HIGH COURT CHALLENGES TO DECISIONS TO TAKE ENFORCEMENT ACTION

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INTRODUCTION

'Enforcement' means planning enforcement (s187B injunction, direct action under s178, stop notice).

Do not suggest that there is anything unique about such challenges: are ordinary judicial reviews. But some particular points have arisen in challenges of this sort over the last 10 years which are unlikely to be relevant where the subject matter of the judicial review is not an enforcement measure of some kind.

Almost all cases concern gypsies. Taking enforcement action against gypsy caravans involves interfering with A8 rights.

The scenarios:

1. Gypsies own a piece of land and move on in breach of planning control. The local planning authority normally serves an enforcement notice; that is appealed (appeal suspends the notice). There may also be a planning application. There is then an inquiry. If the gypsies win, that is the end of the matter. If they lose they tend to stay put. Council will then want to enforce the enforcement notice. It can do this by prosecution, injunction or direct action under s178. This talk is about challenges to decisions to take these steps. In this scenario there will have been exhaustive consideration of the planning merits.

2. The local planning authority has power to take enforcement action right at the start of this process by a stop notice (I am not going to talk about temporary stop notices). A stop notice is parasitic on an enforcement notice and has effect in the period before the enforcement notice comes into effect. If the enforcement notice is quashed on appeal the stop notice will also fall. If the enforcement notice is upheld the stop notice will continue in effect until the enforcement notice comes into effect. There is a limited risk of having to pay compensation if a stop notice has been served and the underlying enforcement notice is quashed. A stop notice can require that use of land for the stationing of caravans shall cease. Stop notices are relatively rare, especially in gypsy cases, because of fear of a legal challenge.

3. Gypsies may be trespassing on the Council's land and the Council will start possession proceedings. In a number of cases challenges to the decision to start possession proceedings have been made.

SOME INTERESTING GROUNDS WHICH HAVE COME AND GONE

Start with some interesting grounds of challenge which have come and gone.

Stop notice regime incompatible with A14?

R (Wilson) v Wychavon DC [2007] EWCA Civ 52 – 6.2.07
S183 no longer has any exemption preventing its use against the stationing of caravans – it used to, and there is a limited exemption in the use of TSNs against caravans. There is an exemption preventing its use against the use of buildings as dwelling houses. Was said that this was discriminatory and so incompatible with A14.

The Government accepted that the absence of an exemption is indirectly discriminatory since it is more likely to affect gypsies adversely than members of the settled community (paragraph 27). CA accepted that the indirect discrimination was justified. The reasoning was as follows -

> The protection of the environment is a legitimate aim which justifies interference with human rights; the courts accord Parliament a discretionary area of judgment in framing legislation on these matters (although the scope of this will vary); the inclusion of caravans is not aimed at gypsies and so does not involve direct discrimination; the fact that a less restrictive solution might have been possible is not fatal; it can readily be seen why Parliament conferred exemption in the case of dwelling houses (local planning authority would have adequate opportunity to take enforcement action against the construction of a new building before it is occupied; the change of use of an existing building to use as a dwelling house will probably involve little harm to the environment whereas caravans can have serious effects on public amenity); may be a need for urgent action against caravans; decision in any *particular* case must respect A8 rights of occupants.
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> As for the more stringent approach applied to TSNs, the whole point of a TSN is that it can be used before the Council has had a full opportunity to make a proper decision on the planning merits; this means that it is more likely to be used in cases where it turns out that it should not have been.

Can regard point as settled.

Direct action to achieve a residential eviction inherently disproportionate?

In a series of cases it has been argued that it is inherently disproportionate to use direct action under s178 to evict gypsies. The argument is that a s187B injunction should *always*

be preferred as a 'less interfering' measure since the injunction route offers greater procedural protection to the gypsies.

There are four first instance decisions in which this has been raised and rejected -

> *R (Mitchell) v Horsham DC* [2003] EWHC 234 Admin – 14.2.03
> *R (Lee) v Nuneaton BC* [2004] EWHC 950 (Admin) – 21.4.04
> *R (O'Brien) v Basildon* [2006] EWHC 1346 (Admin) – 12.4.06
> *R (Smith) v S Norfolk Council* [2006] EWHC 2772 (Admin) 10.11.06

See especially *O'Brien*

> At the planning merits stage the need for gypsy sites and the harm to the environment are weighed; the planning decision-making process is demonstrative of proportionality; there is no suggestion of any limit on the availability direct action and the interposition of the court is not necessary to make the removal of caravans by direct action proportionate; great, even decisive weigh can properly be given to effective enforcement of the criminal law, meaning that effective enforcement, even a residential eviction, is capable of being proportionate; judicial review and the procedures for substantive decision-making in planning provide all the procedural protections necessary.

Can probably regard the point as being settled too.

But note that there appears to be an obligation on the local planning authority to consider all the alternative options (do nothing, injunction, CPO) before deciding on direct action (*R (Lee) v Nuneaton*) and also whether it would be appropriate to take action against only some of the gypsies (*R (McCarthy) v Basildon*).

Challenging lawfulness of decisions to seek injunction by way of separate judicial review?

R v Basildon DC ex p Clarke unreported
The Council was seeking an injunction in the County Court – the judge refused to adjourn the injunction proceedings so that the Defendants could mount a judicial review to challenge the decision to seek the injunction. Carnwath J said that judge had been correct.

> "If something had gone seriously wrong with the procedure whether in the initiation of the injunction proceedings or in any other way, it was difficult to see why the county court judge could not properly take it into account in the exercise of his discretion to grant or refuse the injunction."

This was pre-*Porter* (when there was a view that the extent of the court's discretion in injunction proceedings was fairly limited).

With *Porter* and the recognition of an original jurisdiction the point became less important – Defendants could raise defects in the local authority decision in trying to persuade the judge not to make injunction (both Simon Brown LJ and Lord Bingham indicated that the quality of the authority's decision would be relevant to the balance).

R (Ahmed) v Herefordshire DC [2004] EWHC 1070 (Admin) – 12.3.04
Permission was refused for judicial review to challenge a decision to take s187B action; it was said that the challenge should be made in the County Court.

SCDC v Gammell [2007] EWHC 2919 (QB) – 7.12.07
The Defendant accepted the logic of this and attempted to raise the alleged unlawfulness of the decision to start the injunction proceedings in the injunction proceedings themselves, arguing that the Council should be 'non-suited'. The Court took the predictable approach and dealt with the complaints as matters relevant to whether an injunction should be granted - the logic of Defendant's case was of course that court should not get to stage of considering whether to make an injunction. Obviously there will be cases where this could be the result – eg the decision was outwith the relevant standing orders.

MATERIAL CONSIDERATIONS IN ENFORCEMENT DECISIONS

Prospects of the development getting planning permission

Stop notice

A stop notice can prevent the use of land for the stationing of caravans and carries a criminal sanction. One might think that it therefore achieves everything that an injunction does with much less trouble to the local planning authority.

But the whole point is that a stop notice operates *before* the enforcement notice comes into effect. Therefore the only assessment of the planning merits will be that made by the authority itself. I am sure that the reason for the widespread reluctance to use stop notices (or indeed to seek an injunction at an early stage to remove caravans) is the fear of judicial review on basis that Defendants have a real prospect of planning permission and that it would be unreasonable/disproportionate to throw them off the site in meantime. I have known cases where such judicial reviews have been threatened: I am not aware of any reported decision. Can take it that this argument would have force.

Enforcement of upheld enforcement notice by direct action or injunction

Where an enforcement notice has come into effect the Defendant will have had the opportunity to appeal and to argue that planning permission should be granted.

If there has been an appeal the local planning authority will be able to show there has been an exhaustive consideration of whether the development is deserving of planning permission and that its decision to proceed with enforcement action took this into account – so the point will not arise.

But what if there has not been an appeal or if the planning circumstances change after the making/upholding of the enforcement notice – eg a new circular comes out?

R (O'Brien) v Basildon [2006] EWHC 1346 (Admin) – 12.4.06

This was not a case about changed circumstances, but it makes the position clear. The Council was seeking to take direct action. The enforcement notices were quite old and there had been fresh applications and a post C1/2006 inquiry was imminent. The Council had decided that it would not grant planning permission for the development but it did not address whether the Secretary of State might do so. It argued that the prospects of success on appeal were not a material consideration in its decision to take direct action (paragraph 173).

Ouseley J held that these prospects should have been taken into account. (Interestingly he held that they would not be relevant to decision to prosecute, although they might be relevant to mitigation (paragraph 176)).

In fact Ouseley J took it upon himself to decide that the Defendants did have reasonable prospects of success on appeal so that a decision to take direct action would not be proportionate – meaning that the Council had no freedom of choice in the matter (paragraph 194).

Welfare inquiries

Decision to exercise powers under s77 CJPOA 1994

R v Lincolnshire CC ex p Atkinson [1997] JPL 65

Did not concern gypsies or planning enforcement but decisions to seek a removal direction under CJPOA 1994 against two groups of New Age Travellers.

C18/94 reminds local authorities of their responsibilities under social services and education legislation which are relevant if eviction takes place. Sedley J held that that these matters were considerations of common humanity and would be material considerations in any eviction decision even without the Circular saying so. He held that there needed to be some form of inquiry to ascertain if these duties were relevant.

In neither case had there been inquiries before the initial removal direction under s77 was made. In one of the cases there were inquiries afterwards, but before the Magistrates made a direction under s78. Sedley J declined to quash the initial direction in that case.

Decision to prosecute/seek injunction

R v Kerrier DC ex p Uzell 71 P&CR 566 (6.11.95)
Gypsies were parked on County Council land. The District Council served an enforcement notice which was upheld on appeal. The District Council decided to prosecute the landowner for breach of the enforcement notice or to seek an injunction if the landowner did not start possession proceedings. The Council argued unsuccessfully that it was not obliged to consider personal circumstances when taking decisions on planning enforcement. In fact it was held that the Council was adequately informed of these circumstances when the relevant decision was taken.

Direct action

R (Mitchell) v Horsham DC [2003] EWHC 234 Admin 14.2.03
The effect of *Atkinson* is similar to that of *South Bucks v Porter. Porter* deals with the court's discretion to make s187B injunctions: the upshot is that the court has to be adequately informed about the personal circumstances of a gypsy defendant before it will be prepared to make an injunction which requires him to remove his caravan.

It was said in *Mitchell* that the Council had to demonstrate that the interference was proportionate and that this meant following the approach of Simon Brown LJ in *Porter* (paragraph 46).

In enforcement cases this is no more than common sense – the decision-maker must inform itself about impact of action on individual concerned, especially where the object of enforcement action is to deprive individual of his home.

Possession proceedings

See now *Price* and *Doherty* (both concerning gypsies). These hold that even where a public authority has an unqualified right to possession, the court hearing a possession action will entertain a public law challenge to the decision to start proceedings - and that this can include a challenge based on *Atkinson* to the effect that authority had not adequately investigated the personal circumstances of those who will be affected. (Note in passing that one of the major issues in both cases was whether the right to challenge was confined to 'conventional' judicial review grounds or extended to 'human rights' grounds. Some of the majority relied on the fact that conventional judicial review now includes challenges on the ground that the decision maker has not made adequate inquiries into the personal circumstances of the Defendant and that this reduces the gap between the two bases for challenge.)

SOME MORE UNUSUAL GROUNDS

Race equality duty

S71 of the Race Relations Act 1976 (as amended) states that 'in carrying out their functions' various authorities, including local planning authorities, must have 'due regard' to the need to eliminate unlawful racial discrimination and to promote good race relations and equality of opportunity between the races. In discharging this duty authorities must take into account a code of practice issued by the CRE (now the EHRC). The code requires all authorities to have a race equality scheme, essentially a programme for assessing how the various policies of the authority achieve the race equality duty.

The present race equality duty has existed since 2000 but did not start to feature in judicial reviews until about 2005. There are three reported cases involving challenges to enforcement decisions where it has been raised:

> *R (Casey) v Crawley* [2006] EWHC 301 (Admin) - 1.3.06
> *R (Smith) v S Norfolk Council* [2006] EWHC 2772 (Admin) – 10.11.06
> *R (McCarthy) v Basildon* [2008] EWHC 987 (Admin) – 9.5.08 – there is an appeal

In all three it was said that, on the facts, the RED had not been taken into account. In *McCarthy* the EHRC intervened and argued that it was not enough just to say that greater weight should be given to enforcing planning policy (paragraph 52) and that enforcement action in circumstances where there were no alternative sites for the gypsies to go to indicated that due regard could not have been had (paragraph 55). This argument, if right, would mean that in certain/many cases enforcement action would simply be impossible.

In fact the most detailed consideration of the RED is in *Baker v SSE* [2008] EWCA Civ 141 (28.2.08), a s288 challenge to a decision letter to refuse planning permission for gypsy caravans – where the Inspector had not addressed RED at all (the parties had not mentioned it). The EHRC intervened. The site was in the Green Belt; the Inspector gave full consideration to the personal circumstances of the Appellants, the general need for additional gypsy sites, the apparent unavailability of pitches on alternative sites, human rights and the possibility of a temporary planning permission. The complaint was that the Inspector had not had due regard to the need to promote equality of opportunity between the Appellants (as Irish travellers) and different racial groups.

The CA held that Inspector was obliged to comply with RED even if no party mentioned it, but that she had in fact done so.

> The section 71(1) duty is not a duty to achieve a result, namely the elimination of unlawful racial discrimination or the promotion of equality of opportunity: it is a duty to *have due regard to the need* to achieve these goals. *Due* regard is the regard that is appropriate in all the circumstances. The circumstances include the importance of the inequality (regarded as substantial since inadequate housing means inadequate access to education and health care) and the countervailing planning factors (eg Green Belt). How much weight she gave to the various factors was a matter for her *planning* judgment.

The failure of an inspector to make explicit reference to the RED was not fatal, although it is good practice to refer to it.

The Inspector was alive to the plight of gypsies and travellers and the disadvantages under which they labour as compared with the general settled community. Relevant points which the Inspector had mentioned included -

> Gypsy status, which weighed in Appellants' favour; the only reason for this was that gypsies suffer from inequality of opportunity as compared with persons of different racial groups. By treating this as a factor which weighed in the Appellants' favour, she showed that she was having due regard to the need to promote equality of opportunity between them and persons of different racial groups.
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> Circular 01/2006, the underlying premise of which is that gypsies are disadvantaged as compared with persons of different racial groups.
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> The discussion of the need for additional gypsy sites in the area: persons of different racial groups in the area did not suffer from a lack of suitable sites to house them.
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> Discussion of lack of availability of pitches on the 5 authorised sites: 'it is implicit in this part of the decision that the Inspector was saying that the Appellants are at a disadvantage because persons of other racial groups in the area are not limited to the 5 authorised sites to meet their accommodation needs'.

A properly-reasoned planning decision will therefore satisfy the duty. The whole of planning policy in this area is of course based on positive discrimination. Members of two particular racial groups, English Romanies and Irish Travellers, get the benefit of this in acknowledgement of the inadequate provision made for them.

This is all very well for Inspector's decision letters. A local authority decision to take enforcement action is also subject to RED. To what extent does the report to committee have to show the same quality of consideration?

If there has already been an Inspector's decision dealing with these points, a subsequent decision by local planning authority to enforce decision could rely on this.

In *Smith* there had been a decision letter in 2005 and the Council was alert to s71; it even did a RIA on the proposed direct action. Ouseley J held that the scheme of the planning system meant that there was adequate opportunity for the s71 factors to be considered in the absence of express analysis.

In *McCarthy* there were very detailed reports and repeated reconsideration. The EHRC had been in correspondence with Council for some time. The reports made express reference to the RED. Collins J applied *Baker* and was able to conclude that the reports spelt out correctly the considerations that had to be taken into account. But what is the minimum requirement for a report to committee?

Housing duties

Under the Housing Act 1996 a local housing authority has duties to carry out investigations if a homelessness application is made by someone who appears to be homeless. If the LHA decides that that person is indeed homeless, in priority need and not intentionally homeless, it will owe a duty to provide assistance to him. If that person is a gypsy with a cultural aversion to bricks and mortar, the LHA will have to consider whether it is able to discharge this duty by providing a pitch on which he can station his caravan.

Someone who has no lawful place in which to reside (including no lawful place to station his caravan) is homeless.

Gypsies will often make formal homelessness applications. I have heard it argued that if gypsies who are about to be evicted let the local authority know that they want the authority to provide an alternative site for them, this amounts to a homeless application (there are no formal requirements for an application).

If the homelessness duties are triggered, what is effect on the legality of enforcement action? The two relevant cases, decided within about a month of each other, do not give very clear guidance.

Lee v Nuneaton [2004] EWHC 950 (Admin) - 21.4.04
This was a challenge to a decision to take direct action. The decision was taken shortly after the gypsies had made homelessness applications; the committee was informed about the applications. See paragraphs 45 and 46 –

> 'It seems to me that that was a highly relevant consideration which ought specifically to have been taken into account by the committee in deciding [in January 2004] when the removal of the site should take place. It seems to me that because [the committee] knew that there was nowhere else that could be made available to station any caravan and … that there may be an aversion … to living in traditional accommodation, that is a matter which should have made them appreciate that there was a need possibly to defer the action which was proposed for 12th January and it seems to me that they did not properly take that into account.'

Things had moved on since January 2004, although exactly how is not clear. It appears that the gypsies did not state in terms that they would not accept bricks and mortar and that the inquiries had been completed although no offer of accommodation had been made.

> 'I do not have full information as to the precise nature of the up-to-date situation. What I do say is that although it may well be that the decision in January ought to have been deferred, as things now stand the Council is clearly entitled to make use of section 178 and I have no doubt that the matter will go back now for consideration as to when that enforcement should be put into effect, but that there will be continuing consideration, insofar as there has not yet been, of the particular position of individual families.'

Collins J was not prepared to make an order which prevented direct action while an appeal to the County Court against any decision on homelessness application was made. He said that the Council was entitled to use direct action, that eviction should take place speedily but 'obviously they have to bear in mind their obligations under the Housing Act.'

Of course, if Collins J thought that the gypsies were actually about to be rehoused, that would plainly be material to the timing of direct action.

R (Maughan) v Leicester City Council [2004] EWHC 1429 (Admin) (26.5.04)

Here the gypsies were trespassers on Council land and the decision being challenged was to take possession proceedings. The gypsies had made a homeless application – by time of hearing Council had accepted the *interim* duty (so the obligation to make inquiries continued) but decided that the cultural aversion to bricks and mortar was not so great as to make hostel accommodation inappropriate. The gypsies said that Council should have considered the homelessness duty when deciding whether to start possession proceedings – the Council might conclude that the only way to provide suitable accommodation was to allow Claimants to remain. Richards J applied *R v Brent ex p Grumbridge* 1992 24 HLR 433 and *R v Lewisham ex p Akinsola* 1999 32 HLR 414 to hold that there was no link between the decision to evict and homeless duties (paragraph 52). Plus the housing decision that had been taken at the relevant time was lawful. Richards J said that this meant (i) there could be no question of the only suitable accommodation being the site where the Claimant and his family were encamped, and (ii) there was simply no way in which the homelessness decision could have any effect on the decision to evict (save perhaps to strengthen the case for eviction).

Does *Doherty* make a difference to this?

It may be that any problem is more apparent than real because homelessness applications will normally have been finally determined before the challenges to the eviction decisions get heard.