

GYPSIES AND TRAVELLERS ON UNAUTHORISED ENCAMPMENTS

THE LAW RELATING TO WELFARE ENQUIRIES AND HUMANITARIAN CONSIDERATIONS

The Criminal Justice and Public Order Act 1994 and Circular 18/94

At the same time as the draconian eviction provisions contained in the Criminal Justice and Public Order Act (CJPOA) 1994 were brought into force the Government introduced Department of Environment (DOE) Circular 18/94 *Gypsy Sites Policy and Unauthorised Camping*. The Circular was described as giving guidance on the provisions in sections 77 to 80 of the CJPOA 1994 and it emphasised the need for taking into account welfare considerations and for making welfare enquiries before deciding whether or not to evict an unauthorised encampment.

At para 6 it stated:

Whilst it is a matter for local discretion to decide whether it is appropriate to evict an unauthorised Gypsy encampment, the Secretary of State believes that local authorities should consider using their powers to do so wherever the Gypsies concerned are causing a level of nuisance which cannot be effectively controlled. They also consider that it will usually be legitimate for a local authority to exercise these powers wherever Gypsies who are camped unlawfully refuse to move onto an authorised local authority site.....

At para 9 it is stated:

The Secretary of State continues to consider that local authorities should not use their powers to evict Gypsies needlessly. He considers that local authorities should use their powers in a humane and compassionate way, taking account of the rights and needs of the Gypsies concerned, the owners of the land in question and the wider community whose lives may be affected by the situation.

Paras 10 and 11 stress the obligations that local authorities have under the Children Act 1989, under what was then part III of the Housing Act 1985 (now Part VII of the Housing Act 1996) with regard to homelessness, and their duties as local education authorities.

At para 13 it is stated:

Local authorities should also bear in mind that families camped unlawfully on land may need or may be receiving assistance from local health or welfare services.

In Wales the relevant Circular was Welsh Office Circular 76/94 (which gave exactly the same guidance as DOE Circular 18/94).

The Atkinson Case

In *R v Lincolnshire County Council ex p Atkinson, Wealden District Council ex p Wales and Stratford* [1995] 8 Admin LR 529, Sedley J (as he then was) made it clear that local authorities ought, when considering the eviction of unauthorised encampments, to comply with DOE Circular 18/94 (or Welsh Office Circular 76/94). Sedley J stated:

Detailed analysis of [passages from the Circular] and debate about what legal force, if any, an advisory circular of this kind possesses has been made unnecessary by the realistic concession of counsel for both local authorities that whether or not they were spelt out in a departmental circular the matters mentioned ... would be material considerations in the public law sense that to overlook them in the exercise of a local authority's powers under sections 77 to 79 of the Act of 1994 would be to leave relevant matters out of account and so jeopardise the validity of any consequent step. The concession is rightly made because those considerations in the material paragraphs which are not statutory are considerations of common humanity, none of which can be properly ignored when dealing with one of the most fundamental needs, the need for shelter with at least a modicum of security (at 535).

Case law from 1996 to 1998

Following the *Atkinson* case, some local authorities attempted to put forward the rather unattractive argument that the matters mentioned in DOE Circular 18/94 were only relevant when proceedings were being taken under CJPOA 1994 sections 77 to 78 and not, for example, when possession proceedings were being taken in the county court. There followed four cases with conflicting judgments on this issue. The first case, *R v Kerrier District Council ex p Uzell Blythe* [1996] JPL 837, involved the use of planning enforcement powers. The other three cases involved county court possession actions which were challenged by way of judicial review: *R v Brighton and Hove Council ex p Marmont* [1998] HLR 1046; *R v Leeds City Council ex p Maloney* [1999] HLR 552; and *R v Hillingdon LBC ex p McDonagh* (1999) HLR 531. Broadly speaking, the judgments in *Uzell Blythe* and *Maloney* stated that DOE Circular 18/94 (or, at least, the spirit of it) should not just apply to evictions under CJPOA 1994 sections 77 and 78 but should also apply to planning enforcement and possession actions, and the judgments in *Marmont* and *McDonagh* stated the contrary view (though it should be noted that it is at least accepted in those cases that there must be some reference to 'humanitarian considerations').

Those cases are mentioned here solely for historical reasons since subsequent Government guidance and subsequent case law has made the position absolutely clear.

Subsequent Government Guidance

The position was clarified in October 1998 by the publication of the Department of the Environment Transport and the Regions (DETR)/Home Office *Good Practice Guide, Managing Unauthorised Camping*, which made clear that local authorities should take into account welfare issues regardless of the method of eviction being contemplated.

That point was recognised in the case of *R (Ward) v Hillingdon BC* [2001] LGR 457, where Stanley Burton J (at 460) stated:

[A] local authority considering exercising its powers to evict travellers...from an unauthorised encampment must not act in an uninformed, precipitate or inconsiderate manner. It must make adequate enquiries to elicit relevant information, including the number, age, health and needs of the travellers concerned and make its decision having properly taken that information into account. The Guidance expressly envisages that there will be circumstances in which a local authority may properly decide not to evict travellers from an unauthorised encampment.

The *Good Practice Guide* has now been superseded by subsequent Government guidance but the thrust of the new guidance has not changed.

In 2004 the Office of the Deputy Prime Minister issued *Guidance on Managing Unauthorised Camping* (hereafter 'the 2004 Guidance')¹.

At para 5.7 of the 2004 Guidance it is stated:

Local Authorities may have obligations towards unauthorised campers under other legislation (mainly regarding children, homelessness and education). Authorities should liaise with other local authorities; health and welfare services who might have responsibilities towards the families of unauthorised campers. Some form of effective welfare enquiry is necessary to identify whether needs exist which might trigger these duties or necessitate the involvement of other sectors, including the voluntary sector, to help resolve issues.

At para 5.8 it is stated:

The Human Rights Act (HRA) applies to all public authorities including local authorities...With regard to eviction, the issue that must be determined is whether the interference with Gypsy/Traveller family life and home is justified and proportionate. Any particular welfare needs experienced by unauthorised campers are material in reaching a balanced and proportionate decision ...

At para 5.9 it is stated:

All public authorities need to be able to demonstrate that they have taken into consideration any welfare needs of unauthorised campers prior to making a decision to evict²

¹ The Welsh Assembly Government/Home Office issued Guidance in January 2005, namely *Guidance on Managing Unauthorised Camping*. The Welsh Guidance is extremely similar to the 2004 Guidance.

² Indeed the Guidance, as is apparent here, makes it clear that all public authorities, including the police, must take account of welfare enquiries. The fact that it is a relevant consideration for all public authorities has been recognised in a number of cases including: *R v Metropolitan Police ex p Small*, 27th August 1998 (unreported); *R (Kanssen) v Secretary of State for the Environment, Food and Rural Affairs* [2005] EWHC 1024 Admin, [2005] EWCA Civ 1453.

Of course, the 2004 Guidance makes it clear that the carrying out of welfare enquiries is not just a mere formality but must be followed by the proper consideration of any issues that are raised. For example, it is stated at para 5.12:

To collect initial information from unauthorised campers on any perceived welfare, health or educational needs ... is the starting point for liaison with other relevant departments. Where school-age children are present, the Traveller Education Service should be notified. Similarly, social services or health authorities should be notified where there seems to be social, welfare or health needs to be further assessed and met.

At para 5.19 it is stated:

Decisions about what action to take in connection with an unauthorised encampment must be made in the light of information gathered.

Again at para 5.20 it is stated:

Any welfare needs of unauthorised campers are a material consideration for local authorities when deciding whether to start eviction proceedings or to allow the encampment to remain longer.

The 2004 Guidance has been supplemented by further guidance issued by the ODPM/Home Office in 2006, namely the *Guide to Effective Use of Enforcement Powers – Part 1: Unauthorised Encampments* (hereafter ‘the 2006 Guidance’)³.

At para 65 of the 2006 Guidance it is stated:

Local authority officers should conduct thorough welfare enquiries when a new encampment of Gypsies and Travellers arrives in the area. Where pressing needs for particular services are identified as part of the local authority’s enquiries, relevant departments or external agencies should be contacted in order to meet these needs as appropriate (health services, social services, housing departments and so on).

The 2006 Guidance continues at para 66:

If necessary, removal of the encampment could be delayed while urgent welfare needs are addressed (unless... the site which the unauthorised campers are using is particularly sensitive or hazardous, in which case the unauthorised campers should be asked to relocate to a more appropriate location in the vicinity).

³ At the moment there is no further supplementary guidance for Wales.

The experience of the Travellers Advice Team

The Travellers Advice Team (TAT), now based at the Community Law Partnership (but originally at McGrath & Co solicitors in Birmingham) was set up in 1995. From 1995 to 2000 TAT regularly met with local authorities who had not carried out welfare enquiries or had carried out inadequate welfare enquiries. Many judicial review applications had to be lodged as a result. However, nowadays, TAT's extensive experience throughout England and Wales shows that it is much more unusual to come across a local authority that does not have a proper written policy for dealing with unauthorised encampments and does not carry out at least some form of welfare enquiries.

Conclusion

It is now beyond doubt that a local authority must carry out welfare enquiries before deciding whether to evict an encampment (whatever type of action is contemplated) and must take account of matters that are raised by those enquiries when deciding what action to take.

In the early years after the issue of DOE Circular 18/94 there was much legal argument about its application to various types of eviction proceedings and the nature and extent of the welfare enquiries that ought to be undertaken.

More recently, in *R (Casey and Others) v Crawley Borough Council and the ODPM* [2006] EWHC 301 Admin it was successfully argued that Government guidance ought to lead public bodies to consider whether it would be possible to relocate an unauthorised encampment. Thus, Burton J framed three options that are available to local authorities in such situations:

- i) To seek and obtain possession of the site in question (Option 1);
- ii) To tolerate the Gypsies or Travellers, if only for a short time, until an alternative site could be found (Option 2);
- iii) To find an alternative site, if only on a temporary basis, and offer the Gypsies and Travellers concerned a move to it (Option 3).

Burton J stated (at para 55 (ii)):

*If, in a given situation, **reactively** the Council can find for travellers on an unauthorised site another temporary toleration site where lawfully, and notwithstanding the lack of planning permission they can be temporarily sited, that would be a suitable administrative decision and exercise of Option 3: but there is no need for them to have a proactively identified pool [of such sites] ready, even if that were feasible.*

Finally, mention should be made of the case of *Doherty v Birmingham City Council* [2008] 3 WLR 636, in which the House of Lords confirmed that a trespasser can raise a public law defence in the county court when faced with a possession action and that such a defence extends beyond the classic *Wednesbury* challenge, albeit not quite as far as the full proportionality review (which the European Court of Human Rights clearly believes should be undertaken in such cases).⁴ Given the conflict between the two approaches the scope of the court's review of eviction action taken by a local authority is likely to be examined again in the near future.

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⁴ See *Paulic v Croatia* [2009] ECHR 1614, 22nd October 2009, the latest in a long line of such judgments.