Evictions by Local and Other Public Authorities from Unauthorised Encampments

Introduction

This paper will deal with the position in England.[1] In the Traveller Caravan Count carried out by the Department for Communities and Local Government (DCLG) in July 2015, it was recorded that 1,201 caravans were on unauthorised encampments. It should be pointed out that it is widely accepted that the caravan count is always an underestimate.

This paper will look at potential challenges to eviction actions against unauthorised encampments and will also look at the history of such challenges over the past 20 years or so.

It is widely accepted (including by the current Government) that the already severe health and educational problems suffered by the Gypsy and Traveller communities are exacerbated by frequent evictions and the uncertainty of life and lack of services and facilities on unauthorised encampments (see, for example, Greenfields and Brindley *Impact of insecure accommodation and the living environment on Gypsies' and Travellers' health*, National Inclusion Health Board, January 2016).

Methods of Evictions

All public authorities can use County Court Civil Procedure Rules (CPR) Part 55 to evict Gypsies or Travellers.

Additionally local authorities can use Criminal Justice and Public Order Act (CJPOA) 1994 Section 77.

Government guidance indicates that public authorities should always seek eviction, if necessary, by way of court action. Public authorities and especially local authorities should not be using common law powers of eviction.

In terms of the use of CPR Part 55 and/or CJPOA 1994 Section 77, there may be a substantive defence if the conditions for using either Part 55 or Section 77 are not met or if there is a straight defence e.g. that the public authority taking a possession action has not proved their ownership of the land or, in terms of Section 77, the accused can "show that his failure to leave or to remove the vehicle or other

[1] In terms of Wales, all of this paper applies except as follows:

(i) The Housing (Wales) Act 2014 section 103 introduces a duty to meet the assessed need for sites. It is expected that this will be brought into force in March 2016. Once the duty is in place, Gypsies and Travellers may be able to challenge a proposed eviction from local authority land where that same local authority has not complied with the duty – see *West Glamorgan CC v Rafferty* [1987] 1 WLR 457.

(ii) The relevant guidance in Wales is Welsh Office Circular 76/94 (which is identical to DoE Circular 18/94) and Welsh Government *Guidance on Managing Unauthorised Camping* (2013 - which is much more extensive than the English guidance).

property as soon as practicable or his re-entry with a vehicle was due to illness, mechanical breakdown or other immediate emergency" (Section 77 (5)).

Challenges to Eviction Action

The case of *R - v - Lincolnshire County Council ex parte Atkinson, Wealden District Council ex parte Wales and Stratford* (1996) 8 Admin LR 529, concerned an eviction action and the Department of Environment (DoE) Circular 18/94. Sedley J (as he then was) stated:-

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

Local and other public authorities must take account of the relevant government guidance which is: DoE Circular 18/94; Office of the Deputy Prime Minister (ODPM) *Guidance on Managing Unauthorised Camping* (2004); and ODPM/Home Office *Guide to Effective Use of Enforcement Powers - Part 1 : Unauthorised Encampments* (2006). It should be noted that the Government withdrew the 2006 Guidance on August 31st 2015 at the same time as they introduced the new *Planning policy for traveller sites* (PPTS). After a threat of a challenge from a Romani Gypsy, the Government conceded that they had failed to take account of the Public Sector Equality Duty under the Equality Act 2010 in removing the 2006 Guidance and they immediately reinstated it.

One of the main thrusts of the guidance is that local and other public authorities must take account of welfare considerations before deciding whether to seek eviction of an unauthorised encampment. This must involve some kind of enquiry process and then some form of proper consideration of the results of that enquiry process. It should not be a mere formality.

In addition to this case law has shown that it is very important to take account of whether there are alternative locations before deciding to evict an unauthorised encampment. In *R (Casey and Others) - v - Crawley BC* [2006] EWHC 201 Admin, Burton J framed three options that were available to the defendant local authority:-

i) To seek and obtain possession of the site (option 1);

ii) To tolerate the Travellers, if only for a short term, until an alternative site can be found (option 2);
iii) To find an alternative site, if only on a temporary basis, and offer the Travellers a move to it (option 3).

Additionally, Article 8 of the Human Rights Act 1998 (the right to respect for private and family life and home) must be taken into account and it must be decided whether the decision to evict is "proportionate" or not. There are complex arguments about how precisely this should be carried out that I will not go into here.

In terms of Article 8 it is important to have reference to the cases of *Yordanova - v - Bulgaria* [2012] ECHR 758 and *Winterstein - v - France* [2013] ECHR 984.

If a Gypsy or Traveller has made a homelessness application to a local authority relying on the case of *R (Price) - v - Carmarthenshire County Council* [2003] EWHC 42 Admin, and if the Gypsy or Traveller is camping on a piece of the same local authority's land, then it can be argued that he or she should be allowed to remain there while the homelessness application is progressed, providing that he or she is not causing any nuisance or obstruction.

Specific Issues

The definition of Gypsies and Travellers for the purposes of the guidance.

Some local authorities insist that Gypsies and Travellers should come within some specific definition before they apply the relevant guidance. It is true that DoE Circular 18/94 has the (old) definition of 'gypsies' but the 2004 ODPM Guidance has a very wide definition and the 2006 Guidance simply uses the definition contained in the 2004 Guidance. Therefore the most detailed guidance available with regard to unauthorised encampments uses a very wide definition of Gypsy and Traveller and we would urge all local authorities to do likewise. Just to re-emphasise the position, the 2004 guidance uses the following meaning:-

Gypsies and Travellers: used as a generic term to denote the whole population of those groups families and individuals who subscribe to Gypsy/Traveller culture and/or lifestyle, the term encompasses ethnic Gypsies and Travellers and those who fall within the legal definition of a 'Gypsy' (s24 of the Caravan Sites and Control of Development Act 1960 as amended by s80 of the Criminal Justice and Public Order Act 1994).

We would suggest that all Gypsies and Travellers should be taken into account when local authorities are having reference to the guidance and, if a local authority fails to do so, they may well leave themselves open to legal challenge.

28 days

Some local authorities argue that they cannot 'tolerate' an encampment for more than 28 days. This argument stems from the Town and Country Planning (General Permitted Development) Order 1994 which includes certain caravan uses such as use by a person travelling with a caravan for one or two nights. The total period of time allowed for such usage over a year is 28 days. The fact is that local authorities are also local planning authorities. They have a discretion to decide whether to insist on a planning application or planning permission in certain circumstances or not. They also have a discretion with regard to their own land. The most obvious question is:- who is going to prosecute them if they do not have planning permission for a piece of land where Gypsies or Travellers stay for longer than 28 days? The only slight possibility of prosecution would be where there had been an encampment tolerated for a very long time by the local authority and that encampment had caused immense nuisance to locals. However, provided there is some form of agreement with the Gypsies or Travellers concerned about the standard of behaviour expected, then we would see absolutely no problem in allowing encampments to stay for well beyond 28 days if people are not causing nuisance and/or anti-social behaviour. Many local authorities around the country allow encampments to stay in place for very long periods of time when they are on appropriate pieces of land (and, as we say above, usually subject to some form of agreement between the local authority and the Gypsies and Travellers concerned).

Implied tenancies

There is a certain concern amongst local authorities that, if they tolerate encampments, it will be stated that there is an implied tenancy.

To start with, protection under the Mobile Homes Act 1983 (even for transit sites), is only available where there is planning permission for the piece of land in question.

Aside from that, there needs to be a clear agreement between the local authority and the Gypsy or Travellers concerned before it would be said that there was any licence or similar agreement - see *Steward - v - Royal Borough of Kingston-upon-Thames* [2007] EWCA Civ 565, CA.

In conclusion on this point, there is no problem for a local authority to enter into a "toleration agreement" without creating a licence. Even if a formal agreement is entered into that, at best, creates a licence and a licence can very easily be terminated (indeed, simply subject to the terms of the licence itself).

Conclusion

The Travellers Advice Team (TAT) at the Community Law Partnership (CLP) was set up in August 1995. Originally, we were lodging vast numbers of judicial reviews against local authorities who were failing to follow government guidance, not carrying out welfare enquiries, not considering alternative locations and not acting

in a reasonable or proportionate manner. Over the years there has been something of a sea change in the attitude of local authorities. Originally it was very unusual to come across a local authority that had a written policy and, on the other side of the coin, it was very common to come across zero toleration policies. Now it is very rare to come across a local authority that does not have a written policy and equally rare to come across a local authority that does not at least attempt to carry out welfare enquiries etc.

This does not mean that we have arrived at the "sunny uplands". There are still many failures to deal with the matters that have been addressed above. Nevertheless it is the case that court challenges over the years have led to a situation where there has been a vast improvement across England in the way that unauthorised encampments and the question of potential eviction of those encampments is dealt with.

A good example is provided by the approach of the Forestry Commission (which comes under the auspices of the Secretary of State for the Environment, Food and Rural Affairs (SSEFRA)). Over the initial years of TAT we had many challenges to the SSEFRA over the way they dealt with the evictions of Gypsies and Travellers. Then there was a change of approach in the Forestry Commission. They produce their own guidance. They began to enter into agreements and to tolerate encampments provided the Travellers kept to such agreements. Since then there have been virtually no legal challenges to any eviction action by SSEFRA.

This links in directly to the question of Leeds style "negotiated stopping agreements". Such agreements will clearly save enormous amounts of time, effort and costs with regard to avoiding any necessity for the eviction of unauthorised encampments (apart from when Gypsies and Travellers are not acting reasonably or are on totally inappropriate locations).[2]

TAT at CLP
26th January 2016

Reading Matter:- Legal Action *Gypsy and Traveller Law* 2nd Edition 2007 (3rd Edition is under construction). Annual updates in the Legal Action magazine. Information on cases, consultations, reports and other issues on the CLP website at www.communitylawpartnership.co.uk.

[2] See the excellent report by Leeds GATE *Assessing the Potential of Negotiated Stopping*, February 2016.
We would add that we do not see why there should not be 'negotiated stopping' with Gypsies and Travellers who are in transit. We further feel it would be extremely useful if there was a national database of local authority, police and other public authority policies on unauthorised encampments.