

## Gypsies, travellers and discrimination law

The Race Relations (Amendment) Act poses many challenges for advisers. It extends the Act, beyond employment and goods & services as hitherto defined, to embrace most of the functions of public authorities. In appropriate cases, advisers dealing with housing, education, health, policing and prisons (among others) must now consider use of the RRA. Discrimination specialists need some familiarity with the substantive law in those areas in order to advise clients experiencing discrimination by public authorities.

This Briefing considers the position of Gypsies and Irish Travellers in Great Britain from the point of view of discrimination law. No group has more complex legal needs in the areas of planning, education, health and the criminal justice system.

### Who is protected under the RRA?

In the case of *Commission for Racial Equality v Dutton* [1989] IRLR 8 the CA held that Romany Gypsies are a racial group under the RRA by reason of their ethnic origins. The Court applied the test set out by the HL in the leading case of *Mandla v Lee* [1983] IRLR 209 HL.

*Dutton* was a county court case brought by the CRE under section 29 of the RRA. It concerned a discriminatory advertisement (a 'No Travellers' sign outside a pub). The CA decision binds English courts and employment tribunals. In Scotland it has persuasive authority only. In a recent report the Equal Opportunities Committee of the Scottish Parliament has recommended that Gypsy Travellers be regarded as a racial group for the purposes of framing legislation and policies concerning public services.

The case of *O'Leary & Others v Punch Retail & Others* (Westminster County Court 29 August 2000, unreported) was brought by Irish Travellers refused service in a number of pubs. HHJ Goldstein, sitting with two assessors, tried as a preliminary issue whether or not Irish Travellers are a distinct racial group for the purposes of the RRA. After a six-day hearing the court

ruled that they are, by reason of their ethnic origins. This decision has persuasive authority only, in England, Wales and Scotland. In Northern Ireland Irish Travellers are specifically protected under the Race Relations (Northern Ireland) Order 1997.

Travelling, although historically of great significance, is only one part of the identity of Romany Gypsies and Irish Travellers. Coercion, economic necessity, lack of adequate sites, their children's need for schooling, all mean that many are now in some degree "settled". Whether or not they are nomadic, Romany Gypsies and Irish Travellers are protected by the RRA as racial groups defined by their ethnicity. Conversely, there are other Travellers (such as so-called New Age Travellers) who are not so protected. Not all those protected are Travellers; not all Travellers are protected.

The point is important. Those who move into Council or private housing retain their culture and identity, and continue to face prejudice, but may find it less easy to access specialist services. Public authorities lose interest in them, and the Government has little information that might enable their specific needs to be identified. The UK's most recent report to the UN Committee for the Elimination of Racial Discrimination (CERD) was criticised by the Committee for the absence of information about settled Romany Gypsies.

### 'No Travellers' – direct or indirect discrimination?

Both *Dutton* and *O'Leary* concerned pubs with a 'No Travellers' policy. In *Dutton* it was held that the discrimination was indirect, because the court found on the facts of that case that a Gypsy living in a house would not have been caught by the pub's 'No Travellers' rule, whereas a non-Gypsy Traveller would have been. In *O'Leary* by contrast the allegation was of direct discrimination.

The discrimination faced by Romany and Irish Gypsies will often be indirect, not direct, for two

reasons: firstly, because the act complained of may be directed at them as Travellers rather than as Gypsies (but the issue will always be, not the language used, but the group that is or will be affected); and secondly, because the discrimination may consist in treating them the same as other people, when their needs are different.

### **The extension of the RRA**

Section 19B(1) of the RRA as amended by the RRAA makes it unlawful for a public authority to discriminate in carrying out any of its functions. Public authorities include all local authorities and NHS trusts, but not general practitioners, who are however caught by the original goods and services provisions.

### **Specific duties under the Act**

Every local authority, NHS trust and police authority (among many others) is required, by 31st May 2002, to publish a Race Equality Scheme; that is, a scheme showing how it intends to fulfil its general duty to work towards the elimination of unlawful racial discrimination and promote equality of opportunity and good race relations. Local pressure will be needed to ensure that the needs of Romany Gypsies and Irish Travellers are addressed. Authorities may need reminding that both are racial groups under the Act.

State and Voluntary Aided schools must produce a less detailed written statement by the same date.

### **The Human Rights Act**

Section 3 of the HRA requires that the RRA as amended be interpreted so far as is possible in a way that is consistent with Convention rights. Section 7 of the Act creates a free-standing cause of action against a public authority where Convention rights are violated.

Gypsies and Travellers face enormous difficulty in securing their most basic needs for a home, adequate health care, and education for their children. It is not surprising that there has been a series of challenges under Article 8 to interferences by the State in Gypsies' homes and family life. In Strasbourg such challenges have so far been unsuccessful, because in each case the ECtHR, while acknowledging that there has been an interference, has refused to rule the interference unlawful, and has instead allowed the UK government a wide margin of appreciation. The most recent such case is *Chapman v UK* No. 27238/95 (The Times 30.1.2001).

A UK court or tribunal must take into account the

judgments of the ECtHR to the extent it considers them relevant, but is not bound by them (HRA s. 2). In allowing the UK a margin of appreciation in cases such as *Chapman*, the ECtHR is in effect exercising a supervisory jurisdiction. However, the margin of appreciation has no application to the domestic courts, which must therefore engage with the substantive issues when a violation of Convention rights is alleged.

Where Convention rights of Gypsies and Irish Travellers are violated, the facts may well found a claim under the RRA, in which HRA points can be taken. In any case where racism is suspected, full use should be made of the Race Relations Questionnaire (RR65) procedure.

### **Evictions under the Criminal Justice & Public Order Act 1994**

Ever since legislation in 1960 gave local authorities the right to close commons to Travellers, there has been a grave shortage of sites where Gypsies and Travellers can lawfully stop, even for short periods. The concomitant duty to provide sites was never fully complied with and has now been repealed. Most publicly provided Gypsy sites are specifically excluded from the security of tenure provisions in the Mobile Homes Act 1983.

The Criminal Justice & Public Order Act 1994 gives draconian powers to both local authorities and the police to evict Travellers camped unlawfully. The case law and statutory guidance say that before the decision to evict is taken, full enquiries must normally be made as to the family's circumstances. Nevertheless, hundreds of evictions take place every year.

This is an area which both local authorities and the police should be pressed to address in their Race Equality Schemes. A claim of direct racial discrimination may be well founded if the applicant can find a comparator. For instance, when there is trouble on a Council housing estate, it is the practice to go after those causing the trouble. One does not hear of entire estates being evicted, yet that is what can happen when there is trouble at an unauthorised Gypsy site. Of course this comparison is not exact enough to found a claim under the Act.

### **Planning**

Section 19A of the RRA makes it unlawful for a planning authority to discriminate in carrying out their

planning functions. This provision was in the RRA even before the RRAA amendments.

Planning permission is required for the carrying out of any material development of land, and a change in the use of land for the stationing of caravans (trailers) can constitute a development. Those who resort to buying their own land very often find that they are refused planning permission to station their trailers on it. Such refusals of planning permission can be justified on planning grounds, since Local Development Plans rarely contain any provision for the needs of Gypsies and Travellers. The position is exacerbated if the land is in a Green Belt.

In these circumstances, it is hard in practice to obtain evidence that a planning decision, ostensibly made on good planning grounds, is in fact tainted by racism towards the applicant. It is not surprising that, to my knowledge, no such case has ever been brought. Yet the whole process reeks of racism from start to finish, and is constantly challenged as a breach of Article 8. Most of the cases taken to Strasbourg have been on this issue: see for instance *Buckley v UK* No. 20348/92 (1996) and *Chapman* (referred to above).

In an important development, the use of injunctions to enforce planning decisions has recently been curtailed by the CA decision in *South Buckinghamshire District Council v Porter* The Times 9.11.01. The CA overruled a long line of cases sanctioning the grant of what were effectively rubber-stamp injunctions. The CA applied the HRA and found that such a practice breached the Article 8 right to respect for home and family life. An injunction may still be granted in an appropriate case, after due consideration.

The RRA can be invoked at every stage of the planning process. Planning authorities may be sensitive to accusations that by ignoring the needs of Gypsies and Travellers they are in breach of their general statutory duty under section 71 of the RRA. Individual refusals of planning permission can in an appropriate case be challenged under the RRA as either directly or indirectly discriminatory, and HRA points can be taken in the proceedings.

## Education

Statute law in this area is largely satisfactory, and Government funded Traveller Education Services provide support to children and their families. It is in the areas of policy and practice that problems arise.

In its observations on the UK's last report (see above), CERD expressed concern about admission and access to schools for Romany Gypsy children. Schools that refuse to offer places to children in their area should always be challenged to explain their decision, possibly through an RR65.

There is a great deal of bullying of Gypsy and Traveller children, and it is a factor in low attendance rates (another is the disruption caused by repeated evictions of families who would like to stay put during term time so that their children can attend school).

Exclusion rates for Gypsy and Traveller children are very high, and warrant the same concern as exclusion rates for Afro-Caribbean boys. Exclusions may involve both direct and indirect discrimination. Ignorance of Gypsy culture may on occasion cause behaviour to be misinterpreted. Equally, it is beyond belief that decisions are never taken on racial grounds. This area is ripe for challenge under the Act.

## Health and social services

This is another area in which legislation is largely adequate, but policy and practice may fail to take into account the special needs of Travellers.

GP's who refuse to offer temporary or permanent registration to Travellers in their area can be challenged with an RR65 Questionnaire.

The situation of disabled adults and children is of particular concern, as their needs are often inadequately met. Disabled children may not be identified, and so they and their families may not receive the services and support to which they are entitled. In appropriate cases, challenge under both the DDA and the RRA should be considered, and Questionnaires served.

Mental health is an area of widespread failure to make appropriate provision. A major problem concerns detention, both under the Mental Health Act and in prison. To confine a person used to a nomadic lifestyle in a hospital or prison is arguably to place them at grave risk of suffering psychological damage. It is thought that a disproportionate number of young men committing suicide while on remand may be from such backgrounds. There is no easy answer to this problem, but the Prison Service and health authorities (including the Special Health Authorities) are subject to the s. 71 general duty and also the specific duty to prepare Race Equality Schemes. Regimes that indirectly discriminate

against Gypsies and Travellers can and should be challenged under the RRA.

## Conclusion

Gypsies and Irish Travellers are among the most marginalised groups in our society. The RRA as amended by the RRAA provides a framework within which to challenge both direct and indirect discrimination against them, and its use should be

considered whenever there is reason to suspect such discrimination. The RR65 Questionnaire procedure provides a very useful tool for eliciting information, on the basis of which it should be possible to ascertain whether there is a case.

**Gaby Charing**

Discrimination Law Association

The Traveller Law Research Unit (TLRU) at Cardiff Law School has recently published the Traveller Law Reform Bill. It is the product of a massive exercise in consultation among Gypsy and Traveller organisations and other concerned individuals and organisations. Its main purpose is to tackle the social exclusion of Gypsies and Travellers by amending discriminatory statutory provisions and removing decisions concerning site

provision and site “toleration” from the political stage.

The Bill, an explanatory memorandum and a brief guide can be downloaded from the TLRU Web site at [www.cf.ac.uk/claws/tlru](http://www.cf.ac.uk/claws/tlru). It can also be ordered by e-mail from [TLRU-L@cardiff.ac.uk](mailto:TLRU-L@cardiff.ac.uk) or by post from Traveller Law Research Unit, Cardiff Law School, P O Box 427, Museum Avenue, Cardiff, CF10 3XJ.