

THE IMPORTANCE OF HUMAN RIGHTS TO GYPSY AND TRAVELLER COMMUNITIES

INTRODUCTION

This report considers the ways in which human rights legislation affects Gypsy and Traveller Communities living in England and Wales. It is written in the context of government plans to repeal the Human Rights Act 1998 (HRA), a piece of domestic legislation which codifies the protections contained in the European Convention on Human Rights (ECHR) into UK law¹. Amongst other things, the HRA ensures that public bodies must comply with convention rights and that individuals can access their rights in the domestic courts.

The report will address the potential effects of repeal on the aforementioned communities, with particular focus on legislative provisions which safeguard their accommodation needs. In doing so, it aims to provide an overview of the legal rights and channels which are available to these communities and to civil society organisations looking to enforce them on their behalf.

It is worth recognising at the outset that these rights, however clearly enumerated and actionable, are just one thread in the tapestry of protection of vulnerable minority groups. The limitations of formal legal recourse, especially in relation to minority groups, are well-documented: the courts cannot solve structural disadvantages; they are typically *reactive*, in that they can only respond to injustice; and they are often inaccessible; or perceived as such. Legal means, therefore, must be complemented by continuous pressure in other areas, such as policy, education, and other sub-legal domains.

WHO ARE THE GYPSY AND TRAVELLER COMMUNITIES?

The term "Gypsies and Travellers" will be used throughout this report (unless otherwise indicated) to include: Romani Gypsies, Irish Travellers, Scottish Gypsy Travellers, Welsh Gypsy Travellers (or Kale), New Travellers and Travelling Showpeople.

There are about 200,000 to 300,000 Gypsies and Travellers living in the United Kingdom. The majority live in conventional housing but there are a significant number (perhaps more than 60,000) who live in caravans on both authorised and

¹<http://www.independent.co.uk/news/uk/politics/government-delays-human-rights-act-repeal-amid-opposition-from-senior-tories-10277687.html>

unauthorised sites, and wish to continue doing so in accordance with their culture and traditional way of life.

Records show that the descendants of Romani Gypsies, Scottish Gypsy Travellers and Welsh Gypsy Travellers have been resident in the UK since the 16th century and that Irish Travellers have been resident in mainland Britain since at least the 19th century.

Romani Gypsies and Irish Travellers have been held to be separate "ethnic" groups for the purpose of the Equality Act 2010 and are protected from discrimination by our equality legislation.

In *Commission for Racial Equality v Dutton* [1989] Q.B. 783, CA the Court of Appeal found that Romani Gypsies were an ethnic minority with a long, shared history, a common geographical origin and a cultural tradition of their own. In *P. O'Leary and others v Allied Domecq and others* (unreported) 29 August 2000 (Case No CL 950275-79), H.H.J. Goldstein reached a similar decision in respect of Irish Travellers². Travelling Showpeople and New Travellers are not protected by domestic equality legislation.

A Nomadic Habit of Life: Many ethnic Gypsies and Travellers still pursue a nomadic habit of life, travelling with their caravans for work. However, it should be noted that it is their separate group identities which make them eligible for protection under our equality legislation; their ethnicity does not rely upon their travel patterns.

Discrimination and Inequality: Gypsies and Travellers are amongst the most discriminated and marginalised members of our society³. Laws which protect the human rights of these communities are therefore of particular importance.

A SUMMARY OF THE LAW ON ACCOMMODATION

The 2009 Equality and Human Rights Commission Research Report (EHRC) on Gypsies and Travellers noted that "the lack of suitable and safe accommodation underpins many of the inequalities that Gypsies and Travellers experience."⁴ This observation remains pertinent in 2015.

² Although a county court judgment, it should be noted that, in Northern Ireland, Irish Travellers are explicitly protected from discrimination under Race Relations Order 1997 (Amendment) Order (Northern Ireland) 2012/263 art.5, and this makes it highly unlikely that their status as members of a separate ethnic group could be open to challenge again in the United Kingdom.

³ Cemlyn, Sarah. "Inequalities experienced by Gypsy and Traveller communities: a review." (2009); Data in focus report: the Roma (01, EU Minorities and Discrimination Survey, 2009), FRA, available at: http://fra.europa.eu/fraWebsite/eu-midis/eumidis_roma_en.htm

A shortage of caravan sites: Despite the 1968 the Caravans Sites Act (CSA) 1968, which imposed a duty on County Councils to provide caravan sites for Gypsies residing in their area, and a succession of new laws and initiatives since then, many local authorities have failed to provide sites in sufficient numbers.

Decades of inaction have resulted in a significant shortfall in suitable accommodation for Gypsies and Travellers throughout England and Wales. It is estimated that about 20% of those living in caravans are technically homeless (i.e. without a lawful place to station their caravans)⁵.

In 2012, the Coalition government used the Localism Act 2011 to revoke the most recent planning circular⁶ and replace it with "light touch guidance", entitled 'planning policy for traveller sites'. WAG Circular 30/07 remains the relevant planning policy covering the provision of caravan sites for Gypsies and Travellers in Wales.

Planning policy for traveller sites states that the government's "overarching aim is to ensure fair and equal treatment for travellers, in a way that facilitates the traditional and nomadic way of life of travellers while respecting the interests of the settled community".

Instead of the top-down approach laid down by Circular 1/2006, Planning policy for traveller sites leaves the assessment of the accommodation needs of Gypsies and Travellers to Local Planning Authorities (LPAs) and requires them to have a five-year supply of sites to meet their identified needs.

The guidance in planning policy for traveller sites covers the provision of caravan sites for all Gypsies and Travellers, including New Travellers and Travelling Showpeople. However, it is important to note that Gypsies and Travellers can only rely upon the guidance if they can show that they can demonstrate that they fall within the planning definition of what it means to be a Gypsy or Traveller (or within the separate definition of what it means to be a Travelling Showperson). The definition of Gypsies and Travellers is not dependent upon ethnicity; rather it focuses on nomadism and includes "*Persons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family's or dependants' educational or health needs or old age have ceased to travel temporarily or permanently, but excluding members of an organised group of travelling showpeople or circus people travelling together as such.*"

⁴ Ibid, p.iv

⁵ EHRC, p.335-343.

⁶ This guidance was drafted in the context of the policy of localism, and the most recent planning circular (number 1/2006) was revoked, along with the accompanying infrastructure (bodies such as regional planning boards), pursuant to the Localism Act 2011.

Unauthorised Developments: Gypsies and Travellers living on caravan sites on land which has been developed without planning permission (known as unauthorised developments) will be liable to face planning enforcement action brought by the LPA using its powers laid down by the Town and Country Planning Act 1990 (as amended).

Unauthorised Encampments: Gypsies and Travellers who camp on public and private land (known as unauthorised encampments) will also be liable to be moved on by the police and/or evicted by the landowner. The police have powers to direct that Gypsies and Travellers move off unauthorised encampments which are laid down in ss.61-62A of the Criminal Justice and Public Order Act (CJPOA) 1994 (as amended). Local authorities have similar powers. Public and private landowners can also seek possession of their land in the event that an encampment takes place on their land.

However, before any action is taken by a public body there is a requirement that welfare enquiries are undertaken and that the public body considers whether those enquiries have revealed circumstances which warrant further examination or lead to the conclusion that eviction should be delayed⁷.

Where Gypsies and Travellers camp on the public highway then they may be liable to prosecution by the police or local authority using their powers laid down by s.137 Highways Act 1980.

Homelessness: A Gypsy or Traveller will be homeless for the purposes of the homelessness legislation if s/he lives in a caravan but there is no place that s/he is entitled or permitted to place it and reside in it: see s.175(2)(b) of the Housing Act 1996.

As a homeless person, a Gypsy or Traveller living in a caravan, but without a lawful stopping place, is entitled to apply for the provision of homeless person's accommodation. Any such accommodation should be "suitable" and a Gypsy or Traveller that has a "cultural aversion to bricks and mortar" ought to be provided with a pitch rather than some form of conventional housing, if it is possible to do so. Failure to make such provision in circumstances where it is possible to do so may

⁷ See: *R. v Lincolnshire CC Ex p. Atkinson* (1996) 8 Admin. L.R. 529; ODPM Guidance on Managing Unauthorised Camping (February 2004); ODPM Guide to Effective Use of Enforcement Powers: Unauthorised Encampments (February 2006); and the Welsh Government Guidance on Managing Unauthorised Camping 2013.

breach arts 8 (the right to respect for home and family life) and 14 of the ECHR⁸: That said, in circumstances where no pitch is available, the offer of conventional housing made to a Gypsy or Traveller applicant with a cultural aversion to bricks and mortar will not be considered unsuitable unless there is, for example, a very real risk that the applicant would suffer psychiatric harm if s/he accepted the offer and moved in to the premises: see *Sheridan v Basildon BC (formerly Basildon DC)* [2012] EWCA Civ 335.

Rented Caravan Site Accommodation: Many Gypsies and Travellers live on authorised caravan sites which are rented from public and private landlords (Their rights are governed by the Mobile Homes Act 1983 (as amended) and secondary legislation).

Article 8 of the ECHR, which protects the right to respect for an individual's home and family life, is relevant when considering accommodation of Gypsies and Travellers. There are several points worth making about art. 8. Firstly, although the text of the art. 8(1) itself does not impose an obligation on public authorities to provide homes for anybody, or to provide sites for Gypsies and Travellers, the case law obliges authorities to respect the home. This is significant in the context of evictions by local authorities which arise largely because of a lack of authorised sites. In brief, art. 8(2) prohibits interference with the right to respect for the home except where it is in accordance with the law, fulfils one of the legitimate aims⁹, and is proportionate¹⁰. It follows that it is possible to rely upon an alleged breach of art. 8 as a defence to a claim for possession action brought by a public body against Gypsies and Travellers or as a ground for seeking judicial review of a decision to evict, though there will be very few cases in which such an argument will succeed¹¹.

Secondly, the word 'home' has been construed broadly by the European Court to include a house or other traditional residence. The case law specifically extends this to caravans and sites of Gypsies and Travellers, as defined ethnic groups.¹² In *Chapman v United Kingdom* (27238/95) (2001) 33 E.H.R.R. 18, the European Court of Human Rights (the "ECtHR") concerned a complaint made by a Romani Gypsy woman that her article 8 rights were violated when she stationed her residential

⁸ see *Clarke v Secretary of State for Transport, Local Government and the Regions* [2002] EWCA Civ 819; [2002] J.P.L. 1365; and *R. (on the application of Price) v Carmarthenshire CC* [2003] EWHC 42 (Admin); [2003] A.C.D. 39. 28.

⁹ That is: it is 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.

¹⁰ The test for proportionality under english law is outlined by Lord Sumption at [20] in *Bank Mellat (Appellant) v Her Majesty's Treasury (Respondent) (No. 1)* [2013] UKSC 38

¹¹ Williers, Mark QC. "Gypsies and Travellers: eviction from unauthorised encampments" (2014).

¹² *Chapman v. the United Kingdom* [2001] 33 EHRR 18, paras 98 and 103

caravans on her land in the Green Belt without planning permission (and thereby created an unauthorised development) and had been prosecuted for breach of a planning enforcement notice which had required her to cease its use for such purposes.

The ECtHR rejected the complaint but in doing so accepted that planning enforcement measures taken against the applicant interfered with her right to respect for her "home", even though it was established without planning permission. Significantly, the ECtHR also accepted that the applicant's occupation of her caravan was an integral part of her ethnic identity as a Gypsy.

Although the judgement (at paragraph 96) indicated that there was a "positive obligation imposed on the contracting states by virtue of art.8 to facilitate the Gypsy way of life," this has not been translated by national courts into an obligation on states to supply caravan sites for the Gypsies.

Some Gypsy and Traveller groups and their legal representatives have argued that evictions from unauthorised sites are not lawful as the provision of authorised sites is inadequate¹³. The lack of suitable alternatives often leaves Gypsies and Travellers with little choice but to live on unauthorised sites. These arguments have been backed by international human rights bodies including the United Nations Special Rapporteur on the Right to Housing¹⁴ and the United Nations Committee on the Elimination of Racial Discrimination. Thus far, these claims have not been upheld in court (see the discussion of the Dale Farm case). However, legal opinion suggests that there may be grounds to challenge that decision. In addition, the European Court has recognised that there needs to be special consideration given to the needs and different lifestyle of Gypsies and Travellers in the context of planning decisions, and we expect to see further consideration of this issue over the coming years.

Summary: To date, the courts have not found a breach of Article 8 in relation to an eviction from an unauthorised Gypsy and Traveller site, although there may be grounds to challenge that decision. Nevertheless, art.8 has been successfully relied upon in defences against evictions from local authority sites, and has prompted legislative change.¹⁵

¹³ *R.(McCarthy) v. Basildon DC* [2011] EWHC 2938 (Admin).

¹⁴ United Nations press release, 5 July 2011, 'Irish Traveller Community at Dale Farm facing eviction'. Available at: http://europe.ohchr.org/EN/NewsEvents/Pages/Dale_Farm.aspx. Accessed 27/02/2012

¹⁵ In *Connors v United Kingdom* (66746/01) (2005) 40 E.H.R.R. 9 the ECHR held that the eviction of an Irish Traveller from a local authority run site in Leeds in accordance with the provisions of the Caravan Sites Act 1968 was a violation of his art. 8 rights. Following Connors, the CSA was amended to give the courts the power to suspend possession orders for periods of up to 12 months.

THE EFFECTS OF REPEAL

At present, the uncertainty surrounding the proposed repeal and replacement of the HRA precludes a rigorous, fact-driven analysis of the effects of repeal. However, there are some points of general importance.

Firstly, the erosion of substantive protections, particularly if the long-time controversial article 8 is scrapped, could threaten the safety of Gypsies and Travellers. Although the case law in this area has been slow in protecting their cultural identity, it has introduced important procedural safeguards, forcing local authorities to consider the impact of eviction on residents.

Secondly, the legal rights of the Gypsy and Traveller communities may be put at risk by legislative alterations which restrict the volume or type of cases which can be heard in the domestic courts. Legal rights are only valuable if they are accessible. For precisely this reason, the HRA was designed to 'bring rights home', such that they could be invoked in domestic proceedings. A serious concern regarding the current proposals is that, by restricting individuals' Convention rights, they would be forced to petition the ECtHR directly. This would be highly undesirable: the ECtHR is tragically ill-equipped to deal with the current volume of cases, let alone the additional wave of litigation¹⁶. These proceedings take longer, cost more, and make less favourable awards of damages than the domestic courts¹⁷. For disadvantaged groups, already pushed to the legal periphery, this additional set of hurdles could well divorce them from effective legal redress of their human rights violations.

Thirdly, minorities such as Gypsies and Travellers stand to lose out amid a cultural shift away from concern for human rights. Scrapping the HRA in the face of populist anger represents a significant concession, and is likely to further weaken the cause of protecting the most vulnerable. Part of the value of the HRA has been its institution of a 'culture of human rights', a notion that cannot be measured solely according to the number of court cases which successfully invoke articles from the Convention. The HRA has made people more conscious and more caring about human rights in general, even as they are frustrated by some of its effects; public bodies are obligated to measure the impact of policies on the most vulnerable. This attitudinal shift is particularly important for Gypsies and Travellers who, because of

¹⁶ In 2012, the Court had a backlog of around 150,000 applications from individuals seeking redress for alleged violations of the European Convention on Human Rights. Statistic available at: <https://www.opensocietyfoundations.org/sites/default/files/echr-reform-qanda-4-3-12-2.pdf>

¹⁷ Before the 1998 Act "brought rights home", it took an average of five years at a cost of £30,000 to go to Strasbourg. The Guardian Law, available at: <http://www.theguardian.com/law/2014/oct/01/scrapping-human-rights-act-british-bill-of-rights>

their societal exclusion, are less likely to reach for the self-help mechanisms. Instead, they rely on beneficent treatment from societal institutions, something which is threatened by weakening the focus on and potency of human rights.

CONCLUSIONS

This report has shown the importance of a tiny segment of human rights legislation to Gypsies and Travellers. Removing these legal protections would compound the disadvantage of these groups, principally because they would be made more vulnerable to the cycle of evictions and associated harms, which ensure that they are locked into poverty.

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