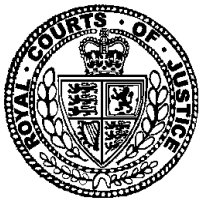

Neutral Citation Number: [2024] EWHC 1137 (Admin)

Case No: AC-2022-BHM -000148

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
Birmingham Civil and Family
Justice Centre

33, Bull Street, Birmingham B4 6DS

Date: 14 May 2024

Before:

MR JUSTICE SWIFT

- -

Between

THE KING

on the application of

WENDY SMITH — **Claimant**

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT — **Defendant**

-and-

(1) FRIENDS, FAMILIES AND TRAVELLERS
(2) LIBERTY

Interveners

- -
- -

Marc Willers KC and Ollie Persey (instructed by **Community Law Partnership**) for the **Claimant**
Russell Fortt (instructed by **GLD**) for the **Defendant**
Stephen Simblet KC and Nadia O'Mara (instructed by **Community Law Partnership**) for the **First Intervener**
Tim Buley KC and Ben Amunwa (instructed by **Liberty**) for the **Second Intervener** (written submissions only)

Hearing dates 23 – 24 January 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.00 am on 14 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE SWIFT

A. Introduction

1. The Claimant contends that amendments made to provisions in Part V of the Criminal Justice and Public Order Act 1994 ("the 1994 Act") by Part 4 of the Police, Crime, Sentencing and Courts Act 2022 ("the 2022 Act") are incompatible with the Convention rights protected by the Human Rights Act 1998 because they give rise to discrimination that either cannot be justified, or is not justified.

2. The most visible change made to the 1994 Act by the 2022 Act was the addition of sections 60C and 60D, and 62F. Section 60C is the new criminal offence of residing on land in or with a vehicle, without the consent of the occupier of the land. Section 60D is an allied power that permits the police to seize and remove property that appears to belong to a person suspected of having committed the offence under section 60C.

3. Section 62F requires the Home Secretary to issue guidance to the police concerning the exercise of their powers, both the powers in sections 60C and 60D, and also all other powers in Part V of the 1994 Act to remove trespassers from land. The 2022 Act makes further amendments to the powers concerning trespass that were already in sections 61 and 62A of the 1994 Act.

4. The Claimant's case is that these amendments are contrary to article 14 read with article 8; that they amount to unjustified discrimination against Romani Gypsies and Irish Travellers. In this judgment, for simplicity only, I will refer to these groups together as Gypsies. Garnham J granted permission to apply for judicial review on the article 14 ground on 21 July 2023. By the same order he refused the Claimant's application for permission on a further ground of challenge that relied on article 7.

5. The Claimant is a Romani Gypsy. She has lived in caravans all her life. Her caravan is presently in a layby; she lives there with the permission of the local authority. This arrangement is not settled. In the past the Claimant has lived on land without permission of the owner, an arrangement referred to as "unauthorised encampment". Were the local authority to withdraw its permission, the Claimant fears she would be forced once again to have resort to unauthorised encampment.

6. Unauthorised encampments can be distinguished both from "authorised developments" where caravans are on land with the consent of the owner or occupier and there is planning permission for use of that land for that purpose, and from "unauthorised developments" where caravans are on land with the consent of the owner or occupier but there is no planning permission.

(1) The statutory measures affecting unauthorised encampments

7. Section 60C is the latest of several sets of measures, all in Part V of the 1994 Act, intended to address unauthorised encampments. The others are at sections 77 - 78, sections 62A - D, and sections 61 - 62, respectively. Each set of measures is directed to persons who are present on land as trespassers either residing in vehicles or with vehicles, and having "the common purpose of residing" on the land. Although each of the measures is precisely drawn on its own terms, the measures overlap in various

different ways. Where the measures do overlap each is potentially available to deal with the situation in hand.

8. Sections 77 and 78 of the 1994 Act give local authorities a power to direct "persons … residing in a vehicle or vehicles" on highways, on unoccupied land, and on occupied land without the consent of the occupier, to leave the land and remove vehicles and other property. Failure to comply with such a direction is a criminal offence punishable on conviction by a fine. Further, it is also a criminal offence for a person directed to leave land to return to the land in a vehicle within a specified period of the date the direction was given. Prior to the amendments made by the 2022 Act the relevant period was 3 months. Following amendment, it is now 12 months. Section 77(5) provides a defence.

> "(5) In proceedings for an offence under this section it is a defence for the accused to show that his failure to leave or to remove the vehicle or other property as soon as practicable or his re-entry with a vehicle was due to illness, mechanical breakdown or other immediate emergency."

By section 78, local authorities can obtain orders from magistrates' courts permitting them to enter land and remove vehicles, and any people residing in the vehicles.

9. Sections 62A – D provide the first of two powers available to the police. The police may direct a person to leave land and remove any vehicle or other property from the land if the conditions in 62A(2) are met.

> "(2) The conditions are–
>
> (a) that the person and one or more others ("the trespassers") are trespassing on the land;
>
> (b) that the trespassers have between them at least one vehicle on the land;
>
> (c) that the trespassers are present on the land with the common purpose of residing there for any period;
>
> (d) if it appears to the officer that the person has one or more caravans in his possession or under his control on the land, that there is a suitable pitch on a relevant caravan site for that caravan or each of those caravans;
>
> (e) that the occupier of the land or a person acting on his behalf has asked the police to remove the trespassers from the land."

This power of direction is also backed by criminal sanction. By section 62B, a person who knows a direction has been given to him commits an offence punishable by a fine or up to 3 months' imprisonment if he fails to leave the land "as soon as reasonably practicable", or returns to "any land in the area of the relevant local authority as a trespasser before the end of the relevant period with the intention of residing there".

Until the amendments introduced by the 2022 Act (with effect from 28 June 2022) the relevant period was 3 months. Since then the relevant period has been changed to 12 months. There is a statutory defence to the section 62B offence (at section 62B(5)).

> "(5) In proceedings for an offence under this section it is a defence for the accused to show–
>
> (a) that he was not trespassing on the land in respect of which he is alleged to have committed the offence, or
>
> (b) that he had a reasonable excuse–
>
> (i) for failing to leave the relevant land as soon as reasonably practicable, or
>
> (ii) for entering land in the area of the relevant local authority as a trespasser with the intention of residing there, or
>
> (c) that, at the time the direction was given, he was under the age of 18 years and was residing with his parent or guardian."

Where a section 62A direction has been given, section 62C permits a constable to seize and remove vehicles if he "suspects that a person to whom the direction applies has, without reasonable excuse …" either failed to remove the vehicle, or entered land in the local authority area as a trespasser with a vehicle "before the end of the relevant period with the intention of residing there".

10. The second power available to the police is at section 61 of the 1994 Act. Taken together with section 62, the police may direct people to leave land and may seize and remove vehicles and property. The conditions to the power to direct are in section 61(1).

> "(1) If the senior police officer present at the scene reasonably believes that two or more persons are trespassing on land and are present there with the common purpose of residing there for any period, that reasonable steps have been taken by or on behalf of the occupier to ask them to leave and—
>
> (a) that any of those persons
>
> (i) in the case of persons trespassing on land in England and Wales, has caused damage, disruption or distress (see subsection (10));
>
> (ii) in the case of persons trespassing on land in Scotland, has caused damage to the land or to property on the land or used threatening, abusive or insulting words or behaviour towards the occupier, a member of his family or an employee or agent of his, or

> (b) in either case, that those persons have between them six or more vehicles on the land,
>
> he may direct those persons, or any of them, to leave the land and to remove any vehicles or other property they have with them on the land."

Section 61(1)(a) was amended by the 2022 Act which also inserted a definition of damage, disruption and distress.

> "(10) For the purposes of subsection (1)(a)(i)—
>
> *"damage"* includes—
>
> (a) damage to the land;
>
> (b) damage to any property on the land not belonging to the persons trespassing;
>
> (c) damage to the environment (including excessive noise, smells, litter or deposits of waste);
>
> *"disruption"* includes an interference with—
>
> (a) a person's ability to access any services or facilities located on the land or otherwise make lawful use of the land, or
>
> (b) a supply of water, energy or fuel;
>
> *"distress"* means distress caused by—
>
> (a) the use of threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
>
> (b) the display of any writing, sign, or other visible representation that is threatening, abusive or insulting."

11. If a direction is given but not complied with or, having left the persons enter the land as a "trespasser within the prohibited period", a criminal offence will be committed. The offence is punishable by fine or up to 3 months' imprisonment. As a result of amendment by the 2022 Act the prohibited period is now 12 months. Before that the relevant period was 3 months. There is a statutory defence to the offence.

> "(6) In proceedings for an offence under this section it is a defence for the accused to show—
>
> (a) that he was not trespassing on the land, or

> (b) that he had a reasonable excuse for failing to leave the land as soon as reasonably practicable or, as the case may be, for again entering the land as a trespasser."

12. Section 62 permits the police to seize vehicles if a direction has been made and if a person who is subject of the direction.

> "(1) … has, without reasonable excuse—
>
> (a) failed to remove any vehicle on the land which appears to the constable to belong to him or to be in his possession or under his control; or
>
> (b) entered the land as a trespasser with a vehicle within the prohibited period,
>
> the constable may seize and remove that vehicle."

13. Drawing these matters together, the following observations may be made. The section 77 power of direction is the one with the widest reach. Notwithstanding that any local authority exercising this power would need to do so in a manner that was lawful in public law terms (for example the power must be exercised by reference only to relevant considerations, for a proper purpose and, in public law terms reasonably: see on this point *R v Lincolnshire County Council and Wealdon District Council exp Atkinson, Wales and Stratford* (1996) Admin LR 529 per Sedley J, generally, who also emphasised that when a local authority was considering its exercise of its powers under section 77 and 78 it must have regard to Department of Environment Circular 18/94 which served to inform the exercise of those powers), a direction might be given without evidence of damage to land or property and without the need to identify an alternative site for the Gypsies concerned. The section 62A police power depends on the existence of a suitable pitch in a relevant caravan site, but does not require proof of damage. The other (section 61) police power may only be exercised on proof of damage, disruption and distress, and is only available when 6 or more vehicles are present on the land.

14. One feature of section 61 and section 62A is that it is a condition for making a direction is that the occupier has requested the trespassers to leave (a request direct to the trespassers is required under section 61, by section 62A the occupier must make his request to the police), but the possibility of criminal sanction only arises when the police direction has been given and there has been non-compliance with that direction. In his judgment in *R (Fuller) v Chief Constable of Dorset Police* [2002] 3 All ER 57, Stanley Burnton J construed section 61 of the 1994 Act as providing two chances for a trespasser to leave: first at the request of the occupier (section 61(1)); and second, following direction by the police. He concluded that a direction could be given only if the trespassers had failed to comply with the occupier's request to leave. The same analysis would apply to the section 62A power of direction.

15. Section 60C is as follows.

"**60C Offence relating to residing on land without consent in or with a vehicle**

(1) Subsection (2) applies where—

(a) a person aged 18 or over ("P") is residing, or intending to reside, on land without the consent of the occupier of the land,

(b) P has, or intends to have, at least one vehicle with them on the land,

(c) one or more of the conditions mentioned in subsection (4) is satisfied, and

(d) the occupier, a representative of the occupier or a constable requests P to do either or both of the following—

(i) leave the land;

(ii) remove from the land property that is in P's possession or under P's control.

(2) P commits an offence if—

(a) P fails to comply with the request as soon as reasonably practicable, or

(b) P—

(i) enters (or having left, re-enters) the land within the prohibited period with the intention of residing there without the consent of the occupier of the land, and

(ii) has, or intends to have, at least one vehicle with them on the land.

(3) The prohibited period is the period of 12 months beginning with the day on which the request was made.

(4) The conditions are—

(a) in a case where P is residing on the land, significant damage or significant disruption has been caused or is likely to be caused as a result of P's residence;

(b) in a case where P is not yet residing on the land, it is likely that significant damage or significant disruption would be caused as a result of P's residence if P were to reside on the land;

(c) that significant damage or significant disruption has been caused or is likely to be caused as a result of conduct carried on, or likely to be carried on, by P while P is on the land;

(d) that significant distress has been caused or is likely to be caused as a result of offensive conduct carried on, or likely to be carried on, by P while P is on the land.

(5) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale, or both.

(6) In proceedings for an offence under this section it is a defence for the accused to show that the accused had a reasonable excuse for—

(a) failing to comply as soon as reasonably practicable with the request mentioned in subsection (1)(d), or

(b) after receiving such a request, entering (or re-entering) the land with the intention of residing there without the consent of the occupier of the land.

(7) In its application to common land, this section has effect—

(a) in a case where the common land is land to which the public has access and the occupier cannot be identified, as if references to the occupier were references to the local authority in relation to the common land;

(b) in a case where P's residence or intended residence without the consent of the occupier is, or would be, an infringement of the commoners' rights and—

(i) the occupier is aware of P's residence or intended residence and had an opportunity to consent to it, or

(ii) if sub-paragraph (i) does not apply, any one or more of the commoners took reasonable steps to try to inform the occupier of P's residence or intended residence and provide an opportunity to consent to it,

as if in subsection (1)(d) after "a constable" there were inserted "or the commoners or any of them or their representative".

(8) In this section-—

"common land" and *"commoner"* have the same meaning as in section 61;

"damage" includes—

(a) damage to the land;

(b) damage to any property on the land not belonging to P;

(c) damage to the environment (including excessive noise, smells, litter or deposits of waste);

"disruption" includes interference with—

(a) a person's ability to access any services or facilities located on the land or otherwise make lawful use of the land, or

(b) a supply of water, energy or fuel;

"land" does not include buildings other than—

(a) agricultural buildings within the meaning of paragraphs 3 to 8 of Schedule 5 to the Local Government Finance Act 1988, or

(b) scheduled monuments within the meaning of the Ancient Monuments and Archaeological Areas Act 1979;

"the local authority", in relation to common land, has the same meaning as in section 61;

"occupier" means the person entitled to possession of the land by virtue of an estate or interest held by the person;

"offensive conduct" means—

(a) the use of threatening, abusive or insulting words or behaviour, or disorderly behaviour, or

(b) the display of any writing, sign, or other visible representation that is threatening, abusive or insulting;

"vehicle" includes—

(a) any vehicle, whether or not it is in a fit state for use on roads, and includes any chassis or body, with or without wheels, appearing to have formed part of such a vehicle, and any load carried by, and anything attached to, such a vehicle, and

(b) a caravan as defined in section 29(1) of the Caravan Sites and Control of Development Act 1960.

> (9) For the purposes of this section a person is to be considered as residing or having the intention to reside in a place even if that residence or intended residence is temporary, and a person may be regarded as residing or having an intention to reside in a place notwithstanding that the person has a home elsewhere."

Section 60D contains a power to seize vehicles and other property in the possession or the control of a person suspected by a constable to have committed an offence under section 60C.

16. Section 60C provides a premise for criminal sanction that is distinct from the three powers of direction that were already within Part V of the 1994 Act. The most obvious difference is that commission of the criminal offence under section 60C is not contingent on a direction having been made by the police or a local authority. While the police would be involved in investigating any complaint made under section 60C, to be satisfied that all other elements of the offence were present, section 60C places greater initiative with the occupier of the land. Failure to comply with the occupier's request can be the condition for criminal liability. Only one of the two chances envisaged by Stanley Burnton J in his judgment in *Fuller* is present.

17. In other respects, section 60C exists on its own terms. In some ways it is more broadly cast than the other measures in Part V. The offence can be committed by a person acting alone. There is no requirement for "persons" (section 77) or "two or more persons" (section 61), or "the person and one or more others" (section 62A)". The section 77 offence requires a person to be residing in "a vehicle"; and each of the other offences is committed when people are trespassing with "the common purpose of residing". Section 60C goes wider in that it applies to a person residing and a person "intending to reside" without the consent of the occupier (see section 60C(1)(a) read with the explanation at section 60C(9)). In other ways section 60C is (or may be) narrower than the other measures in Part V. The requirement in section 60C(4) is formulated by reference to the need or likelihood of "significant damage" or "significant disruption" arising from the actual residence or possible residence of the person, or "significant distress" arising from offensive conduct that has occurred or is likely to occur. By contrast there is no requirement for damage in either section 77 or section 62A, and the requirement in section 61 is for "damage, disruption or distress" as now defined 61(10).

18. The final part of the picture is the new requirement in section 62F(3) of the 1994 Act that when exercising their functions under any of section 60C to 62E the police must have regard to guidance issued by the Home Secretary pursuant to section 62F(1). The current version of the guidance is the one issued in July 2022. In respect of the section 60C offence, the guidance includes the following:

> "**Welfare issues.**
>
> Police should ensure that, in accordance with their wider equalities and human rights obligations, proper welfare enquiries are carried out to determine whether there are pressing needs

presented by those on unauthorised encampments and that, where necessary, the appropriate agencies (including Local Authorities) are involved as soon as possible.

Each case should be dealt with on its own merits by police. This includes considering the potential impact issuing a direction to leave, arresting a person, or seizing a vehicle may have on the families involved and on the vulnerable, before taking an enforcement decision.

If necessary, enforcement action against those on the unauthorised encampment could be delayed while urgent welfare needs are addressed.

The police have the powers to take action where significant harms have been caused. It is for the police to decide on proportionate enforcement action based on the circumstances and evidence of each case.

Equalities.

The Equality Act 2010 makes it unlawful to treat someone less favourably than others because of their protected characteristic, including race (which includes a person's ethnic or national origins and nationality).

The Public Sector Equality Duty, under section 149 of the Equality Act 2010, applies to the police (as a public authority) and places a duty on the police to have due regard to the need to eliminate discrimination, promote equality of opportunity and foster good relations between persons of different racial groups.

Gypsy, Roma and Irish Travellers each a distinct racial group, are recognised as sharing a protected characteristic under the Equality Act 2010. Following a nomad lifestyle is lawful. The Gypsy, Roma, Traveller community has a unique way of life and their way of life may need to be accommodated differently to other communities or wider society.

Members of the Gypsy, Roma, Traveller Community, like all members of the public, have a right to respect for private and family life under Article 8 of the Human Rights Act 1998.

The European Court recognised that a nomadic way of life is central to the Gypsy and Traveller identity.

However, the police, alongside other public bodies, should not gold-plate human rights and equalities legislation. The police have been given strong powers to deal with unauthorised encampments and when deciding on what action to take, they

> should consider the harms caused by the unauthorised encampment … and that an individual may be deprived of their property where this is provided for by law and where there is a public interest justification for doing so.
>
> Human rights legislation does not prevent action to protect local amenities and the local environment; to maintain public order and safety; and to protect public health.
>
> The necessary balancing of interests and rights of both travellers and settled residents reflects the position regarding qualified rights in the Human Rights Act … and the need to maintain good community relations under the Equality Act 2010."

So far as concerns the use of any of the powers now in Part V of the 1994 Act the guidance includes the following matters of general application relevant to the proportionate use of the powers.

> "**Application of the guidance**
>
> When deciding on the appropriate actions to take in relation to the new offence and existing … enforcement powers, police should continue to consider all the facts of each case. NPCC operational advice for tackling unauthorised encampments and individual police force guidance will provide operational best practices and can be used alongside this statutory guidance.
>
> …
>
> **Likely to cause**
>
> Relating to the new offence under section 60C only, a person will commit an offence if they have caused, or are likely to cause, significant damage, disruption, or distress while residing or with an intention to reside. This enables the police to prevent further repeated significant harms, rather than waiting until damage has taken place again, at another or the same location before taking action. This is particularly useful where those who cause damage, leave and move to another piece of land a short distance away or return, without the consent of the occupier.
>
> As is the case for other criminal offences, the police will need to collect evidence to form reasonable grounds to suspect a person has committed the offence and the offence will have been committed only where the specific conditions have been met.
>
> **Intention to reside**
>
> As for 'likely to cause', the police will need to assess each case and consider whether there is an intention to reside. An example could be where a person is not yet physically on the land but is

> in a vehicle just outside of the land and has already placed several of their belongings on the land, thus possibly indicating an intention to reside."

(2) The factual context for the claim

19. The Claimant's evidence, not contested by the Home Secretary, points to a serious shortage of Gypsy sites: both transit sites where pitches are available for stays of up to 3 months; and permanent sites that are used by those who wish to stay in one place for longer. This shortage has persisted for a long time. The Caravan Sites Act 1968 included an obligation on local authorities to provide accommodation on caravan sites for Gypsies "residing in or resorting to" their areas. However, the complaint often made was that this obligation was honoured as much in the breach as in the observance. The 1994 Act repealed this obligation. From that time, local authorities retained a power to provide sites (under the Caravan Sites and Control of the Development Act 1960), but the expectation was that more privately-owned sites would be provided and that local planning policies would facilitate the establishment of those sites. This expectation was reflected in planning guidance starting with Department of the Environment Circular 1/94.

20. The evidence available is that there are still insufficient authorised sites. This was recognised in the two consultations that preceded the 2022 Act. In April 2018 the Department of Housing, Communities and Local Government consulted on the effectiveness on the measures already within the 1994 Act and the possibility of further measures to address unauthorised encampments. In large part this consultation was a request for evidence on the nature and extent of unauthorised encampments. The consultation response document was published in February 2019. While this document set out decisions that existing powers would be strengthened, and that there would be further consultation on what new measure should be introduced to criminalise unauthorised encampments, the response document also recognised that provision of additional transit sites would itself be a way of reducing incidence of unauthorised encampments. The document included the following.

> "**Transit sites and local authority joint-working**
>
> The Government has heard over the last year that law enforcement bodies are able to use their powers more effectively where they can identify an alternative authorised site for an authorised encampment to move to. The Government is aware that many unauthorised sites are generated by travellers moving from one location to the other, and therefore more transit sites will help to address the issue where there is inadequate provision.
>
> The Government has made clear that authorities have a duty to assess the housing needs of its area and ensure that appropriate travellers' sites are provided for the travelling community, as currently set out in the Planning Policy for Traveller Sites. It is the Government's assessment that the current duties and policies

> are sufficient in terms of setting out what local authorities must do to provide these sites.
>
> **The Government is reminding local authorities of their duties to assess the need for transit sites, in addition to permanent sites, through a written Ministerial Statement published alongside this document**. This will also remind local authorities that in planning for transit sites, they should work together with neighbouring authorities to ensure that areas of the country and not left without provision, leaving other communities at risk of unauthorised encampments. The Government will also introduce further guidance making clear that the Secretary of State will be prepared to review cases where concerns are raised that there are too high a concentration of authorised traveller sites in one location."

21. A second consultation was undertaken by the Home Office in November 2019. This consultation sought views on specific suggestions to amend the measures already in Part V of the 1994 Act, and to put in place a new measure to criminalise the "act of trespassing when setting up authorised encampment". The response document for this consultation, published in September 2021, set out the measure that became section 60C of the 1994 Act. This document too referred to the need of transit sites.

> "The Government is clear that the intention behind the new offence is to deter trespassers from setting up or residing on an unauthorised encampment and to support action to tackle unauthorised encampments where necessary.
>
> The Government recognises the need for transit and permanent sites to be available. Caravan count data sets out that transit pitches having increased by 41% (356 pitches) across England and Wales over the last 10 years.
>
> In 2018, the Government remined local authorities of the importance of planning for transit sites as part of local authority assessments of need. The Government has reminded local authorities of the importance of providing sites in their local plans, as well as joint-working between local authorities. Local planning authorities should assess the need and identify land for sites."

22. The same point, about the need to increase the number of sites and pitches available, is evident from the Equality Impact Assessment Document prepared in connection with the Police, Crime, Sentencing and Courts Bill which included the following:

> "**Unauthorised Encampments.**
>
> In June 2019, MHCLG announced plans to launch a national strategy to tackle entrenched inequality and improve the lives of

travelling communities. The strategy recognises that health, education and housing disparities are considerable and looked to launch an ambitious programme of work to be undertaken across government, which will aim to tackle the serious disparities faced by GRT communities. Work continues on this strategy.

Mitigating actions regarding housing have been set out within the limbs, and are summarised as of below:

- Local housing authorities are required to assess housing
- The government asks local planning authorities to make their own assessment of need for the purposes of planning
- The £11.5 billion Affordable Homes programme for local authorities will provide a wide range of homes to meet the housing needs of people, including funding for new authorised pitches."

23. Some idea of the extent of the problem in practice can be obtained from the Traveller Caravan Count, a form of census undertaken by the Department for Levelling Up, Housing and Communities in January and July each year. The information from the counts may be summarised as follows, showing a small, yet reasonably persistent number of caravans on unauthorised encampments and as such, at risk of being subject to the powers in Part 5 of the 1994 Act.

Table Title

	July 2022	**January 2023**	**July 2023**
Total caravans	25,653	25,333	25,220
Caravans on authorised private sites	15,400	15,354	15,131
Caravans on authorised socially rented sites	6,638	6,792	6,558
Caravans on unauthorised sites	2,853	2,716	2,920
Caravans on unauthorised encampments	769 (3% of the total)	471 (1.9% of the total)	611 (2.4% of the total)

24. The final part of the evidence is in a statement made by Lizzy Hawkins the Assistant Director responsible for the Gypsy Roma Traveller Policy Team at the Department for Levelling Up, Housing and Communities. That evidence is that in 2022/23 £10 million in capital funding was available to local authorities for new site provision. Nine councils bid for funding with a view to: providing a new transit site comprising 10 pitches; extending a permanent site by 14 pitches; and refurbishing 225 existing pitches. In addition, local authorities and social housing providers can obtain funding for new sites from the Affordable Housing programme. In the period 2016 – 2021 this resulted in 55 new permanent pitches split between 4 different local authorities. For the period 2021 – 2026, based on bids for funds from the Affordable Homes programme received to date, that programme will fund 2 new transit sites each of 15 pitches.

25. Thus, while some new provision has been made, the increase in pitches has fallen short of what will be required to substantially reduce the likelihood that unauthorised encampments will occur. The Claimant's submission is that implementation of any new measure to address unauthorised encampments, such as section 60C and D of the 1994 Act, ought to have been accompanied by significant additional provision of transit pitches. The numbers of caravans in unauthorised encampments on the recent Traveller Caravan Counts suggest that several hundred more transit pitches would be required for that purpose.

(3) The Claimant's case

26. The Claimant's submission relies on article 14 read with article 8. It is directed to all the amendments made to Part V of the 1994 Act by Part 4 of the 2022 Act. It is supported by the submissions of two interveners, Liberty, and Friends, Families and Travellers. The Interveners' submissions do not give rise to any discrete grounds of challenge, rather they reinforce various parts of the Claimant's overall case. Although the Claimant's case is directed to all the changes made by the 2022 Act, it is more conveniently considered in two parts: first the section 60C criminal offence and the allied section 60D power to seize vehicles and other property (but excluding for this purpose section 60C(3)); and second, the other amendments to the measures at section 61, 62(1A)(a), 62A and section 60C(3).

27. The Claimant's case may be summarised as follows. First it is submitted that the amendments to Part V of the 1994 Act deliberately target Gypsies, comprising a form of direct discrimination on grounds of race that is not capable of being justified. Alternatively, if the amendments to the 1994 Act only give rise to a *prima facie* case of indirect discrimination, the provisions added to the Act are not justified for a number of reasons. (a) They do not pursue a legitimate objective. (b) There is insufficient evidence of the need for further measures going beyond those already in Part V of the 1994 Act. (c) The new measures are unnecessarily wide and, so far as concerns section 60C and 60D, are insufficiently certain, rendering them vulnerable to misuse. For example, requests by occupiers of land to leave might be made maliciously or motivated by discrimination. It is further submitted that the width of section 60C and 60D will have a "chilling effect" on Gypsies, deterring them from their nomadic life. (d) Overall, the amendments do not represent a fair balance between the rights and freedoms of Gypsies and the rights and freedoms of others, in particular given the present shortage of transit pitches and the lack of progress in increasing the number of transit pitches.

The provision of additional pitches would be an obvious alternative and less intrusive means of addressing the problem of unauthorised encampments.

28. So far as concerns the amendments to the existing section 61, 62(1A)(a) and section 62A measures, and to 60C(3), the Claimant's submission is focused on the amendments to section 61(4)(b) and section 62B(2), and the new section 60C(3). Each affects the duration of directions given – i.e. the period during which following a direction it remains an offence to return: (a) in the case of a direction under section 61 to the land previously trespassed on; and (b) in the case under the direction of section 62A, to "any land in the area of the relevant local authority as a trespasser". In each case the period has been increased from 3 months to 12 months. Section 60C(3) is entirely new but in like manner attaches a 12 month no return period when an offence under section 60C has been committed. The Claimant's submission is that that extension of each no return period is disproportionate since the maximum permitted length of stay on a transit pitch is 3 months: provisions in the Mobile Homes Act 1983 define transit pitches as those "on which a person is entitled to station a mobile home under the terms of the agreement under a fixed period for up to 3 months" (see section 1(8B) of, and paragraph 1 of Schedule 1 to that Act).

B. Decision

29. I do not accept the Claimant's first submission that the amendments to Part V of the 1994 Act comprise race discrimination in breach of Convention rights which is incapable of being justified. In its judgment in *DH v Czech Republic* (2008) 47 EHRR3, the European Court of Human Rights stated (at paragraph 176).

> "Discrimination on account of inter alia, a person's ethnic origin is a form of racial discrimination. Racial discrimination is a particular invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities, special vigilance and a vigorous reaction. It is for this reason that the authorities must use all the available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but a source of enrichment. The Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures."

However, it is notable in that case, which concerned the legality of arrangements which resulted in Roma children being educated in special schools rather than regular primary schools, the Court did not attempt to erode the distinction, long-established in law, that recognises that arrangements that have the effect of adversely affecting the protected group will not ordinarily, by reason of that fact alone, be considered measures that target the protected group or, to use the formulation adopted by the Court, be measures based exclusively or decisively on the group's protected characteristic. Whether any set of arrangement is properly to be considered to fall into this class, rather than being arrangements giving rise to an adverse impact which must be justified, depends heavily

on context. In *DH* itself, the Court treated the arrangements under consideration as ones disclosing a *prima facie* case of indirect discrimination and went on to consider whether they were justified, concluding that they were not.

30. In this case, the consultation exercises that preceded the 2022 Act (in April 2018 and November 2019) concerned whether and if so what further measures should be put in place to deter and deal with unauthorised encampments. Both consultation documents recognised that any further measures would affect Romani Gypsies and Irish Travellers. However, I do not consider this is sufficient to support a conclusion that the amendments to Part V of the 1994 Act rested either exclusively or to a decisive extent on those groups' ethnic origins. The April 2018 consultation exercise was in large part a request for evidence on whether existing measures aimed at regulating unauthorised encampments were sufficient. This prompted responses from a number of local authorities which were summarised in the February 2019 consultation response document.

> "The consultation responses are clear that significant problems are created by many unauthorised encampments. Responses highlighted the sense of unease and intimidation residents feel when an unauthorised encampment occurs, the frustration at not being able to access amenities, public land and business premises, and the waste and costs that is left once the encampment has moved on.
>
> The Government has heard a number of accounts where unauthorised encampments have caused significant distress to local communities and where local authorities have had to deal with a range of issues as result of such behaviour. Some of these situations are set out below:
>
> **Luton**
>
> Between 2016 and 2018 there have been 65 encampments on areas of land maintained by Luton Borough Council including the public highway. The costs to the authority in clear up costs, officer time and legal fees are estimated to be in the region of £130,000 for this period. The travellers would often traverse between two sites, which is having a negative impact on the businesses and community facilities operating from these locations. There have been reports made to the police of anti-social behaviour and intimidation, and each encampment usually results in significant waste being deposited in the area, which the authority has had to clear.
>
> **Hampshire County Council**
>
> In 2017 there were 212 encampments in Hampshire with a total of 765 caravans overall encamped on County Council,

> Highways, local authority and private land. These encampments vary in size from 1 to 12 caravans with a requirement for regular clearance of fly tipping and industrial waste from the sites, the cost of which is borne by the local authority. Encampments are regularly served with a direction under Section 77 of the [1994 Act] to vacate. There are numerous occasions where the legal process is initiated and summons papers served, with the site then vacated within 24 hours of the Court date, resulting in wasted costs and officer and Court time.
>
> **South Gloucestershire**
>
> In the previous two years, South Gloucestershire Council has dealt with approximately 100 unauthorised encampments across its area, varying in scale from 1 to over 30 trailers and associated vehicles. The impact on the local community usually focuses on damage to the land in occupation, personal safety and security, fly tipping and human waste, the speed with which the local authority and statutory agencies can respond and secure their removal, and the clean-up operation and restoration of the land.
>
> **Croydon**
>
> There have been over 200 unauthorised settlements in the last three years. These affect mostly private property land owners in the winter as the family groups settle on firmer ground such as concrete. This evolves into the parks and open spaces in summer months when the weather is good and the ground in the parks is normally dry and firm for easy access. In summer, Croydon Council receives complaints from residents when parks or common land areas are partly or fully taken over by groups of travellers. Sometimes the behaviour of the travelling group can be very challenging, anti-social or even criminal which elevates the concerns of residents and therefore the complaints level."

The measures ultimately inserted by amendment into Part V of the 1994 Act were by way of response to such circumstances. This context does not support a conclusion that the new measures were directed against Gypsies *per se*, on grounds of race or ethnic origin.

(1) Sections 60C and 60D, excluding section 60C(3)

31. The Home Secretary accepts there is a *prima facie* case of indirect discrimination, that the section 60C offence and the powers to seize vehicles and other property in section 60D will disproportionately affect Gypsies such as the Claimant, and that this disproportionate impact must be justified.

32. The first matter is to identify the nature and extent of the interference with interests falling within the ambit of article 8. Sections 60C and 60D are unlikely to affect Gypsies who, for whatever reason, have chosen to live on pitches at permanent sites.

Only those who choose to travel for all or part of the year will be affected. This explains the significance of the shortage of transit pitches because resort to unauthorised encampment is one possible response to the unavailability of a transit pitch.

33. I do not consider that for this purpose it is helpful to describe section 60C as being either "widely" or "narrowly" cast. Rather, the scope of the provision stands on its own terms. Various aspects of the offence may be noted. It applies to persons intending to reside on land without consent as much as to those who reside without consent. One condition to commission of the offence is that there must have been any of, significant damage, or significant disruption as a result of the person's residence, or that the person's "offensive conduct" has caused significant distress. These conditions will tend to limit the application of the offence. It has been submitted that the need for "significant" damage, disruption or distress may not limit the application of section 60C because the offence can also be committed when significant damage or disruption or distress is likely. This does tend to lower the bar. However, it is appropriate for the purposes of this generic challenge to the legislation to proceed on the basis that police action in pursuit of section 60C will be consistent with the guidance issued by the Home Secretary pursuant to section 62F of the 1994 Act. The material passages in the guidance address the criteria "Likely to cause" and "Intention to reside", set out at paragraph 18 above. While this is only guidance, the police must have regard to it when exercising their functions under section 60C, and the guidance points to a narrower, more pragmatic application of section 60C and not an approach permitting pre-emptive action based only on remote possibility.

34. Commission of the section 60C offence does not depend on failure to comply with a police direction. This formality is absent and the requirement is that either the legal occupier or a police constable has asked the person trespassing to leave the land. Failure to comply with the request gives rise to the criminal offence. In this respect, the section 60C offence differs from the offences under section 61 and section 62A of the 1994 Act. Yet this may be a distinction that gives rise to little or no practical difference. The submission to the contrary is that the absence of requirement for direction by the police may mean that a person may not receive fair warning of possible arrest, or that the legal occupiers of land may make requests acting maliciously or to victimise Gypsies. I do not consider these possibilities carry true weight. Even though no police direction is required, it will be for the police to enforce section 60C through arrest or through the use of power in section 60D to seize vehicles and other property. It is appropriate to assume that the police will use their powers under these sections only if satisfied that the relevant conditions are met and having regard to the guidance issued by the Home Secretary (as is required, by section 62(F)(3)). That guidance includes a requirement to follow the operational advice issued by the National Police Chiefs' Council, "Operational Advice on Unauthorised Encampments". Any officer following this operational advice would not act precipitately. This ought to be sufficient to filter out the possibility of malicious or discriminatory action by the legal occupiers of land. I also consider that in practice, following the guidance, including the operational advice will mean that there will be sufficient warning of the possibility of arrest, or seizure of property under section 60D.

35. Friends, Families and Travellers made a specific point to the effect that the usual threshold for the power of arrest, reasonable grounds to suspect that the person has committed an offence, was in some way objectionable in this context. I am not

convinced this raises any discrete point. It is something that is a feature of any provision creating a criminal offence, and must be taken into consideration. Nothing in the context of the section 60C offence gives this point any greater significance.

36. One submission made, primarily by Friends, Families and Travellers, was that section 60C was too vague, and lacked the quality of legal certainty. I do not accept that submission. Applying section 60C does involve assessment of a number of factual matters, for example the existence or likelihood of significant damage etc. However, the fact that applying a statutory provision to the circumstances of a particular case requires judgement on matters of this sort does not mean the application of the provision is uncertain. There will need to be decisions on whether the conditions set out are met. But the conditions themselves are set out clearly and intelligibly in section 60C allowing anyone who might be affected by the provision to understand what is required of them and the conduct that will give rise to the offence.

37. The section 60D power to seize vehicles and other properties is significant. This power arises when a constable reasonably suspects a person has committed an offence under section 60C. It permits vehicles and property to be seized and retained for either 3 months or until a decision not to prosecute for the section 60C offence, whichever comes sooner. If a prosecution is commenced, things seized may be retained until the conclusion of the proceedings. Any decision to seize and retain vehicles or caravans that are used as homes would quite clearly cause real hardship and would involve a very significant interference with interests falling within the ambit of article 8.

38. Lastly on this point, the Claimant contended that the provisions had a "chilling effect" - i.e. the existence of section 60C and 60D would serve to dissuade Gypsies from stopping from place to place, as is their custom. There is some support for this in the evidence on the use of the new powers so far. An article in the Travellers' Times of 18 July 2023 refers to the police using the new provisions to encourage Gypsies to move on, without actually resorting to the use of the power to arrest or the power to seize property. Further, research published in August 2023 by academics at Birmingham City University is to the effect that the possibility of arrest under section 60C has resulted in Gypsies stopping at unauthorised encampments for shorter periods, and moving more frequently.

39. Drawing these matters together, it is clear that sections 60C and D comprise a significant enhancement of the measures available in Part V of the 1994 Act aimed at dealing with unauthorised encampments. No relevant purpose is served by submission to the effect that these provisions are "overbroad". The material features of them are that they provide a criminal sanction where there is actual or intended trespass on land with vehicles that causes or is likely to cause significant damage, disruption or distress, and permit vehicles (including caravans) to be seized when there are reasonable grounds to suspect that an offence has been committed. I do not consider the sections lack sufficient certainty or clarity or that it is likely that the absence of provision requiring a prior direction by police runs the risks that the application of section 60C will be affected by malice or discrimination on the part of occupiers of land. I consider that the requirement for justification should be approached on the premise that the police will exercise the powers available to them having regard to the guidance issued by the Home Secretary as they are required by the 1994 Act to do. Use of these powers is capable of significant intrusion on the lives of Gypsies. The extent of possible

interference is increased by the evidence of under provision of transit pitches (see *Chapman v United Kingdom* (2001) (33 EHRR 18 at paragraph 103). The new provisions do present the possibility of particular disadvantage which requires justification.

40. The next matter, pursued by Liberty, is that sections 60C and 60D do not pursue a legitimate aim. The submission is that there is no legitimate aim because the objective of these provisions is, to adopt the title of the November 2019 consultation document "strengthening police powers to tackle unauthorised encampments". This submission misses its mark. If the consultation documents are considered in the round, the objective to "strengthen police powers" was clearly not an end in itself. The consultation exercises concerned whether the provision then in Part V of the 1994 Act needed to be altered in the interests of what the consultation document described as the "settled communities". For Convention purposes the amendments made to Part V of the 1994 Act pursued the legitimate aim of protecting the rights and freedoms others.

41. The Claimant's submission on justification first contended, relying on the judgment of the Court of Appeal in *Smith v Secretary of State for Levelling Up, Housing and Communities* [2023] PTSR 312, that this case is not one where the threshold for justification should be set low. I do not consider that the reasoning in *Smith* applies to the present case. In *Smith* the Claimant's challenge to the Government's 2015 "Planning Policy for Travellers Sites" arose in proceedings in which the Claimant challenged a decision of a planning inspector who had refused her application for planning permission to use land as a Gypsy caravan site. In that context, the Court of Appeal concluded that the question was not simply whether the policy could be justified *per se*, in the abstract, but also whether its application in the circumstances of the Claimant's case could be justified: see the judgment of the Court at paragraphs 48 to 52 and 54. The present case is different. Although it is brought by Ms Smith rather than any representative organisation, it remains a challenge to the generality of the amendments made to Part V of the 1994 Act, a challenge to the simple existence of those provisions. It is not, for example, a challenge to the application to any of those provisions to Ms Smith.

42. The Claimant also contended that the standard for justification in this case was higher by reason of positive obligations arising under article 8. This is a reference to the judgment of the European Court of Human Rights in *Chapman v United Kingdom.* That case concerned a complaint that a decision refusing the applicant's application for planning permission to use land she owned (which was green belt land) as a permanent pitch for her caravan, amounted to a disproportionate interference with article 8 rights and/or unlawful discrimination based on article 14 read with article 8. The Court accepted that the refusal to grant planning permission comprised an interference with article 8 rights but concluded the interference was justified and did not amount to unlawful discrimination. On the approach to justification, the Court's reasoning included the following:

> "95. Moreover, to accord to a gypsy who has unlawfully established a caravan site at a particular place different treatment from that accorded to non-gypsies who have established a caravan site at that place or from that accorded to any individual

> who has established a house in that particular place would raise substantial problems under Article 14 of the Convention.
>
> 96. Nonetheless, although the fact of being a member of a minority with a traditional lifestyle different from that of the majority of a society does not confer an immunity from general laws intended to safeguard assets common to the whole society such as the environment, it may have an incidence on the manner in which such laws are to be implemented. As intimated in the *Buckley* judgment, the vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in arriving at the decisions in particular cases. [48] To this extent there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the gypsy way of life."

The Court repeated the same point in its judgment in *Connors v United Kingdom* (2005) 40 EHRR 9. However, the circumstances considered in both cases are important. Each concerned the treatment of an applicant lawfully occupying land. Although in other cases where the applicant was not in lawful occupation, for example *Yordanova and Tohse v Bulgaria* (application number 25446/06, judgment 24 September 2002) and *Winterstein v France* (application number 27013/07, judgment 17 October 2013) the Court has emphasised the importance that any steps to remove Gypsies from land must be subject to appropriate procedural protection that ensures that proportionality is assessed taking account of all material facts, all judgments of the European Court of Human Rights in this area have emphasised that article 8 is not to be understood as providing the right to obtain a home. I do not consider that the observations in *Chapman*, made in the context of a challenge to a decision on a planning application made by an applicant lawfully occupying land, should be directly read-over to a case such as the present, which arises in very different circumstances. Rather, the proper formulation is the one used by the European Court of Human Rights at paragraph 129 of its judgment in *Yordanova*, that the position of Gypsies as a social group, and their needs, must be relevant factors in the proportionality assessment.

43. The consequence is that the approach to justification in this case should be the approach explained by Lord Reed in his judgment in *R(SC) v Secretary of State for Work and Pensions* [2022] AC 223 at paragraph 53. In the circumstances of this case the approach to justification must take account both that this challenge is directed generically to sections 60C and 60D of the 1994 Act, and the particular circumstances and needs of Gypsies, fully recognising that what must be justified is the disadvantage those provisions impose on a long-recognised ethnic group. What must be justified is the extent to which Gypsies will be more greatly disadvantaged by these provisions than will others.

44. Applying this approach, I am satisfied that sections 60C and 60D are justified. I accept these provisions will give rise to disadvantage in particular to those Gypsies who do not live on permanent pitches. However, the conditions that must be met before an

offence is committed are significant. The offence may be committed in different ways but the core circumstances require residence on land, without consent, with the consequence of significant damage or disruption or significant distress as a result of offensive conduct. Each of these conditions significantly confines the application of section 60C. Notwithstanding that residence includes temporary residence (see section 60C(9)), the notion of residence indicates that the person's presence on the land must have some quality of settlement or continuity. The requirement for significant damage etc. is a further important threshold to be crossed.

45. I accept that the offence can be committed in other ways: where the person "intends to reside" and where significant damage has not yet been caused but "is likely". However, any decision by the police to act in reliance on section 60C must be taken having regard to the guidance issued under section 62F. I have referred to that guidance above, (see at paragraphs 18, 33 and 34). The guidance on "intention" and "likely to cause" encourage a narrow rather than a broad approach. When assessing justification in a case such as the present where the challenge to statutory provisions is put generically and not directed to a specific use of those powers, the court must make realistic assumptions. In this instance, this includes an assumption of compliance with section 62F with the 1994 Act.

46. Before resorting to use of section 60C and 60D, the police would also need to be satisfied that the required request had been made; to consider whether there might be "reasonable excuse" for not complying with the request; and to have regard (as required by the statutory guidance) to the welfare and other consequences of decisions to arrest or to seize vehicles or property.

47. Taken together, these matters show that the powers provided by section 60C and 60D reflect a calibration of competing rights and interests.

48. I do not accept the Claimant's submission that there was insufficient evidence of the need to supplement the measures already in Part V of the 1994 Act. The response to the first consultation exercise (of April 2018) provided evidence that notwithstanding the powers already in the 1994 Act, there were significant numbers of unauthorised encampments. The Claimant places significant reliance on the response of the National Police Chiefs' Council to that consultation. This was to the effect that no new criminal offence was required and that what was required were new transit pitches. I do not consider that response can be taken to be decisive. One important point is that the tenor of the response seems to be no further legal provision need be added to Part V of the 1994 Act assuming there would be prompt and lawful removal of unauthorised encampments in exercise of the powers already in the Act. Other responses to the consultation (see above at paragraph 30) suggested that no such assumption could be made. In any event, it was for the Secretary of State to evaluate the responses, taking them into account when deciding how to proceed. By reference to the response to consultation document published in February 2019 there was a sufficient evidential basis for the conclusion that new measures should be added to Part V of the 1994 Act.

49. The Claimant also relies on the responses to the second consultation exercise (November 2019). I do not consider this exercise produced anything that can properly be described as relevant evidence. The relevant part of this consultation comprised a series of questions asking people to express opinions ranging from "strongly agree" to

"strongly disagree" on whether a new offence ought or ought not to contain various conditions or limitations. There were some 26,000 responses. The outcome, no doubt not the one intended by those who set the consultation questions but nevertheless entirely foreseeable, was a bewildering set of contradictory opinions. It is striking that the response to consultation document records the responses in terms of percentage outcomes but makes no attempt to assimilate them. By reference to the various percentages, the Claimant points out that there was no majority view in favour of any measure in addition to those already within Part V of the 1994 Act. This seems to me to be correct. But I also consider the point to be irrelevant. The second consultation exercise was in the nature of an opinion poll. Information of this type is not likely to weigh heavily in a proportionality exercise: in many respects the proportionality test that is imposed on actions that infringe Convention rights exists as a restraint on, or even the antidote to, majoritarianism.

50. The Claimant's next submission is that sections 60C and 60D are not justified because there was a less intrusive course that could have been taken to address unauthorised encampments, namely a decision to increase the number of transit pitches. This submission requires careful handling. In his judgment in *Bank Mellat v HM Treasury (No. 2)* [2014] AC 700, Lord Reed considered the requirements of the proportionality test. He first referred to the three-part test set out by the Privy Council in *de Freitas* ([1999] 1 AC 69):

> "72. The approach to proportionality adopted in our domestic case law under the Human Rights Act 1998 has not generally mirrored that of the Strasbourg court. In accordance with the analytical approach to legal reasoning characteristic of the common law, a more clearly structured approach has generally been adopted, derived from case law under Commonwealth constitutions and Bills of Rights, including in particular the Canadian Charter of Fundamental Rights and Freedoms of 1982. The three-limb test set out by Lord Clyde in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69*, 80 has been influential:
>
> > "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."
>
> *de Freitas* was a Privy Council case concerned with fundamental rights under the constitution of Antigua and Barbuda, and the dictum drew on South African, Canadian and Zimbabwean authority. The three criteria have however an affinity to those formulated by the Strasbourg court in cases concerned with the requirement under articles 8–11 that an interference with the protected right should be necessary in a democratic society (e.g., *Jersild v Denmark (1994) 19 EHRR 1*, para 31), provided the third limb of the test is understood as permitting the primary

> decision-maker an area within which its judgment will be respected."

He then pointed out that this test was drawn from the judgment of Dickson CJ in *R v Oakes* [1986] 1 SCR 103, a judgment of the Canadian Supreme Court. Lord Reed then continued.

> "74. The judgment of Dickson CJ in *Oakes* provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in Oakes can be summarised by saying that it is necessary to determine (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, and (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. The first three of these are the criteria listed by Lord Clyde in *de Freitas,* and the fourth reflects the additional observation made in *Huang*. I have formulated the fourth criterion in greater detail than Lord Sumption JSC, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.
>
> 75. In relation to the third of these criteria, Dickson CJ made clear in *R v Edwards Books and Art Ltd [1986] 2 SCR 713* , 781–782 that the limitation of the protected right must be one that "it was reasonable for the legislature to impose", and that the courts were "not called on to substitute judicial opinions for legislative ones as to the place at which to draw a precise line". This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified: as Blackmun J once observed, a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down (*Illinois State Board of Elections v Socialist Workers Party* (1979) 440 US 173 , 188–189); especially, one might add, if he is unaware of the relevant practicalities and indifferent to considerations of cost. To allow the legislature a margin of appreciation is also essential if a federal system such as that of Canada, or a devolved system such as that of the United Kingdom, is to work, since a strict

> application of a "least restrictive means" test would allow only one legislative response to an objective that involved limiting a protected right."

Although in this case it would have been open to the government to leave Part V of the 1994 Act unaltered and focus instead on different measures, such as to increase the number of transit pitches, the fact that that course was not taken does not prove that the introduction of section 60C and D was unjustified.

51. The prevalence of unauthorised encampments presents a complex political problem. Complex problems rarely permit of a single answer in the nature of a magic bullet. Sometimes the response that may appear to be obvious may turn out not to be practicable, or to represent an outcome that would not be considered politically acceptable. On occasion, resolution of a complex problem requires trial and error – an application of successive measures each aimed at a different aspect of the problem. Lord Reed's approach to the third part of the proportionality test anticipates such situations.

52. In the present case the third part of the proportionality test must be applied allowing a significant margin of appreciation. The Claimant submitted to the contrary, relying on particular on an observation made by Coulson LJ in his judgment in *Bromley v Persons Unknown* [2020] PTSR 1043. That case concerned the grant of *quia timet* injunctions to prevent the establishment of unauthorised encampments. Having dismissed the appeal, Coulson LJ made a number of observations in response to the parties' request for general guidance. At paragraph 100 he said this.

> "100. I consider that there is an inescapable tension between the article 8 rights of the gipsy and traveller community (as stated in such clear terms by the European case law summarised at paras 44–48 above), and the common law of trespass. The obvious solution is the provision of more designated transit sites for the gipsy and traveller community. It is a striking feature of many of the documents that the court was shown that the absence of sufficient transit sites has repeatedly stymied any coherent attempt to deal with this issue. The reality is that, without such sites, unauthorised encampments will continue and attempts to prevent them may very well put the local authorities concerned in breach of the Convention."

However, it is clear that this part of Coulson LJ's judgment does not and did not purport to set out any legal obligation. A conclusion in this case that a decision to increase the number of transit pitches was a less intrusive measure rendering the addition of sections 60C and D to the 1994 Act disproportionate, would be tantamount to applying article 8 on the basis that it did give rise to a home, a course the European Court of Human Rights has consistently rejected. While I do not accept the Claimant's less intrusive course of action submission, I do consider the present shortage of transit pitches is a matter relevant to the proportionality fair balance.

53. The shortage of transit pitches is a significant matter in the fair balance – i.e. whether the impact of the infringement consequent on sections 60C and 60D is disproportionate to the objective those measures pursue. However, I am not satisfied it is sufficient to make good the Claimant's case on justification. The Caravan Count figures indicate the proportion of Gypsies resorting to unauthorised encampment is small (see above at paragraph 23). As explained above, the measures within section 60C and 60D are confined by the requirements for residence, the existence of significant damage etc., the obligation to apply those measures having regard to the Home Secretary's guidance, the requirement for a request to leave the land which will act in the manner of a warning, and the operation of the statutory defence in section 60C(6). Also, these measures only apply to trespassers. These matters are sufficient to strike a fair balance with the objective of protecting the interests of the legal occupiers of land. Those interests are important, and are sufficient to justify the disadvantage arising from section 60C and 60D. This part of the Claimant's case therefore fails.

(2) The amendments comprising section 61(4) read with 61(4ZA), section 62(1A)(a), section 62B(2) and section 60C(3).

54. Having set out matters going to justification at length in the previous section of this judgment I can deal with this part of the Claimant's case more briefly. The Claimant's submission relies again on the connection between unauthorised encampments and the availability of pitches; on the under-supply of pitches and the lack of evidence to suggest that further sites will be provided; and the fact that the previous 3-month non-return periods in section 61 and section 62B correspond to the maximum time that a Gypsy can stay in a caravan at one transit pitch. The three-month non-return periods meant that Gypsies could avoid the criminal penalties by using either transit pitches or permanent pitches. The Claimant further relies on matters arising from the April 2018 consultation exercise. In the consultation document the matter was referred to at paragraph 15:

> "Failure to comply with a police direction under section 61 or 62A is a criminal offence punishable by a fine and/or a custodial sentence of up to three months' imprisonment, as is re-entry onto the land by persons subject to the direction within three months. We would welcome views on whether there is evidence supporting an extension of this time period before a person can legally return to a site once directed to leave by the police."

In the consultation response document under the heading "Stronger Police Powers" the Secretary of State said the following.

> "The consultation responses signalled clear calls for the Government to take action to improve enforcement against unauthorised encampments.
>
> …
>
> The Government will seek Parliamentary approval to amend sections 61 and 62A of the Criminal Justice and Public Order Act 1994 to increase the period of time in which trespassers

> directed from land would be unable to return. Currently, the power prohibits a trespasser from returning to the area of land for three months. The Government plan to extend this time period to twelve months. This would provide greater protection to land targeted by the same group of trespassers on a regular basis."

The Claimant submits that the decision to extend the non-return periods is largely unexplained, and that the mismatch between the 12-month period and the 3-month maximum stay at a transit pitch is a matter calling for explanation as it means that Gypsies will no longer be able to avoid the risk of criminal penalty by resort to transit pitches. The position might be different if transit pitches were readily available: moving between several different pitches over the course of a 12-month period would be a feasible option. But the evidence shows this is not the position. The Claimant's submission is that the increased protection to land owners given by the 12 month no-return periods places a disproportionate burden on Gypsies. It expands the scope of the criminal penalties and at the same time makes it more difficult to comply with the law.

55. I accept this submission. The point here is not simply that the no-return periods have been extended. That of itself does revisit the balance struck between the property rights of landowners and occupiers and the interest of Gypsies, but if this point stood alone the likely success of the submission that the change produced a disproportionate outcome would be in the balance. The matter that is decisive in the Claimant's favour is that the extension of the no-return period of itself narrows the options available to comply with the new requirement. Resort to a transit pitch will no longer suffice as the maximum stay on a transit pitch is 3 months. The under supply of transit pitches renders it much less likely that the opportunity exists to move from one to another. In this way, extending the no-return period not only puts Gypsies at a particular disadvantage but also and of itself, compounds that disadvantage. This consequence was neither recognised nor addressed in the consultation documents. It has not been addressed in the Home Secretary's evidence in this case. Absent explanation, and even allowing that the need to address the problem caused by unauthorised encampments is a complex problem, the 12 month no-return period in section 60C, 61, 62(1A)(a) and 62B is disproportionate.

56. This conclusion cannot be addressed through use of the interpretive obligation at section 3 of the Human Rights Act 1998. Any attempt to read down the duration of the no-return provisions would go far beyond anything recognisable as statutory interpretation. The appropriate course is a declaration of incompatibility under section 4 of the Human Rights Act 1998 that is directed to sections 60C(3), 61(4ZA)(a) and 62B(2) of the 1994 Act.

C. Disposal

57. For the reasons above, the Claimant's claim succeeds but only so far as concerns the submission on the duration of the no-return periods. The remaining part of the Claimant's claim fails.

58. I will make a declaration of incompatibility directed to sections 60C(3), 61(4ZA)(a), 62(1A)(a) and 62B(2) of the 1994 Act in so far as they identify a 12-month no-return period. I invite Counsel to seek to agree the terms of that declaration.
