

**CHALLENGING GYPSY PLANNING POLICIES**  
***OCCASIONAL DISCUSSION PAPER NUMBER 1***  
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## **1 Introduction**

Section 54A of the Town and Country Planning Act 1990 requires local authorities to exercise their planning functions 'in accordance with the [development] plan unless material considerations indicate otherwise'. Under this plan-led approach, a Gypsy planning policy that is so restrictive that it is in practice impossible to comply with will provide a massive obstacle to those requiring planning permission for Gypsy sites. The result in the majority of such cases is enforcement action and, in any appeal, an uphill and usually unsuccessful battle to show the planning inspector why the plan should not be followed.

## **2 Grounds of challenge**

It will thus be important where possible to challenge the validity of the restrictive Gypsy planning policy. However, section 284 of the Town and Country Planning Act 1990 provides that the validity of any plan can only be challenged by means of an appeal pursuant to section 287 which must be brought within a strict six-week time limit following adoption of the plan. In *Hughes v Secretary of State for the Environment* ((1995) 71 P & CR 168) the court held that failure to challenge a plan under section 287 within the six-week time limit precluded a subsequent *ultra vires* challenge. Many Gypsies may be adversely affected by a restrictive policy long after the six-week period for appealing a plan has elapsed. It may, therefore, be impossible for those adversely affected to appeal under section 287. In circumstances where a challenge to the validity of a plan is time-barred, one option may be to challenge a local authority's reliance on a particular restrictive policy over and above other material considerations. Alternatively it could be argued that the fact that a particular application of a Gypsy policy is repugnant to statute or the common law is a material consideration for the purposes of section 54A of the Town and Country Planning Act 1990.

Two grounds of challenge appear possible:

- (a) by showing that the policy is racially discriminatory pursuant to the Race Relations Act 1976; and/or
- (b) by showing that the policy is *ultra vires* by virtue of being partial and unequal in its operation as between Gypsies and non-Gypsies following the 19th-century decision in *Kruse v Johnson* [1898] QBD 91.

## **3 Race Relations Act 1976**

Section 1 of the Act defines discrimination for the purposes of the Act. There are two types of discrimination: direct and indirect. Both are unlawful. To show direct discrimination against Gypsies it is necessary to show less favourable treatment to a particular Gypsy 'on racial grounds'. To show indirect discrimination against Gypsies it is necessary first to identify a requirement or condition which a particular Gypsy cannot comply with (here, for example, a restrictive planning policy) and then to show that:

- (a) the proportion of Gypsies able to comply with that policy is considerably smaller than the proportion of non-Gypsies; and
- (b) the local authority cannot justify the policy without reference to the race or ethnic or national origins of the Gypsies to whom the policy applies.

## **4 Gypsies as a racial group**

The Court of Appeal held in *CRE v Dutton* [1989] 1 All ER 304 that Gypsies can be a racial group such that discrimination against them is unlawful pursuant to the Race Relations Act, notwithstanding

that the definition of 'gypsies' in the Caravan Sites Act 1968 (which is that adopted by local authorities in relation to their Gypsy planning policies) refers to 'persons of nomadic habit of life whatever their race or origin' - i.e. an expressly non-racial definition. The Court of Appeal therefore accepted that some Gypsies as defined in the Caravan Sites Act - i.e. those who were Gypsies but not 'ethnic' (e.g. Romany) Gypsies would not be protected from discrimination by the Act.

## **5 *R v Runnymede BC ex parte Smith***

Whether a planning policy was racially discriminatory was considered by the court in *R v Runnymede Borough Council ex parte Smith* (1994) 70 P&CR 244. In that case, a Gypsy sought leave to apply for judicial review of a decision by the respondent local authority to take enforcement action in reliance on a Gypsy policy which provided that no further Gypsy sites would be permitted in the area. By contrast the planning policy in respect of residential (non-Gypsy) caravan sites envisaged the possibility of permission being granted for such development. The applicant argued that the Gypsy policy was void since it was in breach of the Race Relations Act. Refusing leave, Owen J held:

- (1) (in relation to alleged direct discrimination) that since the policy was stated to apply to Gypsies as defined by the Caravan Sites Act, both ethnic Gypsies and 'other' (not ethnic) Gypsies were within its ambit. Any less favourable treatment the policy conferred was conferred equally on ethnic Gypsies and other Gypsies, and was not, therefore, conferred 'on racial grounds'. The policy could not therefore constitute direct discrimination;
- (2) (in relation to alleged indirect discrimination) that:
  - (a) there was no statistical evidence before the court that a considerably smaller proportion of ethnic Gypsies than people who were not ethnic Gypsies could comply with the policy;
  - (b) the policy was simply a reflection of the fact that following the abolition of the duty under section 6 of the Caravan Sites Act 1968 on local authorities to provide authorized sites, Gypsies no longer enjoyed a privileged position in the planning system, and therefore did not result in unfavourable treatment;
  - (c) the plan was not determinative since the applicant's personal circumstances would be material considerations that might outweigh the restrictive policy;
  - (d) in any event, the policy could be justified without reference to the applicant's race or ethnic origins.

## **6 *Comments on ex parte Smith***

The judgment is considered below with some ideas on how a similar case might be brought in future:

- (1) The judge appears to have had no regard to the fact that a non-Gypsy requiring permission for a caravan site would have been able to apply under the residential caravan sites policy which was not subject to an absolute prohibition. Arguably, therefore, no statistical information was required to prove that a considerably smaller proportion of ethnic Gypsies could comply with the local planning policy than the proportion of the rest of the population that could so comply.

However, the chances of any future challenge succeeding might be improved by adducing evidence of (i) the number of unauthorized Gypsy and non-Gypsy encampments in the area; (ii) the number of successful planning applications under each of the Gypsy and non-Gypsy caravan site policies.

- (2) In respect of the alleged indirect discrimination, the judge's comments on the 'level playing field' nature of the Gypsy policy (see paragraph 5(2)(b) above) were irrelevant. The judge appears to have confused the tests for direct and indirect discrimination.
- (3) While it is true that a plan is not necessarily determinative when opposed by overwhelming material considerations, experience (including research carried out by the Friends Families and Travellers Support Group) shows that Gypsies' personal circumstances seldom outweigh restrictive policies. In practice, therefore, a restrictive policy is likely to be an absolute bar.

- (4) The judge's view that the policy could be justified irrespective of race or ethnic origin was a key conclusion that will have to be carefully countered in any future challenge. It would be necessary to show that a policy is so restrictive that it is incapable of being justified at all - alternatively, that any justification depends on racial or ethnic origins. A starting point is the acknowledgement that such policies effectively prevent any new Gypsy site provision regardless of need, and that the only justification for the distinction between a restrictive Gypsy policy and less restrictive non-Gypsy caravan site policy and other countryside policies depends on a person's Gypsy status.

## 7 *Kruse v Johnson*

In *Kruse v Johnson* the court quashed a by-law which prohibited singing or making music in a public place within fifty yards of a dwelling after having been asked to stop by or on behalf of a police constable. Giving the lead judgment, the Lord Chief Justice, Lord Russell, outlined the democratic checks and balances inherent in the process by which the by-law came into being. He continued: 'the presence of these safeguards in no way relieves the court of the responsibility of inquiring into the validity of by-laws where they are brought into question'.

Lord Russell concluded that by-laws would be void for unreasonableness if:

- (a) they were found to be partial and unequal in their operation as between different classes;
- (b) they were manifestly unjust;
- (c) they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men.

The principle in *Kruse v Johnson* is stated to apply to any class of persons (for example, caravan dwellers) and is not restricted in its application to racial or ethnic groups. A *Kruse v Johnson* challenge to a planning policy's legality would therefore avoid those semantic difficulties inherent in a Race Relations Act challenge which appeared to trouble the court in *ex parte Smith*.

Evidence required in support of a challenge to a Gypsy planning policy based on *Kruse v Johnson* would show: (i) the impartial operation of a restrictive Gypsy planning policy as between that class of persons who rely on the policy in order to reside in their homes, and others; and (ii) the oppressive effect on those whose traditional way of life is outlawed as a result of (i).

## 8 The European Convention on Human Rights

The relevant provisions of the Convention for Gypsies facing eviction are likely to be:

- (a) Article 3 - freedom from inhuman or degrading treatment;
- (b) Article 8 - right to respect for private and family life, home, and correspondence;
- (c) Article 14 - freedom from discrimination in respect of rights protected by the Convention;
- (d) Article 1 of the First Protocol - right to peaceful enjoyment of possessions;
- (e) Article 2 of the First Protocol - right to education.

Whilst the Convention is not incorporated into UK law, it has a special relevance to planning decisions for the following reasons:

- (1) Paragraphs 4 and 30 of Planning Policy Guidance 1 (PPG1) provide that the planning regime must take account of the UK's international obligations. Judgment has just been given in the case of *Buckley v UK* in which the European Court of Human Rights heard a complaint by June Buckley, a Gypsy, that the planning enforcement action violated her rights under Article 8 of the Convention;
- (2) a written parliamentary answer by Baroness Chalker (*House of Lords Debates*, written answer, column 84, 7 December 1994) confirmed that, as a matter of government policy, civil servants (including planning inspectors) should comply with international obligations including the Convention;
- (3) the High Court in *Woolhead v Secretary of State for the Environment* ((1995) 71 P & CR 419) held that facts relating to an alleged violation of Article 8 should be raised in front of the

planning inspector before the court would consider them on appeal. It follows that Article 8 points should also be considered when raised by local planning authorities, since it would arguably constitute maladministration for a local authority to ignore a point which will later be argued on appeal before a planning inspector at considerable public expense.

## **9 A short note on *Buckley v UK***

In the case of *Buckley v UK* referred to above, the European Court of Human Rights ruled by a 6-3 majority that, although on the facts of the case there was no violation of Article 8 because the interference with Ms Buckley's Article 8 rights had been proportionate, Article 8 applied and there had been *prima facie* interference with Ms Buckley's rights under it. This means that in future each case in which it is asserted that a Gypsy's Article 8 rights are being violated will have to be considered and determined on its merits. It is significant that the court in *Buckley* did not consider the effect of the Criminal Justice and Public Order Act 1994 on the alleged violation of Ms Buckley's Article 8 rights since Ms Buckley's complaint to Strasbourg pre-dated that legislation. Another weakness in *Buckley*, and one which distinguishes it from many others, is that Ms Buckley was offered an alternative site (albeit one which she considered to be unsatisfactory). In cases where there is no offer of an alternative site, planning enforcement measures requiring the eviction of Gypsy sites are less likely than in *Buckley* to be proportionate, and therefore more likely to constitute a violation of Article 8.

## **10 Interpretation of the common law and the European Convention on Human Rights**

Where the common law is developing or unclear, it will be interpreted in accordance with the European Convention on Human Rights (*Derbyshire County Council v Times Newspapers* [1993] AC 534).

In relation to Article 8 rights, the domestic courts have held in *R v Wealden District Council ex parte Wales* (*Times* 22 September 1995) that local authorities considering whether to evict Travellers have to weigh all relevant factors in the balance (including the effect of an eviction on the individuals concerned) before coming to a decision. This is akin to the proportionality test inherent in Article 8(2) which permits violations of Article 8 only insofar as is necessary in a democratic society for certain specified ends.

Given that this is a developing and uncertain area of law, it follows that, in relation to any challenge to Gypsy planning policies, the common law should be interpreted in accordance with Article 14 which prohibits discrimination against any group in relation to the group's enjoyment of Convention rights (in particular for Gypsies, their rights under Article 8), whatever the group's race or ethnicity. Article 14 therefore reinforces the principle in *Kruse v Johnson*.

## **11 Conclusion**

It is submitted that the time is right for *R v Runnymede BC ex parte Smith* to be revisited supported by a *Kruse v Johnson* challenge. It may also be argued in support of the challenge that the court in interpreting the common law should consider whether the application of the policy under challenge constitutes a breach of the challenger's Convention rights. Obviously, any such challenge to a Gypsy policy must be supported by relevant and carefully prepared evidence.

**\* I would be keen to hear from anyone involved with or representing a Traveller who is adversely affected by a Gypsy policy which she or he wishes to challenge; please contact me at: Gill & Co, 22a Theobalds Rd, London WC1X 8PF Tel: 0171-242 0404/ Fax: 0171-831 8537/ DX: 35747 Bloomsbury 1**

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