COMMISSION FOR RACIAL EQUALITY v DUTTON

[COURT OF APPEAL]

[1989] Q B 783

HEARING-DATES: 18, 19, 20, May 27 July 1988

27 July 1988

CATCHWORDS:

Discrimination, Race - Racial group - Gipsy - Signs displayed at public house that "travellers" not served - Whether words synonymous with gipsies - Whether signs indicating intention to discriminate on ground of "ethnic ... origins" - Race Relations Act 1976 (c. 74), ss. 1(1)(a), (b), 3(1), 29(1)

HEADNOTE:

The defendant, a licensee, displayed signs marked "No travellers" at his public house following an incident involving persons from caravans parked nearby. The Commission of Racial Equality, considering that the signs referred to gipsies so as to indicate an intention by the defendant to discriminate unlawfully against them, brought an action against him for a declaration that the signs contravened section 29(1) of the Race Relations Act 1976 n1 and an injunction restraining him from continuing to display the signs. The judge, dismissing the action, held that since "travellers" was not synonymous with "gipsies" the signs did not indicate any intention to discriminate directly contrary to section 1(1)(a) of the Act. He further held that gipsies were not on the evidence a racial group for the purposes of section 3(1) of the Act and, accordingly, rejected the commission's contention that the signs could amount to indirect discrimination contrary to section 1(1)(b) of the Act.

On appeal by the commission:-

Held, (1) that the meaning of "traveller" depended on the context in which it was used and was not synonymous with "gipsy;" that when displayed at a public house near land on which nomads periodically encamped, it was reasonably understood as referring to persons currently leading a nomadic way of life, irrespective of whether or not they were gipsies; and that, accordingly, the signs gave no indication of any intention to discriminate directly contrary to section 1(1)(a) of the Act of 1976 (post, pp. 798A-F, 804B-D, 807B-C).

n1 Race Relations Act 1976, s. 1(1)(a)(b): see post, pp. 795C, 798G - 799A.

S. 3(1): see post, p. 795C-D.

S. 29(1): see post, p. 795A-B.

(2) Allowing the appeal, that the term "gipsy" could be understood colloquially as meaning "nomad," but that in its narrow sense, as denoting a member of a wandering tribe, called Romany, might import the concept of ethnic origins for the purposes of the Act; and that there being

sufficient evidence to establish that gipsies were an identifiable minority group with a long-shared history, a common geographical origin and distinctive cultural features so as not to have been absorbed into the general population, they did accordingly constitute a racial group within the meaning of section 3(1) of the Act (post, pp. 796B-D, 801A-D, G-H, 802H, 806F-H, 810C-F).

Mandla (Sewa Singh) v. Dowell Lee [1983] 2 A.C. 548, H.L.(E.) applied.

Mills v. Cooper [1967] 2 Q.B. 459, D.C. distinguished.

(3) That since the proportion of gipsies who could comply with the condition "No travellers" was substantially smaller than the proportion of non-gipsies, and since on a true construction of section 1(1)(b) the question whether or not the condition could be complied with fell to be tested at the time it came to be fulfilled, namely, when a gipsy wished to resort to the defendant's public house the signs might have indicated an intention to discriminate indirectly contrary to section 1(1)(b); but that in the absence of evidence as to whether the signs might be justified under section 1(1)(b)(ii) the matter would be remitted to the county court for a further hearing (post, pp. 803G, 804A-C, 807A, 810C-F).

Clarke v. Eley (IMI) Kynoch Ltd. [1983] I.C.R. 165, E.A.T. applied.

Per curiam. In considering whether or not the word "gipsy" for the purposes of the Race Relations Act 1976 imports the concept of ethnic origins, no assistance is to be derived from the meaning ascribed to the word for the purposes of the Highways Act 1959 and the Caravan Sites Act 1968 (post, pp. 802D-E,805B-C, 807F-H).

INTRODUCTION:

APPEAL from Judge Harris Q.C. sitting at Westminster County Court.

By their re-amended particulars of claim dated 24 June 1987, the plaintiffs, the Commission for Racial Equality, sought (1) a declaration that signs bearing the words "No travellers" displayed by the defendant, Patrick Dutton, the licensee of the Cat and Mutton Public House Broadway Market, London Fields, London E.8, on the door of the public house, contravened section 29 of the Race Relations Act 1976 and (2) an injunction restraining him, his servants or agents from displaying the signs, or any others bearing words to similar effect.

The commission alleged that in their natural and ordinary meaning the signs indicated, or might reasonably be understood as indicating an intention by the defendant to do an act of discrimination, namely, on racial grounds to treat gipsies less favourably than other persons by refusing or deliberately omitting to provide them with goods, facilities, or services that they might seek to obtain or use; alternatively to apply a requirement that a person who wished to enter or remain in the public house must not be a traveller, namely a person living in a caravan or otherwise living a nomadic way of life (i) a condition which would apply equally to persons not of the same racial group as gipsies but which was such that the proportion of gipsies who could comply was considerably smaller than the proportion of non-gipsies and (ii) which could not be justified irrespective of the colour race nationality or ethnic or national origins of the gipsies to whom it could apply and (iii) which would be to the detriment of gipsies because they could not comply with it.

By an order dated 29 June 1987 Judge Harris Q.C., sitting with two assessors, found that the word "traveller" was not synonymous with "gipsy," and that gipsies were not a racial group within

the meaning of the Act of 1976. He accordingly held that the signs did not contravene section 29 as indicating an intention by the defendant to discriminate either directly or indirectly contrary to section 1(1)(a) and (b) of the Act and he dismissed the commission's action.

By a notice of appeal dated 16 July 1987 the commission appealed on the grounds (1) that the judge erred in law in holding that the publication of an advertisement displayed on the door of the Cat and Mutton Public House stating "No travellers" might not reasonably be understood as indicating an intention by the licensee to do an act of discrimination, namely, refusing to provide facilities and refreshments at the public house to persons because they were gipsies, being members of a racial group; (2) that the judge erred in law in not holding that the word "traveller" contained in such an advertisement might be reasonably understood as meaning "a gipsy;" (3) that alternatively the judge misdirected himself in not holding that the words "No travellers" might reasonably be understood

by gipsies as indicating an intention by a person to do an act of discrimination; and that to give effect to the meaning of the words "an advertisement which ... might reasonably be understood as indicating" in section 29 of the Race Relations Act 1976, it was necessary to insert after the words "might reasonably be understood" the words "by such persons as were members of the racial group to whom the advertisement was directed;" (4) that the judge erred in law in holding that gipsies were not a racial group within the meaning of section 3 of the Act of 1976; (5) that the decision of the judge that the word "travellers" might not reasonably be understood to mean gipsies and that gipsies were not members of a racial group was a decision made against the weight of the evidence; (6) that the judge erred in law in holding that it was not possible for a person to be a gipsy and a member of a racial group under the Act of 1976, and not a gipsy as defined by section 16 of the Caravan Sites Act 1968; (7) that the judge erred in finding that gipsies did not form part of a clearly identifiable racial group; (8) that the judge erred in law in rejecting the commission's alternative case that the defendant was guilty of an act of discrimination within the meaning of section 1(1)(b) of the Act of 1976.

By a respondent's notice dated 30 September 1987, the defendant sought to contend that the judge's decision should be affirmed on the additional grounds (1) that the judge's rejection of the commission's submission that the meaning of "traveller" was synonymous with "gipsy" was supported by the evidence; (2) that the judge's findings that the word "traveller" did not and might not reasonably be understood as referring to a member of a racial group amounted to findings of fact supported by the evidence; (3) that the judge's finding that gipsies were not a racial group was supported by the evidence which showed that persons who might be called gipsies did not come within the seven conditions described by Lord Fraser of Tullybelton in Mandla (Sewa Singh) v. Dowell Lee [1983] 2 A.C. 548, 562; (4) that the commission failed to prove an act of discrimination contrary to section 1(1)(b) of the Act of 1976 because (a) discrimination was alleged against members of the public, not members of an ethnic group, (b) there was no condition applied by the advertisement, (c) there was no evidence in any event of the application of a condition to any member of a racial group, (d) there was no evidence to satisfy section 1(1)(b)(iii) of the Act of 1976 and (e) in any event the defendant proved the justifiability of the advertisement.

The facts are stated in the judgment of Nicholls L.J.

COUNSEL:

Stephen Sedley Q.C. and Keith Hornby for the commission. The facts are not in dispute. The sign displayed in the defendant's public house constitutes "an intention to discriminate" against gipsies who form an ethnic and therefore a racial group which the Race Relations Act 1976 is intended to protect. The judge was wrong to hold that the intention evinced by the notice, namely to exclude the caravan-dwellers encamped on the nearby waste land, was not adverse to any identifiable ethnic group and accordingly not directly or indirectly discriminatory within the meaning of the Act. The judge neither asked nor answered the correct question of law and his conclusions were untenable not only in terms of the law but also of the evidence.

Under the Act the judge's principal task was to decide whether the "No travellers" sign might reasonably be understood as indicating an intention by the defendant to discriminate on racial grounds in the provisions of goods, facilities or services. In the alternative he had to decide whether the defendant, in imposing a condition that the patrons of the Cat and Mutton must not be travellers, was indirectly discriminating against members of a group defined by reference to ethnic origin. The judge failed to evaluate the lay and expert evidence or to distinguish between what he rejected and what he accepted. Giving the maximum permissible weight to his expressed views on the experts as witnesses, the evidence still establishes the defendant's liability, or at least requires remission for a proper appraisal.

The terms "gipsy" and "traveller" are synonymous. The defendant's evidence made it clear that the notice was aimed at the nearby "travellers" who were recognisable to him by their dress, their speech, and by their not being regulars. They included men, women, babies and children. The sign would not deter travelling football fans, nor necessarily hippies. The evidence of both sides establishes the distinct cultural and physical identity of the persons excluded (and intended to be excluded) by the sign. Whether such people are properly called travellers or gipsies or both, the expert witnesses gave evidence about their cultural identity which was unshaken and, since the defendant called no evidence to the contrary, it was uncontroverted. While conceding that the judge's strictures on Dr. Acton were justified, as he had not been an easy witness, it was wrong to consider the other expert, Dr. Kenrick in the same class. The judge's critical and adverse view of both experts and of their motivation did not entitle him to disregard their evidence. The effect of that evidence is that the people excluded (and intended to be excluded) by the sign form an ethnic group.

The point of section 29 of the Act is primarily to prevent people from discriminating prospectively by limiting public offers or invitations so as to exclude some people on racial grounds. While the existence of an intention or what might reasonably be understood as an intention to discriminate may in some cases be tested by the natural and ordinary meaning of the words, that test will not necessarily answer the question whether discrimination is on racial grounds: as contrasted with the approach in Commission for Racial Equality v. Associated Newspapers Group Ltd. [1978] 1 W.L.R. 905, 908, per Lord Denning M.R. Whether discrimination on racial grounds has arisen will in some cases depend on the factual context. Any notice excluding a class of person indicates an intention to discriminate, so that here the only live question is whether the ground of discrimination is racial. While therefore the language of section 29 is objective, when related back to section 1, as it has to be, the court will be concerned principally to ascertain the message the

advertisement will convey to the people it seeks to exclude, and secondarily with the message to the wider public. Thus a message "No Chinese" inevitably infringes section 29.

Section 29 as now drawn has undergone a significant change from its predecessor section 6 of the Race Relations Act 1968. The word in section 29 is "might reasonably be understood" ... whereas in section

6(1) the word used was "could reasonably be understood." "Might" has a wider connotation and the word change is material having regard to a statute of the present kind which deals with a deeply sensitive area of social policy. There is no single natural and ordinary meaning to a notice stating "No travellers." Its significance will vary according to the context, such context including who conveys the message and to whom. It is for the court to select a meaning in the light of the factual context. The judge therefore had to decide whether the ground of the intention to discriminate which the notice in its ordinary and natural meaning plainly conveyed was a racial ground within section 3(1) of the Act of 1976 - namely a ground related to the ethnic origins of those excluded. And that issue had to be decided by reference to the evidence and the purposes of the Act to ascertain whether in its factual context the Sign offended against the law. The judge entirely failed to carry out that exercise.

Where a discriminatory notice is displayed but there is a range of possible understandings of whom it seeks to exclude, the court has (a) to see if the ground of any of them is racial (that is, contrary to section 1(1)(a)) and/or if any of them has an adverse impact on one or more racial groups (that is, contrary to section 1(1)(b)), or (b) to see whether the racial grounds or the racial group specified by the commission are established by the evidence as within the range of what might reasonably be understood from the notice in its context. A third possibility, namely, (c) to decide whom the notice is reasonably to be understood as excluding, and whether that exclusion is directly or indirectly racially discriminatory, assumes what may well not be true: that there is always a single such understanding or meaning.

In the instant case approaches (a) and (b) produce more than one possible result on the evidence and include two meanings of which one or both may be held to come within the range of reasonably possible understandings: (i) "Travellers" are gipsies who form an ethnic group; in which case (a) and (b) operate via section 1(1)(a) irrespective of other possible meanings; (ii) "travellers" include gipsies, who form an ethnic group; in which case (a) and (b) operate via section 1(1)(b) also irrespective of other possible meanings. Approach (c), by contrast, requires a choice between (i) and (ii). If that is the correct construction, its application depends on the facts found.

In ordinary modern usage and on the uncontroverted evidence "travellers" in the context of the Cat and Mutton notice meant gipsies, in particular those encamped nearby. For well-known reasons, which appeared in the evidence, the common use of "gipsy" as a term of abuse has caused both gipsies and the settled population to use the non-pejorative alternative "traveller." The law has however stuck to "gipsy," allowing it to be used non-pejoratively: see the language of Ralph Gibson L.J. in West Glamorgan County Council v. Rafferty [1987] 1 W.L.R. 457, 463. The judge's decision that the terms are not synonymous is both wrong and legally irrelevant. There was inescapable evidence that a meaning of "traveller" was "gipsy." The fact that linguistically it could also be used to denote a wider class did not matter. The second purpose of section 29 is to prevent the unjustifiable exclusion of people

who though not racially defined substantially include or consist of one or more racial groups: that is to prevent indirect discrimination contrary to section 1(1)(b). The judge did not address the question whether, given his finding that "traveller" was a wider category that included gipsy, the notice had an adverse impact within section 1(1)(b)(i) and (iii), and if so, whether it was justifiable. This failure was because on his other findings he wrongly concluded that gipsies were not an ethnic group.

The law governing the meaning of "ethnic ... origins" in section 3(1) of the Act is set out in Mandla (Sewa Singh) v. Dowell Lee [1985] 2 A.C. 548. At p. 560, Lord Fraser referred to the issue of construction raised by the words "can comply" in section 1(1)(b) and, at pp. 562 and 565, he set out the criteria to be applied in considering whether ethnicity is established. With regard to a common literature, the judge here acknowledged the importance of the criterion but wrongly conclude,d that the gipsies' oral tradition was not the equivalent of a common literature. The decision in Mandla's case taken with those in King-Ansell v. Police [1979] 2 N.Z.L.R. 531 and Ealing London Borough Council v. Race Relations Board [1972] A.C. 342 explain the legislation, but the judge did not sufficiently consider these decisions, mistakenly relegating this source of law to the end of his consideration of ethnicity. He there failed to give any reasons why in his view the expert and other evidence failed to satisfy the legal criteria. Instead he approached the question as though he was required to construe the word "gipsy" by choosing between a blood relationship: "Romany race or true gipsies" and the nomad definition contained in section 16 of the Caravan Sites Act 1968 derived from the decision in Mills v. Cooper [1967] 2 Q.B. 459.

In applying the Race Relations Act 1976 the judge ought to have started with the guidance contained in the Mandla case and then he should have decided how far the various sources of evidence established that travellers or gipsies have a shared ethnic origin. Had he done that, he would necessarily have concluded that they fell within section 3(1) of the Act.

The definition of gipsy contained in the Caravan Sites Act 1968 has a related but distinct purpose, namely to make provision for what in terms of the Race Relations Act 1976 is or may be an ethnic group by means of a workable formula which is not narrowed by reference to blood lineage and is not so wide as to include all caravan-dwellers. [Reference was made to the Caravan Sites and Control of Development Act 1960, sections 23 and 24; Caravan Sites Act 1968; Mills v. Cooper [1967] 2 Q.B. 459 and Greenwich London Borough Council v. Powell, The Times, 24 February 1988, Court of Appeal (Civil Division) Transcript No. 151 of 1988.] The judge's conclusion, that it was not possible to be a gipsy or a non-gipsy for the purposes of one statute, and not for another, indicates that he misunderstood the limited relevance of these other statutes. Their relevance is simply that the highways legislation from 1835 contained offences which only "gipsies" (amongst others) could commit. Faced in 1967 with the contention that that was a definition by blood lineage, the court held that it bore the broader colloquial "nomad" meaning. Parliament used that definition in 1968 in legislating to attempt to resolve the difficulties of site shortages which

was giving rise to fruitless prosecutions (of which Mills v. Cooper is an example). It has now repealed, and not re-enacted, section 127. The legislative history helps to explain why "traveller" and "gipsy" co-exist in modern English, but it has no closer bearing on section 3(1), or indeed on the Act of 1976 which looks centrally at the issue of ethnic origin. Different identifying features will arise from those applicable under the Acts of 1960 and 1968 which focus on nomadic habits of life.

The evidence before the judge all tended to establish the ethnicity of travellers or gipsies. The dictionary definitions practically all use the word "race" or "people" and the modern entries show traveller as synonymous with gipsy: see Chambers 20th Century Dictionary (1983) and Supplement to the Oxford English Dictionary (1986). The judge's finding on this part of the evidence is accordingly perverse. The government reports produced and referred to in evidence all establish the Mandla criteria: see in particular the report by Mr. John Cripps for the Department of the Environment and the Welsh Office "Accommodation for Gipsies," (1976). The judge's conclusion about the report was based on a misreading of it. The expert evidence, which was uncontroverted, deserved fuller analysis. Its purpose is to inform the court and the parties of matters requiring specialised knowledge. Assessors are a check on it, but not a substitute: see Halsbury's Laws of England, vol. 37 (1982), p. 359, para. 475. Where expert evidence is all one way the court must accept it unless in an extreme case the court was satisfied that it was untruthful: see Patel v. Mehtab (1980) 5 H.L.R. 78, 82. In the present case taken with the oral evidence of both lay and expert witnesses and the documentary evidence, it establishes the commission's case.

If "travellers" is not synonymous with "gipsies" for the purposes of section 1(1)(a), then the term includes gipsies, and the notice amounts to an intention to discriminate indirectly contrary to section 1(1)(b). To establish such adverse impact it must be shown that (a) the notice imposes a requirement or condition; (b) it applies to non-gipsies as well as gipsies; (c) gipsies are a racial group; (d) the proportion of gipsies who can comply with the condition is considerably smaller than the proportion of non-gipsies who can so comply; (e) inability to comply is to gipsies' detriment; (f) the condition cannot be justifiable irrespective of gipsies' ethnic origins.

Assuming that travellers are a wider category which includes gipsies, it is a requirement that patrons of the Cat and Mutton must not be travellers. The condition applies to all potential patrons including gipsies who are a racial group within section 3(1). However no gipsy can comply with the condition but most non-gipsies can. "Can comply" does not mean "can physically:" see Mandla (Sewa Singh) v. Dowell Lee[1983] 2 A.C. 548, 565F-566A, per Lord Fraser. It means "can comply consistently with the customs and cultural conditions of the racial group:" see also Price v. Civil Service Commission [1977] 1 W.L.R. 1417 and dicta of Browne-Wilkinson J. in Clarke v. Eley (IMI) Kynoch Ltd.[1983] I.C.R. 165, 171. Reference was also made to Raval v. Department of Health and Social Security [1985] I.C.R. 685 and Hampson v. Department of Education and Science [1988] I.C.R. 278. Obviously it is

to anyone's detriment not to be able to get a drink in a public house when he or she would like one; but with regard to the defendant's particular problem, the way to deal with trouble-makers is to exclude them, not to make blanket assumptions about groups or types: see Hampson v. Department of Education and Science. The test for justifiability is that the condition must correspond to a real need and be both appropriate and necessary for meeting that need. Exclusion of travellers does not meet that test.

John Samuels Q.C. and Roger McCarthy. It is not unlawful to intend to discriminate simpliciter, but only to intend to do so on racial grounds, and many discriminatory notices are outside the ambit of the Act of 1976. The Race Relations legislation is a good example of social engineering to change attitudes by appropriate statutory intervention. Although initially criticised as intrusive, its importance is now accepted. The corollary is that those charged with conduct contrary to the Act are stigmatised as acting in an anti-social way. The width of the commission's argument shows the dangers of a construction which is both technical and tortuous. In fact the case involves the simple

matter of an East End publican attempting to deal with the particular problem of disturbance facing him by means of a handwritten notice to exclude categories of customer who had in the past or were likely in the future to cause him trouble. He needed to know, as the correspondence with the commission demonstrates, whether his notice was lawful or not, on the basis of an ordinary, not an academic, definition: see the approach of Lord Reid in Cozens v. Brutus [1973] A.C. 854, 861, which is applicable here. The court should be guided by the decision in Commission for Racial Equality v. Associated Newspapers Group Ltd. [1978] 1 W.L.R. 905, and in particular by dicta of Lord Denning M.R., at p. 908. That decision is the only reported case of the Court of Appeal on the advertisement provisions of the legislation and the court's approach there is in consequence of great importance in subsequent cases. At p. 908E-F Lord Denning M.R. equated the test as to the meaning of the relevant words with that in libel cases where no true innuendo is pleaded, namely the words bear the meaning which an ordinary reasonable man would ascribe to them, and that that question was to be determined by the tribunal of fact.

The decision in the present case is that of the judge nominated to deal with cases concerning race relations at the county court designated for that purpose for the Greater London and Home Counties areas, and who sat with assessors. His reference to the presence of the assessors shows that although he did not specifically refer to it, he had the passage of Lord Denning's judgment in Commission for Racial Equality v. Associated Newspapers Croup Ltd. [1978] 1 W.L.R. 905, 909C-E, well in mind. There is nothing to indicate that his approach to the assessors was other than entirely appropriate. His experience, having regard to his special expertise in dealing with this type of case, was therefore considerable.

Travellers are not synonymous with gipsies. The experts' evidence does not establish that. A member of the public in using "traveller" in its ordinary meaning would be referring to a nomad such as a hippy. A

good example is provided by the recent press report of "travellers" being removed from Stonehenge while attempting to celebrate the summer solstice. If the judge is right, there is no such thing as an ethnic group of gipsies, and the matter ends there. If he is wrong but the terms "traveller" and "gipsy" are not synonymous, there being a group of ethnic gipsies within the term, the question then becomes: would a reasonable member of the public imagine "traveller" referred to, amongst others, gipsies?

With regard to the criteria set out by Lord Fraser in Mandla (Sewa Singh) v. Dowell Lee [1983] 2 A.C. 548, 562-563, there is no evidence, and it is significant that no member of the nomads encamped at Hackney near the Cat and Mutton gave evidence, that gipsies as a group were aware of a shared history. In fact some material pointed in the contrary direction. Nor was there any evidence of a cultural tradition. It was necessary to demonstrate some common identity, but the commission's evidence failed to do so. As to geographical origins, as nomadic populations are of their essence wandering, they cannot be said to have a discernible common geographical origin. It is clear that there are difficulties in keeping a common language alive, and there was no evidence suggestive of a common religion shared by gipsies and binding them together. That they are a minority group is obvious. As to whether they are oppressed, on a subjective test, they would probably answer affirmatively on the grounds that there are insufficient local authority sites and that they are universally victimised. On an objective test however that cannot be so, for they are obviously not kept subject to a tyrannical exercise of power. Caravan site shortages must fall short of true oppression. As for common literature, there is clearly an oral tradition but in general they are

illiterate, and Lord Fraser in Mandla'scase was obviously not contemplating the existence of literary tradition amongst the illiterate. Although a common artistic tradition (unless it be encompassed within a common culture) is not referred to by Lord Fraser in setting out his criteria, that might provide a stronger claim to ethnicity.

Accordingly, as the judge concluded, the term "traveller" cannot be synonymous with "gipsy" and no claim to direct discrimination under section 1(1)(a) can succeed. A claim based on indirect discrimination contrary to section 1(1)(b) can also only succeed if the Mandla criteria are satisfied. Since on the evidence there is no racial group of gipsies such as would satisfy Lord Fraser's criteria there can be no possible basis for establishing that the notice amounts to an intention to discriminate indirectly. Only if there were such a racial group does it become relevant to consider whether the condition imposed by the notice is one with which members of the group "can comply." The words of the section "can comply" bear, as Lord Fraser said, the meaning "can comply without giving up the distinctive customs and cultural rules of gipsies." It follows that if a gipsy ceases to be nomadic and becomes a house-dweller, he can comply with the condition set by the notice. Ceasing to be nomadic will not involve his giving up his distinctive customs if he wishes to maintain them. Accordingly on its true construction the notice gives no indication nor might it reasonably

be understood as indicating in the natural and ordinary meaning of the words an intention to do an act of discrimination.

If, contrary to the argument, the notice is held to indicate indirect discrimination within the meaning of section 1(1)(b), there is no finding by the judge as to justifiability for the purposes of paragraph (ii). In that circumstance the matter would have to be remitted to the county court, since at least prima facie the defendant has that defence open to him.

Sedley Q.C. in reply. The ambit of the Act is not only directed to catching those attempting to frustrate its purposes, but also to preventing unconscious discrimination. That is distinguished in the legislation from intentional discrimination, since only the latter gives rise to liability in damages: see section 57(3). [Reference was made to Grieg v. Community Industry [1979] I.C.R. 356.]

It is emphasised that the formula for construing the notice is either within its context, or according to its natural and ordinary meaning. Dicta of Lord Reid in Cozens v. Brutus [1973] A.C. 854, 861 do not assist in the present circumstances. "Insulting," the word there under consideration, can be understood as an ordinary word, but an advertisement such as forms the subject matter of the present issue, depends for its meaning on its context.

Since the decision now under appeal is that of the judge designated for dealing with such cases, it is all the more necessary for the appellate court to ensure that he applies the law properly and that the fact finding exercise is both reasoned out and reflects the admissible and relevant evidence. As for his experience it should be noted that very few cases of the present kind come before Westminster County Court, and a case concerning gipsies is probably unique in that area. It should also be noted that the assessors in fact took no part in the proceedings in open court. The attack by both the judge and those representing the defendant on the experts was unjustified and unwarranted. They were both leading scholars in their field, not part of a pressure group bent on assisting the gipsy cause.

Assuming that it is found that there is evidence of indirect discrimination, in the present circumstances, the defence of justifiability has no chance of success: see dicta of the Employment Appeal Tribunal in Hurley v. Mustoe [1981] I.C.R. 490, 496B. In any event the defendant's analysis

wrongly suggested that the commission's evidence failed to establish the Mandla criteria. There is material showing a group consciousness of a shared history, though not all members of the group are necessarily aware of it. There is also material indicating a cultural tradition: see, for example, the detailed expert testimony relating to the personal hygiene taboos typical of gipsies. Although a commonly held religion is not a particularly good indicator, it is not negatived by the evidence. In addition there is material demonstrating the existence of a common origin: see also dicta of Lord Diplock in Mills v. Cooper [1967] 2 Q.B. 459, 467-468, and of a common language, including the different gipsy dialects spoken, for example, by English and Welsh gipsies. As to oppression, more than one degree of oppression is possible and the judge failed to make any finding about that aspect of the matter. There was therefore sufficient material to establish the Mandla criteria and the

judge should have concluded that gipsies formed a racial group for the purposes of the Act. On any view his findings do not amount to a satisfactorily reasoned judgment.

Cur. adv. vult.

27 July. The following judgments were handed down.

PANEL: Stocker, Nicholls, and Taylor L.JJ

JUDGMENTBY-1: NICHOLLS L.J

JUDGMENT-1:

NICHOLLS L.J: This case concerns gipsies, and whether they are a racial group within the Race Relations Act 1976. The defendant, Mr. Patrick Dutton, has been the licensee of the Cat and Mutton public house at Broadway Market, London Fields, London E.8 for four years. Previously he was the licensee for a year at the Earl of Beaconsfield, in Southwark, and before that he was at the Lord Cecil, in Clapton, from 1978. At both those houses the defendant had unpleasant experiences with people who came from caravans which were parked illegally on nearby sites. They caused damage. They threatened him and terrorised his wife. They behaved generally in such a way as to upset the defendant's regular customers. So much so that, after such incidents, he put up a sign in the windows of the Earl of Beaconsfield and, subsequently, the Lord Cecil, which read "No travellers." By that he meant, as he said in evidence, a person who travels around in a caravan and parks on illegal sites and gives him "hassle." He wanted only to stop such people coming into his public house. Had the incidents continued he would have lost all his customers. After he put up the signs he had no more problems with such people.

One weekend, after the defendant had been at the Cat and Mutton for about 18 months, some 15 or so caravans parked opposite the public house on London Fields, illegally, about 150 yards away. On Sunday morning some of these "travellers" came into the Cat and Mutton. The defendant refused to serve one of them on the ground he was from the site. There was an incident. The defendant then put up handwritten signs in the windows of the door of the Cat and Mutton: "Sorry, no travellers." Since then he has had no more trouble with "travellers."

In June 1985 a local resident, who does not use the Cat and Mutton brought these signs to the attention of the Commission for Racial Equality. The commission took the view that the signs discriminated against gipsies. After correspondence this action was brought by the commission, in the exercise of its functions under section 63. The commission seeks a declaration that by

displaying the signs the defendant has contravened section 29 of the Race Relations Act 1976 and an injunction restraining him from continuing to display the signs. The action was heard by Judge J. P. Harris Q.C. at the Westminster County Court. He sat with two assessors appointed from the list maintained by the Secretary of State under section 67(4) of persons who appear to him to have special knowledge and experience of problems connected with relations between persons of different racial groups. On 29 June 1987 the judge dismissed the action. The commission has appealed from that decision.

The statute

Section 29(1) provides:

"It is unlawful to publish or to cause to be published an advertisement which indicates, or might reasonably be understood as indicating, an intention by a person to do an act of discrimination, whether the doing of that act by him would be lawful or, by virtue of Part II or III, unlawful."

Discrimination for the purposes relevant in the present case is defined in section 1(1). Two types of conduct are within the definition. Paragraph (a) defines what is generally known as "direct" discrimination, although not so called in the Act, as follows:

"(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if - (a) on racial grounds he treats that other less favourably than he treats or would treat other persons; ..."

Section 3(1) defines "racial grounds" as meaning "any of the following grounds, namely colour, race, nationality or ethnic or national origins."

The defendant's notices are advertisements within the definition in section 78(1). Further, they indicate an intention by him to treat "travellers" less favourably than he treats other persons, in circumstances relevant for the purposes of the Act. By the notices he is informing would-be customers that he will not serve any who are "travellers." They cannot use the Cat and Mutton. That is discrimination in the provision of goods, facilities or services: see section 20. Thus arises the question on this part of the case: is that discrimination "on racial grounds?" On this, the first issue to be considered is the meaning of the expression "travellers" in the context in which the signs are being displayed.

The commission's case was that in these notices "travellers" is synonymous with gipsies. Before the judge there was material supporting the contention that, in recent years, the two expressions are sometimes used interchangeably. For example, a new edition of Chambers 20th Century Dictionary (1983) includes under the word "travel" the subheading "traveller:" "travelling folk, people: the name by which itinerant people often call themselves, in preference to the derogatory names gipsies or tinkers." Again, the Supplement to the Oxford English Dictionary (1986), added a further meaning to the word "traveller: ... Also, a gypsy." There was also evidence to the same effect, from two expert witnesses, Dr. Donald Kenrick and Dr. Thomas Acton.

The meaning of "gipsy"

Notwithstanding this material the judge rejected the view that the words are synonymous. I agree with him. But before proceeding further it is necessary for me to comment on the word "gipsy." One of the difficulties in the present case, in my view, is that the word "gipsy" has itself more than one meaning. The classic "dictionary" meaning can be found as the primary meaning given in the Oxford English Dictionary,(1933):

"A member of a wandering race (by themselves called Romany), of Hindu origin, which first appeared in England about the beginning of the 16th c. and was then believed to have come from Egypt."

Hence the word "gipsy," also spelled as "gypsy." It is a corruption of the word Egyptian. We find this usage in Shakespeare, Othello: Act III, scene IV: where Othello says to Desdemona:

"That handkerchief

Did an Egyptian to my mother give.

She was a charmer, and could almost read

The thoughts of people."

Alongside this meaning, the word "gipsy" also has a more colloquial, looser meaning. This is expressed in the Longman Dictionary of Contemporary English (1987), where two meanings are attributed to "gipsy." The first meaning is along the lines I have already quoted. The second is: "a person who habitually wanders or who has the habits of someone who does not stay for long in one place." In short, a nomad.

I can anticipate here by noting that if the word "gipsy" is used in this second, colloquial sense it is not definitive of a racial group within the Act. To discriminate against such a group would not be on racial grounds, namely, on the ground of ethnic origins. As the judge observed, there are many people who travel around the country in caravans, vans, converted buses, trailers, lorries and motor vehicles, leading a peripatetic or nomadic way of life. They include didicois, mumpers, peace people, new age travellers, hippies, tinkers, hawkers, self-styled "anarchists," and others, as well as (Romany) gipsies. They may all be loosely referred to as "gipsies," but as a group they do not have the characteristics requisite of a racial group within the Act.

I give two further illustrations of this point. First, an extract from a report of the Greater London Conciliation Committee, set out in Appendix III to the Report of the Race Relations Board for 1967-68. This refers neatly to a difficulty arising in this field from the two meanings I have mentioned:

"There are the pubs who discriminate against gipsies. In tackling this problem the committee has been hampered by two ambiguities. There is, first, some doubt as to the status of gipsies under the Act. The committee feels that there is little or no justification for this doubt, but equally believe that it persists and that it does so largely because of the second ambiguity. This second ambiguity arises out of common parlance, for it seems that the word "gipsy" is used to designate wanderers generally as opposed to ethnic gipsies. The committee is, therefore, trying to prevent discrimination against gipsies in the one (proper) sense while being aware that it may not interfere with discrimination against gipsies in the other (vulgar) sense, and it is in a weak position in any argument with a publican about which way he uses the words."

Secondly, the decision of the Queen's Bench Divisional Court in Mills v. Cooper [1967] 2 Q.B. 459. The court was there concerned with

the meaning of the word "gipsy" in section 127 of the Highways Act 1959. So far as material the section provides:

"If, without lawful authority or excuse ... (c) a hawker or other itinerant trader or a gipsy pitches a booth, stall or stand, or encamps on a highway, he shall be guilty of an offence ..."

In Mills v. Cooper it was argued that the word "gipsy" should be "given its dictionary meaning, as being 'a member of the Romany race'." Lord Parker C.J. said, at p. 467:

"That a man is of the Romany race is, as it seems to me, something which is really too vague of ascertainment, and impossible to prove; moreover it is difficult to think that Parliament intended to subject a man to a penalty in the context of causing litter and obstruction on the highway merely by reason of his race. I think that in this context 'gipsy' means no more than a person leading a nomadic life with no, or no fixed, employment and with no fixed abode. In saying that, I am hoping that those words will not be considered as the words of a statute, but merely as conveying the general colloquial idea of a gipsy."

Likewise Diplock L.J. said, at pp. 467-468:

"I agree that the word 'gipsy' as used in section 127 of the Highways Act 1959, cannot bear its dictionary meaning of 'a member of a wandering race (by themselves called Romany) of Hindu origin. ...' If it did it would mean that Parliament in 1959 had amended the corresponding section of the Highway Act 1935 (which referred to 'gipsy or other person'), so as to discriminate against persons by reason of their racial origin alone."

In the context provided by this difficulty, and the impossibility of ever being able to prove pure Romany origin, Diplock L.J. preferred what he described, at p. 468, as the popular meaning of the word "gipsy:" "a person without fixed abode who leads a nomadic life, dwelling in tents or other shelters, or in caravans or other vehicles." The substance of that definition was then adopted by Parliament in the Caravan Sites Act 1968. Section 6 of that Act imposed on local authorities a duty to exercise their powers, under the Caravan Sites and Control of Development Act 1960, to provide caravan sites "so far as may be necessary to provide adequate accommodation for gipsies residing in or resorting to their area." Section 16 provides:

"'gipsies' means persons of nomadic habit of life, whatever their race or origin, but does not include members of an organised group of travelling showmen, or of persons engaged in travelling circuses, travelling together as such."

I shall return at a later stage to the relevance of those statutory provisions. For the moment it is sufficient to note that there is ambiguity in the word "gipsy," and when considering reports and other material about gipsies it is essential therefore to identify what is the meaning with which the author is using the word "gipsy." In this judgment, save

where I indicate otherwise, I shall henceforth use the word "gipsy" in the narrower sense, of the first of the two meanings mentioned above.

"No travellers"

I can now state my reasons for agreeing with the judge's conclusion on the "direct" discrimination issue. Like most English words, the meaning of the word "traveller" depends on the context in which it is being used. It has one meaning when seen on a railway station. For some time now the refreshment service provided at railway stations and on trains has been styled "Travellers Fare." The word has a different meaning when in its context it is directed at travelling salesmen. In my view, in the windows of the Cat and Mutton "No travellers" will be understood by those to whom it is directed, namely, potential customers, as meaning persons who are currently leading a nomadic way of life, living in tents or caravans or other vehicles. Thus the notices embrace gipsies who are living in that way. But the class of persons excluded from the Cat and Mutton is not

confined to gipsies. The prohibited class includes all those of a nomadic way of life mentioned above. As the judge said, they all come under the umbrella expression "travellers," as this accurately describes their way of life.

It is estimated that nowadays between one-half and two-thirds of gipsies in this country have wholly or largely abandoned a nomadic way of life, in favour of living in houses. I do not think that the notices could reasonably be understood as applying to them, that is, to gipsies who are currently living in houses. Gipsies may prefer to be described as "travellers" as they believe this is a less derogatory expression. But, in the context of a notice displayed in the windows of a public house near a common on which nomads encamp from time to time, I do not think "No travellers" can reasonably be understood as other than "No nomads." It would not embrace house-dwellers, of any race or origin.

For this reason I cannot accept that the defendant's notices indicate, or might reasonably be understood as indicating, an intention by him to do an act of discrimination within section 1(1)(a). Excluded from the Cat and Mutton are all "travellers," whether or not they are gipsies. All "travellers," all nomads, are treated equally, whatever their race. They are not being discriminated against on racial grounds.

Indirect discrimination: a racial group

That suffices to dispose of the claim based on section 1(1)(a), but that is not the end of the action. I must now turn to consider section 1(1)(b), which is in the following terms:

"(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if - ... (b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but - (i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and (ii) which he cannot show

to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and (iii) which is to the detriment of that other because he cannot comply with it."

On this the first question which arises is whether gipsies are a racial group. If they are not, paragraph (b) cannot apply to the defendant's notices. He cannot apply to a gipsy who wishes to have a drink at the Cat and Mutton a condition, in this case, of not being a traveller, which he applies equally to persons "not of the same racial group" unless gipsies are a racial group within the Act. Indeed, if gipsies are not a racial group, a notice saying "No gipsies" would be lawful.

The definition of "racial group" in section 3(1) includes a group of persons defined by reference to "ethnic ... origins." This definition was considered by the House of Lords in Mandla (Sewa Singh) v. Dowell Lee [1983] 2 A.C. 548. There the context was whether Sikhs constituted a group defined by reference to ethnic origins. Lord Fraser of Tullybelton observed, at p. 563, that the word "ethnic" in the Act should be construed relatively widely, in a broad cultural/historic sense. He approved the following passage from the judgment of Richardson J. sitting in the New Zealand Court of Appeal in King-Ansell v. Police[1979] 2 N.Z.L.R. 531, 543:

"a group is identifiable in terms of its ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and

characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents."

Lord Fraser, summarised his opinion on the construction of the Act in his own words, at pp. 562-563:

"For a group to constitute an ethnic group in the sense of the Act of 1976, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar

to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups. A group defined by reference to enough of these characteristics would be capable of including converts, for example, persons who marry into the group, and of excluding apostates. Provided a person who joins the group feels himself or herself to be a member of it, and is accepted by other members, then he is, for the purposes of the Act, a member. That appears to be consistent with the words at the end of section 3(1): 'references to a person's racial group refer to any racial group into which he falls.' In my opinion, it is possible for a person to fall into a particular racial group either by birth or by adherence, and it makes no difference, so far as the Act of 1976 is concerned, by which route he finds his way into the group."

In the present case the judge expressed his conclusion on the conditions enunciated by Lord Fraser in this way:

"It may well be, as I have said, that there is a small number of travelling people who can claim either by looks or characteristics to be true gipsies but these people have been absorbed into a larger group. Some have abandoned the nomadic way of life and some are indistinguishable from any ordinary member of the public. The larger group of travellers or gipsies forming a part of a larger group cannot in my judgment on the evidence before the court satisfy those two essential conditions and can satisfy barely any of the other five conditions. Although there may be a Romany language, some may be able to trace their ancestry back to people who came to England many hundreds of years ago, the language does not seem to be in general use. There is no common religion, they have no literature. Although it was urged on the court that there should be some relevance in the fact that they have what was described as oral literature passing on myths and other old stories I do not think that was what Lord Fraser was referring to."

He decided that gipsies were not a group defined by reference to ethnic origins.

I come here to a further difficulty about the present case. The evidence on this part of the case consisted principally of evidence called by the commission: the two experts I have mentioned, and a Mr. Peter Mercer, who is a gipsy. No expert evidence was led by the defendant. But although there was no contrary evidence called by the defendant, the judge was not impressed by either of the commission's expert witnesses. He approached their evidence with much caution and doubt. Mr. Sedley criticised the judge's comments in this regard, but on this the judge's advantage, of having seen and heard the witnesses, is obviously of paramount importance. We are

not in a position to conclude that the judge erred in his assessment of the reliability of these witnesses.

Nevertheless, taking the judge's assessment of the witnesses fully into account, and with all respect to the judge, I am unable to agree with his conclusion on what have been called the Mandla conditions when applied, not to the larger, amorphous group of "travellers" or "gipsies," colloquially so-called, but to "gipsies" in the primary, narrower sense of that word. On the evidence it is clear that such gipsies are a minority, with a long-shared history and a common geographical origin. They are a people who originated in northern India. They migrated thence to Europe through Persia in medieval times. They have certain, albeit limited, customs of their own, regarding cooking and the manner of washing. They have a distinctive, traditional style of dressing, with heavy jewellery worn by the women, although this dress is not worn all the time. They also furnish their caravans in a distinctive manner. They have a language or dialect, known as "pogadi chib," spoken by English gipsies (Romany chals) and Welsh gipsies (Kale) which consists of up to one-fifth of Romany words in place of English words. They do not have a common religion, nor a peculiar, common literature of their own, but they have a repertoire of folktales and music passed on from one generation to the next. No doubt, after all the centuries which have passed since the first gipsies left the Punjab, gipsies are no longer derived from what, in biological terms, is a common racial stock, but that of itself does not prevent them from being a racial group as widely defined in the Act.

I come now to the part of the case which has caused me most difficulty. Gipsies prefer to be called "travellers" as they think that term is less derogatory. This might suggest a wish to lose their separate, distinctive identity so far as the general public is concerned. Half or more of them now live in houses, like most other people. Have gipsies now lost their separate, group identity, so that they are no longer a community recognisable by ethnic origins within the meaning of the Act? The judge held that they had. This is a finding of fact.

Nevertheless, with respect to the judge, I do not think that there was before him any evidence justifying his conclusion that gipsies have been absorbed into a larger group, if by that he meant that substantially all gipsies have been so absorbed. The fact that some have been so absorbed and are indistinguishable from any ordinary member of the public, is not sufficient in itself to establish loss of what Richardson J., in King-Ansell v. Police [1979] 2 N.Z.L.R. 531, 543, referred to as "an historically determined social identity in [the group's] own eyes and in the eyes of those outside the group." There was some evidence to the contrary from Mr. Mercer, on whose testimony the judge expressed no adverse comment. He gave evidence that "we know who are members of our community" and that "we know we are different." In my view the evidence was sufficient to establish that, despite their long presence in England, gipsies have not merged wholly in the

population, as have the Saxons and the Danes, and altogether lost their separate identity. They, or many of them, have retained a separateness, a self-awareness, of still being gipsies.

I feel less constrained than otherwise I would to depart from the judge's conclusions on this point because of the importance attached by him to the meaning borne by the word "gipsy" in the Highways Act 1959 and the Caravan Sites Act 1968. He said:

"Although the Highways Act 1959 and the Caravan Sites Act 1968 are statutory examples of the use of the word "gipsy" the meaning given to the word in those Acts does have great weight in my mind. If you find a word defined in a definition section of one Act of Parliament and defined by the Divisional Court on another use of the same word in another statute it would be difficult to say: well when you are looking at the Race Relations Act 1976 you must have a wholly and totally different meaning attached to it. I consider, agreeing as I do with the Divisional Court in Mills v. Cooper [1967] 2 Q.B. 459, that it would be impossible to discover if any person or any body of persons were members of the Romany race or true gipsies. It is not difficult to discover whether they are leading a nomadic life, whether they are travelling from place to place with no fixed abode and no fixed employment. But having ascertained these matters one might justifiably come to the conclusion that they being travellers were not clearly gipsies. As I say I do not think one can be a gipsy or a non-gipsy in one statute and not in another."

In my view those two statutes do not materially assist in the present case, and the judge misdirected himself on this point. The present case is quite different from Mills v. Cooper. In the present case the issue is not which of two or more meanings of the word "gipsy" is to be preferred in the context of a particular statute or document. The question is whether there is an identifiable group of persons, traditionally called "gipsies," who are defined by reference to ethnic origins. That is essentially a question of fact, to be determined on the evidence, applying the approach set out in Mandla (Sewa Singh) v. Dowell Lee [1983] 2 A.C. 548. On that question the definition of "gipsy" used in the Caravan Sites Act 1968, and the meaning of the word "gipsy" in the Highways Act 1959 as interpreted in Mills v. Cooper, are of little assistance, if any. Furthermore the difficulty, mentioned in Mills v. Cooper, at pp. 467, 468, of determining today whether a person is of "the Romany race" or is of "pure Romany descent" or "Romany origin," seems to have led the judge into thinking that that difficulty constituted an obstacle to the commission's success in the present case. But that is not so. The material provision in the Act of 1976 is concerned with ethnic origins, and "ethnic" is not used in that Act in a strictly biological or racial sense. That was decided in Mandla (Sewa Singh) v. Dowell Lee[1983] 2 A.C. 548.

In my view, accepting the judge's doubts about the evidence of Dr. Kenrick and Dr. Acton, the evidence was still sufficient to establish that gipsies are an identifiable group of persons defined by reference to ethnic origins within the meaning of the Act.

Indirect discrimination: adverse impact

Having concluded that gipsies are a racial group, each of the subparagraphs (i) to (iii) in section 1(1)(b) must be satisfied before the conduct complained of amounts to discrimination within the meaning of the Act. I shall consider the three sub-paragraphs one by one, starting with sub-paragraph (i).

Clearly the proportion of gipsies who will satisfy the "No travellers" condition is considerably smaller than the proportion of non-gipsies. Of the estimated gipsy population in the United Kingdom of some 80,000, between one-half and two-thirds now live in houses. But this still means

that a far higher proportion of gipsies are leading a nomadic way of life than the rest of the population in general or, more narrowly, than the rest of the population who might wish to resort to the Cat and Mutton.

Mr. Samuels submitted that the word "can" in the expression "can comply" in sub-paragraph (i) means "can comply without giving up the distinctive customs and cultural rules of gipsies." He submitted that gipsies can cease to be nomadic, and become house-dwellers, and comply with the "No travellers" condition, without giving up their customs and culture and that, therefore, sub-paragraph (i) is not satisfied in this case. I do not accept this. Lord Fraser's words in Mandla (Sewa Singh) v. Dowell Lee [1983] 2 A.C. 548, 565-566, which Mr. Samuels embraced in this submission, were used in the context of a "No turban" condition being applied in relation to a Sikh. Lord Fraser was rejecting the submission that "can" meant "can physically." But that does not assist the solution of the present case. Indeed, gipsies can and do cease to be nomadic, but that will be of little use to a particular nomadic gipsy when he chances upon the Cat and Mutton and wishes to go in for a drink. At that stage he is, in practice, unable to comply. In the present case the problem is a different one: at what moment of time does ability to comply fall to be judged? Is it when the condition is invoked: in this case, when the gipsy is outside the public house wishing to enter? or is it at some earlier date: which would give the gipsy sufficient opportunity to acquire housing accommodation for himself before turning up at the Cat and Mutton?

A similar question was considered by the Employment Appeal Tribunal in Clarke v. Eley (IMI) Kynoch Ltd. [1983] I.C.R. 165, with regard to section 1(1) of the Sex Discrimination Act 1975, the wording of which does not differ materially from section 1(1)(b) of the Act of 1976. Browne-Wilkinson J. delivered the judgment of the tribunal, to the effect that the relevant point of time at which the ability or inability to comply has to be shown is the date at which the requirement or condition has to be fulfilled. I find his reasoning, set out at pp. 171-172, compelling, and I agree with his conclusion.

In my view, therefore, sub-paragraph (i) is satisfied in the present case.

Indirect discrimination: detriment

Sub-paragraph (iii) requires the applied condition to be to the relevant person's detriment because he cannot comply with it. Rightly, it was not disputed that sub-paragraph (iii) is satisfied in the present case,

by the hypothetical nomad gipsy being excluded from the Cat and Mutton: I say hypothetical, because there was no evidence that there were any gipsies amongst the travellers on the nearby sites.

Indirect discrimination: justification

I have left sub-paragraph (ii) to the end, for this reason. On the admitted or proved facts it is possible for this court to decide whether sub-paragraphs (i) and (iii) are satisfied, even though the judge himself did not decide these points. Sub-paragraph (ii) is different. On the facts before us it would not be satisfactory for this court to attempt to decide this point, which the judge expressly left open.

In these circumstances for my part I would remit the action to the county court for the judge to determine whether section 1(1)(b)(ii) is satisfied in the present case and, if it is, for him to make such order as he considers appropriate. I would allow this appeal accordingly.

JUDGMENTBY-2: TAYLOR L.J

JUDGMENT-2:

TAYLOR L.J: I agree. The commission's case under section 1(1)(a) of the Race Relations Act 1976 must fail for the reasons given by Nicholls L.J. The word "traveller" is not synonymous with the word "gipsy."

The case under section 1(1)(b) turns essentially on whether gipsies are a racial group within the meaning of the Act. It is only on that issue that I wish to add some observations.

The judge considered four different approaches to the issue. First he said he would consider the evidence of the two expert witnesses called on behalf of the commission and their gipsy witness Mr. Mercer. In fact, he made no reference to Mr. Mercer in dealing with this first approach. Clearly, the two experts made an unfavourable impression on the judge who described their views as wholly obsessive, biased and totally preconceived. In particular, he found Dr. Acton to be a very bad witness in that he could not be contained within the ordinary question and answer routine. The judge summarised his conclusions on this approach, i.e. via the commission's witnesses, by saying merely that he approached the experts "with much caution and doubt" and did not consider "that their evidence overrides or displaces the views" he later set out. But, however difficult or partisan the experts may have been, it was surely an excessive reaction to reject their evidence altogether. The historical account they gave of gipsies, their origins and customs was not contradicted by any other evidence. Furthermore, Mr. Mercer gave first hand evidence confirming much of what they said and the judge made no finding adverse to his qualities as a witness.

The second approach was headed by the judge "Statutes and statements in government reports on the legal interpretation of the word 'gipsy'."

It is clear that the word gipsy bears at least two broad meanings. Historically it referred to:

"a member of a wandering race (by themselves called Romany), of Hindu origin, which first appeared in England about the beginning of the 16th c. and was then believed to have come from Egypt:" see The Oxford English Dictionary (1933).

More recently it has come to mean "a nomad." The latter meaning has been adopted in certain statutes. Thus, as the judge noted, the word gipsy in section 127 of the Highways Act 1959 was held to have "the colloquial meaning of a person leading a nomadic life with no fixed employment and with no fixed abode:" see Mills v. Cooper [1967] 2 Q.B. 459, 467. Again, section 16 of the Caravan Sites Act 1968 defines gipsies as meaning:

"persons of nomadic habit of life, whatever their race or origin, but does not include members of an organised group of travelling showmen, or of persons engaged in travelling circuses, travelling together as such."

Those statutes, however, have nothing whatsoever to do with race relations or discrimination. They are concerned with highways and the provision and regulation of caravan sites. The statutory adoption of the second broad meaning of gipsy in those contexts cannot be taken to consign a racial group called gipsies to oblivion if it still exists in fact. I therefore agree that the judge misdirected himself in relying on the statutory meaning of "gipsy" in contexts quite different from that of the present case. [His Lordship referred to that part of the judgment set out by Nicholls L.J., ante, p.

802A-D, and continued:] That approach assumes "gipsy" must have the same meaning in all contexts and fails to identify the two different meanings mentioned above. In fact, the word gipsy does not occur in section 1 of the Race Relations Act 1976. The phrase which has to be construed is a "racial group" as defined in section 3(1) and as interpreted in Mandla (Sewa Singh) v. Dowell Lee[1983] 2 A.C. 548, 560.

Confusion of the two meanings of gipsy continued when the judge came to refer to certain reports which had been put before him. He quoted from the report of the Greater London Conciliation Committee set out in Appendix III to the Report of the Race Relations Board for 1967-68. He went on to cite a report "Accommodation for Gipsies," (1976), by Mr. John Cripps for the Department of the Environment and the Welsh Office. However, they were not dealing with the same subject matter. The first report was concerned with the type of problem presented by the present case. The second was clearly made in the context of provision of caravan sites and defined the word gipsy in that context as, in effect, a person of "nomadic habit of life."

The third approach was to examine dictionary definitions. Here, the judge expressed the view that one could pick and choose the meaning one wished to find. He cited six definitions ranging from "A member of a dark haired race which may be of Indian origin etc. " through the broader meaning of "A person who habitually wanders" to the merely abusive "Cunning rogue." Having set out those definitions the judge said:

"Accordingly in my judgment the plaintiffs cannot really derive any assistance from dictionary definitions. People obtaining the meaning from the dictionary could not think that a gipsy was a member of a racial group or had basic ethnic origins."

Here, I do not follow the judge's reasoning. The fact that dictionaries give more than one meaning for the word gipsy does not prevent the word from having, at any rate in some contexts, the meaning given in four out of six of the definitions.

Finally the judge considered the approach laid down in Mandla (Sewa Singh) v. Dowell Lee [1983] 2 A.C. 548. It is important first to emphasise that ethnic origin is not now limited to or to be equated with strict racial or biological origins. Lord Fraser said, at pp. 561-562:

"My Lords, I recognise that 'ethnic' conveys a flavour of race but it cannot, in my opinion, have been used in the Act of 1976 in a strictly racial or biological sense. For one thing, it would be absurd to suppose that Parliament can have intended that membership of a particular racial group should depend upon scientific proof that a person possessed the relevant distinctive biological characteristics (assuming that such characteristics exist). The practical difficulties of such proof would be prohibitive, and it is clear that Parliament must have used the word in some more popular sense. ... In my opinion, the word 'ethnic' still retains a racial flavour but it is used nowadays in an extended sense to include other characteristics which may be commonly thought of as being associated with common racial origin."

Lord Fraser then set out, at pp. 562-563, what he described as the two essential conditions followed by five other relevant characteristics. The passage has already been cited in full by Nicholls L.J., together with the judge's application of the Mandla tests: see ante, pp. 799F - 800F. With respect to the judge, the fact that some gipsies, even a substantial proportion, have abandoned the nomadic way of life or have become assimilated in the general public is not decisive of the issue. There are no doubt other religious, racial or ethnic groups whose numbers diminish due to

intermarriage, lack of adherence to the group or lapsed observance. But if there remains a discernible minority which does adhere it may still be a racial group within Lord Fraser's criteria.

On the evidence, and perhaps that of Mr. Mercer in particular, there is still a discernible group of gipsies with "a long shared history of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive." There may well be individuals on the borderline between membership and assimilation whom it might be difficult to classify, but that does not deny the existence of the group. Likewise, the fact that some of those within the group prefer to call themselves travellers rather than gipsies is not indicative of whether a discrete racial group has ceased to exist.

As to Lord Fraser's second essential characteristic, I agree that the evidence summarised by Nicholls L.J. does show gipsies have a cultural tradition of their own including family and social customs and manners.

Accordingly, I conclude that the four approaches rightly identified by the judge, ought to have led him to a different conclusion from the one he reached.

I too would remit the action to the county court for the judge to determine whether section 1(1)(b)(ii) is satisfied and to make the appropriate order. I would allow this appeal.

JUDGMENTBY-3: STOCKER L.J

JUDGMENT-3:

STOCKER L.J: I have had the benefit of reading in draft the judgments of Nicholls and Taylor L.JJ. I agree with their conclusions that the matter should be remitted for determination under section 1(1)(b)(ii), though for my part I have entertained considerable doubt on one aspect of this matter in the light of some of the findings of fact made by the judge.

I agree that in order to succeed under section 1(1)(a) - direct discrimination - the commission had to prove that the words "traveller" and "gipsy" were synonymous. For the reasons given by Nicholls L.J., they plainly are not and the claim under this subsection must fail.

So far as indirect discrimination is concerned the judge dealt with the question whether or not gipsies were of "ethnic origin" and thus a racial group in general terms in his consideration of direct discrimination and applied his findings that they were not to indirect discrimination and dismissed the claim under 1(1)(b) in a single paragraph. There is no reason why he should not have adopted this approach but it seems to me that it may have concealed the problem that "gipsy" is used in two different senses. On the one hand it is used to embrace the category which may be described as "true gipsies": i.e. one who is, or believes he is, of Romany descent, or by long established adherence is a member of that class. On the other, it embraces all those of nomadic habit and disposition.

I agree that the judge's reasoning whereby he concluded that gipsies, in the strict sense, are not an ethnic group was in many respects flawed. I say nothing of his rejection of the evidence of the expert witnesses - he saw and heard them and was entitled to regard their evidence with doubt and caution - though their evidence on the historical migration, settlement, and customs of gipsies was not the subject of any evidence to the contrary. I also agree with Nicholls and Taylor L.JJ. that dictionary definitions can support a conclusion either way on the essential question of the ethnic origins of gipsies where the word is capable of the two distinct meanings referred to, but this fact

does not itself resolve the problem raised on this appeal. I further agree that contrary to the judge's finding no assistance is to be derived from the meaning of the word "gipsy" for the purpose of section 127 of the Highways Act 1959, or the Caravan Sites Act 1968, since both statutes would be unworkable in practice if "gipsy" for the purposes of those Acts were to be defined in the strict sense. The definition accorded to the word for the purpose of the Highways Act 1959 in Mills v. Cooper[1967] 2 Q.B. 459 and the definition in the Caravan Sites Act 1968, do not assist at all when the issue under the Race Relations Act 1976 is whether or not the word "gipsy" for the purpose of that Act imports the conception of "ethnic origin." I refer hereunder to the dicta of Lord Parker C.J., in that case in a different context. Before considering the fourth basis of the judge's reasoning, his application of the decision of the House of Lords in Mandla (Sewa Singh) v. Dowell Lee [1983] 2

A.C. 548, I think it convenient to refer to four passages in his judgment which are findings of fact made by him. He said:

"There is, in my judgment, no easily identifiable group of gipsies as there were Sikhs. The evidence is that persons who had hitherto regarded themselves as true gipsies or Romanies no longer wish to be known as gipsies because they think that is pejorative and they wish to adhere to a larger amorphous group known apparently as 'Travellers'."

The judge expressed his findings in these terms:

"Gipsies may, as I have said, be a part of a group of travelling people, they may well be accurately called 'Travellers,' but they themselves do not, in my judgment, form any clearly identifiable group."

Later the judge said:

"It may well be, as I have said, that there is a small number of travelling people who can claim either by looks or characteristics to be true gipsies but these people have been absorbed into a larger group. Some have abandoned the nomadic way of life and some are indistinguishable from any ordinary member of the public. The larger group of travellers or gipsies forming a part of a larger group cannot, in my judgment, on the evidence before the court satisfy those two essential conditions and can satisfy barely any of the other five condition."

A little later, the judge said:

"I am wholly satisfied that the group, whether you call them gipsies or travellers, are not a group forming a racial group referred to by reference to their ethnic origins as provided by section 3(1) of the Act of 1976."

If the reference in the earlier passage to the larger group is a reference to the wide meaning of the word "gipsy" and the small number to the word in its strict sense then this conclusion may beg the question rather than answering it. Finally the judge adopted as a finding of fact in the instant case the dicta of Lord Parker C.J. in Mills v. Cooper [1967] 2 Q.B. 459, 467: "That a man is of the Romany race is, as it seems to me, something which is really too vague of ascertainment, and impossible to prove."

My hesitation arises from the conclusion to be drawn from these findings, if justified on the facts, in the context of Mandla (Sewa Singh) v. Dowell Lee [1983] 2 A.C. 548 read in its full context. It seems to me clear from the speeches of Lord Fraser of Tullybelton and Lord Templeman that the fact alone that a group may comply with all or most of the relevant criteria does not itself establish that such a group is of ethnic origin. Examples of such groups which might comply with

the criteria but which would not be of ethnic origin were cited, at p. 555D, by the respondent. Indeed, such groups might themselves be of multiracial composition where no question of racial discrimination on the grounds of ethnic origin could possibly arise though many of the criteria

could apply to them. No doubt there are many other examples. Lord Fraser of Tullybelton said, at p. 561:

"... I recognise that 'ethnic' conveys a flavour of race but it cannot, in my opinion, have been used in the Act of 1976 in a strictly racial or biological sense."

And he said, at p. 562:

"the word 'ethnic' still retains a racial flavour but it is used nowadays in an extended sense to include other characteristics which may be commonly thought of as being associated with common racial origin. For a group to constitute an ethnic group in the sense of the Act of 1976, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics."

It is in this context that he sets out the criteria which in his opinion were essential or helpful in "distinguishing the group from the surrounding community." Lord Templeman said, at p. 569:

"In my opinion, for the purposes of the Race Relations Act a group of persons defined by reference to ethnic origins must possess some of the characteristics of a race, namely group descent, a group of geographical origin and a group history. The evidence shows that the Sikhs satisfy these tests. They are more than a religious sect, they are almost a race and almost a nation."

It is in the context of these comments that the House considered the question whether or not the Sikh community complied with the relevant criteria. It seems to me relevant to observe that the main issue before the House was not so much whether the Sikh community did or did not comply with the criteria but what was the correct test to apply in deciding the question of ethnic origin? The question whether or not the Sikh community complied with the criteria seems to me to have been one which was almost self evident once the appropriate criteria was established and for my part I doubt very much whether an ordinary member of the public would have had any doubts about this. Most people would regard Sikhs as a "race" even if they falsely believed that their race was "biologically derived." Many, if not all, of the general public would know that there had been two Sikh wars and would know that for generations regiments of Sikhs formed a part of the Indian Army and were often a symbol, through their presence on guard at British Embassies and establishments, of British Imperial power based on the Indian Army and the British Army in India. They would know that they fought in two world wars as distinctive units. They would know of their distinctive dress and probably some of their customs regarding hair and the wearing of turbans. They would know that the Sikhs had a distinct religion or would at least have heard of the Golden Temple of Amritsar. The question whether or not Sikhs were of ethnic origin within the criteria was, in my view, a simple and obvious one and would have been regarded as such by the general public once the appropriate criteria for the phrase "ethnic origin" was established. A

Sikh would certainly have so regarded himself and his fellow Sikhs. The same does not necessarily apply to gipsies and if the judge's findings of fact were justified by the evidence I would, for my part, be inclined to agree that even if individual gipsies fall within many of the Mandla criteria they were not an ethnic group because on the judge's finding such a group was not in any true sense identifiable as a group even by the gipsies themselves or by others, and no

sufficient racial flavour existed. If the judge's findings were justified by the evidence the fact that the conclusion was reached by a process of flawed reasoning would not necessarily be fatal to the decision.

Was the finding justified on the evidence? Accepting that the judge was entitled, having heard them, to form an unfavourable view of the experts and to regard their evidence with caution it is not easy to understand how he can have wholly rejected their historical discourse nor their evidence with regard to the customs and traditions and traditional way of life peculiar to gipsies since no evidence to controvert this was tendered. The evidence of Mr. Mercer who described himself as "a gipsy by birth" and whose people "were gipsies back in 1888" was to the effect that he could identify "our own people." However, the evidence of the continued separate identity of gipsies as people "who regarded themselves and who were regarded by others as a distinct community" was scant and it is for this reason I have hesitated whether or not it could be said that the ethnic identity of gipsies in the strict sense was established. The validity of the judge's finding above recited "that there may well be a small number of travelling people who can claim either by looks or characteristics to be true gipsies, but these people have been absorbed into a larger group" must depend on whether or not there is sufficient evidence that such absorption has occurred. There was, at least, some evidence that it has not and for these reasons I do not feel I can properly dissent from the conclusions of Nicholls and Taylor L.JJ. I reach this conclusion with some regret. I doubt whether if the claim for breach of the Act is finally established, benefit rather than detriment will result to either side.

For the reasons I have given I agree with the conclusion of Nicholls and Taylor L.JJ. and would allow this appeal. I agree with the directions proposed.

DISPOSITION:

Appeal allowed with costs.

Costs below reserved to trial judge.

Case remitted to county court to determine whether section 1(1)(b)(ii) of the Act of 1976 applied.

SOLICITORS:

Solicitors: Bindman & Partners; Edward Fail, Bradshaw & Waterson.

[Reported by MRS. DIANA PROCTER, Barrister-at-Law]