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The Right to Respect for Home and Family Life: The first in a series of 'Gypsy cases' to challenge UK legislation.

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Summary

The decision of the European Court of Human Rights in *Buckley* v *UK* App 20348/92[1] on 25th September 1995 was disappointing, but not unexpected by those working with the Gypsy community (*The Times*, 26 September 1996). The case itself was based on a challenge to the old Caravan Sites Act 1968 (now largely repealed by the Criminal Justice and Public Order Act 1994) and the refusal of local planning officers to allow Mrs Buckley to live in her caravan with her family on her own land. The applicant alleged a violation of Article 8 in conjunction with Article 14 of the European Convention of Human Rights. In January 1995 the European Commission found in favour of the applicant in holding that there had been a violation of Article 8, concerning the applicant's right to respect for her home and family life, but declined to express an opinion on Article 14 as to whether she was discriminated against on account of her Gypsy identity. The case was referred to the European Court and, after seven months of deliberation, they found by a majority, of six votes to three, against a violation of Article 8 and, by eight votes to one, against a violation of Article 14.

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[1] The revised text of the decision is expected in the Report of Judgments and Decisions for 1996 shortly. This comment is based on the report of the Registrar, 25 September 1996 which is cited in this comment qs ECHR 1996. The full citation is *Buckley* v *UK* (23/1995/529/615).

Background to the Case

Mrs Buckley purchased the land where her family's three caravans were stationed in 1988, and made a retrospective planning application in December 1989. She was refused planning permission by the District Council, and on appeal by the Secretary of State for the Environment. The decision of the Secretary of State was based on an inspector's report and centred primarily on highway safety and planning concerns. Additionally, the Secretary of State concluded that there was a sufficient number of sites already in the area.

In 1994 the applicant was offered the opportunity to move to an authorised site 700 metres away from her own land. Mrs Buckley refused to move, basing her decision on the evidence of a high degree of violence and over-crowding associated with the official site, making it unsuitable for the needs of her children. She later applied for planning permission again but was refused. The District Council reiterated the findings of the Department Of Environment Inspector that provision in the area had reached the 'desirable maximum' of 35 caravans.

The Relevant Domestic law

Planning Regulations

Planning permission is required for any development of land under the Town and Country Planning Act 1990, s 57. A change in land use to accommodate caravans can constitute a development and thus warrants an application for planning permission (*John Davies* v *Secretary of State for Environment and S Hertfordshire DC* [1989] JPL 601). The 1990 Act also makes it an offence for a person to use a caravan as their only or principal home without planning permission. Under s 174(1) enforcement notices can be served to remove caravans from illegal encampments. Additionally, a fine of up to £20,000 can be issued for failing to comply with a stop-notice issued under s 183 of the 1990 Act as amended by s 9 of The Planning and Compensation Act 1991 (Barnett 1994, pp 459-60). The applicant has so far been prosecuted three times for failing to comply with an enforcement notice issued under this legislation. The High Court have recently rejected that Mrs Buckely's submission that there was a breach of natural justice in the decision process and that adequate reasons were not given for the decision (*Buckley and Others* v *Secretary of State for Environment and another* [1996] EGCS 124).

The Caravan Sites Act 1968

At this time the Caravan Sites Act 1968 was still in force and s 6 provided that local authorities were under a duty: "to exercise their powers...so far as may be necessary...to provide adequate accommodation for gipsies residing in or resorting to their area". Once this duty is carried out to the satisfaction of the Secretary of State, the local authority could apply to have designated status under s 12 of the 1968 Act. Designated areas have powers akin to those given to all local authorities under the Criminal Justice and Public Order Act 1994, i.e. it becomes a criminal offence for a Gypsy to station their caravan on any land within the boundaries of the highway, unoccupied land, or land without the consent of the owner (Caravan Sites Act 1968, s 10(1)).

The Self-help Objective

Due to the gradual failure of many local authorities to provide sites for Gypsies, the Government increasingly came to promote the self-help objective of private site provision (O'Nions, 1995). Department of Environment Circular 57/78 advised local authorities that "the special need to accommodate Gypsies...should be taken into account as a material consideration in reaching planning decisions".[2]

It is clear, however, that the planning system has failed to respond adequately to the needs of Gypsies who wish to comply with the self-help objective. Within two years of the circular recognising the 'special need' of Gypsies in the planning process, the National Gypsy Council notified the Department of Environment that they were aware of only two cases where Gypsies had been granted planning permission without a time-consuming, costly appeal (National Gypsies Council 1982, p 27). In 1985, Bill Forrester described the planning system as "the single biggest obstacle to the proper provision of adequate traveller sites" (Forrester 1985, p 8) and a recent estimate suggests that as many as 90% of applications from Gypsies are rejected (Sir David Mitchell, HC Debates Vol 241, col 317, 13 April, 1994).

New planning guidance accompanying the Criminal Justice and Public Order Act provisions was issued in January 1994. It states that:

> "In order to encourage private site provision, local planning authorities should offer advice and practical help with planning procedures to gypsies who wish to acquire their own land for development....The aim should be as far as possible to help gypsies to help themselves, to allow them to secure the kind of sites they require and thus help avoid breaches of planning control."

It then goes on to say:

> "Whilst Gypsy sites might be acceptable in some rural locations, the granting of permission must be consistent with agricultural, archaeological, countryside, environmental, and Green Belt policies...." (DoE Circular1/94, para 20).

Therefore, the importance of private sites for Gypsies is acknowledged, but only to the extent that other policies concerning development and the environment are not adversely affected. local authorities are

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[2] A number of judicial review cases were brought by Gypsies relying on the special consideration suggested in DoE Circular 57/78. In most cases the Court showed reluctance at interfering with the local authority decision see e.g. *Smith* v *Secretary of State for the Environment and Another* [1988] LEXIS 10 March 1988 CA; and *Gaskin* v *Secretary of State for the Environment* [1994] EGCS 171, CA.

expected to consider the needs of Gypsies when making development plans (Ciruclar 1/94, para 11; Home 1993, p 16), and the absence of policies for Gypsies may lead to a judicial review. However, as emphasised in *Webb* v *Secretary of State for Environment* [1995] EGCS 147, their needs are clearly no longer of special significance.

The Requirements of Article 8

Article 8 states:

> "1. Everyone has the right to respect for his private and family life, his home and correspondence.
>
> 2. 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."

1. Private and family life, home and correspondence.

Both the Court and the Commission decided that the facts of the case did give rise to a right falling within Article 8 (ECHR 1996, p 15 para.52-4) – the applicant's right to respect for her 'home' did not necessarily require that home to be lawfully established. The issues of 'family life' and 'private life' were not considered by the Court, although the Commission found that the complaint fell within each of the headings in Article 8 (ECHR 1995, p 10 para 65).

2. Interference by a public authority in accordance with the law

The applicant asked the Court to consider the provisions in the Caravan Sites Act 1968 and Part V of the Criminal Justice and Public Order Act 1994. However, the Court found that the applicant had not been directly affected by these acts (ECHR 1996, p 16 para 59) and as a result focused its attention on the enforcement of planning controls. There was no dispute that the interference was "in accordance with the law" under the Town and Country Planning Act 1990 as amended.

3. Interference in pursuance of a legitimate aim

This point was not disputed by Mrs Buckley, and the Government relied upon planning aims such as highway safety, preservation of the environment and public health (ECHR 1996, p 17 para 62).

4. Interference "necessary in a democratic society"

The Government contended that it was: "unacceptable to exempt any section of the community from planning controls, or to allow any group the benefit of more lenient standards than those to which the general population was subject" (ECHR 1996, p 19 para 69). This clearly ignores the rationale behind the special consideration for Gypsies which was a counter-balance to the potentially discriminatory designation provisions in the Caravans Sites Act 1968, s 10. Indeed, Department of Environment Circular 57/78 had recognised the inherent problem of discrimination: "The powers that follow from designation are severely discriminatory against one group of people". As a result, the Commission found that a proper balance had not been achieved in the applicant's case and that she was placed under an excessive burden (ECHR 1995, p 12 para 78). Particularly relevant in their conclusion on this point was the applicant's identity as a Gypsy: "This case presents the special feature that, being a gypsy, the applicant leads a traditional lifestyle which restricts the options open to her" (ECHR 1995, p 12 para 78).

The Court noted that in planning matters a wide margin of appreciation was given to the State, it being in a better position to evaluate local needs and concerns (ECHR 1996, p 20 para 75), but that proper safeguards should be available to the individual to prevent their rights being violated in favour of flimsy justifications (ECHR 1996, p 20 para 76). They found that proper safeguards had been established, and that special consideration had been given to the applicant when balancing her individual needs against the planning needs of the community (ECHR 1996, p 20 para 80). It was thus concluded that there was no violation of Article 8.

Article 14 in conjunction with Article 8

The Court is only empowered to examine legislation that has had a direct effect on the applicant as an individual, rather than any legislation alleged to discriminate against a group in general. In confining its decision to the specific facts of the case (*Bellet* v *France* 1995 Series A no333-B, pp 42 and 43) the Commission felt unable to express an opinion on the provisions contained in the Criminal Justice and Public Order Act 1994 and possible violation of Article 14 (ECHR 1996, p 14 para 47).

The Court supported this view and unequivocally affirmed that the policy of the Government was intended to promote the Gypsy lifestyle by enabling them to provide suitable accommodation for themselves (ECHR 1996, p 24 para 88).

Criticisms of The Court's Reasoning

The report of the planning inspector was particularly important in the formation of the Court's decision. However, in giving such importance to the wording of the report, the Court unfortunately failed to challenge several key components underpinning the Secretary of State's rejection of the application.

First, it was noted by the Commission that the original objections to the granting of planning permission centred on highway control and safety matters. The Court noted that these objections were no longer supported in the Government's case, yet the Government were not asked to account for the change of heart. The reasons for the refusal to grant planning permission appear to have changed during the hearings, a fact which should be relevant in establishing whether the decision was "necessary in a democratic society".

Secondly, the inspector reported:

> "It is...clear in my mind that a need exists for more authorised spaces....Nevertheless, I consider it important to keep concentrations of sites for gypsies small, because in this way they are more readily accepted by the local community....The concentration of gypsy sites in Willingham has reached the desirable maximum and I do not consider that the overall need for sites should, in this case, outweigh the planning objections."

The number of Gypsies in the region was thus a key factor in the Department of Environment's decision, despite the fact that DoE Circular 1/94 states at para .21:

> "Authorities should not refuse private applications on the grounds that they consider public provision in the area to be adequate, or because adequate alternative accommodation is available elsewhere on the authorities' own sites."

Furthermore, whilst it is necessary under Article 8(2) to balance the interests of the local community with the individual's right to a home, it is difficult to accept that the continued residence of the Buckley family would present any significant problems for local residents, particularly as it was noted that she had been living in the area since 1988 and that her land could be adequately screened to prevent visual intrusion (as referred to at ECHR 1996, p 23 para 82).

It would thus appear that the main reason for the refusal of planning permission centred on the desire to have a small, controlled number of Gypsies in the South Cambridgeshire area. This could easily be interpreted as giving rise to discrimination contrary to Article 14 of the European Convention in

conjunction with Article 8. The dissenting opinion of Judge Pettiti recognises the relevance of Article 14 to these circumstances:

> "In the general context of Article 14 and Article 8 all of the applicant's complaints relate to the effect of the de jure and de facto measures, which, in being discriminatory prevented respect for family life." (ECHR 1996, p 33)

Finally, it has been noted that the applicant's right to establish a 'home' is contingent to some extent on a range of legal alternative options. There are of course limitations to the exercise of this choice, and the Court noted:

> "Article 8 does not necessarily go so far as to allow individuals' preferences as to their place of residence to override the general interest." (ECHR 1996, p 22 para 81)

However, the Commission recognised that the applicant's objection to the poor conditions of the authorised site nearby were legitimate and, as a result, it is clear that the operation of the designation provisions under the 1968 Act served to deprive her of any real legal alternatives. (This point was raised in the dissenting judgments of Judges Repik and Pettiti, ECHR 1996, pp 26-36).

Although the 1968 Act did not operate directly to discriminate against Mrs Buckley, the choices of residence available to her were severely restricted by the operation of that legislation which made it an offence to occupy unoccupied or highway land. Such provisions only operated in the case of a Gypsy who falls within the statutory definition in the Caravan Sites Act 1968, s 16. The Government successfully contended that the discriminatory nature of the 1968 Act (see ACERT 1985) was mitigated by the special site provision duty owed only to Gypsies. However, the cumulative effects of the designation powers and the planning criteria have, in many cases, had an extremely disruptive effect on the lives of Gypsy families. In his informed, dissenting judgment, Judge Pettiti recognised the adverse effect of these cumulative measures. He found that such diverse administrative rules:

> "result, firstly, in it being totally impossible for a gypsy family to make suitable arrangements for its accommodation, social life and the integration of its children at school and, secondly, in different government departments combining measures relating to town planning, nature conservation, the viability of access roads, planning permission requirements, road safety and public health that, in the instant case, mean the Buckley family are caught in a 'vicious circle'."

The failure of the whole Court to look deeper at these cumulative effects has unfortunately resulted in a decision which will have adverse repercussions for many of the same Gypsy families who are finding it virtually impossible to find a secure, legal home.

Positive consequences

Whilst I have outlined a number of flaws in the Court's reasoning, also apparent are some indications of a greater awareness of the problems facing Gypsies in general, and with regard to the UK legislation in particular.

The Concept of 'Home'

The Government contended that as the applicant was occupying the land illegally she could not rely on Article 8 – she was in essence using Article 8 to give her the right to establish a home (ECHR 1995, p 9 para 62). In previous planning cases, such as *R* v *Secretary of State for the Environment, ex p. Davies* [1991] 61 P&CR 487, the High Court had refused to allow an appeal against an enforcement notice on the basis that the applicant had no interest in the land itself from which to mount such a challenge. However, the Commission decided that 'Home' is an autonomous concept which does not depend on domestic classification and is not limited to those lawfully established – depending instead on the existence of continuous and sufficient links with the land in question (ECHR 1995, p 9 para 63). Thus a more pragmatic approach has been taken which will enable future applicants with no legally definable interest to bring a case based on their factual association with the land.

Each Case to be Decided on its Facts

The court also emphasised that each case will be looked at on its facts, which is good news for the other Gypsy applicants who wish to challenge the planning regulations as well as the Criminal Justice and Public Order Act 1994 provisions. On this point it was clearly stated that the new legislation was not at issue in this particular case (ECHR 1996, p 16 para 59), and thus we can expect to see future cases based on the refusal to provide public sites for Gypsies coupled with the criminalisation of unauthorised camping (Comment 1995, p 640). Gary Blaker has similarly noted:

> "With the repeal of the duty to provide sites, the new criminal offence of illegal camping and the guidance in Circular 1/94 the conflict between the planning system and gypsies' needs may well reach a crisis point." (Blaker 1995, p 196).

A Growing Awareness of the Problems Facing Gypsies

In both the Commission and the Court decisions there was evidence of a growing awareness about the problems faced by many Gypsies. The Commission were appreciative of the nomadic tradition found among many British Gypsies and recognised "that living in a caravan home is an integral and deeply-felt part of her Gypsy lifestyle" (ECHR 1995, p 10 para 64).

This reflects increasing concern within the Council of Europe and other international bodies about the intolerance and discrimination routinely experienced by the Gypsy community. A recent report by the Council of Europe on the Citizenship Issue in the Czech Republic is critical of the Czech Government's handling of the citizenship question which has resulted in many Roma becoming stateless (Council of Europe, 1996; O'Nions, 1996). It remains to be seen whether the European human rights machinery will be equally critical of the provisions introduced in the Criminal Justice and Public Order Act 1994.

Conclusion

Mrs Buckley's solicitor, Mr Luke Clements (of Thorpes and Co., Hereford), is optimistic about the future:

> "This is the first gypsy case that has ever got to Strasbourg. It would have been lovely to win, but the Court has unanimously said it will consider each case on its merits. This is the beginning of the court getting to grips with the problems gypsies face." (*The Independent*, 26 September 1996)

There are some fifteen other Gypsies, including neighbours of Mrs Buckley, preparing to take their cases to Strasbourg (*The Guardian*, 26 September 1996), and the outcomes will be eagerly awaited by the 30% of non-sedentary Gypsies who do not have an authorised caravan site (DoE 1996).

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