

COMMITTEE ON EQUALITY OF OPPORTUNITY EOC 06-02(p4)

Date: Thursday, 17 October 2002

Time: 9.00am

Venue: Committee Rooms 3&4, National Assembly Building

Title PAPER OUTLINING CERTAIN ASPECTS OF THE LAW AS IT RELATES TO GYPSIES AND TRAVELLERS

GYPSY/TRAVELLER REVIEW

Expressions used in this paper

GOWA = the Government of Wales Act 1998

LEAs = local education authorities in Wales

The 1999 TFO = The National Assembly for Wales (Transfer of Functions) Order 1999 (SI 1999/672)

The Advice Commissioned

The commissioning paper from the Committee Secretariat requested that this paper should cover

"the legal framework relating to Gypsy-travellers, specifically:

- the duties placed on education providers, health service and local government to provide services to Gypsy-travellers;
- the impact of the Race Relations Amendment Act
- the impact of Human Rights legislation
- voting in elections and access to information
- any read-across from, similarities to or differences between, the treatment of Gypsy-travellers and homeless people".

The Committee will appreciate that this does not cover all the areas of law relating to or of particular relevance to Gypsies and travellers. Nor does it cover the Assembly's powers in any

of the areas specified.

The Race Relations Act 1976 (as amended by the Race Relations Amendment Act 2000)

1. The Race Relations Act 1976 ("the RRA"), as amended, prohibits direct and indirect discrimination, and victimisation, on racial grounds in employment and the provision of a very wide range of public and private services. There is a general prohibition, subject to limited exceptions, of discrimination in the provision of goods, facilities or services to the public or a section of the public. Examples of the facilities and services covered are:
 - (i) access to and use of any place which members of the public are permitted to enter;
 - (ii) facilities for education;
 - (iii) facilities for transport or travel;
 - (iv) the services of any profession or trade, or any local or other public authority.
2. Direct discrimination in breach of the RRA is committed if someone treats another person, in the prescribed fields, less favourably, on racial grounds, than he treats or would treat other persons.
3. Indirect discrimination is committed if someone applies a requirement or condition to the person, which s/he cannot comply with, and which, although apparently neutral, is in fact such that the proportion of persons of the racial group in question who can comply with it is "considerably smaller" than the proportion of persons of other racial groups who can. It will not, however, be discrimination if the alleged discriminator can show that the requirement or condition is justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied.
4. For the purposes of the RRA, segregating a person from other persons on racial grounds amounts to treating him/her less favourably.
5. "Racial grounds" are defined as "colour, race, nationality or ethnic or national origins".
6. By virtue of the amendments made by the Race Relations (Amendment) Act 2000, the RRA now imposes a duty on named public authorities to "have due regard to the need (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity and good relations between persons of different racial groups" in carrying out their functions. The National Assembly, all local authorities, all public health bodies and all publicly-funded educational institutions, are subject to this duty.
7. Gypsies have been held to constitute a "racial group" under the RRA. Moreover, less favourable treatment linked to a travelling lifestyle can constitute indirect discrimination

against them. Other travellers will be protected if they are discriminated against on any of the "racial grounds" listed. However, the RRA will not protect non-Gypsy travellers if they are treated unfavourably because of their travelling lifestyle, rather than because of their nationality (etc).

The Human Rights Act 1998

8. The Human Rights Act ("HRA") transposes into UK law most of the individual rights set out in the European Convention on Human Rights. The HRA does this, in part, by prohibiting public authorities (including private bodies carrying out some public functions) from breaching any of the Convention rights so incorporated ("the Convention Rights").
9. Convention Rights which appear particularly relevant to Gypsies/travellers are:
 - Article 3 (prohibition of inhuman or degrading treatment)
 - Article 8 (right to respect for private and family life, home and correspondence)
 - Article 11 (freedom of peaceful assembly and association)
 - Article 1 of Protocol 1 (right to peaceful enjoyment of possessions)
 - Article 2 of Protocol 1 (right not be denied education).

In relation to Article 8, the Court has held that "occupation of [a] caravan is an integral part of ... ethnic identity as a gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. This is the case even though ... many gypsies increasingly settle for long periods in one place....". Hence, measures taken by a public authority, which affect Gypsies' ability to station their caravans without interference, bring into play both the right to respect for a home and the right to a private life (in the sense of maintaining and developing one's identity).

Also obviously relevant to Gypsies and travellers is Article 14, the prohibition against discrimination. The effect of the inclusion of this in the HRA is that no UK public authority should discriminate against any person, in their enjoyment of the other rights and freedoms set forth in the Convention, on the grounds of **any personal circumstance**.

1. Some of the examples of unacceptable grounds given in Article 14 are race, language, national or social origin, association with a national minority, and property. As in the case of the RRA, those who can show that they are Gypsies by race can rely on Article 14, as can travellers of a particular national origin. Because of the wide wording of Article 14, which goes beyond the categories of unlawful discrimination in domestic legislation, it is also possible that non-ethnic Gypsies, treated unfavourably on the grounds of a nomadic lifestyle, may be able to invoke Article 14 in connection with

another Convention right.

2. Different treatment is not a breach of the right in Article 14 if there is objective and reasonable justification for it.
3. Thus, the Article will be breached where two persons in objectively similar positions are treated differently in their enjoyment of a Convention right/freedom, with no objective and reasonable justification. It will also be breached where two persons in objectively different positions are treated in the same way, with no objective or reasonable justification.
4. Article 14 can only be relied on where one of the other rights or freedoms protected by the Convention is in play (such as those listed above). Gypsies or travellers may be able successfully to claim a breach of any of those rights alone, or in combination with Article 14.
5. To date, there have been no successful claims of breach of Article 14 in the European Court of Human Rights by Roma or other Gypsy peoples, or travellers. Cases against the UK have included a number brought by Gypsies who had purchased land in order to establish a home there but who had been refused planning permission to do so (see below, section headed "Planning").

Other Human Rights obligations on the UK

6. Other Human Rights instruments binding on the United Kingdom which the Committee may wish to consider include the Framework Convention for the Protection of National Minorities; the European Charter for Regional or Minority Languages; and the UN Convention on the Rights of the Child.

Local Authority Obligations in respect of Accommodation for Gypsies and Travellers

7. Until 1994, local authorities were under a duty to provide adequate accommodation for Gypsies residing in or resorting to their areas under the **Caravan Sites Act 1968 (ss.6-12)**. This duty was repealed by the **Criminal Justice and Public Order Act 1994**.
8. The 1994 Act also repealed **s.70** of the **Local Government, Planning and Land Act 1980** which gave the Secretary of State power to provide money to local authorities to create caravan sites to accommodate Gypsies. Instead, the 1994 Act introduced new powers for local authorities to remove unauthorised campers.
9. Local authorities have powers (but not duties) under s. 24 of the **Caravan Sites and Control of Development Act 1960** to provide caravan sites. This power was introduced to compensate for the power given to local authorities in s. 23 of the same Act to prohibit

caravans from camping on common land, which had previously been the normal resort of Gypsies.

10. W.O. Circular 76/94 (D.O.E. Circular 18/94) "Gypsy Sites Policy and Unauthorised Camping" is concerned with statutory powers under the 1994 Act. It sets out the general approach to be adopted by local authorities with regard to Gypsies and espouses a policy of toleration towards unauthorised Gypsy encampments.
11. Local authorities also have powers under **s.269** of the **Public Health Act 1936** to grant licences to allow land to be occupied by caravans. It is an offence to occupy a site for more than 42 days in any twelve months without a licence.
12. **Section 78** of the **Housing Grants, Construction and Regeneration Act 1996** permits the housing authority to offer home repair assistance in respect of house-boats and mobile homes. The **Home Repairs Assistance (Extension) Regulations 1998** (which apply to England and Wales) relaxes the residence requirement so that home repair assistance may be offered to occupiers of mobile homes on local authority sites for Gypsies.
13. Under **s.175(2)** of the **Housing Act 1996** a person is homeless and may be eligible for housing if his accommodation consists of a moveable structure and there is no place where he is entitled or permitted both to place it or to reside in it.

See further below under "Planning".

Planning

14. W.O. Circular 2/94 (identical in all respects to D.O.E. Circular 1/94 as regards England) 'Gypsy Sites and Planning' sets out the policy considerations for dealing with applications for proposed 'Gypsy' sites. Planning applications may need to be made where land is purchased by individual Gypsies with the intention of providing a place where they and their family can camp lawfully for a more or less extended period.

The definition of 'gypsy' used in the Circular is the same as that contained in s. 16 of the Caravan Sites Act 1968, despite the fact that that section has since been repealed: "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". The same definition has been retained in section 26 of the Caravan Sites and Control of Development Act 1960, an Act, the extant parts of which are more concerned with the internal arrangements of lawful sites rather than the principal of development.

15. Local Planning Authorities ("LPAs") are advised in the Circular that notwithstanding the then imminent repeal of the statutory duty to provide sites, in preparing development plans LPAs should continue to indicate the regard they have had to meet Gypsies 'accommodation needs. Regard should be had to their statutory duties regarding

homelessness in formulating their proposals. The Circular states:

"Repeal of the statutory duty will make it all the more important that LPAs make adequate gypsy site provision in their development plans, through appropriate use of locational and/or criteria based-policies and provide a general framework for site provision" (paragraph 9).

16. The Circular sets out various criteria by which applications should be considered by LPAs and provides advice on planning enforcement and other issues.
17. Planning Policy Wales, issued by the Welsh Assembly Government in March 2002, states:

"9.2.17 Local authorities must indicate the regard they have had to meeting the accommodation needs of gypsy families. It is important that local planning authorities have policies for the provision of gypsy sites in their [Unitary Development Plans]. In drawing up policies local planning authorities should consult with providers of social housing, representatives of gypsies and travellers and landowners in areas likely to be appropriate for gypsy sites."

18. As well as functions in relation to the setting of planning policy for Wales, which has an impact on the grant or refusal of individual planning applications, the Assembly has functions in relation to appeals against the refusal of planning applications in Wales. Further legal advice on these aspects can be provided if the Committee so wishes.

Social Services and Child Care

19. The following obligations in child care law (as regards provision of children's services) might be of particular relevance to Gypsies & travellers.

S. 17 Children Act (CA) 1989: Imposes a general duty on every local

authority to safeguard and promote the welfare of children within their area who are in need and (so far as is consistent with that duty) to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs.

S. 22(5)(c) CA 1989: Where a local authority is "looking after" a child, there is a requirement, before making any decisions in respect of that child to give due consideration to the child's religious persuasion, racial origin and cultural and linguistic background.

Sch. 2 Para. 11 CA 1989: A local authority is under a duty to consider racial groups to which children in need belong, in making arrangements for the provision of day care or in encouraging persons to act as local authority foster parents.

Education

20. There are few **obligations** in education legislation relating specifically to the provision of services to Gypsies and travellers. An exception in Wales is contained in National Assembly legislation - the Education Development Plans (Wales) Regulations 2002 (SI 2002/1187 W. 135). These place an obligation on LEAs to include in their Education Development Plans (known in Wales as "Education Strategic Plans") information about the number of travellers' children educated within their schools, arrangements for monitoring those numbers and information about the average stay of such children. This aids planning to meet the needs of those children.
21. LEAs are under a **duty** to contribute towards the spiritual, moral, mental and physical development of the community by securing the provision of primary and secondary education to meet the needs of their areas - section 13 Education Act 1996 ("EA 1996"). They **must** also exercise their education functions with a view to promoting high standards - section 13A. This duty applies to all children.
22. However, LEAs also **are under a duty** under section 19 to make arrangements for the education at school or otherwise for those children of compulsory school age who "by reason of illness, exclusion from school or otherwise, may not for any period receive education unless such arrangements are made for them". In making such arrangements LEAs must have regard to any guidance issued by the Assembly. Special arrangements can be made under this section for traveller children.
23. There are **powers** for the National Assembly to make grants to LEAs and further education institutions to promote and facilitate the education of Gypsies and Travellers - see section 488 of the Education Act 1996 (EA 1996) and the Education (Grants) (Travellers and Displaced Persons) Regulations 1993 (SI 1993/359) and section 210 of the Education Reform Act 1988, and the Regulations made thereunder 1993 (SI 1993/569), taken together with the 1999 TFO. Details of the current grant scheme are contained in Welsh Office Circular 52/90 and its annex.
24. These (and other grant powers) will be replaced by sweeping new general powers when the relevant provisions of the Education Act 2002 are brought into force.
25. The provisions relating to children with special educational needs ("SEN") applies to Gypsy/traveller children as it does to other children. Although a child does not have SEN by reason solely that his or her home language is not the language in which he/she will be taught, the language difficulties of such a child must always be addressed as part of the duty to secure suitable education for him or her. Policy colleagues have informed OCG that traveller families are in general reluctant to enter into the SEN statementing process.
26. Every parent is under a statutory duty to secure education by the regular attendance of

his/her child at school or otherwise, and this applies to Gypsies and travellers in the same way as it applies to any other parent - see section 7 of the EA 1996. Where a child of compulsory school age is a registered pupil at school, the parents commit an offence if they fail to secure his/ her regular attendance - section 444. There are a number of defences. Relevant for present purposes is subsection (6) which provides that a parent who has no fixed abode must be acquitted if he/she proves that his/her job requires him/her to travel, that the child has attended school as often as the job permits and (where the child has attained the age of 6) he/she has made at least 200 attendances in the past 12 months. Enforcement of school attendance is a function of the LEA.

27. LEAs **can prohibit** a child from being employed in such a manner as to be prejudicial to the child's health or otherwise render him/her unfit to obtain the full benefit of the education provided for him/her - section 559 EA 1996.
28. As regards provision of support and services for young people aged 11-25, the Learning and Skills Act 2000 provides for the National Assembly to issue **directions** to local authorities **requiring** them to provide youth support services, and in doing so, to have regard to National Assembly Guidance. The term "youth support services" means services which in the opinion of the National Assembly will encourage, enable or assist young persons (directly or indirectly) to participate effectively in education, to take advantage of opportunities for employment and to participate effectively in the lives of their communities.
29. The Guidance on "Extending Entitlement" which is about to issue (in support of the Youth Support Services Directions (Wales) 2002 - effective date 1st September 2002) refers to the importance of ensuring that young travellers are specifically catered for. They are specifically mentioned in paras 23 & 28 of the Guidance as one of a number of "hard to reach" groups of young people. The intention is that local Young People's Partnerships (YPPs) will have regard to the existing provision of services and support for young travellers and their needs in undertaking future planning and developing provision. This will include encouraging young travellers to comment on existing services (including aspects such as information provision and accessibility of "mainstream" services such as housing, benefits and health) and real or perceived gaps, and acting upon the information received as a result of the process.
30. With regard to the careers service, there are no special obligations with regard to the children of travellers.
31. There are no statutory duties imposed on the National Council for Education and Training for Wales (the Council) under the Learning and Skills Act 2000 (apart from an equality of opportunity provision which refers, inter alia, to race - see s.42). There are provisions for approval/imposition of plans and strategies by the National Assembly, and for issuing directions etc. which might enable the National Assembly to require the Council to take action targeted at Gypsies and travellers. However, policy colleagues have informed OCG that no requirements of special relevance to this exercise have been imposed by the National Assembly under any of these mechanisms to date.

Health

32. There are no duties or powers in law directed specifically at the health care of Gypsies or travellers; the position at law is the same for Gypsies and travellers as it is for the general public.
33. Health authorities are responsible for providing care for all those in their area, whether permanently resident there or not. Access to GP services for those with a nomadic lifestyle is obtained by going to any surgery and filling out a temporary residence form.

Access to information

44. The rights of Gypsies and travellers to information are the same as those of the general public. Relevant legislation includes the Data Protection Act 1998, the Environmental Information Regulations 1992 (as amended) and (when fully in force) the Freedom of Information Act 2000. The National Assembly has a voluntary Code of Practice on Public Access to Information (current edition adopted in plenary on 8th May 2001).

Elections

The right to vote

45. The right to vote in any election in Wales (Parliamentary, Assembly, European or local authority) depends on (amongst other things) a residence qualification.
46. Those wishing to vote in a particular poll need to be registered in the relevant register of electors at the date of that poll. In order to be registered, the person must be resident in the constituency or area on the date they apply to be registered (or on a deemed date, 15th October each year, when the registration officer carries out a canvass). The Representation of the People Act 2000 ("ROPA 2000") amended the Registration of the People Act 1983 so as to allow for registrations and other amendments of the register throughout the year, rather than by reference to a fixed date, as previously. This is helpful to people with a nomadic lifestyle.
47. Gypsies or travellers who have a conventional address, but who pursue a nomadic lifestyle, may face problems in proving "residence", or may find that their residence is later regarded by the registration officer as interrupted.
48. Gypsies or travellers who do not have a conventional address would appear to be able to use the provisions of ROPA 2000 designed to facilitate voting by "homeless persons". Section

7B of ROPA 2000 allows persons who are not resident at any address in the UK to register by making a declaration of local connection, which remains valid for 12 months (or until cancelled or until another such declaration is made in another constituency or area). The declaration must state the address of, or which is nearest to, a place in the UK where the person commonly spends a substantial part of his time. It must also state an address to which correspondence can be sent by the registration officer, or state that the person is willing to collect correspondence periodically from the registration officer's office.

49. Alternatively, Gypsy/travellers with no place where they can lawfully reside in the area may be able to register in the "conventional " manner. The courts have held that a person may 'reside' somewhere as a matter of fact for right to voting purpose, even if s/he does so unlawfully and is liable to be moved on shortly.

Voting

50. Proxy voting would appear to be particularly relevant to people with a nomadic lifestyle, and entitlement to vote by proxy has been extended by ROPA 2000 and amendments to the National Assembly for Wales (Representation of the People) Order 1999. Persons who have made a declaration of local connection (see above) cannot opt to vote by proxy for a period, but only in the case of particular elections. Voting by proxy of course depends on having someone suitable to be appointed as a proxy.

51. A voter can be assisted by another person (typically, a family member) if they are unable to vote alone because of, amongst other things, inability to read.

Office of the Counsel General

13th September 2002