

## **Romani mobilities in Europe** **Oxford University Conference**

### **Facilitating the Gypsy and Traveller way of life** **in England and Wales through the courts<sup>1</sup>**

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#### **Introduction**

This paper looks at the experience of nomadic Gypsies and Travellers in England and Wales, particularly since the repeal of the duty on certain local authorities to provide sites<sup>2</sup>.

In England, the July 2009 Gypsy/Traveller caravan count<sup>3</sup> showed a total of 17,437 caravans: 1537 of these (9%) were on unauthorised encampments<sup>4</sup>; 2192 of these (13%) were on unauthorised developments<sup>5</sup>.

In Wales, the July 2009 Gypsy/Traveller caravan count<sup>6</sup> showed a total of 767 caravans: 101 of these (13%) were on unauthorised encampments; 69 of these (9%) were on unauthorised developments.

This paper concentrates on how the law and the courts have dealt with the position of Gypsies and Travellers on unauthorised encampments. It should be pointed out that those on unauthorised developments may also be subject to eviction action from their own land if they do not ultimately obtain planning permission and may have to resort to unauthorised encampments.

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<sup>1</sup> Aside from those who we acknowledge in footnotes, we must also acknowledge David Watkinson of Garden Court Chambers and Alex Offer of Park Court Chambers whose ideas and arguments have assisted us in certain sections.

<sup>2</sup> Criminal Justice and Public Order Act 1994 section 80 repealed the duty which was contained in Caravan Sites Act 1968 section 6.

<sup>3</sup> Carried out by Communities and Local Government – see <http://www.communities.gov.uk/>

<sup>4</sup> Defined as encampments where the caravans are stationed on land without the consent or permission of the owner or occupier of that land.

<sup>5</sup> Defined as encampments on land owned by the Gypsies or Travellers themselves but without planning permission.

<sup>6</sup> Carried out by the Welsh Assembly Government – see <http://wales.gov.uk/>

Part 1 of this paper examines the position between 1994 and 2009 and is split into three sections:

- Section (a) looks at how the courts have insisted on local authorities' compliance with government guidance when deciding how to manage unauthorised encampments. The effective result has been that, if government guidance is not complied with or is ignored, Gypsies and Travellers may obtain the postponement of any eviction action.
- Section (b) looks at the potential use by such Gypsies and Travellers of the legislation that relates to homelessness. To date the law on homelessness has not greatly assisted in any attempt to defer evictions.
- Section (c) looks at the attempts (so far unsuccessful) to use article 8 of the European Convention on Human Rights<sup>7</sup> to defend eviction actions.

In contrast to what may be seen as the limited effectiveness of the law in facilitating the Gypsy and Traveller way of life as outlined in Part 1, Part 2 of this paper looks at the potential for a dramatic shift of emphasis in the future. This potential shift centres on a 'rights and proportionality' based approach to such situations. It is split into three sections -

- Whereas the law in England and Wales to date has tended to emphasise the absolute right of the landowner (more specifically the public landowner) to regain possession, section (a) looks at two cases from the distant and not so distant past that indicate an approach which weighs up the rights and obligations on both sides before deciding whether an order is justified. Both these cases have a constitutional basis.
- Section (b) analyses a Court of Appeal judgment from 1987 that may have resonance today.
- Section (c) brings us up to date and, by reference to the current legislative and policy position with regard to the provision of Gypsy and Traveller sites, argues that domestic courts ought now to adopt a 'rights and proportionality' based approach when determining whether to sanction eviction action taken by local authorities, having regard to: the jurisprudence of the European Court of Human Rights (ECtHR); and the logical link between homelessness and eviction.

Before embarking on this process, we should explain where the concept of 'facilitating the Gypsy [and Traveller] way of life' comes from.

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<sup>7</sup> The right to respect for private and family life and home.

In the case of *Chapman v UK*<sup>8</sup>, the Gypsy applicant unsuccessfully challenged the compliance of the United Kingdom planning legislation with her rights under article 8. Though her challenge was unsuccessful, the ECtHR made an important finding as to the duties involved:

*...the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in arriving at the decisions in particular cases...To this extent there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the Gypsy way of life...(para 96).*

In many ways this paper is an examination of how far, if at all, the United Kingdom government has succeeded in ensuring that such ‘special consideration’ takes place.

We do not suggest that private landowners have a role to play in facilitating the Gypsy and Traveller way of life unless, of course, they wish to do so. Rather, our focus is on central government and public landowners and, more specifically, upon the role of local authority landowners.

## **Part 1. The developments in the years 1994 to 2009**

### *Part 1 (a). Considerations of common humanity*

When the draconian eviction provisions in the Criminal Justice and Public Order Act (CJPOA) 1994 (given to the police by sections 61 and 62 and to local authorities by sections 77 and 78) were brought into force, the Government issued Department of the Environment (DoE) Circular 18/94 *Gypsies Sites Policy and Unauthorised Camping*. The Circular was described as giving guidance on the provisions in sections 77 to 80 of the CJPOA 1994.

The Circular emphasised the need for taking into account welfare considerations and for making welfare enquiries before deciding whether or not to evict an unauthorised encampment.

At para 6 it stated that:-

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<sup>8</sup> (2001) 33 EHRR 399.

*Whilst it is a matter for local discretion to decide whether it is appropriate to evict an unauthorised Gypsy encampment, the Secretary of State believes that local authorities should consider using their powers to do so wherever the Gypsies concerned are causing a level of nuisance which cannot be effectively controlled. They also consider that it will usually be legitimate for a local authority to exercise these powers wherever Gypsies who are camped unlawfully refuse to move onto an authorised local authority site.....*

At para 9 it is stated that:-

*The Secretary of State continues to consider that local authorities should not use their powers to evict Gypsies needlessly. He considers that local authorities should use their powers in a humane and compassionate way, taking account of the rights and needs of the Gypsies concerned, the owners of the land in question and the wider community whose lives may be affected by the situation.*

Paras 10 and 11 stress the obligations that local authorities have under the Children Act 1989 and under what was then part III of the Housing Act 1985 (now Part VII of the Housing Act 1996) with regard to homelessness as well as their duties as local education authorities.

At para 13 it is stated that:-

*Local authorities should also bear in mind that families camped unlawfully on land may need or may be receiving assistance from local health or welfare services.*

In Wales an equivalent Circular was issued (see Welsh Office Circular 76/94).

In *R v Lincolnshire County Council ex p Atkinson, Wealden District Council ex p Wales and Stratford*<sup>9</sup>, Sedley J (as he then was) made it clear that local authorities when considering the eviction of unauthorised encampments ought to comply with DoE Circular 18/94 (or Welsh Office Circular 76/94). Sedley J stated that:-

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<sup>9</sup> [1995] Admin LR 529.

*Detailed analysis of [passages from the Circular] and debate about what legal force, if any, an advisory circular of this kind possesses has been made unnecessary by the realistic concession of counsel for both local authorities that whether or not they were spelt out in a departmental circular the matters mentioned...would be material considerations in the public law sense that to overlook them in the exercise of a local authority's powers under sections 77 to 79 of the Act of 1994 would be to leave relevant matters out of account and so jeopardise the validity of any consequent step. The concession is rightly made because those considerations in the material paragraphs which are not statutory are considerations of common humanity, none of which can be properly ignored when dealing with one of the most fundamental needs, the need for shelter with at least a modicum of security (at 535).*

### *Subsequent Government Guidance*

The position was further clarified in October 1998 by the publication of the Department of the Environment Transport and the Regions (DETR)/Home Office *Good Practice Guide, Managing Unauthorised Camping* which made clear that local authorities should take into account welfare issues, regardless of the method of eviction being contemplated<sup>10</sup>.

In 2004 the Office of the Deputy Prime Minister issued *Guidance on Managing Unauthorised Camping* (hereafter 'the 2004 Guidance')<sup>11</sup>.

At para 5.7 of the 2004 Guidance it is stated that:-

*Local Authorities may have obligations towards 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.*

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<sup>10</sup> The 1998 Guidance has since been superseded.

<sup>11</sup> The Welsh Assembly Government/Home Office issued Guidance in January 2005, namely *Guidance on Managing Unauthorised Camping*. The Welsh Guidance is extremely similar to the 2004 Guidance.

At para 5.8 it is stated that:-

*The Human Rights Act (HRA) applies to all public authorities including local authorities...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.....*

At para 5.9 it is stated that:-

*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<sup>12</sup>*

The 2004 Guidance makes it clear that the carrying out of welfare enquiries is not just a mere formality but must then lead on to proper consideration of any issues that are raised. For example, it is stated at para 5.12 that:-

*To collect initial information from unauthorised campers on any perceived welfare, health or educational needs....is the starting point for liaison with other relevant departments. Where school-age children are present, the Traveller Education Service should be notified. Similarly, social services or health authorities should be notified where there seems to be social, welfare or health needs to be further assessed and met.*

At para 5.19 it is stated that:-

*Decisions about what action to take in connection with an unauthorised encampment must be made in the light of information gathered.*

Again at para 5.20 it is stated that:-

*Any welfare needs of unauthorised campers are a material consideration for local authorities when deciding whether to start eviction proceedings or to allow the encampment to remain longer.*

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<sup>12</sup> Indeed the Guidance, as is apparent here, makes it clear that all public authorities and not just local authorities must take account of welfare enquiries and this includes the police as well. This is also backed up by case law see, for example *R v Metropolitan Police ex p Small*, Crown Office, August 27<sup>th</sup> 1998 (unreported); *R (Kanssen) v Secretary of State for the Environment, Food and Rural Affairs* [2005] EWHC 1024 Admin, [2005] EWCA Civ 1453.

The 2004 Guidance has been supplemented by further Guidance from the ODPM/Home Office, namely the *Guide to Effective Use of Enforcement Powers – Part 1: Unauthorised Encampments* (hereafter the 2006 Guidance)<sup>13</sup>.

At para 65 of the 2006 Guidance it is stated that:-

*Local authority officers should conduct thorough welfare enquiries when a new encampment of Gypsies and Travellers arrives in the area. Where pressing needs for particular services are identified as part of the local authority's enquiries, relevant departments or external agencies should be contacted in order to meet these needs as appropriate (health services, social services, housing departments and so on).*

The 2006 Guidance continues at para 66:-

*If necessary, removal of the encampment could be delayed while urgent welfare needs are addressed (unless... the site which the unauthorised campers are using is particularly sensitive or hazardous, in which case the unauthorised campers should be asked to relocate to a more appropriate location in the vicinity).*

Thus, Government Guidance makes it clear that welfare enquiries must be made and humanitarian considerations taken into account regardless of what type of eviction process is being used, a point which has been confirmed by the courts.

For example, in *R (Ward) v Hillingdon BC*<sup>14</sup>, Stanley Burton J (at 460) stated:-

*[A] local authority considering exercising its powers to evict travellers...from an unauthorised encampment must not act in an uninformed, precipitate or inconsiderate manner. It must make adequate enquiries to elicit relevant information, including the number, age, health and needs of the travellers concerned and make its decision having properly taken that information into account. The Guidance expressly envisages that there will be circumstances in which a local authority may properly decide not to evict travellers from an unauthorised encampment.*

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<sup>13</sup> At the moment there is no further supplementary guidance for Wales.

<sup>14</sup> [2001] LGR 457.

### *Postponement of eviction*

A local authority's failure to carry out welfare enquiries before deciding whether to evict an encampment and its failure to take account of matters that are raised by those enquiries may well lead to a decision being quashed by the courts on the basis that it is *Wednesbury* unreasonable<sup>15</sup> and the deferment of any eviction action so that such enquiries can be undertaken and a fresh decision can be made.

Such decisions may also be susceptible to challenge and eviction action postponed if a local authority has failed to consider whether a site should be 'tolerated' and whether there are alternative locations to which Gypsies and Travellers could move. In *R (Casey and Others) v Crawley Borough Council and the ODPM*<sup>16</sup> Burton J framed three options that are available to local authorities in such situations:-

- i) To seek and obtain possession of the site in question (Option 1);
- ii) To tolerate the Gypsies or Travellers, if only for a short time, until an alternative site could be found (Option 2);
- iii) To find an alternative site, if only on a temporary basis, and offer the Gypsies and Travellers concerned a move to it (Option 3).

### *Part 1(b). The rat-infested barn*

In this context, how, if at all, has the homelessness legislation assisted Gypsies and Travellers living on unauthorised encampments?

For a very long time there seems to have been a general assumption that the 'accommodation' which local authorities might have to provide under modern homelessness legislation<sup>17</sup> would be 'conventional housing' (or 'bricks and mortar'). It was only relatively recently that that assumption was challenged.

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<sup>15</sup> See *Associated Provincial Picture Houses v Wednesbury Corporation* [1947] 2 All ER 680, CA. *Wednesbury* unreasonableness involves a public authority acting in a way in which no reasonable public authority could act – quite a high hurdle to cross.

<sup>16</sup> [2006] EWHC 301 Admin.

<sup>17</sup> See: National Assistance Act 1948 s21; Housing (Homeless Persons) Act 1977 s6; Housing Act 1985 s69; and Housing Act 1996 s193 – the latter being the current version of the legislation.

### *The caravan as accommodation*

The latest version of the homelessness legislation (in the form of Housing Act 1996 Part VII) contains a specific provision designed for those who are nomadic. Thus, a person is homeless if s/he has accommodation but it consists of a moveable structure, vehicle or vessel designed or adapted for human habitation and there is no place where s/he is entitled or permitted both to place it and reside in it.<sup>18</sup> Put another way, for a Gypsy or Traveller **not** to be homeless they need the combination of a 'caravan' plus an 'authorised pitch'.<sup>19</sup> Accordingly, it might be supposed that, if a homeless applicant living on a caravan on an unauthorised encampment is owed a duty to be provided with suitable accommodation then that duty should be met by the provision of an authorised pitch. Unfortunately, caselaw has not so far led to this result.<sup>20</sup>

### *Suitable accommodation*

The suitability requirements of the Housing Act 1996<sup>21</sup> are applicable to the provision of both temporary and 'permanent' accommodation. When determining what constitutes 'suitable accommodation', a local authority must have regard to the slum clearance and overcrowding provisions of the Housing Act 1985 and to Housing Act 2004 Parts I-IV (housing conditions and control of houses in multiple occupation)<sup>22</sup>. In deciding the question of suitability, the local authority must consider the individual needs of the applicant and his/her family, including needs as to work, education and health.<sup>23</sup>

In recent years it has been argued in a number of cases that 'suitable accommodation' for a homeless Gypsy or Traveller with a cultural aversion to conventional housing ought not to be bricks and mortar but an authorised pitch where s/he could place his/her caravan.

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<sup>18</sup> Housing Act 1996 s175(2)(b).

<sup>19</sup> This is to slightly simplify the matter – the meaning of 'entitled **or permitted**' is controversial – see Johnson & Willers, eds, *Gypsy & Traveller Law* Legal Action 2<sup>nd</sup> edition 2007 Chapter 6 for further discussion on the point.

<sup>20</sup> The problem may lie in the total lack of any statutory definition of 'accommodation' – aside from the question of 'suitability' – and may perhaps point to a need for legislative intervention.

<sup>21</sup> Housing Act 1996 ss206(1) and 210(1).

<sup>22</sup> For a detailed discussion of the question of suitability, see Arden, Hunter & Johnson, eds, *Homelessness and Allocations*, Legal Action 7<sup>th</sup> edition 2006, Chapter 10.

<sup>23</sup> See, for example, *R v Newham LBC ex p Sacupima* [2001] 33 HLR 1. Interestingly, in *R v Southampton CC ex p Ward* [1984] 14 HLR 114, the offer of a pitch, on a caravan site which a social worker described as being in appalling condition, was nonetheless held to be a sufficient discharge of the temporary duty having regard to the family's need to have a pitch as opposed to conventional housing.

### *Cultural aversion to conventional housing*

The concept of ‘cultural aversion to conventional housing’ first appeared in a planning case, *Clarke v Secretary of State for the Environment, Transport and the Regions*.<sup>24</sup> The High Court (in a judgment later upheld by the Court of Appeal) overturned the decision of a Planning Inspector who had refused planning permission to Mr Clarke, a Romani Gypsy, in circumstances where the Inspector had taken into account a previous offer from the local authority of conventional housing. Burton J concluded that, if a cultural aversion to conventional housing was established, such an offer would be unsuitable “*just as would be the offer of a rat-infested barn*” (at para 34).

The concept was then applied in the homelessness case of *R (Price) v Carmarthenshire CC*.<sup>25</sup> Mrs Price and her family are Irish Travellers and they were homeless since they were living on an unauthorised encampment on land owned by the County Council. They made a homelessness application to the latter. A few years earlier Mrs Price had made an enquiry about conventional housing. She later explained that this was solely because of pressure from a local authority officer and that she had had no intention of moving into or accepting such accommodation.

The County Council had regard to the *Clarke* judgment but concluded that Mrs Price did not have a cultural aversion to conventional housing since she had made an earlier enquiry about conventional housing, her mother lived in bricks and mortar and her sister (who travelled with her) had previously lived in conventional housing for a short period of time. The Council offered Mrs Price bricks and mortar housing which she duly refused. The Council then sought to evict her from the unauthorised encampment on its land.

Quashing that decision to evict, Newman J stated 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 Court in Chapman<sup>26</sup> 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* (at para 19).

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<sup>24</sup> [2002] JPL 552.

<sup>25</sup> [2003] EWHC 42 (Admin).

<sup>26</sup> *Chapman v UK* (2001) 33 EHRR 399, European Court of Human Rights.

Newman J felt that the approach of the County Council was flawed because it had given too much weight to Mrs Price's earlier enquiry about housing and had used this as sufficient reason for disregarding her Gypsy way of life altogether when considering her needs. However, whilst her cultural commitment was a significant factor in this process, he also found that the County Council was not duty bound to find her a pitch.

Subsequent cases have indicated that, whilst local authorities must clearly use their best endeavours to try and obtain a pitch for a homeless Gypsy or Traveller with a cultural aversion to conventional housing<sup>27</sup>, if they cannot succeed in that process then conventional housing may have to be offered in discharge of the local authority's duty to accommodate. Thus, Leanne Codona (a Romani Gypsy with what was accepted by all parties as a most extreme cultural aversion to conventional housing) failed in her attempt to challenge an offer of bed and breakfast accommodation before the Court of Appeal<sup>28</sup> and in the county court when she tried to challenge a 'permanent' offer of conventional housing.<sup>29</sup>

Following the dismissal of her appeal to the Court of Appeal, Ms Codona made an application to the ECtHR. The Court found her application inadmissible<sup>30</sup> and in doing so stated:

*Following Chapman the Court does not rule out that, in principle, Article 8<sup>31</sup> could impose a positive obligation on the authorities to provide accommodation for a homeless gypsy which is such that it facilitates their 'gypsy way of life'. However, it considers that this obligation could only arise where the authorities had such accommodation at their disposal and were making a choice between offering such accommodation or accommodation which was not 'suitable' for the cultural needs of a gypsy. In the instant case, however, it appears to be common ground that there were, in fact, no sites available upon which the applicant could lawfully place her caravan. In the premises, the Court cannot conclude that the authorities were then under a positive obligation to create such a site for the applicant (and her extended family).*

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<sup>27</sup> It should be pointed out that a New Traveller may well have an 'aversion to conventional housing'. There are now at least one generation of New Travellers who were, in fact, born on the road and who have never lived in conventional housing.

<sup>28</sup> *Codona v Mid-Bedfordshire DC* [2005] HLR 1.

<sup>29</sup> *Codona v Mid-Bedfordshire DC* Luton County Court, March 20<sup>th</sup> 2006, HHJ Farnworth.

<sup>30</sup> *Codona v UK App* no 485/05.

<sup>31</sup> The right to respect for private and family life and home.

Following the *Price* judgment, Communities and Local Government amended the [English] Homelessness Code of Guidance for Local Authorities<sup>32</sup>. At para 16.38 the amended Code states that:

*Where a duty to secure accommodation [for a Gypsy or Traveller] arises but an appropriate site is not immediately available, the housing authority may need to provide an alternative temporary solution until a suitable site or some other suitable option, becomes available. Some Gypsies and Travellers may have a cultural aversion to the prospect of 'bricks and mortar' accommodation. In such cases, the authority should seek to provide an alternative solution.*<sup>33</sup>

The Code seems to require local authorities to take greater steps than those required by the courts in the cases brought by Ms Codona, holding out the possibility of what many representatives of Gypsies and Travellers had long argued for – the imaginative use of temporary ‘tolerated’ sites, even if such sites do not have planning permission.

The point has not yet been conclusively decided. However, in the recent case of *Lee v Rhondda Cynon Taf BC*<sup>34</sup> the Court of Appeal did consider whether local authorities should be expected to make suitable provision by acquiring and/or developing alternative sites. Once again the Gypsy applicant had refused an offer of conventional housing largely on the basis of cultural aversion. Significantly, the applicant had previously indicated an interest in conventional housing and had not put any psychological or psychiatric evidence to support her aversion before the court.

In dismissing her appeal, Longmore LJ (giving the leading judgment) stated:

*Mr Knafler [counsel for Ms Lee] submits that [the consideration by the local authority of her position as a Gypsy] was not lawful or adequate because [the local authority] did not consider whether they should acquire an alternative site. That however seems to me to be, in the context of a homelessness application, wrong...Homelessness applications are expected to be determined within a short timeframe, ideally at least within 33 days of an acceptance of a requisite duty. If a new site is to be acquired for stationing a caravan for residential purposes, that will usually*

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<sup>32</sup> With effect from September 2<sup>nd</sup> 2006.

<sup>33</sup> See also the CLG *Gypsy and Traveller Site Management Good Practice Guide* (July 2009) which gives as an example of accommodation need ‘people who have a genuine need for caravan site accommodation based on an aversion to bricks and mortar housing’ (p29).

<sup>34</sup> [2008] EWCA Civ 1013, July 16<sup>th</sup> 2008.

*mean a new use which will typically require planning permission. That will require determination by the local authority planning committee, especially if it means a departure from the local development plan...After all that, land would have to be bought if it is not already owned by the local authority itself. All this is, in my judgment, inconsistent with the manner in which homelessness applications are expected to be dealt with by the housing department, and especially since they are expected to be dealt with with a degree of promptness. As, moreover, the Recorder himself observed, that is really inconsistent with the law as laid down by Price and Codona, to the effect that bricks and mortar accommodation is at any rate capable of being suitable accommodation even for a gypsy (para 16).*

That said, Longmore LJ did go on to express the following view:

*All that is not to say that there might not be unusual circumstances in which a local housing authority might be expected to do more than consider availability and sites within their area. If, for example, there was a question of an applicant being at risk of suffering psychiatric harm, it might well be that the local authority should take that consideration into account, specifically in deciding what, or what further enquiries, they should make. In the present case, however, there is no risk of any such psychiatric harm (para 17).*

### *The deferment of the eviction of a homeless Gypsy or Traveller*

Caselaw to date indicates that a homeless Gypsy or Traveller with an aversion to conventional housing will not necessarily have to be provided with a pitch. This is despite the fact that the *Lee* judgment does suggest that proof of psychiatric harm may mean that a different solution might be required.

What then of the possibility of arguing for postponement of an eviction, where the homeless Gypsy or Traveller concerned is camped on a piece of land (without authorisation) which is in the ownership of the same local authority to which s/he has made a homeless application? To date, the courts have fought shy of making any such link. Thus, in *Stokes v London Borough of Brent*<sup>35</sup> (a case involving an appeal by an Irish Traveller against a possession order made in circumstances where she was squatting on a pitch on a local authority site), King J stated:

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<sup>35</sup> [2009] EWHC 1426.

*...I have to say that many of the submissions made to me on behalf of the Appellant appeared premature and more apposite to a challenge to a homelessness decision of the Respondent...wearing a hat different from that worn in the present proceedings (at para 51).*

Part 1 (c). Using article 8 as a defence to eviction proceedings.

Article 8 states:

- 1. Everyone has the right to respect for his private and family life, his home and correspondence.*
- 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

To date attempts made in the domestic UK courts by those faced with eviction by public authority claimants to raise article 8 as a defence to possession proceedings have failed.

Currently, the leading authority on the matter is the House of Lords case of *Doherty v Birmingham City Council*<sup>36</sup>. Mr Doherty is an Irish Traveller living on a local authority site. He and his family have been resident since being granted a licence in 1987. In 2004 Birmingham served a notice to quit and, on its expiry, commenced proceedings for possession asserting an absolute right to possession.

Mr Doherty defended on the basis that his article 8 rights were engaged and that an order for possession would not be proportionate following *Connors v UK*<sup>37</sup>, the only distinction between the two cases being that Mr Doherty was not accused of anti-social behaviour.

HHJ McKenna gave summary judgment for Birmingham, holding himself bound by the decision in *Harrow LBC v Qazi*<sup>38</sup>, but granted a stay of execution and certified the case as suitable for an appeal direct to the

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<sup>36</sup> [2008] 3 WLR 636.

<sup>37</sup> (2005) 40 EHRR 9, a case in which the ECtHR concluded that there had been a violation of the rights protected by article 8 in circumstances where the legislation governing the occupation of local authority run Gypsy sites did not give occupants the right to defend possession proceedings brought against them.

<sup>38</sup> [2004] 1 AC 983.

House of Lords. The Lords declined to hear the appeal, indicating that the case could be decided by the Court of Appeal following the Lords decision in the then pending case of *Kay v Lambeth LBC*<sup>39</sup>. The Court of Appeal, attempting to apply the *Kay* decision, upheld the order for summary judgment. Mr Doherty appealed to the House of Lords who set aside the possession order and have now remitted the case to the county court. Mr Doherty and his family, at the date of this paper, remain in occupation.

The *Doherty* decision, like that in *Kay* before it, is complex. Put shortly, their Lordships held that Mr Doherty did have the right to challenge the local authority's decision to seek possession on "judicial review" grounds and so the case has been remitted for a "review" of Birmingham's decision to serve a notice to quit and for the judge to determine whether its decision to terminate the licence was "reasonable". In addition the Lords unanimously held: (a) that such judicial review style challenges should be brought, not in the Administrative Court, but as part of the possession proceedings in the county court; and (b) that factual disputes between the parties in such proceedings should be resolved by the first instance judge calling and hearing evidence.

Thus, in future cases Gypsies and Travellers may be able to challenge a decision to evict on the basis that the decision was either "arbitrary, unreasonable, or disproportionate" (per Lord Hope, paragraph 21).

If this type of judicial review is to provide, as their Lordships suggest it does, sufficient protection for the occupier's Convention rights, it must be something more than a traditional *Wednesbury* review. There is support in the judgment for both the application of a proportionality test and for a lesser "anxious scrutiny" test. Whilst in some cases there may be little practical difference between the answers reached by the application of either test, in others their application may produce different results. Moreover, it has to be said that the House of Lords judgment in *Doherty* conflicts with recent decisions of the ECtHR in which it has been held that occupiers ought to be entitled to have the proportionality of eviction proceedings brought against them examined by a court<sup>40</sup>. We will return to this conflict below.

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<sup>39</sup> [2006] 2 AC 465.

<sup>40</sup> A situation described by a leading practitioner in the field, Richard Drabble QC, in his keynote speech to the Housing Law Practitioners' Association's Housing Law Conference on December 15<sup>th</sup> 2009, as "a mess".

## **Part 2. A rights and proportionality based approach.**

### *Part 2(a). Lessons from the past – other jurisdictions and other times*

It may seem strange to start with a case that is 140 years old but the principle of application of rights contained therein remains entirely relevant today.

In the case of *Standing Bear v Crook*<sup>41</sup>, Standing Bear, Chief of the Poncas Tribe, attempted to avoid being forced onto a reservation by arguing that an American Indian was a “person” within the US Constitution. Judge Dundy decided in favour of Standing Bear, stating:-

*[The Poncas] are amongst the most peaceable and friendly of all the Indian Tribes.....If they could be removed to [the reservation] by force, and kept there in the same way, I can see no reason why they might not be taken and kept by force in [any jail]....I cannot think that any such arbitrary authority exists in this country (at p700).*

To bring that concept of application of rights more up to date (albeit still not in the UK courts) and to introduce a situation where rights on both sides are weighed in the balance, reference can be made to a leading judgment of the South African Constitutional Court. The case is *Port Elizabeth Municipality v Various Occupiers*<sup>42</sup>. The judgment was given by that renowned Judge, Mr Justice Albie Sachs.

In the *Port Elizabeth* case, some 68 people, including 23 children, occupied 29 shacks which they had erected on privately owned land. Some 1600 people, including the owners of the property, petitioned the Port Elizabeth Municipality. As a result, the Municipality sought an eviction order. After various appeals the matter came before the Constitutional Court.

Referring to the South African Bill of Rights, Mr Justice Sachs stated that the relevant section of the Bill of Rights:-

*.....evinces special constitutional regard for a person’s place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often if will be the only relatively secure space of privacy and*

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<sup>41</sup> (1879) 25 Fed. Cas 695.

<sup>42</sup> [2004] ZACC 7.

*tranquillity in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for the one that has established itself on a site that has become its familiar habitat (at para 17).*

In this case, Mr Justice Sachs pointed out that:-

*.....one is dealing with two diametrically opposed fundamental interests. On the one hand there is the traditional real right inherent in ownership reserving exclusive use and protection of property by the landowner. On the other hand there is the genuine despair of people in dire need of adequate accommodation.*

He concluded that:-

*.....in the light of the lengthy period during which the occupiers have lived on the land in question, the fact that there is no evidence that either the Municipality or the owners of the land need to evict the occupiers in order to put the land to some other productive use, the absence of any significant attempts by the Municipality to listen to and consider the problems of this particular group of occupiers, and the fact that this is a relatively small group of people who appear to be genuinely homeless and in need, I am not persuaded that it is just and equitable to order the eviction of the occupiers (para 59).<sup>43</sup>*

Thus, having carried out the necessary balancing exercise, Sachs J dismissed the claim for a possession order.

*Part 2(b). Local lessons from the past*

Back in 1987 in *West Glamorgan County Council – v – Rafferty, R – v – Secretary of State for Wales ex parte Gihaney*<sup>44</sup> the Court of Appeal carried out a similar exercise in a case concerning the eviction of a Gypsy family from land owned by a County Council, which had itself been in breach of its duty under the Caravan Sites Act 1968 section 6 to exercise its statutory powers in order to provide adequate accommodation “*for gipsies residing in or resorting to [its] area*”.

The County Council had made unsuccessful attempts since the introduction of the duty in 1970 to provide such accommodation. In July 1985 a Council-owned site forming part of an industrial re-development

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<sup>43</sup> For an article on the *Port Elizabeth* case, see *A Compelling Judgment*, Nic Madge, *Legal Action* March 2006 page 21.

<sup>44</sup> [1987] 1 All ER 1005.

area was occupied by Gypsies whose presence on the site was alleged to cause nuisance and damage to neighbouring occupiers and was alleged to inhibit the letting of vacant factories on the site. The Council resolved to institute proceedings to evict the Gypsies from the site because it intended to call for tenders for the re-development of the site and because they were concerned about the nuisance and damage being caused to neighbouring occupiers. The Council considered that it would set a bad example if it were seen to be tolerating trespassers on its land for a long period of time. The Council did not offer alternative accommodation to the Gypsies or consider whether the Gypsies might remain on a different part of the land until alternative temporary accommodation might be found for them.

The Gypsies challenged the possession action that was taken against them and the Court of Appeal quashed the County Council's decision to seek their eviction.

When delivering the lead judgment Ralph Gibson LJ stated as follows:-

*....[A]s to the gipsies being trespassers, it is probable in my judgment that as to many of them their presence on this site as trespassers was caused directly by the long-continued breach of duty of the county council; and the 'badness of the example', if trespassers were seen to be immune, is not, I think, any worse than that provided to the community if the county council is seen, while in clear breach of its statutory duty to provide accommodation for the gipsies in the area, to be evicting the gipsies from a site of this nature without provision of any alternative accommodation....*

*The reasonable council in the view of the law is required to recognise its own breach of legal duty for what it is and to recognise the consequences of that breach of legal duty for what they are. The reasonable council, accordingly, was not in my judgment free to treat the interference with the intended reclamation and redevelopment of this site, for such period of time as would have resulted from the holding up of complete eviction from the entire site while temporary accommodation was provided elsewhere, as outweighing the effects of eviction on the gipsies then present and on those to whom the impact of trespassing by gipsies would necessarily be transferred. The decision is only explicable to me as one made by a council which was either not thinking of its powers and duties under law or was by some error mistaken as to the nature and extent of those powers and duties....*

*It seems to me that the unreasonableness of the decision to evict without any attempt or intention to provide or to direct the gipsies to alternative accommodation is explained by, and probably sprang from, the mistaken view held by the county clerk that there was nothing more to his knowledge that the county council could reasonably do in discharge of their statutory duty. That view was, in my judgment, wrong. It remained the duty of the county council to make provision for the accommodation of gipsies by use of their powers under the 1960 Act. It has not been disputed in this court that they could have used their powers to provide temporary accommodation.*

Once again, but this time in a domestic context, the possession order was refused.<sup>45</sup>

### Part 2(c). A vision of the future

We believe that the time has come for the courts to adopt the approach taken by the Court of Appeal in the *Rafferty* case once again, and that decisions to evict Gypsies and Travellers from local authority land in circumstances where there is no alternative site ought only to be sanctioned in circumstances where nuisance or obstruction is being caused.

Whilst local authorities no longer have a duty to provide adequate accommodation “*for gipsies residing in or resorting to [their] area*”, current Government planning policy stipulates that local authorities must produce Development Plan Documents which will identify locations for Gypsy/Traveller sites<sup>46</sup> and we would argue that the position is little

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<sup>45</sup> And see the article by Luke Clements, (2002) *Dirty Gypsies- ex turpi causa and human rights*, Human Rights, December 2002, pp204-212, London, Jordans: *What is required, therefore, is that courts re-evaluate their attitude to powerless and socially excluded people...Public policy can be anti-social when viewed from the perspective of a minority and the proportionality of such policy is a legitimate question for the administrative court. A policy and regulatory framework that effectively coerces one third of Gypsies to abandon their traditional way of life is (not to mince one's words) 'an affront to the civilised values of our society' [per Steyn LJ in R v Gillingham BC ex p Smith [1994] JPEL B5].*

<sup>46</sup> Office of the Deputy Prime Minister Circular 01/2006 *Planning for Gypsy and Traveller Caravan Sites* (February 2006) and Welsh Assembly Government Circular 30/2007 refers. It should also be noted that if local authorities fail to identify locations, the Government has the power to step in and use its default powers (see Planning and Compulsory Purchase Act 2004 section 15(4)).

different from that which existed at the time when the *Rafferty* case was decided.

Additionally (as discussed above) local authorities have duties under the homelessness legislation (Housing Act 1996 Part VII) and, in a case where a local authority has a duty to accommodate a homeless Gypsy or Traveller camped on its land, then we would question the logic of seeking eviction save in circumstances where nuisance or obstruction is being caused.

We consider that the approach taken in future by our domestic UK courts is likely to be heavily influenced by the ECtHR's position on the use of article 8 as a defence to possession proceedings. There have been a number of cases before the ECtHR in recent years in which it has been held that the failure to permit a defendant to possession proceedings (brought by a public authority with an absolute right to possession under the relevant domestic legislation) the ability to challenge the proportionality of interference with rights protected by article 8 amounted to a violation of the Convention. To take just one case at random, in *Cosic v Croatia*<sup>47</sup> the ECtHR stated that:

*...the loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his or her right of occupation has come to an end (at para 22).*<sup>48</sup>

Several of the petitioners involved in the House of Lords case of *Kay* have applied to the ECtHR. Significantly, the Court has posed one question to the parties<sup>49</sup>:

*Did the applicants have the opportunity to have the proportionality of their evictions determined by an independent tribunal in light of the relevant principles under Article 8.*

The short answer must be 'no'. In our view it can only be a matter of time before domestic UK courts bow to the pressure of recent ECtHR judgments and finally accept that defendants must be entitled to advance

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<sup>47</sup> App. No. 28261/06 January 15<sup>th</sup> 2009.

<sup>48</sup> The Republic of Ireland has accepted this logic in eviction cases –see, to take just one example, *Dublin City Council v Gallagher* [2008] IEHC 354.

<sup>49</sup> App. No. 37341/06, posed by the Court on October 17<sup>th</sup> 2008.

article 8 as a defence to eviction proceedings and to test the proportionality of a decision to evict them from publicly owned land.

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