

# Criminal ban on returning to unauthorised encampments declared incompatible with ECHR

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## Introduction

The High Court in [Smith v Secretary of State for the Home Department \[2024\] EWHC 1137 \(Admin\)](#) has found that criminal law restrictions on persons who return to unauthorised encampments are a disproportionate and unjustified interference with the ECHR article 14 rights of Gypsies, Roma and Travellers. As the Court could not interpret the legislation compatibly with ECHR article 14, it made a declaration of incompatibility under section 4 of the Human Rights Act 1998 ('**HRA 1998**'). Parliament will now face the task of amending the legislation in order to render it compatible with the UK's human rights obligations.

## The legislation in outline

The Police, Crime, Sentencing Courts Act 2022 ('**PCSA 2022**') made various amendments to Part V of the Criminal Justice and Public Order Act 1994 ('**CJPOA 1994**'). The changes strengthened available powers in response to concerns about anti-social conduct perceived to be associated with '*unauthorised encampments*'. Among the changes to the CJPOA 1994 were:

- a new criminal offence of residing on land in or with a vehicle without the consent of the occupier of the land (section 60C);
- a new police power to seize and remove property that appears to belong to a person suspected of having committed an offence under section 60C (section 60D);
- further amendments to the existing police powers to direct trespassers to leave the land and to seize property and the related offence of refusing to comply with a police direction (sections 61, 62, 62A and 62B).

The section 60C offence can be committed where (i) a person '*intends to*' reside on the land without the consent of the occupier; (ii) has or intends to have at least one vehicle on the land; (iii) has been asked by the occupier, their representative or a police constable to leave or to remove their property from the land (iv) and (v) their intended presence on the land is '*likely to*' result in significant damage, disruption or distress. Once asked to leave or to remove their property from the land, if the person returns to the land within 12 months they will commit an offence under section 60C.

The sanctions upon summary conviction are 3 months' imprisonment or a level 4 fine (currently £2,500) or both. The offender may also face police seizure of their vehicle and property under section 60D. The 12 month '*no return*' period following a request to leave also applied to the amended powers in sections 61 to 62A. Prior to their amendment, those provisions prohibited returns within 3 months of a police direction to trespassers to leave the land.

### **The Claimant's challenge**

The Claimant was a Romani Gypsy who, in keeping with her traditional cultural practices, lived in caravans all her life and had previously lived on land without permission of the owner. She challenged the legality of the amendments to the CJPOA 1994 on the ground that they discriminated against Gypsies, Roma and Travellers and could not be justified, contrary to ECHR article 14, read with article 8 (the right to private and family life). The Claimant's challenge was supported by two interveners: Friends, Families and Travellers and Liberty.

### **The Court's conclusions**

Swift J rejected the primary submission of the Claimant and the interveners that the new offence in section 60C of the CJPOA 1994 pre-emptively criminalised Gypsies, Roma and Travellers and was liable to abuse by ill-motivated members of the public. The amendments were accompanied by statutory and other guidance that the police were required to take into consideration in order to avoid excessive or pre-emptive criminalisation and to give effect to equalities and human rights factors (§§33-34, 39, 44 & 45-47). However, the Court accepted the submission that the 12-month no return period in section 60C(3), replicated in several of the amended provisions (sections 61(4ZA)(a), 62(1A)(a), 62B(2)), had a disproportionate and discriminatory impact on Gypsies, Roma and Travellers (§§54-56).

In context, there was serious shortage of authorised transit pitches in England where they could reside lawfully and continue a nomadic lifestyle. Such transit pitches are only available

for a maximum stay of 3 months, making resort to unauthorised encampments an inevitability. In the words of the judgment: *'the extension of the no-return period of itself narrows the options available to comply with the new requirement... In this way, extending the no-return period not only puts Gypsies at a particular disadvantage but also and of itself, compounds that disadvantage.'* (§55).

As the 12-month 'no return' period in the amended provisions of the CJPOA 1994 could not be 'read-down' compatibly with ECHR article 14 under the Court's interpretative obligations in section 3 of the HRA 1998, the Court made a declaration of incompatibility under section 4 of the HRA 1998.

## Representation

The Claimant was represented by Marc Willers KC and Ollie Persey of Garden Court Chambers, instructed by the Community Law Partnership. The first intervener, Friends, Families and Travellers was represented by Stephen Simblett KC and Nadia O'Mara of Garden Court Chambers, also instructed by the Community Law Partnership. The second intervener, Liberty, was represented by 3PB Barristers' Ben Amunwa, led by Tim Buley KC of Landmark Chambers and instructed by Louise Whitfield of Liberty. The Defendant was represented by Russell Fortt of 5 Essex Court, instructed by the Government Legal Department.

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