviction for the non-attendance of their children at school where they can demonstrate that:

- €# they are engaged in a trade or business of such a nature that requires them to travel from place to place;
- €# the child has attended at a school as a registered pupil as regularly as the nature of that trade permits; and
- €# where the child has attained the age of six years, they have attended school for at least 200 half day sessions during the preceding school year (September to July).

However, there is some concern that this exception may in practice deny Traveller children equality of access in education and the Department for Education and Skills (DfES) has recently emphasised the fact that Gypsy and Traveller parents should not regard the 200 half day sessions as the norm but should continue to comply with their legal duty to ensure their children are receiving efficient suitable full time education even when not at school.

To protect the continuity of learning for Gypsy and Traveller children the DfES introduced the concept of 'dual registration'. If parents inform their 'base' school or the Travellers Education Support Service that the family will be travelling and intend to return by a given time, the school may keep the child's place for them and record their absence as authorised. The child can then register at other schools whilst the family is travelling.

Gypsy and Traveller parents can also take advantage of school-based distance learning whereby school teachers and the Traveller Education Support Service work together to provide pupils with a package of curriculum based material to be taken away and studied by them whilst the family are travelling away from the area.

9.3 Special Educational Needs

A child with Special Educational Needs (SEN) will have a learning difficulty that requires special educational provision to be made. A child will have a learning difficulty if:

- €# s/he has a significantly greater difficulty in learning than the majority of children of the same age;

- €# s/he has a disability which either prevents or hinders him/her from making use of educational facilities of a kind generally provided for children of the same age in schools within the area of the LEA; or
- €# the child is under the age of 5 years and is, or would be if special educational provision was not made, likely to fall within the categories when over that age.

If your children have started school late or attended school irregularly, they may be judged to have special needs, which may include remedial help with reading or even the necessity for them to go to a special school. There are rules about the way in which this decision on special needs is made, and if you cannot read well you will need the assistance of someone who can help you through this process. Once again your local Traveller Education Support Service may be able to assist.

9.4 Transport to School

LEAs have to make appropriate arrangements to provide free transport for children to attend school unless the school is within walking distance, that is 2 miles (or 3 miles where the child is over 8 years old). Alternatively, LEAs may 'as they think fit' provide funding for 'reasonable travelling expenses' for children for whom they have not made arrangements to provide free transport.

9.5 Exclusion from School

In 1996 Ofsted found that Gypsy and Traveller children suffer a disproportionately high level of school exclusion. If your child is threatened with exclusion then you should contact your local Traveller Education Support Service or the National Association of Teachers for Travellers for initial assistance but may need to seek legal advice as well. When a school contemplates excluding a child it must follow the guidance published by the DfES. Failure to do so could result in a successful legal challenge. Parents are entitled to make representations before any decision is taken and there is provision for an appeal to be made against the decision to exclude a child from school.

If a child is excluded from a school the LEA will still have a duty to make arrangements for the provision of suitable education for that child.

9.6 Bullying at School

In 1996 Ofsted also found that Gypsy and Traveller children are often subject to bullying of a racist nature. Schools should have clear policies and strategies to deal with the prevention of bullying and the punishment of such behaviour. A school that fails to investigate and take action in circumstances where bullying is alleged to have taken place may find itself subject to a claim for judicial review to force the school to act. Alternatively, a parent may bring a claim for negligence and/or possibly make an allegation that the school has subjected the child to degrading treatment in breach of Article 3 of the Convention by failing to prevent bullying behaviour by other pupils.

Gypsy and Traveller parents should seek legal advice if they are concerned that a school has failed to protect their child from such behaviour.

9.7 Discrimination and Education

Romany Gypsies and Travellers of Irish Heritage are recognised as members of racial groups under the Race Relations Act 1976 (the RRA). That Act outlaws both direct and indirect racial discrimination in education. If Gypsy or Traveller parents wish to claim that their child has been the subject of discrimination then legal advice should be sought. A claimant must notify the Secretary of State before proceedings are commenced and a claim should be brought in the county court within 6 months of the alleged act of discrimination.

The Race Relations (Amendment) Act 2000 (the RRAA) imposes a statutory duty on public bodies including LEAs and schools to promote race equality. Schools are now required to:

- €# prepare a written statement of their policies for promoting race equality and act upon them;
- €# assess the impact of their policies on pupils, staff and parents from different racial groups, in particular the impact on attainment levels of these pupils; and
- €# monitor the operation of all the school's policies, in particular their impact on the attainment levels of pupils from different racial groups.

The fact that schools must comply with this duty should cause them to address bullying and racist behaviour. Ofsted will inspect schools' compliance with the RRAA as part of their regular inspections.

9.8 Education Otherwise than at School

Parents do have the option of educating their children at home. However, the education a child receives must be 'suitable education', that is efficient education suitable to the child's age, ability and aptitude and any special educational needs s/he may have.

If it appears to a LEA that a child of school age is not receiving suitable education at home it may serve the parents with a notice requiring them to satisfy the LEA that the child is receiving a satisfactory education.

If the LEA is not satisfied by the parents that the child is receiving a suitable education then it can serve the parents with a school attendance order requiring the parents to register a child at a named school. It is a criminal offence to fail to comply with a school attendance order and conviction in the magistrates' court is punishable by a fine.

Before deciding to prosecute the parents the LEA should consider whether it would be appropriate to take the alternative route of making an application in the family proceedings court for an education supervision order which would last one year and would enable a supervisor or education social worker to advise, assist and befriend and give directions to both the child and the parents.

9.9 Children Under School Age

LEAs also have a duty to secure sufficient provision in their area for nursery education. Children that have not had the benefit of any form of pre-school learning experience are at risk of underachievement. Gypsy and Traveller parents with 3 and 4 year-old children should contact their LEA or Traveller Education Support Service for details of the facilities and programmes available in their area. Traveller parents should ask about local Sure Start programmes that are designed to help transform the life chances of disadvantaged children under 4 years of age.

9.10 Guide to Good Practice

Gypsy and Traveller parents and their advisers should obtain a copy of the DfES Guide to Good Practice on the education of Traveller children – 'Aiming High: Raising the Achievement of Gypsy Traveller Pupils'.¹⁰¹ The Guide offers advice and practical assistance to everyone in the education system on action that can be taken to enable Gypsy and Traveller children to achieve their potential and, as such, it should prove a useful point of reference for Gypsy and Traveller parents in any case where a school or LEA takes a decision concerning the education of their children.

¹⁰¹ Contact DfES Publications: by post at PO Box 5050, Sherwood Park, Annesley, Nottingham, NG15 0DJ; by telephone on 0845 6022260; or by email at dfes@prolog.uk.com and by quoting the reference DfES/0443/2003.

10. Conclusion

The above outline of how the Gypsy and Traveller community have fared under British law since the Caravan Sites and Control of Development Act 1960 when local authorities were given power to close the commons to Travellers, reveals a catalogue of growing enforcement that has negatively impinged on their nomadic way of life. Sadly, the basic right to a decent home has not featured strongly in the decisions of policy makers since then. What provisions that have been made regarding accommodation have either been ignored or implemented half-heartedly. One day the treatment and experiences of the Gypsy and Traveller community may well be seen to rank alongside the persecution and assimilation meted out to those other great nomadic minorities such as the Aborigines, the Maori and the Native Americans.

Significantly, the Gypsy and Traveller community have themselves begun to engage in the political process. Gypsies, Irish Travellers and New Travellers have come together to form the Traveller Law Reform Coalition (the TLRC) and to put pressure on the Government to change its policy and provide for the needs of the community.

That pressure seems to have had some results. After seven years of relative inaction, there are now some indications that the Government may be taking this issue more seriously. It has been an incredibly busy time for the Traveller Law Reform Coalition and 2004 will go down as one of those key years like 1968 or 1994 for the Gypsy and Traveller community.¹⁰² A very important development has been the release of the report on Traveller accommodation 'Moving Forward' by the Institute for Public Policy Research (IPPR), an influential and Government favoured think tank. The report states there is an urgent need for the Government to address the shortage of authorised sites and to shift the issue away from criminalisation, public order and anti-social behaviour towards provision, equality and enforcement of rights. This combined with the recent interest and support shown by the Commission for Racial Equality (the CRE) for Gypsies and Travellers demonstrates that the difficulties facing their community are at last being mainstreamed in the equalities debate.

The TLRC has been working very closely with the IPPR and CRE. All three organisations are calling and campaigning for the Government to address the inequalities facing the Gypsy and Traveller community and the TLRC is working in particular with the CRE to see that the Housing Bill (which is presently making its way through Parliament) incorporates the accommodation needs of Gypsies and Travellers and places an explicit duty on local authorities to provide/facilitate Gypsy and Traveller accommodation.

¹⁰² In 1968 the Caravan Sites Act was introduced but in 1994 the duty on local authorities to provide accommodation for Gypsies and Travellers was repealed.

The Government has also indicated that the Planning and Compulsory Purchase Bill together with the publication of fresh planning guidance to local authorities to replace circular 1/94 will possibly lead to local authorities having to identify specific pieces of land for site development. The TLRC wishes to ensure that any new laws and policies are fair and effective and is closely monitoring the current proposals in order to try to prevent the Government pandering to those clamouring for more enforcement powers whilst introducing proposals for more sites that are so weak and flawed that they allow local authorities to escape any new duties expected of them.

The Government now has a great opportunity to actually get it's policy right and ensure that the Gypsy and Traveller community has a viable and sustainable future and is not forcibly assimilated into housing and effectively made to disappear from view.

If the Government fails to deliver a fair and effective mechanism to provide more sites for Gypsies and Travellers at a time when it is trumpeting policy initiatives such as 'Decent Homes For All' and 'Cohesive and Sustainable Communities', then its long tradition of championing the rights of minorities and the excluded will be tarnished and the very survival of their traditional way of life will surely be at stake.

At the same time as the Government is grappling with this issue the Gypsy and Traveller community are also beginning to learn the realities of political organisation; it is a difficult process for a minority that has experienced high levels of social exclusion and suffered low levels of educational achievement but is one that must be undertaken if the community is to effectively input into policy formulation and to ensure that the views of Gypsies and Travellers are taken into consideration by the Government.

Gypsies and Travellers are at the beginning of their ascent of the mountain they must climb in order to achieve their goal of securing their right to be able to live their traditional way of life in peace, but the courage and tenacity shown by those who have defended their traditional way of life by continuing to practice nomadism in spite of the obstructions and day to day hardships that they suffered clearly shows that they have the courage and strength to succeed.