

PUBLIC INTEREST LITIGATION AND THE RIGHTS OF TRAVELLERS

By Alyson Kilpatrick BL

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Introduction

Irish Travellers, as an indigenous nomadic group, have been recorded officially in Ireland as far back as the fifth century. They have experienced prejudice and social exclusion since then, which has resulted in them being one of the most disadvantaged groups in Northern Ireland. The cumulative effect of poverty, the limit in the number of stopping places and poor living conditions have led to poor health, low educational achievement, high mortality rates and difficulties in accessing the full range of statutory services.¹ The environmental conditions on the serviced sites, that are available, are extremely poor. Conditions on most emergency sites or sites occupied under the co-operation policy are intolerable due to the lack of basic services such as water, refuse collection and sanitation. However, in Northern Ireland, little respect has been shown to their distinct cultural tradition.

Legal Framework

We have some laws to protect Irish Travellers. For example, the Race Relations (Northern Ireland) Order 1997 recognises Irish Travellers as a racial group and defines the Irish Traveller community as “a community of people commonly so called who are identified (by themselves and others) as people with a shared history, culture and traditions, including, historically, a nomadic way of life on the island of Ireland”. Irish Travellers are protected at law from direct or indirect discrimination² on grounds of racial or ethnic origins in the areas of employment (and related matters), social protection, social advantage, education and access to and supply of goods and services which are available to the public, including housing.

The Belfast Agreement of 1998 introduced a new framework for the people of Northern Ireland guaranteeing human rights, equality and participation. The

¹ The final report of the Promoting Social Inclusion working group on travellers referred to the multiple disadvantage experienced, all of which were exacerbated by poor living conditions. See also *Outlining Minimum Standards for Traveller Accommodation* Equality Commission NI, March 2009.

² By virtue of the Race Relations (NI) Order 1997, as amended by Regulations SR 2003/341 (from 19 July 2003) which were required to implement Council Directive 2000/43 EC of 29 June 2000.

agreement was translated into legislation by the Northern Ireland Act 1998. The Act was supposed to move human rights into the mainstream with the domestic law of Northern Ireland underpinning this new notion of 'constitution'. The Northern Ireland Act provides that a public authority, such as the Northern Ireland Housing Executive (NIHE) and a district council, in carrying out its functions relating to Northern Ireland, must have due regard to the need to promote equality of opportunity between, amongst others, persons of different religious belief, political opinion and racial group.³ In carrying out its functions an authority must also have regard to the desirability of promoting good relations between those groups. An authority is obliged to publish an equality scheme demonstrating how it proposes to fulfil its obligations.⁴ A public authority may be challenged by way of judicial review if it fails to have regard to the above duties in carrying out any of its public functions, including any decision to take action in any particular case.⁵

The Human Rights Act 1998 made the European Convention on Human Rights (ECHR) directly enforceable in domestic courts and therefore the rights enshrined more capable of having a practical effect. It is unlawful for a public authority to act in a way which is incompatible with ECHR rights and all legislation must be read in a way that is compatible with those rights. Most of the powers exercised by public authorities which impact upon the lives of Travellers are discretionary but must now be interpreted and exercised so as to respect the ECHR rights of Travellers.

Have Travellers' rights been litigated?

Lawyers in Northern Ireland must re-evaluate the rights and remedies available at law particularly as they impact on those groups whose human rights, equality and participation have been neglected in the past. Public interest litigation is defined as the use of litigation, or legal action, which seeks to advance the cause of minority or disadvantaged groups or individuals, or which raise issues of broad public concern. It is the way the law can be used to create and sustain social change for the most vulnerable in society. Public interest litigation can have an impact beyond one

³ Section 75, which prohibits also discrimination on grounds of age, marital status or sexual orientation; between men and women generally; between persons with a disability and persons without; and between persons with dependents and persons without

⁴ Schedule 9 to the 1998 Act.

⁵ See e.g. (1) McCarthy (2) Culligan (3) Coyle (4) Taylor & Others (Claimants) v Basildon District Council (Defendant) & Equality & Human Rights Commission (Intervener) (2008) [2008] EWHC 987 (Admin).

individual; it can have a direct effect on the protection and promotion of the rights of a large number of disadvantaged people.

There has been little by way of enforcement of the rights provided by law in Northern Ireland. When asked to speak at this event I was asked to give some examples of the current use of the ECHR in relation to Travellers' rights in Northern Ireland. Unfortunately, I can provide very little of that. If one searches the Northern Ireland database one finds four cases which concerned Travellers and only two of those were concerned with litigating the *rights* of Travellers for Travellers.

One of those cases concerned families of an Irish Traveller family wishing to use the facilities of their local hotel in Dungannon for weddings and other functions.⁶ A number of reservations were cancelled as a result of hotel staffs' stated fear of violence. Thereafter, a blanket ban was imposed on reservations for Traveller families. There had been some violent disturbance previously during a Traveller's reception. The Court of Appeal on a case stated from the District Judge considered the application of the Race Relations Order⁷ and the Equal Treatment Directive.⁸ The Court of Appeal held that the Judge should have first asked herself whether the reason for the treatment was, primarily, that of race. If that was answered affirmatively the respondent must then go on to show why the act was not discriminatory under the legislation. In other words the respondent had to prove on the balance of probabilities (which required cogent evidence) that the treatment was in no way whatever on the grounds of race since no discrimination whatsoever is compatible with the burden of proof Directive. On the facts of that case, however, the Court concluded that there was ample evidence that the decision was not made on racial grounds. The Court however rejected the argument that the decision to ban future events was as a result of unlawful stereotyping of the Traveller community. The Court attached weight to the fact that Travellers had continued to use some of the facilities at the hotel.

⁶ *McDonagh, Brigid & ors v Thom, Samuel John Hamilton t/a Royal Hotel Dungannon* 2007 NI 138 (17-JAN-2007).

⁷ As amended by regulation 43 of the Race Relations Order (Amendment) Regulations (Northern Ireland) 2003, which effectively reversed the burden of proof in discrimination cases.

⁸ Council Directive 2000/43/EC of June 2000.

Compare, however, the English case of *Smith v Cheltenham Borough Council* where the claimants had hired rooms for their daughter's wedding reception.⁹ Based on allegations of disorder in recent years, and rumours about the upcoming wedding, the police became concerned that the wedding celebrations might involve public disorder and informed the local authority of their concerns. The local authority attached conditions to the claimants' hire of the venue, including the payment of a large deposit and entry tickets. The Court upheld the decision of the Judge below that the conditions were in breach of the Race Relations Act. The basis for the belief that earlier disorder was linked with the claimants was the unlawful stereotyping of Gypsies.

The second case heard in Northern Ireland was a judicial review of the refusal by the Planning Appeals Commissions of a planning application for the retention of a serviced site owned by the family.¹⁰ The site lay within a designated Green Belt area. It was accepted that in the relevant area there was unmet need for Travellers generally and that the regional authority responsible for the provision of adequate sites for Travellers was unable to meet the needs of the family for culturally sensitive accommodation in the short or medium term. In allowing the judicial review and remitting the case to the Appeals Commission the Judge referred to Article 8 ECHR (the right to respect for private and family life) and the Court's duty to consider the vulnerable position of Travellers and that some special consideration should be given to their needs and their different lifestyles both in the relevant planning framework and in reaching a decision in a particular case. Weatherup J. went on to consider that the existence and suitability of alternative accommodation was a material factor in balancing public and private rights. In particular, the failure by the Commission to consider whether there was *suitable* alternative accommodation rather than bricks and mortar accommodation was a material failing. He also considered that in assessing the road safety aspects (of visibility splays) the Commission should have considered the positive obligation to facilitate the travelling way of life.

The Future – how might PIL be employed to further Travellers' rights?

⁹ [1999] All ER (D) 1414.

¹⁰ *Re Boswell's Application* [2009] NIQB 95.

The two most relevant ECHR rights are those contained in articles 8 (right to respect for private and family life, home and correspondence) and 14 (enjoyment of the ECHR freedoms and rights without discrimination). Article 8(1) has been held to guarantee the right to respect for the traditional way of life of a minority such as Travellers.¹¹ As seen, those rights have not been relied upon to any great extent in Northern Ireland but there are a number of pressing concerns which must be addressed. For example, having a place to call home, the enjoyment of services, the right to have an education and the right to medical care.

A place to call home? Responsibility for the management and maintenance of serviced sites in Northern Ireland was transferred from local district councils to the Northern Ireland Housing Executive (NIHE).¹² NIHE *must* provide such caravan sites as appear to it to be appropriate for the accommodation of caravans of members of the Irish Traveller community, and may manage those sites or lease them to some other person. NIHE may also acquire land on which to construct caravan sites and may provide, for the use of those occupying sites, any services or facilities for health or convenience that appear to NIHE to be appropriate. While there remains a chronic shortage of sites suitable to and available for Travellers in Northern Ireland, it may be possible to bring that failure before the High Court in Belfast on an application for judicial review.

In respect of the eviction of Travellers from public land and from NIHE sites there is little in the way of statutory protection but it is clear that Article 8 ECHR will be engaged in any action taken by a public authority to remove Travellers from a site upon which they have made their home. Where NIHE seek to evict a family by terminating their licence to occupy a site (for example, where there are allegations of nuisance) it is clear that it must take account of various factors before proceeding to evict. In every case it should be remembered that there is a positive obligation to facilitate the Travellers' way of life; eviction is a serious interference with the article 8 rights to respect for the home requiring weighty reasons of public interest to justify

¹¹ *Chapman v UK* [2001] 33 EHRR 399.

¹² Article 28A of the Housing (NI) Order 1981, as amended by Housing (NI) Order 2003.

the action; and, the eviction must be justified by reference to a pressing social need.¹³

A Traveller who does not have a pitch on an authorised encampment and cannot afford to buy his or her own land and/or cannot obtain planning permission may have no alternative but to make an application to NIHE as a homeless person. The degree of assistance owed to any particular homeless person will depend upon a number of factors. In addition to the legislation,¹⁴ NIHE operates its own homeless policy,¹⁵ which should be applied when NIHE is considering the provision of housing. The policy is used as guidance but cannot override the purpose of the legislation or be applied so strictly that it results in the application of a blanket policy without individual consideration of the merits of the application.¹⁶ A person is homeless if he has no accommodation available for his occupation in the United Kingdom or elsewhere.¹⁷ There is no requirement that the person is 'resident' in Northern Ireland to apply for housing assistance, but the applicant must physically present himself or herself in Northern Ireland in order to apply.

The term 'homeless' suggests that only those applicants who do not have a 'roof' over their heads will be eligible, but 'homeless' also includes those who may be deemed homeless and those who are threatened with homelessness.¹⁸ A person is homeless if his accommodation consists of a moveable structure, vehicle or vessel designed or adapted for human habitation and there is no place where he is entitled or permitted to place it and to reside in it. This will apply, for example, to mobile homes and caravans.

A Traveller with nowhere on which to place his or her caravan must first make an application to NIHE as a homeless person. Importantly, if NIHE accepts that he or she is homeless and owed a duty, the requirement to make accommodation available is a requirement that accommodation is made available for that applicant

¹³ *Connors v United Kingdom* (66746/01) (2005) 40 EHHR 9.

¹⁴ The Housing (NI) Order 1988, as amended by the Housing (NI) Order 2003.

¹⁵ NIHE Code of Guidance and Co-operation on homelessness was withdrawn and has yet to be replaced but a new code is likely to be issued shortly.

¹⁶ The contents of the policy, or the application of it in an individual case, can be judicially reviewed.

¹⁷ Art 3(1) of the 1988 Order as amended by Art 135 of the 2003 Order.

¹⁸ See sections xx below.

and any person who normally resides with him or her as a member of the family or any person who might reasonably be expected to reside with him or her. Given that Irish Travellers often travel in extended family groups, NIHE should ask itself whether those members of the extended family are persons who either reside with the applicant as a member of the family or might reasonably be expected to reside with the applicant. It must be an assessment made by NIHE based upon the true nature of the family unit concerned. It should consider issues of both emotional and financial dependency as well as blood relationship.¹⁹

The accommodation offered in discharge of the duty to the unintentionally homeless in priority need, must be suitable.²⁰ The accommodation must be suitable for the applicant and those persons who might reasonably be expected to reside with the applicant. Importantly, if an applicant has a cultural aversion to bricks and mortar accommodation an offer of such accommodation is unlikely to be suitable and would not accord sufficient respect to the applicant's ECHR rights.²¹ NIHE therefore, considering an application from a Traveller with a cultural aversion to bricks and mortar accommodation, should enquire whether a site, pitch or berth is available either on one of its own sites or on a private site. If there is no reasonable prospect of a suitable site, however, there may be no alternative and an offer of bricks and mortar accommodation may be deemed suitable.

If at a later date, that person then leaves the bricks and mortar accommodation offered pursuant to the duty to house a homeless applicant because of his or her cultural aversion to bricks and mortar, for example, because any prolonged stay conflicts with the nomadic way, NIHE may consider on any subsequent application as a homeless person either that that person made himself or herself homeless intentionally or that the period spent in bricks and mortar accommodation indicates against a cultural aversion. Such a decision may be challenged by judicial review on the ground that the decision is unreasonable and fails to fully consider the ECHR rights of the Traveller and the fact that bricks and mortar accommodation was

¹⁹ See *R v Lambeth LBC, ex parte Ly* (1986) 19 HLR 51.

²⁰ Article 12(1) of the Housing (NI) Order 1988.

²¹ *R (Price) v Carmarthenshire CC* [2003] EWHC 42 (Admin); *Codona v Mid-Bedfordshire DC* [2004] EWCA Civ 925.

occupied for no reason other than it was the only available alternative and would not be considered suitable or reasonable to continue to occupy.

District councils have a statutory obligation to inspect the housing accommodation in their area to ensure that if any premises²² are in such a state as to be prejudicial to health or a nuisance, whatever works or measures are required to abate that state of affairs, are carried out.²³ Prejudicial to health means injurious or likely to cause injury to health. Defective sanitation or drains, defective electrical wiring and any interference with the supply of drinking water are obvious examples of a risk to health. Examples where Travellers have relied successfully on similar provisions in England include condensation dampness in an amenity block, rodent infestation, inadequate lighting, hard surfacing, refuse collection, sanitation, electricity.²⁴

If the district council either of its own volition or in the result of a complaint made by an individual inspects a property and considers that it is in such a state as to be prejudicial to health or a nuisance, it *must* serve a notice on the person responsible requiring him to abate. The person responsible is the person by whose act, default, or sufferance the nuisance arises or continues. If that person cannot be found, the notice must be served on the owner or occupier of the premises on which the nuisance arises. If the nuisance arises from any defect of a structural character, the notice must be served on the owner of the premises.²⁵

If the person upon whom the abatement notice is served fails to comply with any requirement contained in the notice within the time specified or if the nuisance, although abated since the service of the notice, is likely to recur on the same premises, the district council *must* make a complaint to the magistrates' courts. The court will thereafter issue a summons requiring that person to appear.²⁶ If the court is satisfied that the alleged nuisance exists, or that although abated it is likely to recur on the same premises, it must make an order requiring that person to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance within a

²² "Premises" include messuages, buildings, lands, casements, and hereditaments of any tenure, art 2 of the Public Health (Ireland) Act 1878. Caravans and caravan sites will be included.

²³ Public Health (Ireland) Act 1878, s.108.

²⁴ See e.g. *Day v Sheffield CC* Legal Action August 1988.

²⁵ S 110 of the 1878 Act.

²⁶ S 111 of the 1878 Act.

time specified in the order. If works are necessary, the order must include a description of the works required.²⁷ This is an important remedy in relation to privately owned and managed sites. Note also, if it appears to the satisfaction of the magistrates' court that the person by whose act or default the nuisance arises, or the owner or occupier of the premises is not known or cannot be found, the order of the court may be addressed to and executed by the district council.²⁸

NIHE is an independent statutory corporation from the district councils and formal legal action can be taken against it by a district council, including the service of a statutory abatement notice and thereafter proceedings to enforce that notice. Given the obligation on a district council to take action to deal with statutory nuisances, the failure by a district council to take action against NIHE in relation to conditions on a site which are the responsibility of NIHE, could give rise to a judicial review of that failure. Thereby, an individual applicant could obtain an order from the High Court in Belfast requiring the district council to take action.

An individual, who is affected by premises which are prejudicial to health, may take court proceedings to prosecute the person responsible and the court may order that person to abate the nuisance.²⁹ A Traveller may prosecute NIHE as the person responsible for a statutory nuisance but legal aid is not currently available to bring the proceedings. If the claim is successful however costs may be recovered from the other party. It is arguable that the absence of legal aid (without the opportunity to use the contingency fee as in Great Britain) is a breach of the Article 6 ECHR right to a fair hearing.

Conclusion

The above is but an example of where law and protective measures, in particular the Human Rights Act, could and should be relied upon to advance the rights of Travellers on a case by case basis. The importance of taking individual challenges which nonetheless have greater strategic significance cannot be underestimated Not only is the public authority responding to the challenge held to account but precedent

²⁷ S 112 of the 1878 Act.

²⁸ S 116 of the 1878 Act.

²⁹ S 121 of the 1978 Act.

is set for other public authorities charged with making decisions which affect the lives of Travellers. Given the well-documented challenges faced by Travellers such as marginalisation, segregation, ill-health, isolation and social exclusion, a strategically focused approach to public interest litigation is long over-due.