Neutral Citation Number: [2021] EWHC 1650 (Admin)

Case No. CO/41/2019

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**PLANNING COURT**
**IN THE MATTER OF AN APPLICATION UNDER SECTION 288 OF THE TOWN & COUNTRY PLANNING ACT 1990**

Birmingham Civil Justice Centre,
33 Bull Street, Birmingham B4 6DR

Date: 17 June 2021

**Before** :

**THE HONOURABLE MR JUSTICE PEPPERALL**

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**Between :**

**LISA SMITH**

**Claimant**

**- and -**

**(1) THE SECRETARY OF STATE FOR HOUSING, COMMUNITIES & LOCAL GOVERNMENT**
**(2) NORTH-WEST LEICESTERSHIRE DISTRICT COUNCIL**

**Defendants**

**- and -**

**AMOS WILLSHORE**

**Interested Party**

**- and -**

**(1) EQUALITY AND HUMAN RIGHTS COMMISSION**
**(2) NATIONAL FEDERATION OF GYPSY LIAISON GROUPS**
**(3) FRIENDS FAMILIES & TRAVELLERS LONDON GYPSIES & TRAVELLERS SOUTHWARK TRAVELLERS ACTION GROUP**
**(4) LIBERTY**

**Interveners**

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**Marc Willers QC** and **Tessa Buchanan** (instructed by **Deighton Pierce Glynn**) for the **Claimant**
**Tim Mould QC** (instructed by **Government Legal Department**) for the **Defendant**
There being no appearance for the **Interested Party**
**Chris Buttler** (instructed **directly**) for the **First Intervener**
**Tim Jones** (instructed by **Community Law Partnership**) for the **Second Intervener**
**David Wolfe QC** and **Owen Greenhall** (instructed by **Community Law Partnership**) for the **Third Intervener**
**Sarah Sackman** and **Merrow Golden** (instructed **directly**) for the **Fourth Intervener**

Hearing dates: 10-11 December 2020

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**Approved judgment**

I direct that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

## THE HONOURABLE MR JUSTICE PEPPERALL:

1. A significant number of Gypsies and Travellers continue to live in caravans in accordance with their traditional way of life. Many have a cultural aversion to conventional housing such that, as Burton J colourfully put it in *Clarke v. Secretary of State for the Environment, Transport & the Regions* [2001] EWHC Admin 800, [2002] J.P.L. 552, bricks and mortar accommodation would be as unsuitable as a "rat-infested barn." Some remain nomadic, while others prefer to live in caravans in a settled location.

2. Planning policy has long recognised the need to provide suitable caravan sites for Gypsies and Travellers. Between 2006 and 2015, planning policies included within the definition of "Gypsies and Travellers" those who had either temporarily or permanently ceased to travel by reason of health, education or old age. By a revised planning policy issued in August 2015, the Department for Communities & Local Government modified the definition to remove the previous inclusive reference to those who had permanently ceased to travel for such reasons. By this claim, Lisa Smith, a Romany Gypsy who lives with her extended family in caravans on a private site in Coalville, Leicestershire, challenges the lawfulness of the 2015 policy. Further, she challenges the decision of the inspector appointed by the Secretary of State to dismiss the landowner's appeal against the refusal of planning permission.

3. Ms Smith seeks statutory review pursuant to s.288 of the *Town & Country Planning Act 1990* with permission granted on appeal by Lewison LJ. Given the obvious importance of the first ground to other Gypsies and Travellers, Ms Smith is supported by the interveners, the Equality and Human Rights Commission

["EHRC"]; the National Federation of Gypsy Liaison Groups; Friends, Families & Travellers; London Gypsies & Travellers; Southwark Travellers Action Group; and Liberty.

## BACKGROUND

4. Ms Smith rents the site at Coalville from Amos Willshore and has lived there with her family in their caravans since 2011. She currently lives on the site with her husband, Lee Smith; their son, Shane; their daughter-in-law, Tammy; Shane and Tammy's three children; their adult daughter, Sherelle; and their other adult sons, Isaac and Tony. Isaac and Tony are severely disabled and cannot travel for work.

5. On 15 April 2013, planning permission was granted on appeal for a period of 4 years for up to six touring caravans on conditions that included a requirement that the site should not be occupied by any persons other than Gypsies and Travellers as defined in the then current planning policy. Such permission was subsequently varied on 31 March 2015. On 8 March 2016, Mr Willshore applied to the North West Leicestershire District Council to vary the permission to allow the permanent residential use of the site as a Gypsy site and to permit the construction of a larger dayroom. Despite the support of its officers, on 22 December 2016 the council refused the application. Further, by a decision dated 23 November 2018, the inspector appointed by the Secretary of State for Housing, Communities and Local Government dismissed Mr Willshore's appeal. The inspector concluded that no member of the Smith family fell within the definition of Gypsies and Travellers in the 2015 policy and that accordingly the application did not benefit from the more permissive planning regime contained in such policy. The application for permanent planning permission was refused and the inspector decided not to grant a further temporary consent.

## THE PLANNING DEFINITION OF GYPSIES

1960-2006

6. By s.23 of the *Caravan Sites and Control of Development Act 1960,* local authorities were given the power to close common land to travellers. As Sedley J, as he then was, wryly observed in *R (Atkinson) v. Lincolnshire County Council* (1996) 8 Admin. L.R. 529, councils proceeded to close common land with great energy but failed to make any use of the concomitant power provided by s.24 of the Act to open caravan sites. Section 6 of the *Caravan Sites Act 1968* therefore imposed a duty on local authorities to exercise their powers under s.24 of the 1960 Act to provide adequate caravan sites for Gypsies in their areas.

7. Gypsies were defined by s.16 of the 1968 Act:

> "… '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"

8. The origin of the 1968 definition appears to have been the decision of the Divisional Court in *Mills v. Cooper* [1967] 2 Q.B. 459 that the word "Gipsy" in s.127 of the *Highways Act 1959* was not a reference to a member of the Romany race but was used in the colloquial sense. Lord Parker CJ defined a Gypsy, at page 467B, as "a person leading a nomadic life with no, or no fixed, employment and with no fixed abode." The judge added, at page 467C:

> "Looked at in that way, a man might well not be a Gipsy on one date and yet be one on a later date."

In the same case, Diplock LJ, as he then was, described a Gypsy, at page 468C-D, "… as a person without fixed abode who leads a nomadic life, dwelling in tents or other shelters, or in caravans or other vehicles." He agreed that being a Gypsy was not therefore an unalterable status.

9. On 5 January 1994, the Department of the Environment issued Circular 1/94 to give revised guidance on planning control and Gypsy caravan sites. The circular adopted the definition in s.16 of the 1968 Act. One of the principal intentions of the circular was to provide a planning system that recognised the need for accommodation consistent with Gypsies' nomadic lifestyle.

10. The duty under the 1968 Act was repealed in November 1994 by the *Criminal Justice and Public Order Act 1994* leaving simply the power under the 1960 Act. From the same date, the definition was removed from s.16 of the 1968 Act and re-enacted by amendment to s.24(8) of the *Caravan Sites and Control of Development Act 1960*.

11. In *Greenwich London Borough Council v. Powell* [1989] 1 A.C. 995, the House of Lords held that a person could be a Gypsy for the purpose of s.16 of the 1968 Act even though he had a permanent caravan site to which he returned every year after working seasonally as a fruit picker. Lord Bridge said, at page 1010F:

> "…a person may be within the definition if he leads a nomadic life only seasonally and notwithstanding that he regularly returns for part of the year to the same place where he may be said to have a fixed abode or permanent residence."

12. While a nomadic habit of life does not necessarily require constant movement, Auld LJ observed in *Wrexham County Borough Council v. National Assembly of Wales* [2003] EWCA Civ 835, at [11], that "it does require a habit or a rhythm of movement." To the same effect, Neill LJ said in *R v. South Hams District Council, ex parte Gibb* [1995] Q.B. 158, at 168A, that a nomadic habit of life "necessarily involves travelling from place to place."

13. A nomadic habit of life is a question of fact and degree. In the unreported case of *Horsham District Council v. Secretary of State for the Environment* (1989), McCullough J observed:

> "The criterion 'nomadic way of life' … leads to certain ambiguity, especially in relation to Gypsies who settle for lengthy periods on authorised sites. It is

> a fact … that many Gypsies – and I use the term ethnically – do settle sometimes for several years, indeed many years, in the same place. Where this happens, as in this case, it may not be easy to determine whether they have lost their status as Gypsies for the purpose of the relevant legislation.
>
> Clearly there can, and indeed must, come a time when as a matter of fact the nomadic habit of life has been lost. When it is lost the Gypsy is no longer a Gypsy for the purposes of the Act."

14. Thus, in *Hearne v. National Assembly for Wales,* The Times, 10 November 1999, the Court of Appeal held that Mr Hearne had lost his Gypsy status when he moved on to land with the intention of giving up his nomadic way of life.

15. In the *Wrexham Case,* the Court of Appeal considered the planning status of traditional Gypsies, Mr and Mrs Berry, who had ceased travelling because of Mr Berry's ill-health and the educational needs of their children. At first instance, and notwithstanding the earlier decisions of the Court of Appeal in *Gibb* and *Hearne,* Sullivan J (as he then was) held that Gypsies who had been obliged to give up travelling and settle in one place because of illness or old age nevertheless retained a nomadic way of life and were, as a matter of planning law and policy, Gypsies. The Court of Appeal disagreed.

2006-2015

16. On 2 February 2006, the Office of the Deputy Prime Minister issued Circular 1/2006: *Planning for Gypsy & Traveller Caravan Sites.* The revised policy provided, at paragraph 15, a revised definition for Gypsies and Travellers:

> "Persons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family's or dependants' educational or health needs or old age have ceased to travel temporarily or permanently, but excluding members of an organised group of travelling show people or circus people travelling together as such."

17. As explained above, the pre-2006 definition admitted the possibility that someone might retain Gypsy status for the purpose of planning law notwithstanding a temporary cessation of a travelling lifestyle, but Circular 1/2006 introduced the possibility that such status might be retained despite having permanently ceased travelling provided that the applicant was otherwise of nomadic habit of life and had only ceased travelling for the limited reasons specified.

18. The new policy explained, at paragraph 3:

> "A new Circular is necessary because evidence shows that the advice set out in Circular 1/94 has failed to deliver adequate sites for Gypsies and Travellers in many areas of England over the last 10 years. Since the issue of Circular 1/94, and the repeal of local authorities' duty to provide Gypsy and Traveller sites there have been more applications for private Gypsy and Traveller sites, but this has not resulted in the necessary increase in provision."

19. Further, it addressed the then perceived needs of Gypsies and Travellers at paragraphs 17-19:

> "17. Some Gypsies and Travellers have an actively itinerant lifestyle, including groups of long-distance travellers, and are generally self-employed people, sometimes occupied in scrap and scrap-metal dealing, laying tarmacadam, seasonal agricultural work, casual labouring, and other employment. These traditional patterns of work are, however, changing and the community has generally become more settled. For example, a reduction of seasonal agricultural and related work has led to more Travellers working in trades which require less mobility.
>
> 18. There is a need to provide sites, including transit sites, in locations that meet the current working patterns of Gypsies and Travellers. In view of the changes in their work patterns these may not be the same areas they have located in or frequented in the past. This needs to be balanced with the responsibility of Gypsies and Travellers to respect the planning system.
>
> 19. A more settled existence can prove beneficial to some Gypsies and Travellers in terms of access to health and education services, and employment, and can contribute to greater integration and social inclusion within local communities. Nevertheless the ability to travel remains an important part of Gypsy and Traveller culture. Some communities of Gypsies and Travellers live in extended family groups and often travel as such. This is a key feature of their traditional way of life that has an impact on planning for their accommodation needs."

20. In March 2012, the coalition government published its *Planning Policy for Traveller Sites* ["PPTS 2012"]. The 2012 policy did not amend the 2006 definition of Gypsies and Travellers.

2015-

21. In August 2015, the Department for Communities & Local Government published its revised *Planning Policy for Traveller Sites* ["PPTS 2015"]. The policy makes clear that it should be read in conjunction with the *National Planning Policy Framework* ["NPPF"], that it must be taken into account in preparing development plans and that it is a "material consideration" in planning decisions: PPTS 2015, paras 1-2. The policy explains, at paragraph 3:

> "The Government's overarching aim is to ensure fair and equal treatment for Travellers, in a way that facilitates the traditional and nomadic way of life of Travellers while respecting the interests of the settled community."

22. One of the government's specific aims, at paragraph 4(i) of the 2015 policy, was "to reduce tensions between settled and Traveller communities in plan-making and planning decisions." Among other matters, the policy requires local planning authorities to develop local plans properly taking into account anticipated need for pitches for Gypsies and Travellers. Specifically, they should:

22.1 set "pitch targets" for Gypsies and Travellers which address their likely need for permanent and transit-site accommodation;

22.2 identify and update annually a supply of specific deliverable sites sufficient to provide five years' worth of sites against such targets;

22.3 identify a supply of specific developable sites, or broad locations for growth, for years 6-10 and, where possible, years 11-15;

22.4 consider producing joint development plans on a cross-authority basis; and

22.5 set criteria-based policies that are fair and facilitate the traditional and nomadic life of Gypsies and Travellers while respecting the interests of the settled community.

[PPTS 2015, paras 8-11.]

23. Applications for planning permission for a Traveller site should be considered in accordance with the presumption in favour of sustainable development, the NPPF and PPTS 2015. Paragraph 24 of the 2015 policy requires local planning authorities to consider, among other matters, the existing level of local provision and need for sites; the availability or lack of alternative accommodation; and other personal circumstances of the applicant.

24. The policy only applies, however, in respect of the land-use needs of Gypsies and Travellers as defined at Annex 1 of the policy, namely:

> "Persons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family's or dependants' educational or health needs or old age have ceased to travel temporarily, but excluding members of an organised group of travelling showpeople or circus people travelling together as such."

25. The Annex adds:

> "In determining whether persons are 'Gypsies and Travellers' for the purposes of this planning policy, consideration should be given to the following issues amongst other relevant matters:
>
> a) whether they previously led a nomadic habit of life
> b) the reasons for ceasing their nomadic habit of life
> c) whether there is an intention of living a nomadic habit of life in the future, and if so, how soon and in what circumstances."

THE WIDER PLANNING POSITION

26. PPTS 2015, like its predecessors, deals specifically with the land-use needs of Gypsies and Travellers who follow a nomadic habit of life. It does not, however, stand alone:

26.1 Paragraph 59 of the NPPF stresses the importance of addressing the "needs of groups with specific housing requirements."

26.2 Paragraph 61 adds:

> "Within this context, the size, type and tenure of housing needed for different groups in the community should be assessed and reflected in planning policies (including, but not limited to, those who require affordable housing, families with children, older people, students, people with disabilities, service families, travellers, people who rent their homes and people wishing to commission or build their own homes)."

26.3 Indeed, by a written ministerial statement made on 22 July 2015, Baroness Williams confirmed that those who do not fall within the PPTS definition should have their accommodation needs addressed under the NPPF.

26.4 When determining an application for planning permission, a local planning authority must have regard, among other matters, to "material considerations": s.70(2)(c) of the *Town and Country Planning Act 1990*.

26.5 Relevant article 8 rights will be a material consideration which the decision-maker must take into account: *Stevens v. Secretary of State for Communities & Local Government* [2013] EWHC 792 (Admin), Hickinbottom J as he then was, at [69]; *Collins v. Secretary of State for Communities & Local Government* [2012] EWCA Civ 1193, Richards LJ, at [10]-[11].

26.6 In *Chapman v. United Kingdom* (2001) 33 EHRR 18, the European Court of Human Rights confirmed that article 8 imposes a positive obligation on the state to facilitate the Gypsy way of life. It observed, at [73]:

> "The Court considers that the applicant's occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. This is the case even though, under the pressure of development and diverse policies or from their own volition, many Gypsies no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children. Measures which affect the applicant's stationing of her caravans have therefore a wider impact than on the right to respect for home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition."

26.7 Thus, where a Gypsy has a cultural aversion to living in bricks and mortar, such aversion will be a material consideration upon any application for planning permission. Further, it may be a breach of both articles 8 and 14 to hold against such applicant his or her refusal of conventional housing: *Clarke,* at [28]-[35], Burton J. Further, the personal circumstances of Gypsies applying for planning permission can properly be taken into account as part of the material considerations: *Basildon District Council v. Secretary of State for the Environment, Transport & the Regions* [2001] J.P.L. 1184, at [33]-[34], Ouseley J.

26.8 Accordingly, the specific accommodation requirements of a permanently settled Gypsy who seeks planning permission to live in a caravan in order to maintain his or her cultural identity are "material considerations" which must be taken into account pursuant to s.70(2) of the 1990 Act.

SUMMARY

27. While planning policy has consistently defined Gypsies and Travellers as persons of nomadic habit of life, the approach to those who have had to give up travelling has changed over the years:

    27.1 From 1994 to 2006, Gypsies were defined simply on the basis of nomadism, albeit the definition included those who only led a nomadic way of life seasonally.

    27.2 From 2006 to 2015, Gypsies and Travellers included those who had ceased travelling whether temporarily or permanently for reasons of educational or health needs, or old age.

    27.3 PPTS 2015 retains the inclusion for those who have temporarily ceased travelling for such reasons but would appear to exclude those who have had to give up travelling permanently.

28. While PPTS 2015 makes specific provision in respect of the planning policies and planning applications for nomadic Gypsies and Travellers, local authorities must take into account the cultural needs and other personal circumstances of permanently settled Gypsies and Travellers in determining any individual planning application.

## THE GROUNDS OF CHALLENGE

29. Although Ms Smith originally pleaded six grounds, two are relied upon before me:

    29.1 First, Ms Smith argues that the planning definition set out in PPTS 2015 unlawfully discriminates against elderly and disabled Gypsies. She puts her case both on the basis of the European Convention and s.19 of the *Equality Act 2010*.

    29.2 Secondly, she argues that the planning inspector erred in law in concluding that the grant of temporary planning permission would provide her and her family with no benefit.

THE CONSTRUCTION ARGUMENT

30. Before turning to the pleaded grounds, it is first necessary to consider the EHRC's argument that, upon its true construction, the 2015 policy does not actually exclude persons of nomadic habit of life who have permanently ceased to travel. Chris Buttler, who appears for the EHRC, argues that the government broke with the *Wrexham* approach in the 2006 circular and in PPTS 2012; that while PPTS 2015 removed the previous inclusion of those who had permanently ceased travelling, such people were not expressly excluded; that the overarching aim of PPTS 2015 was still to "ensure the fair and equal treatment of Travellers in a way that facilitates the traditional and nomadic way of life"; that it is evident from paragraph 2(b) of Annex 1 to PPTS 2015 that cessation of a nomadic habit of life is not determinative of Gypsy status; and that on their true construction, the focus of the 2006, 2012 and 2015 policies had shifted from the functional question of nomadism to a consideration of nomadic culture. Such argument is not adopted by Marc Willers QC and Tessa Buchanan, who appear for Ms Smith, or indeed counsel for any of the other interveners.

31. Tim Mould QC, who appears for the Secretary of State, disputes Mr Buttler's construction argument. He argues that the consistent focus of both the caravan legislation and planning policy has always been on those who pursue a nomadic habit of life from a functional perspective, and not on either ethnicity or culture.

32. Attractively though Mr Buttler argued the point, I do not accept his construction argument. In brief:

    32.1 While it is true that PPTS 2015 does not in terms expressly exclude those who have permanently ceased travelling, such "retired Gypsies" could only be covered by the definition in the event that they were of a "nomadic habit of life."

    32.2 The authorities are clear that such criterion requires a "habit or rhythm of movement" (*Wrexham,* at [11]) and "necessarily involves travelling from place to place" (*Gibb,* at 168A).

    32.3 I do not accept Mr Buttler's argument that PPTS 2015 was concerned with the culture of nomadism. Rather, its focus, like that of the caravan legislation and previous planning policies, remains upon the functional test of nomadism.

## GROUND 1: ARGUMENT

*The Claimant's case*

33. Mr Willers and Ms Buchanan argue that occupation of caravans is integral to the way of life of ethnic Gypsies and that accordingly Ms Smith's right to lead her private and family life in accordance with such tradition is protected by article 8 of the European Convention on Human Rights. They argue that the amended definition of Gypsy in the 2015 policy has a disproportionately detrimental effect upon elderly and disabled Gypsies. Although the matter was put more broadly in the course of argument, the pleaded case is limited to age and disability discrimination. Ms Smith relies on the fact that she is the primary carer for two severely disabled sons. She has, Mr Willers asserts, had to stop travelling because of the health needs of her family. The claim is therefore put on the basis that the new definition in PPTS 2015 amounts to unlawful discrimination contrary to both article 14 of the Convention and s.19 of the *Equality Act 2010*.

34. Such discrimination, it is argued, cannot be justified:

    34.1 First, in European law, Mr Willers and Ms Buchanan argue that the Secretary of State is not entitled to any significant degree of deference. The court, they argue, must conduct an exacting analysis of the claimed justification in accordance with the four-stage test in *Bank Mellat v. HM Treasury (No. 2)* [2013] UKSC 39, [2014] A.C. 700, and require "very weighty reasons" given that the policy is not a general measure of economic or social strategy; it is not a measure passed by parliament; and it involves discrimination on several of the so-called "suspect" grounds which call for particularly careful scrutiny.

    34.2 While it is accepted that the government's aim of ensuring fairness in the planning system might in principle be legitimate, it is argued that any such aim

is flawed given that the planning system does not unfairly favour Travellers. Mr Willers and Ms Buchanan argue that the Secretary of State relies on assertions rather than evidence.

34.3 It cannot be a legitimate aim to placate an unsubstantiated perception of unfairness held by members of an ethnic majority in respect of a vulnerable and stigmatised minority. Mr Willers colourfully describes the Secretary of State's position in the following terms:

> "a vulnerable minority should be put at a (further) disadvantage in order to assuage the hostility felt towards them by the majority."

34.4 It is argued that the Secretary of State is bound by article 6(1) of the *Framework Convention* to "take effective measures to promote mutual respect and understanding and co-operation" among different peoples. Equally, reliance is placed on the public sector equality duty pursuant to s.149 of the *Equality Act 2010*.

35. Further, the claimant asserts that the Secretary of State's concept of what a fair system looks like is itself unlawful. Reliance is placed on the consultation document which stated:

> "The Government's view is that where Travellers have ceased to travel then they should be treated no differently to members of the settled community."

That, it is argued, is a failure to treat differently people whose situations are significantly different without an objective and reasonable justification. The Secretary of State's insistence that retired Gypsies be treated "no differently to members of the settled community" requires justification and none is offered, it is argued, other than "the circular and misguided argument that it is unfair to treat them differently."

36. Ms Smith accepts that the offered justification of seeking to protect sensitive areas from inappropriate development and reducing the number of unauthorised sites might in principle be legitimate aims. She argues, however:

36.1 Both matters were put forward ex post facto and should therefore be treated with caution: *Re. Brewster* [2017] UKSC 8, [2017] 1 W.L.R. 519, at [52].

36.2 There is no evidence that sensitive areas were insufficiently protected.

37. More generally, it is argued that there is no rational connection between the new policy and the aims of ensuring fairness in the planning system; protecting sensitive areas from development; or reducing the number of unauthorised sites. Any measure which simply reduces the number of successful applications by Gypsies and Travellers regardless of need or the planning merits is not, it is argued, rational. Indeed, it is asserted that restricting the number of successful applications by amending the definition is "no more rational than rejecting the applications of Gypsies and Travellers whose surnames begin with the letters A-L."

38. Further, Ms Smith argues that less intrusive measures could have been used. She cites the following amendments that were made to the policy and which, she argues, would have sufficed:

38.1 The removal of the need to treat the lack of an up-to-date five-year supply of deliverable sites as a material consideration: para. 27.

38.2 The statement that unmet need and personal circumstances are unlikely clearly to outweigh harm to the Green Belt so as to establish very special circumstances in favour of granting an application: paras 16 & 24.

38.3 The statement that local planning authorities should "very" strictly limit new Traveller-site development in the countryside: para. 25.

38.4 The statement that there is no assumption that local planning authorities will be required to "meet their Traveller-site needs in full" where there is a large-scale unauthorised site in the area that has significantly increased the level of need: para. 12.

38.5 The amendment to national planning policy to make "intentional unauthorised development" a material consideration weighing against the grant of planning permission.

39. Finally, it is argued that the unfairness of the amended definition manifests itself in a number of ways:

39.1 It is now much harder for ethnic Gypsies and Travellers, and particularly elderly and disabled Gypsies and Travellers, to obtain planning permission. This makes it harder for them to maintain their culture and pursue their traditional way of life; and risks families being split up.

39.2 Where planning permission was granted on condition that the residents met the definition in the 2012 policy, they now risk being in breach of such condition and evicted.

39.3 The new policy has led to a significant reduction in local planning authorities' assessments of the level of need.

39.4 The assumption that the needs of Gypsies would be met via the NPPF has not been borne out.

39.5 The effect of the amended definition has not been kept under review.

39.6 No consideration was given to providing more sites.

*The interveners' submissions*

40. I have already dealt with Mr Buttler's construction argument.

41. A number of interveners pressed arguments on the basis of gender and race. That is not Ms Smith's case. I have, however, considered the helpful written and further oral submissions from Mr Buttler, and the written submissions from Tim Jones, David Wolfe QC and Owen Greenhall, and Sarah Sackman and Merrow Golden on behalf of the other interveners.

*The Secretary of State's case*

42. Mr Mould accepts that the 2015 definition is potentially indirectly discriminatory in its effect upon Gypsies and Travellers who have settled permanently due to age or disability. He argues, however, that the new policy was a proportionate means of achieving a legitimate aim, namely that the planning policy should apply only for the purpose of meeting the specific land use needs of persons who follow, or will follow after a temporary cessation, a nomadic habit of life. Mr Mould stresses the functional nature of the test.

## GROUND 1: ANALYSIS

THE GYPSY EXPERIENCE

43. There is a plethora of material before the court to indicate that Gypsies and Travellers are among the most marginalised and vulnerable communities in the United Kingdom:

43.1 In 2009, the EHRC noted in its report, *Inequalities experienced by Gypsy and Traveller Communities: A Review*:

> "Racism towards most ethnic minority groups is now hidden, less frequently expressed in public, and widely seen as unacceptable. However, that towards Gypsies and Travellers is still common, frequently overt and seen as justified."

43.2 In 2012, the Department for Communities & Local Government reported the government's concern that Gypsies and Travellers "experience, and are being held back by, some of the worst outcomes of any group across a wide range of social indicators." Key findings included that Gypsies and Travellers were less likely to succeed in education (12% achieving five or more good GCSEs against 58.2% nationally); suffer worse health (measured by the rate of miscarriages, still-births and neonatal deaths); are subject to hostility and discrimination; and, in many places, lead separate parallel lives from the wider community. The report noted that 80% of Traveller caravans are on authorised sites that have planning permission but the remaining 20% (some 3,000 caravans) are on unauthorised sites, either being sites developed without planning permission or on encampments on land not owned by the Travellers. [See *Progress Report by the Ministerial Working Group on Tackling Inequalities experienced by Gypsies and Travellers.*]

43.3 In 2016, the EHRC found that Gypsy and Traveller children were less likely to achieve a good level of development in their early years; less likely to succeed at GCSEs; and more likely to be bullied or excluded from school. Gypsies and Travellers have the lowest recorded economic activity and are more likely to suffer poor health with lower life expectancy; higher maternal and infant mortality rates; lower child immunisation levels; and higher prevalence of anxiety, depression, asthma, chest pain and diabetes. Further, it highlighted that negative attitudes to Gypsies and Travellers were still widely held. [See the EHRC's spotlight report *England's Most Disadvantaged Groups: Gypsies, Travellers & Roma.*]

43.4 In 2019, the House of Commons' Women and Equalities Committee found that Gypsies and Travellers "have the worst outcomes of any ethnic group across a huge range of areas, including education, health, employment,

criminal justice and hate crime." [See *Tackling Inequalities faced by Gypsy, Roma and Traveller Communities,* HC360.]

43.5 In the same year, the EHRC published a further report entitled *Is Britain Fairer: The State of Equality and Human Rights 2018*. It concluded:

> "Gypsies, Roma and Travellers are particularly disadvantaged: they have the poorest attainment levels at school and are more likely to be excluded from school. They also face barriers to accessing healthcare and have poorer health outcomes. Gypsies, Roma and Travellers are also at higher risk of homelessness and experiencing poor housing. These findings are all indicative of a group experiencing extreme poverty but lack of available poverty data for this group means that they are invisible in official poverty statistics."

43.6 Abbie Kirkby, the Advice and Policy Manager at Friends, Families and Travellers, a national charity working with Gypsies and Travellers, explains that disabilities are far more common among Gypsies, with some 42% of English Gypsies affected by a long-term health condition compared to 18% among the general population. Further, Gypsies and Travellers disproportionately suffer from premature geriatric conditions such as dementia, arthritis, multi-morbidity, falls and general frailty.

44. While somewhat out of date, Sarah Spencer's thought-provoking lecture, *Gypsies and Travellers: Britain's Forgotten Minority* [2005] E.H.R.L.R. 355, described the then position in respect of sites available to Gypsies and Travellers:

> "… the location and condition of these sites would not be tolerated for any other section of society. 26% are situated next to, or under, motorways, 13% next to runways, 12% are next to rubbish tips, and 4% adjacent to sewage farms. Tucked away out of sight, far from shops and schools, they can frequently lack public transport to reach jobs and essential services."

45. Further, there is evidence of a serious shortage of sites:

45.1 In April 2015, the Race Equality Foundation's report, *Ethnic Disadvantage,* reported that white Gypsies and Irish Travellers were 7½-times more likely than white British households to experience housing deprivation.

45.2 In January 2020, the Secretary of State's own Traveller count reported that 12% of Traveller caravans in England were on unauthorised sites, and therefore legally homeless. Such proportion can be compared with the homelessness rate of 0.5% across England reported by Shelter in December 2019.

46. Although some considerable time ago, the evidence provided to the European Court in *Chapman* showed that, in 1991, 90% of applications for planning permission made by Gypsies were refused whereas some 80% of all applications were granted.

47. Of course, the causes of socio-economic deprivation among Gypsies cannot simply be explained by difficulties in securing planning permission. Indeed, some

disadvantage is intrinsic in a nomadic lifestyle and a preference for casual labouring work. There is, however, clear evidence before me that there is an endemic problem, and I am entitled to express disquiet as to the poor outcomes achieved by so many Gypsies and the disproportionate difficulty faced by many Gypsies and Travellers in obtaining planning permission. I asked Mr Mould in the course of his submissions on behalf of the Secretary of State why, if the planning system is capable of operating lawfully, it is going wrong. He thoughtfully replied that there are a number of problems:

47.1 First, there is an unwillingness on the part of planning authorities to prioritise the needs of Gypsies and Travellers.

47.2 Secondly, the voice of Gypsies and Travellers is not heard as loudly as that of the major housebuilders.

47.3 Thirdly, there is a shortage of land that is obviously suitable.

47.4 Fourthly, he cautioned that the pattern of evidence presented to the court was designed to emphasise the failures of the current system.

48. The fourth point was well made. It was of course open to the Secretary of State to present evidence to correct the picture, but in fairness he could properly conclude that such course would be inappropriate since the court is dealing with a discrete challenge to the lawfulness of PPTS 2015 and not undertaking a wide-ranging audit as to the effectiveness of government policy. As to the first three points, Mr Willers agreed with Mr Mould's analysis. It is, however, important to understand the limits of the judicial exercise. I am not conducting a public enquiry into the design or operation of the planning system in respect of Gypsies and Travellers, but rather considering the narrower question of whether such system is lawful; and separately considering whether such policy was lawfully operated in this particular case.

THE IMPACT OF PPTS 2015

49. In June 2015, the Secretary of State undertook an impact assessment of the new planning policy in accordance with the public sector equality duty pursuant to s.149 of the *Equality Act 2010*. Such analysis concluded:

> "We recognise that this proposal will have an impact on the identified racial group, i.e. Gypsies and Travellers. We note, for example, that Romany Gypsies and Irish Travellers are a protected race under the *Equality Act 2010* … Additionally, within this group there is likely to be a specific impact on the elderly, disabled and possibly women (particularly those from single parent families). We recognise that age, disability and gender are also protected characteristics under the Act.
>
> The impacts are likely to be on article 8 rights to private and family life, home and correspondence. For example, this could mean that those persons without family connections will no longer be able to live with other members of their Gypsy and Traveller community."

50. The analysis continued:

> "This definition change meets the legitimate policy objective of achieving fairness in the planning system.
>
> Whilst we recognise the article 8 interference set out above and the impact this may have on those with protected characteristics within the identified racial groups, i.e. the elderly, the disabled and women, on balance we think that this interference is necessary and proportionate. Overall it is important for this Government to implement a fair planning system for all, and that where Gypsies and Travellers have settled permanently, they should be treated no differently to the rest of the settled community for planning purposes. The proposal will also support the Government's aim of reducing tensions between the Traveller community and the settled community. Evidence, in the form of departmental correspondence and supported by responses to the consultation, raises concerns about fairness in the treatment of planning applications from Travellers, who have ceased to travel, yet are still defined as Travellers under planning policy. On balance the interference is proportionate.
>
> We recognise that when implementing this new definition there will remain the need to consider article 8 and the best interests of the child, therefore the impact of the change is likely to be focused on a small group. ln cases involving families where some members do not travel, it may continue to be appropriate to grant permission for Traveller sites on the grounds that it is proportionate to do so and would be an unlawful interference with human rights (article 8) to limit the permission to particular family members only. As such, we consider that the group of persons most likely to be affected by this change are quite small (elderly, disabled and possibly women (particularly those from single parent families) without family connections. These persons would not be prohibited from applying for a caravan pitch or site but such an application would be considered under the provisions of the NPPF and not Planning Policy for Traveller Sites. Further, it will always be for the decision maker to consider any personal circumstances of the applicant and weigh such circumstances in the balance.
>
> We recognise that there is a risk that homelessness, unauthorised camping (including roadside camping) may increase as Gypsies and Travellers may try to ensure that they fulfil the new definition by demonstrating that they have not permanently ceased to travel. This may impact on their ability to access services such as education and health and would impact on Gypsies and Travellers particularly, the elderly, disabled and women. Such risks will be kept under review.
>
> ln relation to plan-making, while the persons impacted by this change would not have their needs planned for under the specific provisions of the Planning Policy for Traveller Sites, they would be planned for under the general provisions of the National Planning Policy Framework. This helps mitigate negative impact."

51. The analysis concluded:

> "The amended planning definition of Travellers would mean that where family members have ceased travelling permanently they would no longer have their site needs met separately under Planning Policy for Traveller Sites. This is likely to impact on the elderly, the disabled, women, single-parent families and

> those with long-term health issues within family groups, since they are most likely to be leading a permanently settled life. It may also lead to the break-up of families and couples where some family members do meet the definition and others do not, and would have a particular impact on those families involved in key life transitions, such as pregnancy, if for example families are separated. Although, local authorities would still need to consider article 8 rights (rights to private and family life, home and correspondence) in determining individual cases and may consider that it is proportionate in the circumstances to grant permission for the whole family."

52. In 2019, the EHRC published its research report, *Gypsy & Traveller Sites: The Revised Planning Definition's Impact on Assessing Accommodation Needs*. The report's key finding was that the pre-2015 assessment of a sample of twenty local planning authorities that a further 1,584 pitches were required fell to just 345 plus a further 450 pitches for households whose travelling status had not been ascertained. Dr Siobhan Spencer MBE, a trustee and co-founder of the National Federation of Gypsy Liaison Groups, observes that the report showed that PPTS 2015 had led to a sharp drop of almost 75% in the provision of pitches.

53. Ms Kirkby explains that nearly half of those assessed as needing a pitch in the south east fall outside the PPTS 2015 definition of Gypsies and Travellers. Since the needs of such people will not be counted by local authorities assessing the required number of pitches, there will be inadequate provision for Gypsies and Travellers both now and for future generations. Likewise, work undertaken by London Gypsies and Travellers indicates that while London boroughs assessed the need for 259 pitches for Gypsies and Travellers meeting the 2015 definition, there was a need for a further 408 pitches for households that did not meet the definition.

## THE CONVENTION CLAIM

### *Article 14*

54. Article 14 of the ECHR provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

55. Article 14 has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by other Convention rights. Although the application of article 14 does not presuppose a breach of some other Convention right, there can be no room for a claim under article 14 unless the facts "fall within the ambit" of another Convention right: *Petrovic v. Austria* (1998) 33 E.H.R.R. 14, at [22]. In *Petrovic,* the applicant complained that Austria only paid a parental leave allowance to mothers. Article 8 did not impose any obligation on the state to pay such leave. The payment of the allowance was, however, intended to promote family life and necessarily affected the way in which family life was organised in enabling one parent to stay at home to look after their children. Article

14 therefore came into play because the payment of parental leave was one of the "modalities" of the right guaranteed by article 8.

56. Thus, in order to bring a claim within article 14, Ms Smith does not have to prove that PPTS 2015 infringes her rights under article 8, but only that her complaint falls within the "ambit" of article 8: *Smith v. Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916, [2018] Q.B. 804, at [41]. Further, even if the Secretary of State is under no obligation to provide a particular measure in order to comply with article 8, if he does provide a measure that falls within the ambit of article 8 then article 14 requires that he does so without discrimination: *Smith,* at [42].

57. In *Smith,* Sir Terence Etherton MR reviewed the authorities concerning article 14 claims brought in conjunction with article 8, and in particular *R (Clift) v. Secretary of State for the Home Department* [2006] UKHL 54, [2007] 1 A.C. 484, *M v. Secretary of State for Work & Pensions* [2006] UKHL 11, [2006] 2 A.C. 91 *R (Steinfeld) v. Secretary of State for Education* [2017] EWCA Civ 81, [2018] Q.B. 519. The Master of the Rolls concluded, at [55]:

> "The legal position may, therefore, be summarised as follows in a case where, as here, the claim is that there has been an infringement of article 14, in conjunction with article 8. The claim is capable of falling within article 14 even though there has been no infringement of article 8. If the state has brought into existence a positive measure which, even though not required by article 8, is a modality of the exercise of the rights guaranteed by article 8, the state will be in breach of article 14 if the measure has more than a tenuous connection with the core values protected by article 8 and is discriminatory and not justified. It is not necessary that the measure has any adverse impact on the complainant in a positive modality case other than the fact that the complainant is not entitled to the benefit of the positive measure in question."

58. In *Smith,* s.1A of the *Fatal Accidents Act 1976* (which provides for the payment of bereavement damages by tortfeasors responsible for causing a death) was a positive measure which, even though not required by article 8, was a modality of the exercise of the rights guaranteed by article 8. Accordingly, the state was in breach of article 14 because (1) the measure had more than a tenuous connection with the core values protected by article 8; (2) it was discriminatory in its effect in that the damages were not payable to co-habiting couples who were neither married nor in a civil partnership; and (3) such discrimination was not justified.

59. In *R (Joint Council for the Welfare of Immigrants) v. Secretary of State for the Home Department ("the JCWI Case")* [2020] EWCA Civ 542, [2020] H.L.R. 30, Hickinbottom LJ said, at [87]:

> "… where a state takes positive action which, whilst not required by article 8 (in the sense that a failure to take such action would not have constituted an interference with rights within the scope of article 8(1)), demonstrates its respect for private and family life etc, this will fall within the ambit of art.8. Therefore, where the state granted parental leave allowance to mothers and not fathers, whilst that did not fall within the scope of article 8, the ECtHR

held that it fell within its ambit for the purposes of art.14 (*Petrovic*). Indeed, as Sir Terence Etherton MR said in *Smith* … at [42]:

> 'There are numerous Strasbourg authorities to that effect, in which the positive measure is described as a 'modality' of the right conferred by the substantive provision of the Convention."'

See also *R (C) v. Secretary of State for Work & Pensions* [2019] EWCA Civ 615, [2019] 1 W.L.R. 5687, Leggatt LJ, as he then was, at [57].

60. As I have explained above, in the *Chapman Case* the European Court of Human Rights confirmed that article 8 imposes a positive obligation on the state to facilitate the Gypsy way of life. While the *Wrexham Case* confirmed that there is no breach of article 8 in taking into account the particular cultural needs of a Gypsy who had retired from travelling pursuant to the NPPF and s.70(2) of the 1990 Act, I accept that PPTS 2015 was a modality of the right conferred by article 8 and that this claim therefore falls within the ambit of article 8 such that article 14 requires the policy to operate without discrimination.

*Discrimination*

61. Gypsies and Travellers who can bring themselves within PPTS 2015 obtain a number of advantages in respect of planning policy:

    61.1 First, local authorities are required to set pitch targets to address the likely site accommodation needs of such Gypsies and Travellers (PPTS 2015, policy B, para. 9).

    61.2 Secondly, authorities are required to identify and update a supply of specific deliverable sites against such targets (PPTS 2015, policy B, para. 10).

    61.3 Thirdly, authorities are required to ensure that Traveller sites are sustainable economically, socially and environmentally (PPTS 2015, policy B, para. 13).

    61.4 Fourthly, while general planning policy is to avoid development of isolated homes in the countryside (NPPF, para. 79), a number of policies in PPTS 2015 recognise the need for a more relaxed approach to rural development in order to meet the needs of Gypsies and Travellers (policy C, para. 14; policy D, para. 15; and policy H, paras 24-26).

    61.5 Fifthly, the lack of an up-to-date five-year supply of deliverable sites is a significant material consideration upon an application for temporary planning permission made by a Gypsy or Traveller falling within PPTS 2015 (policy H, para. 27).

62. The government concedes that the exclusion of permanently settled Gypsies and Travellers from the benefits of PPTS 2015 disadvantages older and disabled Gypsies, and that, subject to the issue of justification, such exclusion is discriminatory on the grounds of age and disability. In view of the Secretary of State's concession on the issue, I need not consider the issue further. But for the fact that the government extended the benefits of the predecessor policies between 2006 and 2015 to retired Gypsies, I do, however, observe that it might have been arguable that a policy addressing the specific land-use needs of those leading a nomadic lifestyle cannot sensibly be tested against the different needs of those seeking a permanent home;

and that the 2015 policy could not be said to discriminate on the grounds of age or disability unless it operated less favourably in its application to older or disabled Gypsies and Travellers leading a nomadic lifestyle.

*Thlimmenos discrimination*

63. In *Thlimmenos v. Greece* (2001) 31 E.H.R.R. 15, the European Court of Human Rights held, at [44]:

> "The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

64. Citing *Thlimmenos*, the European Court added in *JD v. United Kingdom* [2020] H.L.R. 5, at [84]:

> "The prohibition deriving from article 14 will therefore also give rise to positive obligations for the Contracting States to make necessary distinctions between persons or groups whose circumstances are relevantly and significantly different."

65. Mr Willers argues that it is *Thlimmenos* discrimination to design a planning system that fails to treat differently the land-use needs of traditional Gypsies from those of the settled population. The point is not, in my judgment, open to Ms Smith since the claim is pleaded on the basis of age and disability discrimination and not race or any other status. In any event:

    65.1 The planning system does treat permanently settled Gypsies differently by taking into account their particular cultural needs both through the NPPF and as material considerations under s.70.

    65.2 Further, for the reasons set out below, such claim would have failed because there was no lack of objective and reasonable justification for limiting the scope of PPTS 2015 to the land-use needs of those following a nomadic habit of life.

*Degree of deference*

66. In *Stec v. United Kingdom* (2006) 43 E.H.R.R. 47, the European Court stressed that the margin of appreciation will vary according to the circumstances, the subject-matter of the case and the background, but added, at [52]:

> "As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention."

67. Likewise, in the *JD Case,* the European Court made plain that "very weighty reasons" would be needed to justify discrimination on the grounds of disabilities or gender. In the *JCWI Case,* Hickinbottom LJ observed, at [140]:

> "The manifestly without reasonable foundation criterion, as used domestically, is derived from the Strasbourg court, which, as I have already indicated ([98] above), generally shies away from formalism. Properly construed, in my view, the criterion cannot simply apply to some cases where there is an issue of justification in respect of a measure involving an element of social or economic policy separated from other cases by a bright line. No such line can sensibly be drawn: the degree of social and economic policy involved in any measure will be infinitely variable. In my view, the criterion simply recognises that, where there is a substantial degree of economic and/or social policy involved in a measure, the degree of deference to the assessment of the democratically elected or -accountable body that enacts the measure must be accorded great weight because of the wide margin of judgment they have in such matters. The greater the element of economic and/or social policy involved, the greater the margin of judgment and the greater the deference that should be afforded … However, if the measure involves adverse discriminatory effects, that will reduce the margin of judgment and thus the degree of deference. That will be particularly so where the ground of discrimination concerns a core attribute such as sex or race."

68. In the same case, Davis LJ added, at [173], that particular close scrutiny is required where there is some element of discrimination on a "suspect" ground such as race, religion or sexual orientation.

69. Although at various times Mr Willers argued that the policy discriminated on the grounds of gender and race, the pleaded case is limited to age and disability. Following *JD,* I accept that very weighty reasons will be needed to justify disability discrimination.

*Justification*

70. In view of the Secretary of State's concession, the fundamental issue is to consider whether there was an objective and reasonable justification for the Secretary of State's decision to limit the ambit of the definition of Gypsies and Travellers for the purpose of the discrete planning policy arrangements for meeting their land-use needs. Such question falls to be answered by reference to the four-stage analysis stated by Lord Reed in *Bank Mellat*, at [74]:

> "(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right;
>
> (2) whether the measure is rationally connected to the objective;
>
> (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective;
>
> (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."
>
> See also Lord Sumption at [20].

71. Ms Smith's claim is not that the inspector has discriminated against her in the exercise of her planning judgment but that PPTS 2015 itself is inherently discriminatory. In *Christian Institute v. Lord Advocate* [2016] UKSC 51, Baroness Hale, Lord Reed and Lord Hodge said, at [29]:

> "This court has explained that an *ab ante* challenge to the validity of legislation on the basis of a lack of proportionality faces a high hurdle: if a legislative provision is capable of being operated in a manner which is compatible with Convention rights in that it will not give rise to an unjustified interference with article 8 rights in all or most cases, the legislation itself will not be incompatible with Convention rights (*R (Bibi) v Secretary of State for the Home Department* [2015] UKSC 68; [2015] 1 WLR 5055 at [2] and [60] per Baroness Hale, at [69] per Lord Hodge)."

See also Hickinbottom LJ in the *JCWI Case*, at [116]-[117].

72. In the *JCWI Case,* Hickinbottom LJ confirmed, at [119], that such proposition applied both to article 8 claims and also, as in both that case and *Bibi,* to claims brought under article 14 read together with article 8. Accordingly, Ms Smith's challenge to the validity of this statutory scheme faces a high hurdle.

73. As noted above, in the *Wrexham Case* the Court of Appeal rejected the argument that Gypsies who had been obliged to give up travelling by reason of illness or old age retained a nomadic habit of life such that they were within Circular 1/94. Auld LJ observed, at [41] and [43]:

> "41. For the purpose of planning control, the Gypsy status of applicants for planning permission is relevant to the question whether they are entitled to a more relaxed regime of planning control than is generally applicable to others. The rationale for that is that their nomadic lifestyle brings with it special needs in that it renders them more vulnerable to homelessness if subject to the normal rigours of planning control. As a matter of history, this different treatment developed to meet the needs of ethnic or traditional Gypsy families who typically travelled to find work. Now, as a matter of statute and national planning policy, Gypsy status has been both extended and confined - extended to those who are not traditional Gypsies, and confined to persons 'of nomadic habit of life, whatever their race or origin.' …
>
> 43. … the fact that applicants for planning permission may not, on the facts, qualify as Gypsies in the statutory and policy sense, does not mean that their traditions and lifestyle and personal circumstances are irrelevant to the planning decision or that they cannot be set and weighed against local plans and policies as s.54A and 70(2) 'material considerations.' The overall issue for the inspector was, as Pill LJ put it in *Hearne* … whether the planning application should have been determined on the basis of their status as Gypsies or upon planning considerations without reference to that status."

74. It was argued in the *Wrexham Case* that circumstances had moved on since the decision in *Gibb* and that the concept of "sedentary Gypsies" had been recognised by the European Court of Human Rights in *Chapman*. Nevertheless, Auld LJ explained that the touchstone of the statutory definition that had been adopted for planning control was a nomadic habit of life. The Court of Appeal firmly rejected the proposition that a "retired Gypsy" (i.e. a Gypsy who had retired from a travelling lifestyle) could be a Gypsy for the purpose of planning policy. Sullivan J's invocation of common sense and common humanity missed the purposes and effect of the policy which was to provide land for those who are nomadic. Auld LJ added, at [46]:

> "Those who are not nomadic, for whatever reason, whether through 'retirement', as in *Hearne,* or through illness, as here, are outside the ambit of the policy. As Burton J observed in *R (Albert Smith) v. London Borough of Barking and Dagenham* [2002] EWHC 2400 Admin, there is other provision for those who are not nomadic. And, as I have said, though outside the policy, the individual circumstances and needs of former Gypsies in the statutory and planning sense may still be taken into account …"

75. The judge added at [48]:

> "The effect of the statutory and policy definition is to focus on the current nomadic life-style of applicants for planning permission, that is, their way of life at the time of the planning determination. The rationale for that focus is to be found in the first of the three main intentions of [1994 Circular] … namely 'to provide that the planning system recognises the need for accommodation consistent with the Gypsies' nomadic lifestyle'. If that lifestyle, as a matter of fact, is no longer present, there is no justification, as Pill LJ said … in *Hearne,* for applying a more relaxed approach to them:
>
> > 'The circulars give guidance upon the approach to planning applications which aim to provide accommodation for Gypsies. That presupposes the continuation of that status upon the grant of permission. They do not provide that Gypsies shall have an advantageous position when applying for permission which is not for Gypsy use. Any relaxation in ordinary planning policies with respect to planning applications for Gypsy caravan sites does not apply when the application is not for a Gypsy caravan site, but which is, on the facts, for a residential caravan site without that status.'"

76. The Court of Appeal also roundly rejected Sullivan J's reliance on article 8 of the Convention. While *Chapman* establishes that article 8 imposes a positive obligation on the state to facilitate the Gypsy way of life, Auld LJ explained at [54]-[55]:

> "54. The whole premise of the Strasbourg Court's judgment and observations in those passages was that Gypsies, by reason of their nomadic, though not necessarily wholly nomadic, lifestyle, require special consideration. There is nothing in article 8 or the reasoning of the Court to suggest that such special consideration should continue in the manner indicated in the policies after they have given up that lifestyle, whatever the reason for doing so …

> 55. Any person, whether a traditional Gypsy, a statutory, that is, a nomadic, Gypsy, or one who is neither, is entitled to the article 8 right to respect for his private and family life and home, and, in determining the planning merits in each case, such respect falls to be considered alongside and weighed against all relevant policies, including the local plan and any other material considerations, as required by sections 54A and 70(2) of the 1990 Act."

77. Auld LJ drew the following important conclusions at [57]:

> "Whether applicants for planning permission are of a 'nomadic way of life' as a matter of planning law and policy is a functional test to be applied to their way of life at the time of the determination. Are they at that time following such a habit of life in the sense of a pattern and/or a rhythm of full-time or seasonal or other periodic travelling? The fact that they may have a permanent base from which they set out on, and to which they return from, their periodic travelling may not deprive them of nomadic status. And the fact that they are temporarily confined to their permanent base for personal reasons such as sickness and/or, possibly, in the interests of their children, may not do so either, depending on the reasons and the length of time, past and projected, of the abeyance of their travelling life. But if they have retired permanently from travelling for whatever reason, ill-health, age or simply because they no longer wish to follow that way of life, they no longer have a 'nomadic habit of life'. That is not to say they cannot recover it later, if their circumstances and intention change, in keeping with Diplock LJ's observation that Gypsy status in this sense is an alterable status. But that would arise if and when they made some future application for permission on the strength of that resumption of the status."

78. The *Wrexham Case* authoritatively dealt with the position under article 8. While the case was not argued on the basis of article 14, the Court of Appeal's clear conclusions are instructive on three issues:

78.1 First, that the ambit of the then applicable planning policy for Gypsies and Travellers was functional in that it focused on the applicant's way of life and consequent land-use needs, rather than upon his or her cultural needs.

78.2 Secondly, the rationale for such policy was that a nomadic lifestyle brings with it special needs in that it renders nomads more vulnerable to homelessness if subjected to the normal rigours of planning control.

78.3 Thirdly, that once a Gypsy or Traveller gives up his or her nomadic lifestyle, there is no justification for continuing to apply a more relaxed planning regime provided the planning system continues to respect the applicant's article 8 rights.

79. I am satisfied that PPTS 2015 retains at its core a functional test of nomadism and that its focus is upon the specific land-use needs of those leading a nomadic lifestyle. Further, I am satisfied that the current policy continues to recognise the special needs of nomadic people. Indeed, the 2015 policy explains, at paragraph 3:

> "The Government's overarching aim is to ensure fair and equal treatment for travellers, in a way that facilitates the traditional and nomadic way of life of travellers while respecting the interests of the settled community."

80. In my judgment, the Secretary of State was plainly justified in drawing a distinction between the specific land-use needs of those seeking to lead a nomadic lifestyle and those seeking a more settled existence. The former throws up particular challenges both for applicants and planning authorities, and the Secretary of State was entitled to devise a specific policy focusing on that issue which did not also seek to address the cultural needs of those Gypsies and Travellers now seeking a permanent home. The critical consideration is that PPTS 2015 does not stand alone. While the policy deals specifically with the housing needs of Gypsies and Travellers who follow a nomadic habit of life, it is part of a patchwork of provisions. As I have already identified:

    80.1 paragraphs 59 and 61 of the NPPF require planning authorities to address the needs of Gypsies and Travellers irrespective of whether they meet the PPTS definition;

    80.2 the specific accommodation requirements of permanently settled Gypsies who seek planning permission in order to maintain their cultural identity as Gypsies are "material considerations" which must be taken into account pursuant to s.70(2)(c) of the 1990 Act; and

    80.3 other personal circumstances of Gypsy applicants can properly be taken into account as part of the material considerations: *Basildon,* at [33]-[34], Ouseley J.

81. It was a matter for the executive and not the judiciary to determine whether:

    81.1 The PPTS should make provision for the land-use needs of all Gypsies and Travellers irrespective of whether they remain nomadic or have ceased travelling.

    81.2 Alternatively, the policy should make discrete provision only for the land-use needs of Gypsies and Travellers who remain of a "nomadic habit of life" and make provision for the needs of permanently settled Gypsies and Travellers through the mainstream planning system.

82. There is nothing inherently objectionable to the executive choosing to take the latter approach as it did between 1994 and 2006 and again from 2015, provided that the system is capable of taking into account the article 8 rights of permanently settled Gypsies and Travellers and their particular personal circumstances. I am therefore satisfied that the planning system taken as a whole is capable of being operated such that it respects the article 8 rights both of nomadic Gypsies and Travellers, and of those who through age or disability have been forced to give up a nomadic life.

83. Thus far, I have analysed the position without direct reference to the four principles identified in *Bank Mellat*. Doing so, I conclude that the exclusion of permanently settled Gypsies from PPTS 2015 was objectively and reasonably justified:

83.1 The principal objectives of the policy were to ensure the fair and equal treatment of Gypsies and Travellers in a way that facilitated their traditional and nomadic habit of life while also respecting the interests of the settled community. Such objectives were sufficiently important to justify limiting the advantages of PPTS 2015 to those leading a nomadic lifestyle provided that the planning system overall also ensured that the cultural needs of retired Gypsies and Travellers were respected and taken into account as material considerations.

83.2 Such limitation was rationally connected to the objectives by ensuring that PPTS 2015 focused on the particular land-use needs of nomadic people.

83.3 I am not persuaded that a less intrusive measure could have been used without unacceptably compromising both the policy's focus on the particular land-use needs of nomadic Gypsies and Travellers, and the interests of the settled community.

83.4 The limitation does not have a particularly severe effect on the rights of settled Gypsies since their cultural needs and personal circumstances must be taken into account upon any planning application. I am, in any event, satisfied that the importance of the objectives, to the extent that the limitation will contribute to their achievement, outweighs any effects upon settled Gypsies.

## THE CLAIM UNDER THE EQUALITY ACT 2010

*Indirect discrimination*

84. Section 19(1) of the *Equality Act 2010* provides that a person (A) discriminates against another (B) if A applies a "provision, criterion or practice" which is discriminatory in relation to a relevant protected characteristic of B's. Section 19(2) explains:

> "… a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

85. Here, the criterion of nomadism in the planning definition puts retired and disabled Gypsies at a particular disadvantage when compared to younger and able-bodied Gypsies respectively. For the purposes of this case, the Secretary of State has not argued that the Claimant and her family are not at such disadvantage. The issue between the parties is therefore as to the issue of justification.

*Justification*

86. Accordingly, the policy is discriminatory if the Secretary of State cannot show "it to be a proportionate means of achieving a legitimate aim": s.19(2)(d) of the *Equality Act 2010*. It is for the court and not the Secretary of State to make that judgment: *Hardy & Hansons plc v. Lax* [2005] EWCA Civ 846, [2005] I.R.L.R. 726, at [31]-[32]; *Homer v. Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] 3 All E.R. 1287, at [20].

87. For the reasons explained above, I reach the following conclusions:

87.1 It was a legitimate aim to distinguish between the land-use needs of nomadic people and of the settled community.

87.2 Provided the planning system as a whole takes into account the particular needs of Gypsies and Travellers who have retired from travelling, whether through age or disability, it was a proportionate means of achieving a legitimate aim to limit PPTS 2015 to the particular land-use needs of nomadic Gypsies and Travellers.

**GROUND 2**

88. Mr Willers and Ms Buchanan argue that the inspector erred in law in that she ruled out the possibility of granting further temporary planning permission because she considered that any such permission would have to be subject to a condition that the occupants met the PPTS 2015 definition of Gypsies and Travellers. They argue that the inspector had power pursuant to s.73 of the 1990 Act to grant permission on fresh conditions, and that in any event she made a mistake of fact in that the 2015 planning permission required the occupants to meet the PPTS 2012 definition and not the amended 2015 definition.

89. The inspector dealt with the issue of temporary planning permission at paragraph 51 of her decision:

> "I have considered whether granting a further temporary consent would be appropriate in this instance. However, advice in the Planning Practice Guidance advises that 'It will rarely be justifiable to grant a second temporary permission – further permissions should normally be granted permanently or refused if there is clear justification for doing so'. Since a further temporary consent would relate to the occupation of the site by Gypsies and Travellers who met the planning definition it would provide no certainty for Mr and Mrs Smith."

90. In considering this ground, it is important to approach the inspector's decision in accordance with the guidance of Lindblom LJ in *St Modwen Developments Ltd v. Secretary of State for Communities & Local Government* [2017] EWCA Civ 1643, [2018] PTSR 746, at [6], and at first instance in *Bloor Homes East Midlands Ltd v. Secretary of State for Communities & Local Government* [2014] EWHC 754 (Admin), [2017] PTSR 1283, at [19]. I particularly keep in mind the following guidance:

> "The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the 'principal important controversial issues'. An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration: see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council v. Porter (No 2)* [2004] 1WLR 1953, 1964B-G."

91. Further, in the *South Bucks Case*, Lord Brown cautioned, at [34], that the scope for drawing an inference that the inspector had not fully understood the materiality of a particular matter would be limited to the main issues and then only "when all other known facts and circumstances appear to point overwhelmingly to a different decision."

92. Here, it is clear from paragraph 51 of her decision that the inspector's principal ground for refusing to grant further temporary planning permission was that the grant of a second temporary permission would rarely be justifiable. No criticism is made of that reasoning.

93. Mr Willers postulates two potential constructions of the final sentence of paragraph 51:

    93.1 First, it is possible that the inspector wrongly believed that she did not have the power to grant further temporary planning permission without imposing a condition limiting the occupation of the land.

    93.2 Secondly, that the inspector wrongly believed that the earlier planning permission was subject to a condition that the land only be occupied by Gypsies and Travellers as defined by PPTS 2015.

94. In my judgment, there is no proper basis for inferring that the inspector fell into such fundamental errors. On the proper construction of the decision, the last sentence of paragraph 51 was a shorthand way of saying that in any event, even if she had been minded to grant a second temporary planning permission, the inspector would have imposed a condition that the land be occupied only by Gypsies and Travellers as defined in the then prevailing PPTS; and that such condition would not provide any certainty to the Smiths in view of her earlier findings that they did not meet such definition.

## CONCLUSIONS

95. For these reasons, I dismiss this claim. In doing so, I record my thanks to all counsel for the quality of their very helpful submissions.