THE HUMAN RIGHTS ACT (HRA) 1998

The European Convention on Human Rights (ECHR)

The Act came into force in the UK on 2nd October 2000[1], and incorporates the European Convention on Human Rights (ECHR) into British law. As the Government White Paper which introduced the Human Rights Bill prior to its enactment stated: 'In this country it was long believed that the rights and freedoms guaranteed by the Convention could be delivered under our common law. In the last two decades, however, there has been a growing awareness that it is not sufficient to rely on the common law and that incorporation is necessary'.

The Convention rights and freedoms protected under the HRA include:

Article 2	The right to life and the prohibition of arbitrary deprivation of life
Article 6	The right to a fair trial
Article 8	The right to respect for private and family life, home and correspondence
Article 10	Freedom of expression, including the right to receive and impart information and ideas without interference
Article 11	Freedom of assembly and association, including the right to form and join trade unions
Article 14	The prohibition of discrimination on any ground such as sex, race, colour, language, religion, opinion, national or social origin, association with a national minority, property, birth or other status.

Also included are the rights under the various Protocols (ECHR supplements) to which the UK is a party, including the right to peaceful enjoyment of possessions (First Protocol, article 1), and the right to education (First Protocol, article 2).

Categories of rights

All of the rights and freedoms can be divided into 3 categories:

1. Those which cannot under any circumstances be restricted, even in times of war and so on i.e. the right to life, the prohibition of torture and slavery, the prohibition of retrospective application of criminal law.
2. Those from which the Government can derogate in prescribed circumstances i.e. the right to a fair trial, the right to liberty and security and security of person; but which are not otherwise to be balanced against the general public interest.
3. Those which are qualified by the general public interest and other limitations, therefore requiring the courts to carry out a 'balancing act'.

Regarding qualified rights, an example very pertinent to Travelling People (Gypsies and other Travellers) would be that of Article 8.1: 'Everyone has the right to respect

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[1] Although the Government of Wales Act 1998 section 107 and Schedule 8 provides that the Welsh Assembly was effectively bound by the HRA provisions from 1 July 1999. See article by Luke Clements in *Legal Action* July 1999, 'Devolution in Wales and the human rights implications' (available from TLRU office).

for his private and family life, his home and his correspondence'. The limitations on this right are listed at Article 8.2 where it is said that there 'shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

Limitation of the Article 8 right can thus only be justified if the person or body limiting it can show that such limitation is 'prescribed by law' *and* that it falls within one of the aims listed in subsection 2. For the latter, the person or body limiting the right must be able to show that the limitation meets a pressing social need and is proportionate to the aim of responding to that need. The analogy developed in Strasbourg under ECHR cases is that a sledgehammer must not be used to crack a nut. With respect to planning cases involving Travelling People, the only feasible limitation in subsection 2 would usually be the last, protection of the rights and freedoms of others (where, again, a 'balancing act' will be necessary).

Article 14: Enjoyment of rights & freedoms without discrimination

Article 14 does not stand alone[2]. A person cannot take a case simply because that one Article has been breached; it must relate to a right or freedom which falls within one of the other Articles. So a person could say to a court or tribunal that a right which could fall within their Article 8 right to privacy has been breached, *and* that it has been breached in such a discriminatory manner that a breach of Article 14 can also be claimed (breach of the former right need not be proven).

Probably the most useful feature of this Article is that the grounds on which discrimination are claimed may not be as important as the fact that discrimination has taken place; the list of grounds under the Convention which includes race, gender and national or social origin is not exhaustive and other grounds have been held to be acceptable (i.e. age and sexual orientation). This may reduce legal arguments about what does or does not constitute a 'Gypsy' or a 'Traveller'; for example, a complainant may not have to prove that they are a Gypsy but only that they were treated in a discriminatory way because it was believed that they were.

The Strasbourg courts have tended to take the line that, if a breach of the relevant other Article has been found (i.e. Article 8), they need not go on to consider whether the breach was discriminatory under Article 14 unless such discrimination was a primary aspect of the case. It remains to be seen what approach will develop in the courts and tribunals of the UK. Other limitations of the Article are that discrimination often takes place between private individuals and organisations so that complainants will have to fall back on Britain's Race Relations Act 1976[3]; and that the Article does not currently apply to indirect discrimination[4].

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[2] The Council of Europe has written Protocol 12 to the ECHR which will make non-discrimination a 'stand alone' provision for signatory States. The UK has not signed it.

[3] Although the Race Relations (Amendment) Act 2000 came into force in April 2001; the 1976 Act as amended has greater potential to tackle 'institutionalised' discrimination.

[4] This occurs where the application of a seemingly indiscriminate rule or policy has a disproportionate effect on individuals in a particular group.

The effects of the Act in the UK

The HRA has the following effects in the UK:

- All primary and secondary legislation passing through Parliament after 2nd October 2000 must be accompanied by a written statement asserting that the new law is compatible with the ECHR, or that it is not but that Parliament should proceed to make it law. There would, of course, need to be very compelling arguments for the latter course to be followed.
- All laws must be interpreted by the courts so as to be compatible with the ECHR, proceeding on the assumption that Parliament intends that its laws should be compatible. This 'rule of construction' applies to past as well as future legislation. This means that our system of 'precedent' in the courts, whereby past decisions are usually followed wherever possible, will not necessarily continue to exist. A new body of case law will develop which takes account of Convention Rights.
- Where primary law is so incompatible with the ECHR that the courts cannot construe it so as to be compatible, the courts have no power to strike it down as in some other countries where the constitution allows for this (i.e. Canada, South Africa). In the UK Parliament is 'supreme'. However, some courts - from the High Court up to the House of Lords - can issue a 'declaration of incompatibility', which sends a signal to the government which should (in theory) persuade it to change the law so that it is compatible[5]. The courts have the power to disapply subordinate legislation, unless the primary legislation to which it is subordinate expressly excludes this.
- All public authorities, including all courts and tribunals, must act in a way that is compatible with the ECHR wherever possible. This obviously encompasses local government, the police, immigration and customs services, prisons, central government, and any person or organisations whose functions are 'of a public nature' (i.e. the privatised utility companies).
- Private individuals and bodies who believe that their rights have been breached by one of these bodies, or an individual acting for one of these bodies, can seek a remedy through judicial review or can rely on the breach as a defence in criminal and civil proceedings. Rights can be raised in any normal court proceedings, from the Magistrates' Court to the House of Lords, and in tribunals. 'Victims' can also, by virtue of section 7(1) of the HRA, take can bring a case for infringement of their rights similar to a civil case for ‘tort’ or civil wrong (which would enable them to seek compensatory damages).

Because of the Human Rights Act, when public authorities are considering whether to take an action (or not to act), they should ask themselves:

1. Do I have a lawful power to do (or not to do) this?
2. Is what I am doing proportionate i.e. do the aims justify the means?
3. What is my objective? Is it relevant and necessary?
4. Is there an alternative course of (in)action which impacts less on rights while achieving the same aim?
5. Do I need to act now, or can it wait?
6. Is there a record of my reasoning, either for future reference in rights-related situations, or in the event of a query about the current situation?

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[5] If such declarations are issued, the Government argue that it would be politically difficult for the to ignore them. I would argue that this may not be the case for very 'unpopular' minorities such as Gypsies and Travellers.

The role of the Courts
The Act is a 'quasi-constitutional' document. The courts will interpret it cautiously because, as a mere Act, the HRA does not reflect a clear constitutional mandate to make judicial decisions which might limit the powers of Parliament.

Civil liberties decisions often reflect the value of the judiciary and of society as a whole. For example, in the United States, it wasn't until the liberal Warren Court of the 1950s that the Supreme Court began to protect the rights of minorities, even in the face of strong opposition, desegregating schools and allowing women the right to abortion. Human rights legislation is not and cannot be the main safeguard to civil liberties; without political will and a fair and impartial judiciary, such legislation can be less effective.

However, 'where victories are won, the substantive law may be altered, with potentially far-reaching effects … the law is seen by many to rest on more neutral considerations of justice and right … judicial decisions wrought through litigation may be more permanent than the political decisions of legislative or executive branches, which - under democratic governments - may flip or flop with the next election or voter survey … strategic litigation aimed at politically independent judges may be the only means of vindicating fundamental rights in societies where numerical majorities retain the political power to deny those rights at will'.[6]

Travelling People
How will this new Act affect Travelling People? Police raids on entire sites rather than individual homes, where officers outnumber the residents 3 to 1 and no arrests are made, could possibly be challenged (as a disproportionate breach of the rights of privacy and peaceful enjoyment). As could constant evictions within a local authority area where no 'toleration' is given or site provision made. It is recommended that the police services and local authorities look at their policies and practices with a view to ensuring that they are proportionate, not discriminatory, and are 'necessary in a democratic society'.

The lack of security of tenure given to residents on local authority Traveller Sites in comparison with the tenancy rights given to other publicly-accommodated people could be open to challenge. And in the realm of planning there are already a number of cases involving Gypsy applicants proceeding through the European human rights mechanisms (see further below). In future Travelling People - as with all other UK citizens - may not have to go as far as Strasbourg (a long, expensive and stressful road) but can commence such hearings in the UK courts[7]; still – but not as – costly.

Clements argues that the law of trespass may be under threat under the HRA. "Article 1 of the First Protocol recognises the right of people to the peaceful enjoyment of their possessions. Trespass however takes this right to an extreme, by protecting the right to 'exclusive' enjoyment. The Convention does not recognise such a right … [l]ikewise the present Government is proposing eroding the trespass

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[6] James A. Goldston [1999] *Race Discrimination in Europe: Problems & Prospects*, European Human Rights Law Review, Issue 5, p. 464.

[7] Although Strasbourg will of course remain as a final source of possible remedy to aggrieved persons.

laws to enable a 'right to roam' over uncultivated land; and clearly does not therefore regard such a right as vulnerable to challenge under the First Protocol".[8]

Clements states that an interference with the First Protocol right of a landowner requires evidence to be put forward that there was a significant hampering of the owner's right to peaceful enjoyment. Actions under trespass law in the UK require no such evidence and mere presence on another's land coupled with a claim to possession can be sufficient to uphold a claim of trespass. This is not in keeping with ECHR law, nor the principal of 'proportionality'. Immediate possession orders may therefore, in future be less easy for public bodies to procure.

Travelling People and Planning

In the case of Buckley v UK[9], Mrs Buckley had been prosecuted and fined for breaches of planning enforcement notices, following refusal of planning permission to reside on her land. She applied to the European Commission of Human Rights in 1991, asserting that the planning system in the UK caused her to unable to maintain her traditional Romany Gypsy way of life. The Commission decided (by 5 votes to 4) that the UK government had violated her rights under Article 8 of the European Convention on Human Rights (ECHR): those of respect for her home, privacy and family life. However, the European Court of Human Rights, while upholding the finding that the case did indeed involve Article 8(1) (which the UK government denied), found in their majority judgement (6-3) the following year that there was no violation of the Article, and that the means employed against Mrs Buckley correctly balanced individual interests against those of the state.

The three minority judges filed dissenting opinions. Judge Lohmus found that, in order to protect their cultural heritage, Gypsies needed more than ordinary and equal treatment by the state; that different treatment might be needed and justified. Judge Pettiti was particularly forceful in his opposition, arguing that, in referring specifically to Gypsies in legislation under their situation was worsened, they were discriminated against. He submitted that '[o]nly discriminatory rules which improved the position of a deprived minority were consistent with non-discrimination and the protection of rights', and that being expected to move off her land with no viable alternative place to go 'amounted to penalising the applicant for the acts or omissions of others'[10].

While this was an adverse decision for Mrs Buckley, and those Travelling People in a similar position who had been hoping that a favourable outcome would assist in their own planning problems, the implications were not all negative. The Court at least showed itself willing and able to consider Gypsy complaints on a case by case basis. If the facts had been slightly different, that is, if there was no alternative site; if powers under the CJPOA 1994 had been used; if extreme and potentially disproportionate enforcement measures had been taken; or if there was a clear breach of natural justice in the planning appeals process, the outcome might have

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8 Luke Clements [1999] *The Impact of the Human Rights Act*, from notes from the Legal Action Group course 'The Law Relating to Travellers', 23 June 1999, p. 24.

9 European Court of Human Rights judgement, 25 September 1996, 23 EHRR 101. The European Commission had previously decided, in September 1995, in favour of Mrs Buckley, holding that her Article 8 rights had been violated.

10 Hilaire Barnett, New Law Journal, 8 November 1996, p. 1628 at p. 1630.

been different for Mrs Buckley. The Court also sustained that the right of Gypsies to their traditional way of life is relevant to the planning process.

Several years later a similar set of cases to that of Mrs Buckley were heard by the European Commission of Human Rights. In Sally Chapman v UK and Jane Smith v UK[11] the Commission concluded by a majority of 18 votes to 9 that there had been no violation of Article 8 of the Convention. Nonetheless, the Commission felt that the case raised sufficient questions of fact and law to justify a further hearing of this case, and five other jointly-heard planning cases brought by Gypsy applicants, by the European Court of Human Rights. Sir Nicolas Bratza, in his separate opinion, expressed the view that his conclusion that there had been no violation was reached with 'considerable hesitation' on his part, and he clearly only reached this conclusion because he found it too difficult to distinguish the case from Buckley[12]. It was noted in the Smith Report that the area where planning permission had been sought, Runnymede in Surrey, 'consists entirely of Green Belt and urban centres'[13].

The five Gypsy planning cases went to be decided recently by the European Court of Human Rights - the lead case being Chapman v UK[14] - and, while decided in favour of the UK Government, contained some stern dissenting judgements decrying the current position for Travelling People here. The Maltese Judge critiqued the inappropriateness of focussing on Mrs Chapman's failure to comply with UK planning law, when the Government itself was in breach of its international commitments towards minorities, and the local authority had failed to comply with its duties under the Caravan Sites Act 1968.

The minority judges, 7 of 17, concluded (at paragraph 5 of their Opinion) that the 'long-term failures of local authorities to make effective provision for gypsies in their planning policies is evident from the history of implementation of measures concerning gypsy sites, both public and private … the Government is already well aware that the legislative and policy framework does not provide in practice for the needs of the gypsy minority and that their policy of leaving it to local authorities to make provision for gypsies has been of limited effectiveness'.

On this basis the minority considered it disproportionate to evict Gypsies from their home on their own land where there is no other lawful, alternative site reasonably open to them, and that local authorities should take steps to ensure that the planning system affords effective respect for the home, private life and family life of gypsies such as the applicant. That the Chapman case was decided by such a slim majority indicates that it may not be long before the majority of a human rights courts not only advises that such measures be taken but insists upon it. In the meantime, these decisions can be seen by the British courts and other planning fora as setting a floor, not a ceiling, on minimum standards of human rights for Travelling People.

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11 Application Nos. 27238/95 and 25154/94 respectively.

12 Sally Chapman v UK, Application No. 27238/95, pp. 20-1; Jane Smith v UK, Application No. 25154/94, pp. 24-5.

13 Jane Smith v UK, p. 7, para. 39.

14 18 January 2001. See the judgement at http://hudoc.echr.coe.int/hudoc/default.asp