McCarthy, Culligan, Coyle, Taylor & Others v Basildon District Council v Equality & Human Rights Commission

Case No: CO/5225/2005

CO/5565/2007

CO/1592/2006

CO/6082/2007

High Court of Justice Queen's Bench Division Administrative Court

9 May 2008

[2008] EWHC 987 (Admin)

2008 WL 2033398

Before: Mr Justice Collins

Date: 9 May 2008, Hearing dates: 11–14 February 2008

Representation

Mr Alex Offer (instructed by Messrs Davies Gore , Lomax) for the Claimants in 5525/2005 & 5865/2007.

Mr David Watkinson (instructed by South West Law) for the Claimants in 1592/2006 and (instructed by Bramwell , Browne, Odedra) for the Claimants in 6082/2007.

Mr David Elvin, Q.C. , Mr Paul Epstein, Q.C. & Mr Reuben Taylor (instructed by the Solicitor to the Council) for the Defendant.

Mr Robin Allen, Q.C. & Mr Marc Willers (instructed by the Legal Officer to the EHRC) for the Intervener.

Judgment

Mr Justice Collins :

1 There are before me four claims by over forty families of mainly Irish Travellers or Gypsies who are resident on unauthorised sites in the Council's district. The land which they occupy is in the Green Belt and planning permission has been refused. Enforcement notices have been served and upheld on appeal. The Council now seeks to remove their caravans from the land they occupy and to enforce compliance with the notices by removing the hard standing which has been placed on the land so that it is restored to its natural state. It has decided to use s.178 of the Town and Country Planning Act 1990 , which empowers the local planning authority, where any steps required by an enforcement notice have not been taken within the period given for compliance, to enter the land and take the steps.

2 Claims CO/5225/2005 and 5565/2007 concern land at Dale Farm, Oak Lane, Billericay. 5225/2005 is known as the Horseshoe because the various plots on which caravans have been

placed are on land shaped in that way. There are at least 39 pitches. 5565/2007 is known as the middle plots and is subdivided into sites A and B. It contains some 12 pitches and lies within the arms of the Horseshoe. The majority of those on the two sites have joined in one or other of the claims.

3 Claim 1592/2006 concerns land at Five Acres Farm, Hovefields Drive, Wickford. Some seven pitches are involved. Claim 6082/2007 concerns land north of Hovefields Drive, Wickford. It involves some five pitches. The two sites are not contiguous although, as the names suggest, they are close to each other.

4 As the dates when they were lodged indicate, there is a somewhat lengthy history to these claims. In 2004, there was one site run by the Essex County Council at Hovefields at Courtauld Road which had 25 pitches with a capacity for 50 caravans. There are a number of privately run sites (for some of which permission was granted on appeal from the Council's refusal of planning permission) so that now there are some 116 authorised pitches. One of the authorised sites adjoins the Horseshoe at Dale Farm.

5 Permission was granted in 5225/2005. It involved an attack on the Council's decision on 14 July 2005 to use its powers under s.178 of the 1990 Act. Since then, there have been reconsiderations in January 2006 and finally on 13 December 2007. These reconsiderations resulted from decisions made on various planning applications and enforcement appeals. The decision of 13 December 2007 dealt with all four sites and resolved on the use of s.178 to enforce. It is accepted and is clearly right that the claims should focus on the final decision. Whatever flaws (if any) there may have been in the earlier decisions are not material (unless they have not been addressed in the final decision).

6 Permission had not been granted in the other three claims. There was a direction for what is described as a ‘rolled-up hearing’, namely an application for permission with the substantive hearing to follow immediately if permission be granted. Mr Elvin, Q.C. did not oppose the grant of permission in all claims and so this was done at the commencement of the hearing and this judgment deals with the substantive claims.

7 The EHRC (then known as the Commission for Racial Equality) was given leave to intervene on 29 November 2005 in claim 5225/2005. It had sought to intervene because the claim raised issues of public importance concerning in particular the scope of the obligation to have due regard to the race equality duty under s.71(1) of the Race Relations Act, 1976 as amended. Since it was the body responsible for the review of the workings of the 1976 Act, it was concerned that full argument might not be advanced about the ambit of the race equality duty. Having intervened, Mr Allen Q.C. has in addition sought to advance arguments on the disability and the gender equality duties under the Disability Discrimination Act 1995 and the Sex Discrimination Act 1975 respectively. Mr Elvin objected on the ground that no permission to deal with these issues had been granted and none of the claimants had raised them or contended that there was a breach of duty under either of those Acts. Mr Watkinson sought leave to amend his claims to raise such arguments having seen Mr Allen's skeleton argument. In the end, Mr Elvin did not maintain his opposition with any vigour. He had had sufficient opportunity to consider and to deal with the arguments raised and so I permitted the claimants and the EHRC to pursue them.

8 I was burdened with some 23 lever arch files. This was a thoroughly excessive amount of paper the bulk of which was at best of the most marginal relevance: indeed, much was of no relevance. There is a growing tendency to place far too much material before the court. A claimant must produce all clearly relevant material to the court and must in particular include any which may be considered to be possibly adverse to his claim. Only thus can he comply with the duty of candour. The same applies to a defendant. There is often material which may be relevant but need not be put to the judge until it becomes clear that it is. Equally, parties often want to refer to particular paragraphs or excerpts from reports or other documents which mean that, although the context may need to be made clear, the whole need not be included in a bundle. The court should only be provided initially with what is clearly relevant and material. The balance of possibly relevant material should be brought to court and must have been made available to the other party. The parties should before the hearing seek to agree a core bundle for the judge. At the conclusion of the hearing, since I could not for obvious reasons give an extempore judgment, the parties produced 6 files which contained all the material they considered necessary for me to consider when preparing my judgment. I am grateful to them for that.

9 As the significant number of claims which have come before this court show, the problems created by the lack of sufficient authorised sites for Travellers and Gypsies are too frequently all but insoluble. Section 225 of the Housing Act 2004 imposes a duty on local housing authorities to produce a strategy for dealing with the accommodation needs of Gypsies and Travellers. They are defined by the Housing (Assessment of Accommodation Needs)(Meaning of Gypsies and Travellers)(England) Regulations 2006 (2006 No.3190) in paragraph 2 thus:—

> "(a) persons with a cultural tradition of nomadism or of living in a caravan; and
>
> (b) all other persons of a nomadic habit of life, whatever their race or origin, including —
>
> (i) such persons who, on the grounds only of their own or their family's or dependants' educational or health needs or old age, have ceased to travel temporarily or permanently; and
>
> (ii) members of an organised group of travelling show people or circus people (whether or not travelling together as such)."

With the exception of 2(b)(ii), which is in any event immaterial in these claims, the definition follows essentially, albeit in somewhat greater detail, that which applied in the Caravan Sites Act 1968 (now repealed). There is no doubt that the claimants are all to be regarded as Gypsies or Travellers and, as Irish Travellers, are a particular racial group and so covered by the Race Relations Act 1976 .

10 It is an unfortunate fact that there is a high degree of prejudice against Travellers and Gypsies and few inhabitants of a particular area wish to have sites anywhere near them. This tends to mean that there is strong opposition to the grant of planning permissions for such sites, whether or not there are other objections such as inappropriate development in the Green Belt. Following a report by Sir John Cripps in 1976, which estimated that there were some 40,000 Gypsies in England and Wales, three quarters of whom had nowhere they could lawfully stay, the government set up a scheme whereby Councils were given financial encouragement to provide sites and urged to take into account in planning applications as a material consideration the need to accommodate Gypsies. This was all swept away by the Criminal Justice and Public Order Act 1994 . Circular 1/94 told Councils to encourage private site provision on the basis that Gypsies should help themselves, but it was made clear that planning applications should be determined solely in relation to land use factors. A later Circular (18/94) required Councils to adopt 'a policy of toleration towards unauthorised Gypsy encampments'. If no nuisance was being caused, presence for short periods should be allowed. The power of removal under sections 77 and 78 in the 1994 Act should not be used needlessly and regard should be had to obligations to children, the sick and disabled and to the housing of homeless persons. The approach of Circular 1/94 was that the planning laws and self help should play a large part in obtaining provision of sufficient sites for Gypsies, but local authorities should assess the need for such sites in their areas and make provision for them in their plans or approaches to applications.

11 The approach did not work, perhaps not surprisingly. So on 2 February 2006 a new approach was put into force through Circular 01/2006 issued by the Office of the Deputy Prime Minister (ODPM). This is entitled "Planning for Gypsy and Traveller Caravan Sites". In the introduction, the failure to provide a sufficient number of authorised sites was noted. Paragraphs 4 and 5 read:—

> "4. Creating and sustaining strong communities, for the benefit of all members of society including the Gypsy and Traveller community, is at the heart of the Government's respect agenda. These communities will depend ultimately on a shared commitment to a common set of values, clear rules and a willingness for people to act together to resolve differences. They will also require effective enforcement action to tackle the poor behaviour of some individuals and families. We recognise the conflict and distress associated with unauthorised encampments, and the anti-social behaviour that

sometimes accompanies such sites. This Circular will help to promote good community relations at the local level, and avoid the conflict and controversy associated with unauthorised developments and encampments.

5. Gypsies and Travellers are believed to experience the worst health and education status of any disadvantaged group in England. Research has consistently confirmed the link between the lack of good quality sites for Gypsies and Travellers and poor health and education. This circular should enhance the health and education outcomes of Gypsies and Travellers."

It, together with the duties imposed by the Housing Act 2004 , would require local authorities to take a strategic approach. Authorities have to produce an assessment of Gypsy and Traveller accommodation (GTAA). In the new planning system set up by the 2004 Planning and Compulsory Purchase Act , the information obtained in the GTAA will be fed into the Regional Spatial Strategy (RSS) and will be a key component in the overall assessment of need which informs housing policies in the RSS. The RSS revision should identify the number of pitches required (but not their location) for each local planning authority in the light of the GTAAs and a strategic view of the needs across the region, which for the purposes of these cases extends over the East of England and involves the need for cooperation by a number of local planning authorities within the region.

12 The intentions behind the Circular are set out in Paragraph 12, which reads:—

"The Circular comes into effect immediately. Its main intentions are;

(a) to create and support sustainable, respectful, and inclusive communities where Gypsies and Travellers have fair access to suitable accommodation, education, health and welfare provision; where there is mutual respect and consideration between all communities for the rights and responsibilities of each community and in which they live and work;

(b) to reduce the number of unauthorised encampments and developments and the conflict and controversy they cause and to make enforcement more effective where local authorities have complied with the guidance in this Circular;

(c) to increase significantly the number of Gypsy and Traveller sites in appropriate locations with planning permission in order to address under-provision over the next 3–5 years;

(d) to recognise, protect and facilitate the traditional travelling way of life of Gypsies and Travellers, while respecting the interests of the settled community;

(e) to underline the importance of assessing needs at regional and sub-regional level and for local authorities to develop strategies to ensure that needs are dealt with fairly and effectively;

(f) to identify and make provision for the resultant land and accommodation requirements;

(g) to ensure that DPDs include fair, realistic and inclusive policies and to ensure identified need is dealt with fairly and effectively;

(h) to promote more private Gypsy and Traveller site provision in appropriate locations through the planning system, while recognising that there will be those who cannot provide their own sites; and

(i) to help to avoid Gypsies and Travellers becoming homeless through eviction from unauthorised sites without an alternative to move to."

Paragraph 18 provides:—

"There is a need to provide sites, including transit sites, in locations that meet the

current working patterns of Gypsies and Travellers. In view of the changes in their work patterns, these may not be the same areas they have located in or frequented in the past. This needs to be balanced with the responsibility of Gypsies and Travellers to respect the planning system."

13 The Circular deals with transitional arrangements in Paragraphs 41 to 46. I need only specifically note what is said in Paragraph 43 which states that where there is a clear and immediate need, for instance evidenced through the presence of significant numbers of unauthorised encampments or developments, local planning authorities should bring forward Development Plan Documents (DPD) containing site allocations in advance of regional consideration of pitch numbers, and completion of new GTAAs. There are, I think, difficulties in applying this approach where the council, as here, has real problems in identifying any appropriate sites because of the extent of Green Belt land in its district. It is in its view dependent on the cooperation of other councils in the region in identifying the overall needs and sites which might be appropriate to meet those needs.

14 Counsel for the defendant Council have helpfully set out in their skeleton a summary of the facts in relation to each claim. I shall set them out briefly.

(1) **5225/2005**

The Council first became aware of unauthorised use in late 2001, since when additional families have taken up residence. In April 2002, a number of enforcement notices were served. A number of planning applications were lodged. Overall, there have been nine planning applications and ten enforcement notices. Appeals were lodged against all the enforcement notices and eight of the nine refusals of planning permission. All appeals were refused following three planning enquiries leading to two decisions by the Secretary of State and one by an inspector. The first enforcement appeal led to a decision by the Secretary of State on 13 May 2003 by which he granted a period of 2 years for compliance. He observed in paragraph 23:—

"… the shortage of authorised sites and the personal circumstances of the appellants are material considerations which weigh in favour of the proposals, but these need to be balanced against the harm to the Green Belt and other objections to the proposal in terms of highway safety and regarding the impact on residential amenity …. The considerations in favour of the proposal do not amount to very special circumstances that would justify allowing inappropriate development in the Green Belt."

There is no question and the claimants' counsel do not dispute that what they have done amounts to inappropriate development in the Green Belt so that planning permission can only be granted if they can show that there are very special circumstances. It is accepted and the planning and enforcement decisions confirm that the individual circumstances of the claimants are capable of amounting to very special circumstances provided that those circumstances clearly outweigh the damage done to the Green Belt by the development and any other harm. Apart from the harm to the Green Belt, there were serious highway safety objections to the Dale Farm site because of the need to use a narrow country road for access. The Council's original decision to take enforcement action under s.178 was confirmed in January 2006 and again on 13 December 2007. In the meantime, the claimants remained on the land in breach of the enforcement notices and the criminal law. The extension of 2 years was intended to give them an opportunity to find somewhere else to go, but, rather than take advantage of the extra time, it was used to consolidate their use of the site. However, there was nowhere in the district or indeed in the region where they could lawfully reside in their caravans.

(2) **5565/2007**

Although in the Green Belt, both Sites A and B were developed without planning permission for a variety of industrial uses. The unauthorised uses were enforced against and as a result ceased in the mid 1990s. In 2003, the Council became aware of the unauthorised use of Site B by Travellers.

Two enforcement notices came into effect in October 2003 and were not appealed. They were not complied with and the site was divided into 7 plots which led to five more enforcement notices in 2004. Appeals were dismissed following a public enquiry in the summer of 2005, but the time for compliance was extended to December 2006. On 15 December 2006, a planning application was lodged seeking permission to retain the seven pitches. Permission has been refused by the Council. An appeal has been lodged but no enquiry has yet been held.

In the case of Site A, 9 enforcement notices were served in 2004 and appeals against them were dismissed in December 2005, but time for compliance was extended to December 2006. In the meantime, applications for planning permission covering not only Site A but also part of the horseshoe land had been made and refused by the Council. The refusal was upheld by the Secretary of State on 22 February 2007 following a public enquiry in August 2006. In her decision letter, the Secretary of State agreed with the inspector that, although there were family ties with occupants of the adjacent authorised sites and the appellants had put down some roots and might have a case for staying in the locality, there was no compelling social need for the appellants to live next to the authorised site. There were also no economic, educational or healthcare needs which required the appellants to live at the appeal site.

She considered that the absence of alternative sites, the disruption to the children's educational needs and particular health care problems should carry significant weight. In Paragraph 35 she said this:—

"… The Secretary of State agrees with the Inspector that it is reasonable to assume that if the appeals are dismissed then eviction will follow and this would result in interference with the appellants' home and family life. However, the Secretary of State also agrees with the Inspector that the interference has to be balanced against the harm to the Green Belt and to highway safety caused by the developments and she further considers that the public interest in pursuing the legitimate aims of Article 8 must include the protection of the environment."

It followed that the dismissal of the appeals was, in her view, a necessary and proportionate response which would not result in a violation of the appellants' rights under Article 8 of the ECHR .

A further appeal against the refusal of temporary permission (3 years was requested) was considered at a public inquiry in October 2007 and on 21 January 2008 the Secretary of State dismissed the appeals.

In Paragraphs 14 to 16 of the decision letter she said this:—

“Need for Sites

14. The Secretary of State considers that the exact extent of the local needs is not known, and that there is no certainty at this stage that Basildon District Council will in the future be required to provide more sites. The district level allocation of pitch numbers will not be finalised until the East of England single issue review is complete, and work on this is currently at an early stage. However, she does consider that a current need in this area has been demonstrated. Circular 01/06 makes it clear that factors such as the presence of significant numbers of unauthorised developments can provide evidence of need (Paragraph 43).

15. For the reasons given at IR139 the Secretary of State agrees with the Inspector that the need of these appellants for a site is acute, as they are under threat of a forced eviction, but that no functional need has been established to demonstrate that these appellants need to live on this site. For the reasons given at IR140, the Secretary of State agrees that the lack of an agreed quantitative assessment and the lengthy timescale weigh in favour of the appellants.

Alternative sites

16. For the reasons given at IR141–143, the Secretary of State considers that the lack of alternative sites is a significant factor in favour of the appeal.”

She considered the health and educational needs of the families and accepted the inspector's conclusion that the severity of any illnesses was the relevant factor but that none of the appellants had illnesses which required them to live on the sites and there was no evidence to suggest that only a site in Basildon or in the Green Belt could enable them to receive proper health care. The same applied to the childrens' educational needs. She recognised the absence of acceptable alternative sites in the vicinity, but took the view that the extent of the Green Belt and the consequent potential difficulty in finding acceptable locations for sites in the vicinity did not make the particular Green Belt site any more acceptable.

I have dwelt at some length on the planning history of the sites covered by this claim because the reasoning which led the Secretary of State to reject the appeals against refusals of planning permission or enforcement is, as will be seen, similar in the other cases.

(3) **1592/2006**

There has been unauthorised development of the sites since 1997 and enforcement action has been taken. An injunction was granted in December 2001 requiring the removal of hard standing and caravans. It was not complied with. Various applications for planning permission were refused and finally appeals were dismissed in July 2003. However, not only was there a failure to bring the unlawful development to an end but further such development took place. Enforcement notices were served; appeals were dismissed in December 2004, but the appellants were given until December 2005 to comply. Enforcement action pursuant to s.178 was decided on in January 2006. The claim was lodged on 22 February 2006. In the meantime applications for planning permission for 7 plots were made in March 2006 and refused by the Council in August. An appeal was

dismissed by an inspector in April 2007. There is a pending claim under s.288 of the 1990 Act against that decision.

The inspector decided that the development detracted from the character and appearance of the area. It had an unfortunate harsh look and was harmfully out of keeping: no landscaping (which was absent) could cover the defects. It eroded the openness of the Green Belt. The inspector recorded in Paragraph 25:—

"I have also taken into account the fact that there is an extant enforcement notice in respect of the appeal sites; the period for compliance has expired. Only a judicial review [i.e. this claim] has prevented the Council from taking direct action on those plots; it has already taken such action in respect of the land to the south. The probability, therefore, is that if the appeal is not successful, the appellants will be forced to vacate the sites and will become homeless. The Council is unable to offer alternative accommodation; there are no vacant sites in the vicinity. The probability, therefore, is that they will be forced to return to roadside camping. If they remain in this District, the probability is that such camping would be in the Green Belt."

The inspector went on to consider the individual circumstances of each appellant and their health and educational needs. However, his view was that those needs were not such as could in any case constitute the very special circumstances which were required to justify development which was so harmful to the Green Belt. The harm to the appellants was in his view proportionate and necessary in the circumstances and would not result in a violation of their rights under Articles 8 or 14 of the ECHR .

(4) **6082/2007**

Unauthorised development of the land commenced in 2002. Enforcement notices were not complied with and further notices were issued in November 2004 against the change of use of the land which was then divided into 7 plots. Appeals were dismissed by the Secretary of State in February 2006 following a public inquiry. Enforcement action was approved in June 2007 whereafter the claim was lodged on 19 July 2007. In the meantime, appeals had been lodged against the Council's refusal in April 2007 to grant planning permission for the development. A public enquiry was held in December 2007 and the appeals were dismissed in January 2008. The land in question lay in a part of the Green Belt which was narrow and especially vulnerable and formed an important function in checking unrestricted sprawl of large built-up areas, namely Basildon and Wickford. Thus the harm to the Green Belt was severe and the personal circumstances of the appellants did not outweigh them. Further, the development had caused considerable visual harm to a substantial and prominent area of land and there were problems of noise generated by vehicles accessing the site. Significant weight should be attached to the reduced quality of life for local residents.

The inspector concluded, on the basis of information before him, that, planning circumstances were likely to change within Basildon within the next 3 to 4 years as Gypsy accommodation needs were finalised and additional Gypsy sites were identified. However, the harm that the appeal proposal caused to the Green Belt, to local character and residents' living conditions was unacceptable even on a temporary basis. Thus dismissal of the appeals was proportionate despite the effects on the appellants and their families.

15 In January 2004, there was enforced eviction of a number of families from an unauthorised site at Twin Oaks in Hertfordshire. I have seen a video which shows how the bailiffs employed by the Council (who, it seems, this Council proposes to use if enforcement can take place) acted. The conduct was unacceptable and the evictions were carried out in a fashion which inevitably would have led to harm to those affected. I have no doubt that the Council must reconsider the use of the firm in question and ensure that any eviction (if these claims fail) is carried out in as humane a fashion as possible. The police presence at Twin Oaks failed to curb the excesses of the bailiffs.

16 This eviction led many to come to Dale Farm since they had relations on the adjacent authorised site. They had bought the land at Twin Oaks and the same was done at Dale Farm. While there must be sympathy with them in the plight that they found themselves in, they must have appreciated after their experiences at Twin Oaks that they should not without the benefit of planning permission settle on the sites. Their memory of what happened at Twin Oaks has led them to fear forcible eviction, but they have nowhere to go and their children are getting education and their health needs, some of which are acute, are being catered for. Initiatives have been taken to try to find alternative accommodation, but without success, and they have liaised with the Fire and Rescue Services and the Red Cross to try to set up what would in effect be an encampment nearby in case of eviction.

17 In December 2007, the Essex Race Equality Council (EREC) produced a report on 50 families at Dale Farm and Hovefields Avenue. It was noted that only 5 of the 50 did not suffer from illnesses in their families. One of the points made related to the unfair and almost certainly inaccurate prejudicial media coverage of the claimants. Such coverage is undoubtedly unhelpful, but the Council has no direct control over the activities of the media.

18 The EREC report noted that all wanted to stay and all owned the plot of land on which they resided. The likelihood was that the numbers would increase as children grew up and got married. There was a high level of depression and other physical illnesses and all claimed to suffer racial discrimination and harassment on a regular basis. As the report says, it is to the Council's credit that it has conducted the welfare needs survey.

19 A suggestion had been made that it might be possible to use a site at Pitsea, at least temporarily, which was not in the Green Belt. However, planning permission for this use has been refused. I cannot go behind that for the purposes of these claims and I must assume that the reasons for refusal are proper. In those circumstances, that alternative site is not an option. In fact, the owners of the site had not indicated they were prepared to allow the land to be used for the accommodation of Gypsies or Travellers and there were significant highway objections. In addition, such development would be contrary to the policies contained in the relevant plans which earmarked the site for employment.

20 There is before me evidence from Father Browne, a chaplain for Gypsies and Irish Travellers. He has tried on behalf of the families to negotiate with the Council to see whether there could be a way of avoiding the evictions and the inevitable trauma they would cause to the families. He found, he says, an attitude from the council leader which led him to believe that minds had been closed to any alternative to immediate eviction. The Council was encouraged to carry out a race equality impact assessment, which was necessary, and a separate assessment of need for sites in the longer term. His view, following the various meetings he had had with the leader of the Council culminating in one in June 2007, was that the Council was determined to evict. If the judicial review went against it, it would retake the decision in the light of any procedural defects identified and eviction would in due course take place.

21 The Government is acutely aware of the need to provide sites for Gypsies and Travellers so that unauthorised encampments which so frequently cause serious environmental damage can be prevented. In December 2007, there was published the report of a task force set up to consider site provision and enforcement for Gypsies and Travellers. This followed some 18 months of investigation. In the introduction, this is said:—

> "The Task Group discovered that the scale of the problem was small. About 75% of Gypsies and Travellers who live in caravans are on authorised sites, whilst the remainder only require about 4000 pitches, or less than one square mile of land across the country. We examined the Government's policy, which changed in 2004 in relation

> to site provision, and consider that if it is implemented with vigour by central and local government, there is a prospect that most of the £18m spent on enforcement could be saved, and the life chances of this most deprived ethnic minority group greatly enhanced."

22 The point (an obvious one perhaps) is made that without levels of accommodation commensurate with need unauthorised encampments are inevitable. If there is a clear and pressing local need, authorities should not await RSSs — that follows from Circular 01/2006 — but should give serious consideration to proceeding with a DPD immediately. At page 21, it is said that local authorities must take the necessary steps to ensure that adequate accommodation is available in the area if they are to be able to take rapid and robust action against unauthorised encampments. That is in the context of the use of powers to evict in the Criminal Justice and Public Order Act, 1994 , but the approach is equally applicable to any enforced eviction. It is, the report says, of vital importance that the pace of delivery of the necessary authorised sites is as speedy as possible.

23 The report addresses Dale Farm at p.46. it says this:—

> **"Temporary Planning Permission — A Missed Opportunity?**
>
> "No report on site provision and enforcement could be complete without reference to what is probably the most infamous unauthorised site in the country — Dale Farm in Basildon, Essex. While the scale of development at Dale Farm is far from typical, it provides a cautionary tale of how temporary planning permission can fail to address — and indeed sometimes exacerbate — fundamental problems with the supply of permanent accommodation for Gypsies and Travellers.
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> The site has a long and contentious planning history. Temporary permission was granted by the Secretary of State in 2005 with the intention that this would give the site residents and the local authority time to find a suitable alternative site. However, no such progress has been made, and the local authority has now received a homelessness application for the 400 people who claim that eviction from the site will leave them homeless. At the same time, opposition among parts of the settled community towards site residents has become ever fiercer, with parents from the settled community withdrawing their children from the school attended by children from Dale Farm, and the view regularly expressed in letters to the local press that Gypsies and Travellers living on the site are somehow 'above the law'.

No temporary permission was in fact granted, but the extension of time to comply with the enforcement notices had the same effect.

24 The report concludes that it is essential that the task of providing sufficient suitable sites is addressed with the utmost urgency. Only thus will the problem of unauthorised sites be ameliorated. But it must, in my view, be recognised that it may not be possible in some instances — and that is said with force by the Council to be the position in these claims — to find alternative sites in the district. Cooperation from the districts in the region is needed and that may be impossible to achieve until the RSS is considered. Hence there will be an inevitable delay and that, it is said, is too long a time to tolerate the continued existence of the pitches which are in breach of planning control and so of the criminal law. The refusal of the Secretary of State to grant temporary permissions is prayed in aid in this context.

25 The claimants' Counsel, in particular Mr Watkinson, have argued that, since the effect of the use of s.178 is to evict the claimants from their present residences, it was inappropriate to use it rather than the power to seek an injunction under s.187B of the 1990 Act. The s.187B route would give to the court a discretion which it did not have in dealing with a judicial review of a s.178 decision. This same point was raised before Ouseley J in an earlier challenge to the decision to enforce at Hovefields Avenue: see R(O'Brien) v Basildon DC [2007] 1 P&CR 257 . Ouseley J found in favour of the claimants because the Council had not properly considered the prospects of success in a pending appeal against refusal of planning permission, particularly

having regard to a decision granting temporary permission for a single site nearby. But he rejected the claim that s.178 should not be used in the circumstances.

26 At paragraphs 152 and 153 he said this:—

> "152. The enforcement of criminal law is properly to be given very considerable weight in the decision as to the steps to be taken to enforce compliance with enforcement notices which have taken effect. The European Court of Human Rights recognised, for example in Chapman that the unlawful occupation of land was a factor telling strongly in favour of the proportionality of steps permitted by law to bring that occupation to an end. Where occupation is in breach of the criminal law, even more so will enforcement of the law be a proportionate step. Great, even decisive, weight can properly be given to the effective enforcement of the law, avoiding the law being set at nought and being seen to be flouted, suspended or dispensed with in favour of a particular group.
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> 153. Gypsies have the opportunity for their special circumstances to be weighed at the planning merits stages and, where occupation of land for residential purposes is a criminal offence, the resolutions of planning merits, if ultimately favourable to them, should precede rather than follow the occupation of the land in breach of the criminal law. The courts have clearly set their face against treating the special circumstances of Gypsies as justifying breach of their orders and avoiding committal proceedings, as the decisions in South Cambridgeshire DC v Gammell and Mid Bedfordshire DC v Brown show."

Thus it was not in principle disproportionate to use s.178 instead of s.187B . Parliament had granted the power to enforce directly and the remedy of judicial review provided adequate protection. On a s.187B application, the court has an original and discretionary, not a supervisory jurisdiction: South Bucks DC v Porter [2004] A.C. 558 . The discretion is not absolute and must be exercised with due regard to the purpose for which it was bestowed, namely to restrain actual or threatened breaches of planning control. Lord Bingham at paragraph 18 cited extensively from the judgment of Simon Brown LJ in the Court of Appeal. Simon Brown LJ's conclusion was:—

> "Proportionality requires not only that the injunction be appropriate and necessary for the attainment of the public interest objective sought — here the safeguarding of the environment — but also that it does not impose an excessive burden on the individual whose private interests — here the Gypsy's private life and home and the retention of his ethnic identity — are at stake."

27 Since an eviction inevitably constitutes an interference with the individuals' Article 8 rights, the court, itself a public body, must consider on a judicial review application whether the enforcement action is proportionate. Thus, although the court's role is supervisory and, in distinction to a s.187B application, it has no original jurisdiction, since it has to consider for itself whether the enforcement is proportionate, there is no great difference in the approach. Furthermore, as the Court of Appeal made clear in *R(Samaroo) v Secretary of State for the Home Department [2001] EWCA Civ 1139* , both the end and the means must be proportionate. In all the circumstances, Ouseley J was satisfied that there was sufficient procedural protection available through the planning system of appeals and access to the court at all stages to make the use of direct enforcement proper and proportionate. Proportionality in this context goes to the means used by the Council. Whether the effect on the individual claimants is proportionate having regard to their personal circumstances will have to be considered.

28 Ouseley J pointed out that the planning process was the means whereby the merits and the balance between the needs of the individual and other planning objections were to be considered. Once that was done (and, absent successful challenges, it must be accepted for the purposes of those claims that it has been properly and lawfully done) for the claimants to remain on the land was to breach the criminal law. In Paragraphs 155 and 156 Ouseley J said this:—

> "155. The breach of the criminal law involved here permits and even requires an approach to the proportionality of effective steps to procure compliance with the criminal

> law, which puts rather more weight on compliance with the criminal law than would be the case if the breach of planning control consisted of an unlawful failure to obtain planning permission for a material change of use, rather than the occupation of land in breach of the criminal law. This is particularly important where the circumstances upon which the claimants will rely when putting forward their case at the inquiry will include reliance on factors such as the stability of the children at school, which arise as a result of the occupation of their land in breach of the criminal law.
>
> 156. They may well have improved their case, and created circumstances more favourable to them through this breach of the criminal law. That can properly be seen as bringing the law into disrepute. The occupation of the land by the claimants, which underlines Article 8, has always been in breach of the criminal law in the first place, and it may be permissible to entertain some doubts about the extent to which such acts can generate rights to be respected. But in any event interference with them is justified by law and by the enforcement of the criminal law."

29 The fact that occupation is in breach of the criminal law does not of itself mean that enforcement is automatically proportionate. The Council undoubtedly has a discretion whether and by what means enforcement should be achieved. In the reports to the Committee, the need to act in a proportionate manner was drawn to its attention and the relevance of the failure to meet the need for Gypsy accommodation in the district which was identified in the Dale Farm appeal decisions was mentioned. The five possible courses of action were specified. These were:

> (1) Take no action . This would involve tolerating the site and leaving the enforcement notices on file with the possibility of action being taken later.
>
> (2) Prosecution . The possibility of fines can be a means of achieving enforcement, but, as the report pointed out, it had not proved particularly effective in the past.
>
> (3) Injunction
>
> (4) Direct Action . I have put these together since the advice recorded the observations of Ouseley J.
>
> (5) Compulsory Purchase . This would require a 'compelling case in the public interest'. The procedures would be protracted and expensive and 'unlikely to be approved since there were alternative means'.

In conclusion, the report said:—

> "The key issue for members to weigh in the balancing exercise is whether the impact of taking action to secure compliance with the Enforcement Notices on the occupiers of the sites is such that the public interest in enforcing planning control be set aside in favour of allowing the unauthorised development to remain.
>
> It is for Members to judge the weight that should be attached to each consideration. If they conclude that the circumstances of the occupiers and the hardship suffered if enforced against, are insufficient to outweigh the upholding of the Council's and national planning policies, then Members must consider what option to pursue to secure compliance with the enforcement notices."

30 The advice given in this regard is correct. However, the decision must be made having regard to all material considerations and ignoring any immaterial considerations. That of course is the standard *Wednesbury* test. But in addition, because of the interference with Article 8 rights and those under Article 1 of the First Protocol (Enjoyment of property), the court has a duty to consider whether enforcement is indeed proportionate. While not all the claimants commenced occupation in breach of enforcement notices, all have remained in occupation in breach of such notices and so in breach of the criminal law for substantial periods and have thereby been able to present a stronger case based on the disruption of their children's education, the inability to maintain proper health care and the fact that they have put down roots. The establishment or maintenance of rights under any Article of the ECHR when an individual is in breach of the criminal law reduces the weight to be given to the preservation of those rights.

31 It is submitted that the decisions were unlawful on a number of different grounds. First, it is submitted that the Council wrongly took the view that a need did not exist in its district. The number and extent of the unauthorised encampments showed that there was a demand, but demand is not the same as need and the Council's view was that a personal objective requirement must be shown to live on the particular site. In the reports, this was said:—

> "Basildon's only attraction is the availability and purchasability of cheap Green Belt land. The availability of cheap land is not a justification for considering the grant of temporary permissions in accordance with the transitional arrangements as set out in the [Circular 01/2006]."

32 Those observations are in my view somewhat unfair since they do not give the whole picture. I have already referred to the eviction from Twin Oaks which led some claimants to go to Dale Farm. I do not doubt that a factor was the ability to buy the land at a relatively cheap cost, but as important was the lack of anywhere else to go lawfully and the proximity of friends and relations. It seems that many of these Travellers have regarded Essex as their base. In any event, as the Circular itself points out in Paragraph 43, the presence of significant numbers of unauthorised encampments or developments is evidence of a clear and immediate need. Thus while I accept that need and demand are not the same, there can be no doubt that unmet demand can result in need. However, as is no doubt obvious, the existence of a substantial unauthorised site does not mean that there is a need to remain on that site. But it does show that the Council must take into account the existence of the need and take such steps as it can reasonably take to cater for that need. But it may be impossible for the Council to make any provision or reasonable for it not to do so having regard to the dangers caused by and the circumstances of the unlawful occupation in which case the need, albeit a weighty factor in favour of avoiding eviction if reasonably possible, cannot require that enforcement action not be taken.

33 The Council has asserted that there are in its district more sites for Gypsies and Travellers than in any other district in Essex. There were in 2006 some 116 authorised pitches in their district, many of which were privately run or owned by the occupier and which had received planning permission despite the Council's refusal to grant it. Following Circular 01/2006 and the duty under the 2004 Housing Act , in considering the strategy to be included in future plans required by the regime set up under the 2004 Planning and Compulsory Purchase Act a report has been obtained from the East of England regional Assembly (EERA) which is entitled 'Sustainability Appraisal of the EERA's revision to the Regional Spatial Strategy for the East of England to Address Provision of Gypsy and Traveller Caravan Sites'. The report was produced in January 2008. Its purpose is to "address the pressing need for regional policy to assist local authorities in the East of England in identifying the appropriate number and location of Gypsy and Traveller caravan Sites through their Local Development Documents." A requirement for 1187 net additional residential pitches across the region over the five years between 2006 and 2011 was identified. The proposal was that each district should provide a number of additional pitches which in Basildon's case amounted to 81. It is interesting to note that that is the second largest number of additional sites for a district, and that the total reached would mean (if implemented) that Basildon had the third largest number of pitches by 2011.

The report states in Paragraph 5.14:—

> "There is an urgent need to address the shortage of accommodation suitable for

> Gypsies and Travellers. This shortage of accommodation creates additional problems for the Gypsy and Traveller community in terms of access to health, education, employment and other opportunities. It can also create tensions over the use of pitches without planning permission. This is a national issue, and one that has been evident for some time, but is particularly pressing in the East of England."

34 Mr Elvin tells me that the figures and proposals are not accepted by the Council and in due course will be objected to at the forthcoming consideration of the RSS. Nonetheless, they suggest that there may well be an unmet need in Basildon and that the Council should recognise that it may be necessary to identify sites within its district and so may be unable to rely on an argument that any need must be met in other districts in the region.

35 The officers' reports to Committee state, in relation to need:—

> "There is a … significant demand for accommodation. Whether the demand is to be equated with 'need' depends upon whether (a) there is any functional requirement for the demand to be met in Basildon and (b) any functional need for the land to be within the Green Belt."

Presumably the reference to functional requirement is intended to mean that the need must be shown to be in the district of Basildon rather than somewhere else in the East of England because of some particular requirement for access to facilities or family ties or whatever. This seems to me to be a somewhat too narrow assessment of need. The absence of any sites in the vicinity meant, as the officers' report explained, that 'those removed from the site will have nowhere else to go in the vicinity' and so they would be compelled to resort to illegal camping. Thus Members should assume that:—

> "if enforcement action is taken those required to leave the land will have to resort to camping on the roadside."

This would leave them vulnerable to further removal action and would produce an obvious serious disruption to their lives, in particular in access to schools and to healthcare. The absence of anywhere else to go does, as it seems to me, result in a need to have somewhere to live and that is material to whether they should be able to remain where they are for a temporary period until authorised sites are made available, whether or not within the Council's district. When the EERA report is added in, there may be a need for Basildon to provide further sites.

36 The advice in Paragraph 43 of 01/2006 to identify sites if an immediate need is shown to exist applies to all the districts. Thus there should be immediate liaison to try to identify some such sites. Alternatively, since Basildon may be required to provide more — and the EERA report is a new factor — it should think in terms of active attempts to identify anywhere suitable. The Council has not allocated any land to further Gypsy / Traveller site development ahead of the issue of the draft single issue review. That is now in being and so it is necessary for the Council at least to consider whether any other sites can be found. I appreciate that this may not provide for all those affected by the decision to enforce, but, if there is a question of priorities, the individual circumstances of the various families will have to be taken into account.

37 The claimants point to the Council's duties under the 1996 Housing Act . If the claimants are evicted, they will be homeless and any decision to enforce will mean that they are threatened with homelessness. That will give rise to a duty to consider whether there is an obligation on the Council to provide them with accommodation which must be suitable whether temporarily or permanently. For those with children or who are suffering any serious illnesses, the full duty may arise. It is prima facie difficult to see that any homelessness can be said to be intentional since they have never had anywhere to settle. Suitability is important since the provision of accommodation in bricks and mortar may not be suitable for many Travellers. They clearly have sufficient connexion with Basildon to require Basildon to take the necessary steps and there is no other authority which can be approached instead.

38 In the July 2005 report to Committee (a copy of which was before members in December 2007) homelessness was mentioned. This was said:—

> "… it is likely that the first choice of Travellers, i.e. an alternative site, may not be available and suitable housing in the public and private sector may have to be made available. The caravans and 'demountables' along with other possessions that cannot be housed with the applicants will be the Council's responsibility to store for varying lengths of time depending on individual circumstances."

There may be argument whether bricks and mortar can be suitable.

39 A real risk that the Council will have to find somewhere for a dispossessed family to pitch their caravan, will be a material consideration in deciding whether enforcement should take place and, if so, against which families. This issue was not raised in the reports to committee in December 2007. Mr Elvin submitted it could have made no difference. I cannot be sure of that.

40 The reports had annexed the individual circumstances of the various families. The officers' advice was that there was nothing so special in any family's circumstances to justify a conclusion that it would be disproportionate to enforce against them. It must be remembered that these are individually owned and occupied plots. Thus enforcement is against individuals and their circumstances must be considered. The necessary information was there in the reports and it is to be noted that the Secretary of State and the inspector who dealt with the various appeals considered whether there were any health problems that were so severe as to require continued presence on the site and decided that there were none. Nonetheless, there was a possibility that enforcement action could be taken against some but not all the occupants. A small number who had serious health or educational difficulties might be permitted to remain at least on a temporary basis. I think that option should have been spelt out.

41 The Council's case is and has always been that it has provided more sites than its neighbours but has been the victim of an increase in demand which is far above that which has applied nationally. Since 1990 the national increase has been under 50%; in Basildon it amounted to more than 475%. There was a sudden jump in 2002 in the number of caravans from an average of 40 with a maximum of 71 to 194. This increase in demand was not reflected in the rest of Essex being over 20 times higher. Thus the officer's reports state:—

> "To accept that demand must be satisfied at the point at which it arises is overly simplistic, it will inevitably give rise to disproportionate site distribution and lead to overly large settlements that are unlikely to be sustainable. Accordingly the Council has not allowed any land to further Gypsy / Traveller site development ahead of the issue of the draft Gypsy / Traveller Single Issue Review RIS."

Since the adoption of the Review was timetabled for the Autumn of 2009, there could be no short term resolution of the problem. Thus, it was said, little weight could be attributed to the emerging policy guidance.

42 This coupled with the narrow view taken of need has led to submissions from the claimants that it amounts to the imposition of a quota for Gypsies and Travellers and so amounts to unlawful discrimination on grounds of race. There is no doubt and the Council accepts that the claimants are properly to be regarded as members of a racial group. Arguments in planning cases have often been raised that there is discrimination against Gypsies on the ground of their race. This issue has been taken to the ECtHR. In *Chapman v U.K. (2001) 33 EHRR 18* the Court considered the matter in some detail. The case involved a refusal of planning permission and enforcement action against the siting of the applicant's caravan in the Green Belt. Her 90 year old father, who suffered from senile dementia and needed constant care including medical care lived with the applicant. The applicant suffered from depression and a heart condition and her husband received treatment from his doctor and at hospital for arthritis.

43 The Court noted that it was impossible to challenge the national authorities' judgment that there were in an individual case legitimate planning objections to a particular use of a site. I am incidentally aware that there have been appeals relating to all the sites and in each the decision has been that the planning objections outweigh the needs of the claimants. There is a process for challenging those conclusions; it has not been successful and in the one outstanding case I am satisfied that the chances of success are indeed very low. The court recognised that it could not

decide for itself how the balance of interests between the community and the rest of the population should be ascertained so that it had a purely supervisory role. I have recognised that my role is perhaps somewhat wider since I am aware of and so must apply the national government guidance as to how that balance should be properly achieved. Nevertheless, the caveat is to be borne in mind, particularly as the democratically elected Council is the decision maker, not the court. Thus (subject to questions of perversity which do not arise in this case) if the Council has regard to all that it should, its decision cannot be impugned.

44 In Paragraph 95 of the judgment, the Court said:—

> "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."

Further, in Paragraphs 97 and 98 this is said:—

> "97. It is important to appreciate that in principle Gypsies are at liberty to camp on any caravan site which has planning permission; there has been no suggestion that permissions exclude Gypsies as a group. They are not treated worse than any non-Gypsy who wants to live in a caravan and finds it disagreeable to live in a house. However, it appears from the material placed before the Court, including judgments of the English courts, that the provision of an adequate number of sites which the Gypsies find acceptable and on which they can lawfully place their caravans at a price which they can afford is something which has not been achieved.
>
> 98. The Court does not, however, accept the argument that, because statistically the number of Gypsies is greater than the number of places available in authorised Gypsy sites, the decision not to allow the applicant Gypsy family to occupy land where they wished in order to install their caravan in itself, and without more, constituted a violation of Article 8 . This would be tantamount to imposing on the United Kingdom, as on all the other Contracting States, an obligation by virtue of Article 8 to make available to the Gypsy community an adequate number of suitably equipped sites. The Court is not convinced, despite the undoubted evolution that has taken place in both international law, as evidenced by the Framework Convention , and domestic legislations in regard to protection on minorities, that Article 8 can be interpreted to involve such a far-reaching positive obligation of general social policy being imposed on States."

45 The Court went on to observe in Paragraph 102 that it would be "slow to grant protection to those who, in conscious defiance of the prohibitions of the law, establish a home in an environmentally protected site. For the Court to do otherwise would be to encourage illegal action to the detriment of the protection of the environmental rights of other people in the community". The Court was not persuaded that, although there were no sites available in the vicinity, there was nowhere where the applicant could lawfully site her caravan. The conclusion was (Paragraph 115):_

> "The humanitarian considerations which might have supported another outcome at national level cannot be used as the basis of a finding by the Court which would be tantamount to exempting the applicant from the implementation of the national planning laws and obliging governments to ensure that every Gypsy family has available for its use accommodation appropriate to its needs. Furthermore, the effect of these decisions cannot on the facts of this case be regarded as disproportionate to the legitimate aim being pursued."

46 The claimants submit that the admitted absence of any authorised sites serves to distinguish Chapman on its facts. That is clearly a matter which is relevant to whether in a particular case enforcement is proportionate, but it does not prevent it being so, provided always that the

decision maker has had proper regard to the weight to be attached to the absence of any alternative site. But the considerations set out in the judgment of the majority of the Court are material and must be taken into account. Thus the reluctance to allow advantage to be taken of a deliberate breach of the law is obviously a highly important factor.

47 The claimants submit that the Council's approach amounted to direct discrimination within s.1(1)(a) of the Race Relations Act 1976 . Section 3(4) of the Act requires that the comparison of the case of a person of a particular racial group with that of a person not of that group must be such that the relevant circumstances in the one case are the same or not materially different to the other. The reality here is that the objection is to development in the Green Belt. Anyone, Gypsy or non-Gypsy, who carries out such development will suffer the same consequences. The Council's reasons for believing they have no duty to provide further sites are based upon the view that it has done what it should to provide an adequate number of sites. That will mean that the prohibition on development of this sort will fall more heavily on Gypsies than on others. There is in my judgment no direct discrimination.

48 It is argued that there is indirect discrimination within the meaning of s.1(1)(b) of the Act inasmuch as a requirement or condition is applied equally to all but is such that the proportion of persons of the same racial group as the other who can comply with it is considerably smaller than the proportion of persons not of that special group who can comply with it. The prohibition on development in the Green Belt affects all. But the submission is that the imposition of a requirement of need to justify any authorisation to site a caravan in Basildon means that others than Gypsies can more easily avoid seeking to establish residence in the Green Belt. It is clearly easier for someone prepared to live in bricks and mortar to find accommodation in Basildon and so those who need to site a caravan are at a disadvantage. This does not of itself justify siting in the Green Belt, but it does mean that the legitimate sites for them are fewer. I am persuaded in the circumstances that there is indirect discrimination. But the justification will in the context of cases such as these be based on the same test as applies to Article 8 , namely proportionality. In fact, the special needs of Gypsies are taken into account in considering whether there are the necessary very special circumstances which can allow such development in the Green Belt and a number of such permissions have been given, some temporary, some permanent. Thus even if there is indirect discrimination, the approach applied through the planning system means that there is nothing offensive to the 1976 Act in the presumption against inappropriate development in the Green Belt and the enforcement of refusals of planning permission: cf observations of Owen J in *R v Runnymede BC ex p Smith (1994) 70 P&CR 244* at p.248. If enforcement is proportionate so that Convention rights are not breached so it will be justifiable under s.1(1)(b)(ii) of the 1976 Act.

49 The EHRC's main concern has been to explain the relevance in these claims of the duty on public authorities to promote equality of opportunity and good race relations. That duty, which was introduced following the Macpherson Report on the Lawrence murder by the Race Relations (Amendment) Act 2000 , is contained in s.71 of the 1976 Act. Section 71(1) provides:—

> “Every body or other person specified in Schedule 1A [which includes in Paragraph 12 local authorities] … shall, in carrying out its functions, have due regard to the need —
>
> (a) to eliminate unlawful racial discrimination; and
>
> (b) to promote equality of opportunity and good relations between persons of different racial groups.”

50 The EHRC issues Codes of Practice , as did its predecessor the Commission for Racial Equality (CRE), (whose Codes remain effective until the EHRC requests otherwise), which give guidance and set out what a body subject to the duty should do. The CRE had been concerned for some time about the level of discrimination experienced by Gypsies and Travellers and took steps to try to ensure that local authorities had proper regard to and understood their obligations under the 1976 Act generally and in particular under s.71 . Since being aware of the proposed enforcement in 2005, the CRE engaged in correspondence with the Council because it formed the view that the Council was not complying with its duties under the 1976 Act and had not applied the guidance in the Code of Practice . In particular, it had failed to consider or to publish a Race Equality Scheme . The EHRC's view is that even now the Council's scheme is defective,

but it has decided at the moment not to go to the County Court to take enforcement action.

51 The history of the Council's apparent reluctance to comply with its duty in the past is of some relevance. My concern is whether in taking the enforcement decisions it did have due regard to the three strands identified in s.71 , namely the need to eliminate racial discrimination, provide equality of opportunity and good race relations. In the reports to committee, the need to have regard to the objectives set out in s.71 and to avoid discrimination is identified. It is stated that the Council has 'assessed the race equality duty as having high relevance to its functions of development control and Forward Planning'. The advice continues:—

> "The assessments initial findings show that in particular in relation to PPG2 and PPG18 there is significant adverse impact on Gypsies and Travellers in their application of Green Belt policy and its enforcement. There is however no direct discrimination. Actions, which result in such adverse impact, are not unlawful if justified. For a decision to be justified it must correspond with a legitimate aim and be proportionate.
>
> There is thus in the present case a conflict between the adverse impact on Gypsies and Travellers, and the requirements of planning control. Due regard must be paid to the need to eliminate unlawful discrimination and to promote equality of opportunity and good race relations when weighing these conflicting interests. The officers consider that there are legitimate aims in seeking to uphold planning policy, and given the legitimacy of such aims, enforcement action is proportionate. However, any enforcement should be carried out in an appropriate way that does not have the effect of damaging good race relations over and above the effect produced by the fact of enforcement."

52 The concern of the EHRC, expressed through a witness statement from a senior lawyer, is that greater consideration should have been given to how it would mitigate the adverse impact on the claimants. The witness states:—

> "It should also have explained more clearly why in this particular case planning policy should be given greater weight than the need to promote good race relations, rather than merely stating that complying with planning policy per se was a legitimate aim."

Concern is expressed and followed in Mr Allen's submissions that due regard was not had within the meaning of s.71 .

53 The Court of Appeal has recently considered the duties arising under s.71 in the planning context. The case in question, *R(Baker & Others) v Secretary of State and London Borough of Bromley [2008] EWCA Civ 141* , concerned applications under s.288 of the 1990 Act against refusals of planning permission for the retention of caravans by Gypsies set up in the Green Belt. The EHRC intervened and submissions were made on its behalf by Mr Allen. The inspector had not specifically referred in her decision to the s.71 duty and so it was submitted that the decision was flawed because the duty could not be performed unless the decision maker demonstrated by the language in which he expressed his decision that he was conscious that he was discharging the duty.

54 That submission was rejected. Dyson LJ, who gave the only reasoned judgment, agreed with observations of Ouseley J in R(Smith) v South Norfolk Council [2006] EWHC 2772 (Admin) (another Gypsy case in which similar arguments to those put forward in Baker were raised). In Paragraph 87, Ouseley J said:—

> "I do not accept the submissions made by [counsel] that s.71 was concerned with outcomes; ultimately of course it is aimed at affecting the way in which bodies act. But it does so through the requirement that a process of consideration, a thought process, be undertaken at the time when decisions which could have an impact on racial grounds or on race relations, to put it broadly, are being taken. That process should cover the three aspects identified in the section."

This led the court to accept that a failure to refer specifically to the race equality duty under s.71

could not render the decision unlawful provided that it was apparent that the decision maker made clear that he has in substance had due regard to the relevant statutory duty. Equally, to refer to the statutory duty does not of itself show that the duty has been performed.

55 Mr Allen submitted that the officer's reference to the duty did not in this case show that due regard had been paid since the history of the Council's dealings with the CRE and the decision to enforce despite the lack of any lawful site indicated that due regard could not have been had. That submission is to an extent based on the contention that to evict and so compel the claimants to take up unlawful residence on the roadside or perhaps some other unsatisfactory location would inevitably not only not promote equality of opportunity for the claimants but would harm good relations with those who were affected by the further unlawful encampments and would not assist in eliminating racial discrimination. The dangers he refers to are obvious. But there is also an adverse effect on good relations if the claimants are allowed to remain where they are. There is an inevitable feeling that they are able to breach planning laws and so are getting favourable treatment even though the planning process has established that their personal circumstances do not entitle them to remain. Thus in considering whether eviction should take place, the harm in terms of the race equality duty under s.71 has to be balanced. It is not all one way and the considerations of upholding the protection of the environment and the undesirability of permitting a continued breach of the criminal law must be put in the balance and can mean that eviction is proportionate and justifiable.

56 In Baker , Dyson LJ set out the approach that should be adopted to consideration of the race equality duty and the matters that should be balanced in decisions relating to situations such as those which apply in these claims. In paragraphs 30 to 34 of his judgment, he says this:—

> “30. We had detailed submissions from Mr Allen as to the meaning of section 71(1) and in particular the promotion of equal opportunity limb of section 71(1)(b). I shall summarise his principle submissions briefly, because they were not disputed by Mr Coppel. First, the duty is imposed on a large range of public authorities. This demonstrates its importance as a national tool for securing race equality in the broadest sense. Secondly, promotion of equality of opportunity (and indeed good relations) will be assisted by, but is not the same thing as, the elimination of racial discrimination. Mr Drabble emphasised that his case on behalf of the appellants was not based on an allegation of racial discrimination. Thirdly, the promotion of equality of opportunity is concerned with issues of substantive equality and requires a more penetrating consideration than merely asking whether there has been a breach of the principle of non-discrimination. Fourthly, the duty is to have due regard to the need to promote equality of opportunity (and good relations) between the racial group whose case is under consideration and *any* other racial groups. The reference to any other racial groups may be no more than a reference to the general settled community. Fifthly, the equality of opportunity is of opportunity in all areas of life in which the person or persons under consideration are, or may not be, at a disadvantage by reason of membership of a particular racial group. In practice, this is likely to include disadvantage in the field of education, housing, healthcare and other social needs.
>
> 31. In my judgment, it is important to emphasise that the section 71(1) duty is not a duty to achieve a result, namely to eliminate unlawful racial discrimination or to promote equality of opportunity and good between persons of different racial groups. It is a duty to *have due regard to the need* to achieve these goals. The distinction is vital. Thus the Inspector did not have a duty to promote equality of opportunity between the appellants and persons who were members of different racial groups; her duty was to have due regard to the need to promote such equality of opportunity. She had to take that need into account, and in deciding how much weight to accord to the need, she had to have *due* regard to it. What is *due* regard? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing.
>
> 32. In the context of the present case, the areas of the appellants' lives affected by the inequality of opportunity are of central importance to their well-being, and the extent of the inequality of opportunity is substantial. As is clearly stated at Pragraph 5 of Circulcar

> 01/2006 , Gypsies and Travellers suffer the worst health and education status of any disadvantaged group in England and there is pressing need to promote equality of opportunity in these areas between Gypsies/Travellers and the general settled community in order to eliminate the problem. Again as recognised by the Circular, an effective way of achieving this is to reduce the number of unauthorised encampments and developments and increase the number of Gypsy and Traveller sites in appropriate locations with planning permission.
>
> 33. On the other hand, the fact that the appeal sites are on Green Belt land is a powerful countervailing factor: see paras.3.2 and 3.3 of PPG2 . It is common ground that the residential use of all 3 appeal sites is “inappropriate development” within the meaning of Para3.4 of PPG2 . Paras. 49, 50 and 71 of the Circular make it clear that PPG2 applies with equal force to applications for planning permission from Gypsies and Travellers.
>
> 34. Thus, in discharging the duty to have due regard to the need to promote equality of opportunity in this case, the Inspector was required to take into account the need to promote equality of opportunity for the appellants to have housing which would enable them to have access to education, healthcare and other social needs. But she also had to take into account the powerful countervailing imperative of PPG2 . Ultimately, how much weight she gave to the various factors was a matter for her planning judgment.”

57 It is suggested that the officers' reports fail to discuss or consider properly ameliorative measures, in particular the giving of time until an alternative site is found. But the committee was well aware of the planning decisions which had considered but rejected the possibility of temporary permission or, beyond the extensions of time for compliance granted on earlier enforcement appeals, any further time within which there could be compliance. Under the heading ‘enforcement action’ in each report the officers have clearly set out the relevant obligations to consider the effect on the claimants if they are to be evicted. The lack of alternative sites and the view of the Secretary of State and her Inspectors that there was a need disclosed by the extent of the unauthorised encampments (a view which was not entirely accepted by the Council) were drawn to member's attention as material considerations.

58 Despite Mr Allen's lengthy and detailed submissions, I have no doubt that it is impossible to conclude that the Council was merely paying lip service to the race equality duty. The officers' reports spelt out correctly the considerations that had to be taken into account. It has not been submitted that the decision to evict was perverse. In those circumstances, it cannot properly be suggested that the committee ignored the advice given to it in the reports.

59 Mr Allen sought to rely on a failure to take into account the Council's disability and gender duties. As has already been noted, many of those affected by the proposed evictions suffer from poor health and in at least three cases, their conditions are likely to amount to disabilities. Section 49A of the Disability Discrimination Act 1996 (as amended by the Disability Discrimination Act 2005) requires public authorities in carrying out their functions to have due regard inter alia to the need to promote equality of opportunity between disabled persons and other persons and the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons. There are further requirements specified in Regulations to produce a Disability Equality Scheme (DES), which must set out the steps which the body in question is taking to fulfil its equality duty.

60 It may well be that the Council has not so far been pro-active in fulfilling its obligations to produce a DES . But this does not of itself mean that the decisions with which I am concerned are flawed. There is no doubt that the committee's attention was drawn to the health and other problems suffered by the claimants, but it is true to say that there was no specific reference to the disability equality duty in respect of those (if any) who should be regarded as disabled. The definition of disability in the Act is fairly wide. Section 1(1) reads:—

> “… [A] person has a disability for the purposes of the Act … if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.”

61 The Code of Practice issued for the purposes of the Act, which has Parliamentary approval,

states:—

> "The purpose of impact assessment is both to ensure that an authority's decisions and activities do not disadvantage disabled people, and also to identify where they might better promote equality of opportunity, including consideration of where the different parts of the Disability equality duty (such as promoting positive attitudes) might be built into those policies and practices."

No doubt in reaching any decision the body in question must have due regard to those objectives.

62 Subject to what I have already said in paragraph 40 about the need to consider individual circumstances, the balancing exercise which is relevant to the race equality duty will be the same as that for the disability equality duty. Mr Epstein submitted that the details of the individuals' health needs, which would include possible disability needs, were before the committee and so there was in substance compliance with the duty. Thus the absence of reference to the duty was of no relevance — the Council had proper regard but formed the view, consistently with that formed on the planning appeals, that those needs did not outweigh the factors which favoured eviction.

63 It is, I think, of some materiality that those advising the claimants did not until the EHRC raised the points seek to rely on an alleged breach of s.49A of the Act. They recognised that what was important was whether the Council properly took into account the health problems. This the Council did. Accordingly, I am not persuaded that the failure to refer specifically to the duty or to have produced a DES shows that there has been a breach.

64 Mr Allen also raised gender discrimination and the similar duties arising under the Sex Discrimination Act 1975 as amended. This is indeed to promote form over substance. It is not possible to see the relevance of any gender equality duty or rather of any alleged failure to have due regard to it.

65 There can be no doubt that the claimants cannot remain where they are and that the time must come when they will have to leave, whether voluntarily or by means of forcible eviction. Despite the difficulties they face and the absence at present of sufficient sites to meet their needs, Travellers and Gypsies must appreciate that the law will not tolerate developments without planning permission being obtained, particularly on Green Belt land, and will be likely to uphold enforcement action where the individual circumstances of those affected have been properly considered against the harm to the environment and to relations with the community. Nevertheless, it is necessary for all relevant matters to be properly taken into account and it is impossible not to have some sympathy with the problems created for Gypsies and Travellers by the lack of sufficient sites to cater for their proper needs.

66 I have no doubt that a decision to enforce under s.178 is likely to be unassailable in respect of most and perhaps all of the claimants in due course. But there are concerns which I have already spelt out. It seems to me that the approach to need has been too restrictive and that, following in particular the EERA report (albeit not accepted by the Council), further consideration should be given to whether any sites can be found in the district and whether any families can be allowed to remain for the time being. In addition, I do not think the possible effects of the homelessness duty have been sufficiently dealt with in the advice given to the committee. Finally, I think that the approach has been that the sites should be cleared rather than a consideration of whether there are any individual families whose circumstances are such, whether because of serious ill-health or the needs of their children, that in their individual cases eviction would be disproportionate. I am not to be taken as saying that there necessarily are any such, but I think that possibility should have been drawn to the committee's attention.

67 I am conscious that this decision may mean no more than that a little more time is given to the claimants and the Council may feel that yet further delay is to be deprecated. Nonetheless, the decision, whichever way it goes, must be based on consideration of all that is relevant. But in the circumstances for the reasons I have given I am persuaded that the decisions of 13 December 2007 cannot stand.