

## **Supporting legal action related to COVID-19 with regard to Gypsies and Travellers: Evictions from and service provision to unauthorised encampments**

Chris Johnson | 22 February 2021

### **Introduction**

1. The Travellers Advice Team (TAT) at Community Law Partnership (CLP) have been instructed by Friends, Families and Travellers to produce a document containing legal advice on the situation of Gypsies and Travellers on unauthorised encampments during the period of the COVID-19 pandemic and especially during the period of lockdown. The objective of this project is to alleviate the hardship experienced by some of the most marginalised Gypsies and Travellers who live on roadside encampments, helping families to realise their right to access basic amenities in a safe stopping place, which is ever more pressing in the face of the pandemic.
2. Lockdown was first announced in the United Kingdom by the Prime Minister on 23 March 2020. Recently lockdown has been eased though some local lockdowns have also recently been brought into force. The Cabinet Office Guidance *Staying alert and safe (social distancing)* (updated 31 July 2020) states:

*You should continue to avoid close contact and remain socially distant from anyone you do not live with or who is not in your support bubble...you should wash your hands regularly and wear a face covering in enclosed public spaces where social distancing is difficult and there are people you do not normally meet.*

3. The Public Health England Guidance *Stay at Home: Guidance for households with possible or confirmed coronavirus (COVID-19) infection* (updated 31 July 2020) states:

*If you have symptoms of COVID-19 however mild, you must self-isolate for at least 10 days from when your symptoms started. You should arrange to have a test to see if you have COVID-19...*

*If you are not experiencing symptoms but have tested positive for COVID-19 you also must self-isolate for at least 10 days, starting from the day the test was taken. If you develop symptoms during this isolation period, you must re-start your 10-day isolation from the day you develop symptoms...*

*If you live with others, all other household members must stay at home and not leave the house for 14 days. The 14-day period starts from the day when the first person in the household became ill or if they do not have symptoms, from the day their test was taken...*

*Reduce the spread of infection in your home by washing your hands regularly for 20 seconds using soap and water, or use hand sanitiser...*

4. The Public Health England Guidance *Guidance on shielding and protecting people who are clinically extremely vulnerable from COVID-19* (updated 31 July 2020) states:

*If you're clinically extremely vulnerable you were advised to take extra precautions during the peak of the pandemic in England. This is known as 'shielding'. The Government is advising that you do not need to shield at the moment. This is because the rates of transmission of coronavirus...in the community have fallen significantly. There is specific guidance on what will happen if there is a lockdown in your local area.*

5. Previous restrictions on travelling within the UK unless the travel was essential have been currently lifted.
6. The Count of Traveller Caravans by the Ministry of Housing, Communities and Local Government (MHCLG) in July 2019 showed 2047 caravans on unauthorised developments on land owned by Travellers and 1035 caravans on land not owned by Travellers. Thus 13% of the population of Gypsies and Travellers who live in caravans were on unauthorised land. The January 2020 count for England showed 2049 caravans on unauthorised developments on land owned by Travellers and 694 caravans on unauthorised encampments on land not owned by Travellers. At this time 12% of Gypsies and Travellers who live in caravans were on unauthorised land. With regard to unauthorised encampments, it is noted that less Gypsies and Travellers will be travelling during the winter months.
7. The Traveller Caravan Count has frequently been criticised as usually providing an under-estimate of the correct figures (see *Niner Counting Gypsies and Travellers: A Review of the Gypsy Caravan System* (Office of the Deputy Prime Minister, 2004).

## **The Health of Gypsies and Travellers**

8. Gypsy and Traveller communities face some of the most severe health inequalities and poor life outcomes amongst the United Kingdom population, even when compared with other excluded groups and with other ethnic minorities (Parry et al *Health Status of Gypsies and Travellers in England*, 2007). Gypsies and Travellers report the highest levels of perinatal infant mortality of all ethnic minorities in Britain (Friends, Families and Travellers *Annual Report 2010-2011*). 42% of Gypsies and Travellers have a long-term illness, compared to 18% of the general population (Parry 2007). Gypsies and Travellers are three times more likely to have a chronic cough or bronchitis, even after smoking is taken into account (Parry 2004). 22% of Gypsies and Travellers reported suffering from asthma and 34% reported chest pain (compared to 5% and 22% respectively of the general population) (Parry 2004).
9. The life expectancy of Gypsies and Travellers has been estimated to be between 10 and 12 years less than the general population (Lane et al *Gypsy, Traveller and Roma: Experts by Experience*, 2014). Gypsies and Travellers suffer from poorer health at a younger age – the majority of respondents to a recent study said their health to be bad or very bad by the time they were in their mid to late 30's

(Inclusion Health and the Traveller Movement *Impact of Insecure Accommodation and the Living Environment on Gypsies' and Travellers' Health*, 2016).

10. It can be seen from the above statistics that, as a result of these pre-existing health inequalities, combined with poverty, overcrowding and historic issues related to accommodation, Gypsy and Traveller communities are at a higher risk of being infected by COVID-19 and are at a greater risk of severe outcomes as a result of contracting COVID-19.
11. At the time of full lockdown in the UK, Gypsies and Travellers who had no alternative but to resort to unauthorised encampments (due to the lack of site provision) had very obviously faced grave difficulties with regard to the requirement (at that time) not to travel unless it was essential and to practise social distancing and regular hand washing. Given the severe health problems of many in the Gypsy and Traveller community, many of the community needed to either shield or carry out self-isolation. Under pressure from Gypsy and Traveller organisations and others, MHCLG eventually produced a letter to local authorities in England on *Mitigating Impacts on Gypsy and Traveller Communities* (the letter is undated but was produced in April 2020)<sup>1</sup>.
12. Though restrictions on travel have been eased and though the guidance on shielding has at the moment been lifted, social distancing and the need for good hygiene remain paramount. Additionally there are currently local lockdowns in place and there is a real possibility that not only will there be more local lockdowns, given a rise in the rate of the virus in various areas, but that a national lockdown could return.
13. This situation has led to urgent consideration by Gypsy and Traveller organisations and by lawyers advising Gypsies and Travellers of the legal position with regard to evictions from unauthorised encampments and with regard to service provision to such encampments. This urgent consideration has not only brought about a focus on the legal position on these subjects during this pandemic but also led to an examination of developing legal issues around these subjects, which developing issues are likely to have long-term repercussions beyond the end of the pandemic. However, these developing legal discussions are threatened by the current direction of travel of the UK Government in terms of proposals as to the criminalisation of trespass (see further below).

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<sup>1</sup> <https://www.gypsy-traveller.org/wp-content/uploads/2020/04/COVID-19-MITIGATING-IMPACTS-ON-GYPSY-TRAVELLER-COMMUNITIES.pdf>

## Evictions from Unauthorised Encampments<sup>2</sup>

### 3(a) Introduction

14. The Criminal Justice and Public Order Act (CJPOA) 1994 brought in draconian new powers of eviction. Ever since then government guidance with regard to evictions has been extremely important but there has also been some very important case law. With the beginning of the COVID pandemic, the need to try to prevent evictions of Gypsies and Travellers or to find temporary alternative accommodation has become paramount.

### 3(b) Powers of Eviction

15. There are several possibilities for local authorities in terms of carrying out evictions of Gypsies and Travellers on unauthorised encampments but the main methods of eviction that are used by local authorities and police are detailed below.
16. Civil Procedure Rules (CPR) Part 55 proceedings.

CPR 55.1(b) states:

*... 'a possession claim against trespassers' means a claim for the recovery of land which the claimant alleges is occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to possession of that land...*

Such possession claims must normally be commenced in the County Court. Two clear days' notice to the people on the unauthorised encampment is required of any hearing date. Notices can be either attached to vehicles or placed in clear plastic envelopes on stakes on the land in question. A local authority will need to be either the freeholder or the leaseholder of the land in question in order to rely on this procedure.

17. CJPOA 1994 Section 61

This section gives power to the police to carry out an eviction of an unauthorised encampment. Section 61 states:

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 land 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 toward the occupier, a member of his family or an employee or agent of his, or*

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<sup>2</sup> For a full discussion of the law relating to this matter see Willers and Johnson *Gypsy and Traveller Law* Legal Action Group, Third Edition, 2020

*(b) That those persons have between them 6 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.*

Though this is a power for the police to evict Gypsies and Travellers from unauthorised encampments, clearly the local authority can potentially request the police to exercise this power where they are the occupier of the land. The police would need to take the matter to the Magistrates' Court to get any eviction confirmed (CJPOA 1994 Section 62), but failure to comply with a direction to leave may result in arrest without a warrant and impoundment of vehicles and, therefore, very understandably, Gypsies and Travellers usually leave an encampment when given such a deadline by the police. Such evictions can take place extremely swiftly.

#### 18. CJPOA 1994 Section 62A

This is another power of eviction for the police but, once again, the local authority as occupier of the land could ask the police to use these powers.

Section 62A states as follows:

- (1) If the senior police officer present at a scene reasonably believes that the conditions in sub-section (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.*

This power is not often used and the simple reason for that is that clearly there is a requirement for a pitch on a transit site to be available before the Gypsies or Travellers can be directed to 'a suitable pitch on a relevant caravan site' (see Section 62A(2)(d) above).

#### 19. CJPOA 1994 Section 77.

This is a power that can be used by local authorities against unauthorised encampments and can be used against any land whether or not it is within the control of the local authority. Section 77 states:

- (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 the 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 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.*

To obtain an Eviction Order the local authority would need to go to the Magistrates' Court under Section 78. This action can be done very swiftly, though not quite as swiftly as a Section 61 eviction action.

### **3(c) Public Law Challenges to Evictions**

20. In *R v Lincolnshire CC ex parte Atkinson* (1996) 8 Admin LR 529, Sedley J (as he then was) made it clear then when considering the eviction of unauthorised encampments local authorities ought to comply with the Department of the Environment (DoE) Circular 18/94 *Gypsy sites policy and unauthorised camping*, stating (at 535):

*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 s79 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 human needs, the need for shelter with at least a modicum of security (my emphasis).*

21. The draconian powers of eviction available to local authorities<sup>3</sup> and the police with regard to unauthorised encampments have been somewhat ameliorated by government guidance, namely the aforesaid DoE Circular 18/94 and additionally Office of the Deputy Prime Minister (ODPM)/Home Office *Guidance on Managing Unauthorised Camping* (2004) and the ODPM *Guide to effective use of enforcement powers – Part 1: unauthorised encampments* (2006)<sup>4</sup>.

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<sup>3</sup> When we refer to local authorities we are not only referring to County Councils, Borough Councils, District Councils and Town Councils but also to Parish Councils.

<sup>4</sup> See Legal Action *Gypsy and Traveller Law*, Appendices.

22. These sets of guidance provide an extremely comprehensive guide for local authorities (and the police) to decide whether or not to evict an unauthorised encampment. It should be mentioned that the police are also assisted by the National Police Chiefs' Council *Operational Advice on Unauthorised Encampments* (2018).

23. All of these sets of guidance emphasise the need for local authorities to have policies with regard to unauthorised encampments and especially emphasise the need to take into account welfare considerations including health, disability, and education of children, pregnancy and other issues. The question of locations that may or may not be unsuitable and the possibility of toleration are also emphasised in these sets of guidance. Failure to follow the guidance may lead to a successful public law (judicial review) challenge to any eviction action.

24. DoE Circular 18/94 states at paragraph 6:

*While 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 would 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. Where there are no such sites, and the authority reaches the view that an unauthorised gypsy encampment is not causing a level of nuisance which cannot be effectively controlled, it should consider providing basic services, such as toilets, a refuse skip and a supply of drinking water at that site.*

25. The 2004 Guidance states at paragraph 5.17:

*Reasonable attempts should be made to get information from unauthorised campers not present at the time of the visits. Other members of the group may sometimes be able to provide information. A letter or self-completion form may be left with clear instructions for its return (at no cost to the unauthorised camper). All such action should be clearly recorded, and if there is still no response, this should be noted.*

26. The 2004 Guidance continues at paragraph 5.20:

*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. Welfare needs do not give an open ended 'right' for unauthorised campers to stay as long as they want in an area. For example, the presence of a pregnant woman or school aged children does not, per se, mean that an encampment must remain indefinitely. To defer an eviction which is justified on other grounds, the need must be more immediate and/or of a fixed term.*

27. The 2006 Guidance at paragraph 72 refers to the question of alternative locations:

*Enforcement action will be quicker and more effective, and a wider range of powers can be used, where appropriate authorised provision is made for Gypsies and Travellers within the area...adequate provision will have wide benefits in the management of unauthorised camping as:*

- *There will be less unauthorised camping in the first place;*
- *The Police will not be restricted in the use of ss62 A – E...if suitable pitches are available;*
- *Legal challenges are less likely to occur or succeed;*
- *The Courts are more likely to grant possession orders to local authorities who show they are acting responsibly in carrying out their wider duties and who deal with each incident of unauthorised camping on its merits.*

28. The approach local authorities should take in terms of provision of alternatives was considered in *R (Casey and Others) v Crawley BC* [2006] EWHC 301 (Admin). Burton J framed three options that were available to the defendant local authority:

- (i) Seek and obtain possession of the site (Option 1):
- (ii) Tolerate the defendants, if only for a short time, until an alternative could be found (Option 2);
- (iii) Find an alternative site, if only on a temporary basis, and offer the defendants a move to it (Option 3) (para 50)

29. Burton J continued (at para 55(ii)):

*If, in a given situation, reactively the Council can find for travellers on an unauthorised site another temporary toleration site where lawfully, and notwithstanding the lack of planning permission, they can be temporarily sited, that would be a suitable administrative decision and exercise of Option 3: but there is no need for them to have a pro-actively identified pool [of such sites] ready, even if that were feasible.*

30. The National Police Chiefs' Council (NPCC) advice at page 4, para 9 states:

*In managing unauthorised encampments officers must be sensitive to the fact that there is lack of pitches on authorised sites across the country, making it difficult or even impossible for people to avoid setting up unauthorised pitches.*

31. The NPCC advice continues at page 5, para 4:

*Initial contact should be made with the people on the site and an assessment made of the impact on its location, as well as the behaviour displayed by the occupants. The occupants should be spoken to in order to establish their identities and location of last site, and to ascertain their views on desired duration of stay as well as any pressing welfare needs.*

32. Challenges may also be possible under the Human Rights Act 1998 Article 8 (the right to respect for private and family life and home). On the face of it, any eviction is an interference with Article 8 and a local authority will need to explain why they feel such an eviction is proportionate in all the circumstances, including with regard to the best interests of any children<sup>5</sup>. Just as with challenges on the basis of the government or police guidance, Human Rights Act challenges can be taken by way of Judicial Review.
33. There can be difficulties for Gypsies and Travellers (who are financially eligible for legal aid) in actually obtaining legal aid to take judicial review challenges in such circumstances. Additionally any such challenge taken under legal aid is initially taken by the firm that takes the action at a risk of not recovering any of their costs unless permission is obtained to proceed or unless a settlement is reached and the Legal Aid Agency exercise their discretion and low payment of costs<sup>6</sup>. In other words there may be significant hurdles in the way for any Gypsy or Traveller who wishes to challenge an eviction which they feel is not being carried out lawfully.

### **3(d) Evictions during the COVID-19 pandemic**

34. On 27 March 2020 Civil Procedures Practice Direction 51Z was produced halting all possession actions under CPR Part 55 for a period of 90 days. Unfortunately, on 20 April 2020, this was amended to make actions against trespassers an exception to this stay of proceedings. It is now presumed that the Master of the Rolls and the Lord Chancellor did not initially realise that they were also halting actions against trespassers.
35. Nevertheless, under pressure from Gypsy and Traveller organisations and others, the MHCLG eventually, in April 2020, produced a letter to local authorities regarding the situation of Gypsies and Travellers during the COVID lockdown. The letter stated, amongst other things:

*Some Gypsies and Travellers are particularly vulnerable and have the potential to be disproportionately impacted by COVID-19 and some will already have been asked to shield for 12 weeks due to high risk underlying health conditions. Social-distancing or self-isolation may be particularly challenging for members of these communities due to often confined and communal households, and restricted living conditions on many sites. In addition, we know that some families lack basic amenities including running water, adequate sanitation, and refuse disposal facilities, all of which are essential to limit the spread of the virus and keep people safe. Many will no longer have access to places they may have relied on for water and cleaning purposes, due to closures of leisure centres, Churches, and petrol station toilets. The closure of many recycling centres has also had an impact on the disposal of refuse.*

*It is for Local Authorities to determine how best to support vulnerable groups during this unprecedented period in line with their public health responsibilities. To enable compliance with*

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<sup>5</sup> See, for example, *Yordanova v Bulgaria* [2012] ECHR 758.

<sup>6</sup> See Civil Legal Aid (Remuneration) Regulations 2013 reg 5A.

*COVID-19 public health guidance on hygiene requirements, access to basic facilities is essential. This might involve the provision of additional temporary water, sanitation and waste disposal facilities to those currently lacking access to these, or making alternative stopping places available, such as transit sites, suitable local authority land and holiday campsites which may have closed and have established facilities.*

36. Further guidance was published by the MHCLG and Public Health England on 17 September 2020. Entitled *COVID-19: guidance for those leading a nomadic way of life*, it focuses mainly on how people living on Gypsy and Traveller sites, in vehicles, and in canal boats should protect themselves against Coronavirus and what to do if they develop symptoms. There is also, however, a short section entitled 'Additional support from local authorities' which states that 'If you lack access to facilities such as water, sanitation and waste disposal to help with self-isolation and social distancing, you should contact your local authority for assistance. They may be able to provide you with additional facilities or make alternative stopping places available'. It also reminds readers that 'The prevailing laws against unauthorised encampments or unauthorised development remain in place'.
37. It is understood that the 17 September 2020 guidance is intended to complement the guidance contained in the Minister's letter of April 2020, which has not been withdrawn and therefore remains in force. A further letter from MHCLG on 10 November 2020 also re-emphasised the April 2020 letter.<sup>7</sup>
38. We will revert below to what the letter says in terms of provision of services. With regard to the question of eviction, whilst the letter does not advise that evictions should not take place, it does refer to 'making alternative stopping places available' and I would say it is clear from the letter that the choice available to local authorities during the lockdown is either not to evict an encampment or, if they feel that the encampment cannot remain where it is, to identify an alternative location or transit site for that encampment.
39. During the period of lockdown there have been some bad examples of local authorities still trying to take eviction action without providing any alternatives but there have also been some good examples of local authorities identifying temporary locations (e.g. Bristol City Council who identified two temporary sites to be available during the lockdown period).
40. There are other developments which appear to indicate the possibility of the law developing in a positive direction but, at the same time, there are proposals from the current Government that pull in directly the opposite direction.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/935042/Lord\\_Greenhalgh\\_Letter\\_to\\_LA\\_CEOs\\_November\\_2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/935042/Lord_Greenhalgh_Letter_to_LA_CEOs_November_2020.pdf)

### 3(e) Developing Law

41. Though not directly on the subject of evictions from unauthorised encampments, developments concerning cases taken by local authorities seeking wide injunction orders against Gypsies and Travellers will also have great relevance for unauthorised encampment cases.

42. The lead case on the subject of wide injunctions is *London Borough of Bromley v Persons Unknown, London Gypsies and Travellers and Others* [2020] EWCA Civ 12. Great emphasis was placed in that case by Lord Justice Coulson on the question of transit sites or alternative provision as an answer to unauthorised encampments. Thus Lord Justice Coulson, giving the leading judgment of the Court of Appeal, stated (at para 100):

*It is a striking feature of many of the documents that the court was shown that the absence of sufficient transit sites has repeatedly stymied any coherent attempt to deal with this issue. The reality is that, without such sites, unauthorised encampments will continue and attempts to prevent them may very well put the local authorities concerned in breach of the Convention.*

43. Lord Justice Coulson continued at para 104(d) as follows:

*The equitable doctrine of ‘clean hands’ may require local authorities to demonstrate that they have complied with their general obligations to provide sufficient accommodation and transit sites for the Gypsy and Traveller community.*

44. In his conclusion at para 108(b) he stated:

*If there is no alternative or transit site, no proposal for such a site, and no support for the provision of such a site, then that may weigh significantly against the proportionality of any injunction order.*

45. Reference should also be made to the case of *R (Casey and others) v Crawley* (see above at para 28/29).

46. Between 5 November 2019 and 5 March 2020, the Home Office undertook a consultation on the possibility of the complete criminalisation of trespass or, alternatively, a significant strengthening of police powers of eviction.<sup>8</sup> The Government’s response to the consultation process is expected to be published in autumn 2020. This approach of the Government is completely in opposition to the development of the case law. It is likely that any criminalisation of trespass or significant further strengthening of the already very draconian police powers of eviction will lead to further court challenges. Most unfortunately this Government is not following the lead given by the Court of Appeal and supported by all national and local Gypsy and Traveller organisations.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/844954/Unauthorised Encampments - consultation paper.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/844954/Unauthorised_Encampments_-_consultation_paper.pdf)

## Service Provision

### 4(a) Introduction

47. Gypsies and Travellers who have no alternative but to resort to unauthorised encampments have had grave difficulties in accessing services. They have had to attempt to find sources for the supply of water such as taps at supermarkets or in public facilities. They have often had to go to leisure centres in order to use the showering facilities and to service stations and leisure centres in order to use the toilets. Until very recently, leisure centres have been closed during the COVID lockdown. Additionally Gypsies and Travellers will often face complaints from the leisure centre, service station or other facilities and may even be forbidden from using that facility. Some but not all caravans will have chemical toilets. Sometimes Gypsies and Travellers will be lucky enough to stop close to a water tap attached to a water supply but these locations are few and far between. Gypsies and Travellers will often try and take their refuse to a refuse tip but it can be difficult for them to get permission to use such a tip. Sometimes they have to resort to splitting their refuse between public waste bins.

### 4(b) Government Guidance

48. In England, the government guidance on managing unauthorised encampments includes guidance with regard to the provision of services. The Department of the Environment Circular 18/94 *Gypsy Sites Policy and Unauthorised Camping* (which was brought in at the same time as new draconian eviction powers which are contained in the Criminal Justice and Public Order Act 1994) states, at para 6:
- 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 would 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. **Where there are no such sites, and the authority reaches the view that an unauthorised Gypsy encampment is not causing a level of nuisance which cannot be effectively controlled, it should consider providing basic services, such as toilets, a refuse skip and a supply of drinking water at the site** (my emphasis).*
49. Though showering and washing facilities are not mentioned in this guidance, it is suggested (especially when it is possible to provide portable shower units) that such facilities should also be considered when local authorities are looking to provide services. Obviously, provided it is within their means, Gypsies and Travellers will be happy to pay a small rent or fee for the provision of such services.
50. Office of the Deputy Prime Minister/Home Office *Guidance on Managing Unauthorised Camping* (2004) also contains guidance with regard to service provision. At para 7.1 under the heading 'Managing Unauthorised Encampments' it is stated:

*Although unauthorised camping is unlawful, it is likely to continue while there are insufficient spaces to accommodate Gypsies and Travellers on authorised sites. While more places are being provided it is vital that local authorities, with their police and other partners, pro-actively manage encampments to minimise the disruption caused. The principals involved are:*

- *To enforce the same standards of behaviour by unauthorised campers as are expected of the settled community*
  - *To respond rapidly to any deterioration of behaviour and growing disruption from an encampment*
  - ***To facilitate access to services for Gypsies/Travellers on encampments***
  - *Keep all parties informed of decisions and actions (my emphasis).*
51. From this it will be seen that if an encampment is being tolerated for a period of time, the advice from government is to facilitate the provision of relevant services which ought to include refuse collection, showering/washing facilities, water supply and sanitation facilities e.g. portaloos. Obviously if there is transit site provision or if negotiated stopping agreements<sup>9</sup> are entered into, then services will be provided as part of that transit site or as part of the negotiated stopping agreement.
52. To date there have been significant difficulties for lawyers and advisers acting for Gypsies and Travellers on unauthorised encampments in challenging any failure to provide services. Firstly, the local authority concerned has a discretion as to whether to tolerate an unauthorised encampment (and often they will not tolerate an unauthorised encampment perhaps because the location of the encampment is seen as being 'unsuitable'). Secondly, the local authority then has a discretion as to whether to provide services. They may conclude that, if the period of toleration is not going to last very long or if the encampment is on what they see as an unsuitable location, there is no practical point in going to the lengths of providing services for a short period of time. Therefore, in reality, it has been very difficult to date to seek to challenge the failure or refusal to provide services. The COVID lockdown which eventually led to a letter being circulated from the MHCLG (see further below) has changed that position. We would argue that the recent case of *Hudorovic* (also see further below) may have changed that position even beyond the end of the pandemic.

#### **4(c) Service Provision during COVID-19 pandemic**

53. With reference to the MHCLG letter, the letter states, with regard to service provision:

*To enable compliance with COVID-19 public health guidance on hygiene requirements, access to basic facilities is essential. This might involve the provision of additional temporary water, sanitation and waste disposal facilities to those currently lacking access to these...*

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<sup>9</sup> See link: <https://www.negotiatedstopping.co.uk/>

54. The Public Health England and Local Government Association guidance *COVID-19 Suggestions for mitigating the impact on health inequalities at a local level* gives useful guidance with regard to Gypsy, Roma, Traveller and Boater Communities at pp24 and 25 as follows:

*People who live on Traveller sites, in vehicles or living on canal boats may experience additional difficulties with implementing social distancing and social isolation due to a number of factors, including lack of access to basic amenities including water and sanitation, overcrowded living conditions, access to support and low literacy and language barriers.*

55. With regard to potential action it is stated:

*Local authorities should ensure communities have access to water, sanitation and waste collection. Some Gypsy and Traveller communities, especially those living on unauthorised sites and lacking basic amenities, may require alternative places to stop where access to facilities such as water pipes and water bowsers and portable toilets are provided, or can be made temporarily available. Consider offering support beyond essentials such as medication and food. These could include refilling gas bottles and/or fuel and refilling water butts and advice on refuse collection.*

56. Several local authorities have responded positively to the advice from MHCLG and have ensured either that services are provided to unauthorised encampments or that tolerated places or transit sites are identified for those on encampments.

57. Indeed it can be argued that, during the period of the COVID-19 pandemic, the provisions of services, which would usually be a discretionary matter, has almost risen to the level of an obligation.

#### **4(d) Developing Law: A Right to Water and Sanitation?**

58. For the first time ever, a case has come before the European Court of Human Rights (ECtHR) concerning the question of whether there might be a right to water and sanitation under Article 8 of the European Convention (the right to respect for private and family life at home) combined with Article 14 (discrimination). This case is *Hudorovic and Others v Slovenia* (Applications No. 24816/14 and 25140/14, judgment on 10 March 2020). The case involved two settlements of Roma in two different municipalities in Slovenia. The two families concerned lived in wooden shacks which did not have any building permits. The case provides a comprehensive analysis of international and European materials on the right to water and sanitation and we would recommend readers who are interested to have reference to the analysis in the case.

59. Unfortunately, on the specific facts of the two cases, the ECtHR concluded that there was not a breach of Articles 8 and 14.

60. In an online article in Strasbourg Observers (*The Court's first ruling on Roma's access to safe water and sanitation in Hudorovic et al v Slovenia: reasons for hope and worry*, 9 April 2020)<sup>10</sup> by Valeska David, Affiliated Researcher at the Human Rights Centre of Ghent University (Ghent University intervened in the case), the author concludes:

*It could be argued that Hudorovic et al v Slovenia opens up space...to enforce the right to water and sanitation that many Roma communities still today cannot enjoy. But if the irregular status of their dwellings suffices to justify the denial of connection to the public water supply, and a prolonged lack of access to water may not even qualify as an interference with private and family life or with equality, then access to water will remain largely theoretical for many Roma families. We will see whether future cases clarify the applicability of Articles 8 and 14 ECHR in this context as well as the room for developing water right standards under the ECHR.*

61. In arguing for any right to water and sanitation to unauthorised encampments in the UK doubtless we may be met by arguments that the encampments do not have permission to be where they are. However it is hoped that evidence can be put in to show that the existence of unauthorised encampments is due to the lack of site provision, both permanent and temporary, by local authorities.

62. Importantly, the ECtHR in *Hudorovic* states (at para 116):

*The Court makes clear that access to safe drinking water is not, as such, a right protected by Article 8 of the Convention. However, the Court must be mindful of the fact that without water the human person cannot survive. A persistent and long-standing lack of access to safe drinking water can therefore, by its very nature, have adverse consequences for health and human dignity effectively eroding the core of private life and the enjoyment of a home within the meaning of Article 8. Therefore, when these stringent conditions are fulfilled, the Court is unable to exclude that a convincing allegation may trigger the State's positive obligations under that provision. Existence of any such positive obligation and its eventual content are necessarily determined by the specific circumstances of the persons affected, but also by the legal framework as well as by the economic and social situation of the State in question.*

63. Thus we hope it could be argued that, where an unauthorised encampment is not in an unsuitable location (and where perhaps a negotiated stopping agreement could be entered into), and where it can be shown that it is the lack of site provision that has led to the unauthorised encampment being in existence, that there should be a right to a water supply by some means. Even if there is not a suitable drinking water pipe nearby, water could be supplied by means of a water bowser or by means of a supply of bottles of drinking water.

64. On the question of sanitation, the ECtHR in *Hudorovic* stated (at para 157):

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<sup>10</sup> <https://strasbourgobservers.com/2020/04/09/the-courts-first-ruling-on-romas-access-to-safe-water-and-sanitation-in-hudorovic-et-al-v-slovenia-reasons-for-hope-and-worry/>

*Considering the limited access to sanitation in the two municipalities, it would be difficult, in the absence of proof to the contrary, to conclude that the applicants' respective situations were accorded less importance than those of the majority population.*

65. However the sanitation system in the UK is clearly more advanced than that in Slovenia. Moreover it is very common for portaloos to be supplied to encampments even if for a short period of time. Therefore we think there are strong arguments, again linked in to evidence that the existence of the unauthorised encampment is due to the lack of site provision, for at least portaloos to be supplied to an unauthorised encampment that is not in an unsuitable location.
66. Obviously if a local authority decides (and we would encourage them to do so) that the best way forward would be to direct an unauthorised encampment to an alternative location or a transit site then presumably facilities will be provided in any event at that location.
67. We hope this is the beginning of the recognition, with regard to unauthorised encampments, of a potential right to water and sanitation under Articles 8 and 14 of the Convention.

## **Conclusion**

68. With regard to evictions from unauthorised encampments, initially the additional powers provided by the CJPOA 1994 looked set to drive Gypsies and Travellers either into housing or out of the country altogether. Fortunately developments in case law led by the *Atkinson* case and the government guidance on the issue, avoided that scenario.
69. The COVID-19 pandemic has led to a situation regarding unauthorised encampments where it could be argued either that evictions should not take place or that alternative site provision should be identified.
70. Developing case law around wide injunctions may indicate that this mantra – in other words, either don't evict or find an alternative – may be the way forward. However, this possibility is seriously jeopardised by current proposals from the Government.
71. With regard to service provision to unauthorised encampments, what was previously a pure discretion for local authorities (and a very difficult discretion to challenge if no service provision was provided) has (as argued above) almost risen to the level of obligation during the pandemic. Additionally, the case of *Hudorovic* have brought to the fore the question of a potential right to water and sanitation under the European Convention and this is something we very much hope will be developed from here.
72. It is hoped that lessons from the pandemic which have made both Government and local authorities concentrate their minds on the situation of unauthorised encampments will also assist both

Government and local authorities in the future to finally resolve the question of unauthorised encampments and site provision in England.

### **About CLP**

The Community Law Partnership specialise in law relating to Housing, Public Law and Community Care, and includes the Travellers Advice Team (TAT) – a nationwide advice service for Gypsies and Travellers.

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### **About FFT**

Friends, Families and Travellers is a leading national charity that works on behalf of all Gypsies, Roma and Travellers regardless of ethnicity, culture or background.

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