

THE RAT-INFESTED BARN: GYPSIES, TRAVELLERS AND AVERSION TO CONVENTIONAL HOUSING

Chris Johnson, Community Law Partnership

Introduction

For a very long time there seems to have been a general assumption that the ‘accommodation’ which local authorities might have to provide under modern homelessness legislation¹ would be ‘conventional housing’ (or ‘bricks and mortar’). It was only relatively recently that that assumption was challenged. This was at a time when many Gypsies and Travellers, who were, in fact, eligible to make a homeless application, had given up even trying to do so, since they would probably not even get beyond first base. They might, for example, be told that they were not homeless because they had a caravan to live in, even though they did not have a lawful place to put that caravan. They might be told that the local authority in question only had conventional housing to offer. Several other excuses for not progressing the matter might be made.

The caravan as accommodation

The latest version of the homelessness legislation (in other words, Housing Act 1996 Part VII) contains a specific provision designed for those who are nomadic. Thus a person is homeless if s/he has accommodation but it consists of a moveable structure, vehicle or vessel designed or adapted for human habitation and there is no place where s/he is entitled or permitted both to place it and reside in it.² Accordingly, to put it another way, for a Gypsy or Traveller **not** to be homeless they need the combination of ‘caravan’ plus ‘authorised pitch’³. Accordingly it might be supposed that, if the applicant makes their way across all relevant hurdles in the homelessness process and arrives successfully at the ‘duty to accommodate’, still resident in their caravan on an unauthorised encampment, that the answer to the duty is to add in to the equation the missing element, namely an authorised pitch. Unfortunately caselaw has not so far led to this result.⁴

¹ See: National Assistance Act 1948 s21; Housing (Homeless Persons) Act 1977 s6; Housing Act 1985 s69; and Housing Act 1996 s193 – the latter, of course, being the current version of the legislation.

² Housing Act 1996 s175(2)(b).

³ This is to slightly simplify the matter – the meaning of ‘entitled **or permitted**’ is a whole other kettle of fish which we will not enter into here – see Johnson & Willers, eds, *Gypsy & Traveller Law Legal Action* 2nd edition 2007 Chapter 6.

⁴ The problem may lie in the total lack of any statutory definition of ‘accommodation’ – aside from the question of ‘suitability’ – and may perhaps point to a need for legislative intervention.

Suitable accommodation

The suitability requirements of the Housing Act 1996⁵ are applicable to the provision of both temporary and ‘permanent’ accommodation. When determining what constitutes ‘suitable accommodation’, a local authority must have regard to the slum clearance and overcrowding provisions of the Housing Act 1985 and to Housing Act 2004 Parts I-IV (housing conditions and control of houses in multiple occupation).⁶ In deciding the question of suitability, the local authority must consider the individual needs of the applicant and his/her family, including needs as to work, education and health.⁷

As mentioned above, of recent times the argument was advanced that ‘suitable accommodation’ for a homeless Gypsy or Traveller must surely not be conventional housing but an authorised pitch where s/he could place his/her caravan. The case-law has led in a different direction and has introduced the concept of ‘cultural aversion to conventional housing’.

The rat-infested barn

The concept of ‘cultural aversion to conventional housing’ first appeared in a planning case, *Clarke v Secretary of State for the Environment, Transport and the Regions*.⁸ The High Court (in a judgment later upheld by the Court of Appeal) overturned the decision of a Planning Inspector who had refused planning permission to Mr Clarke, a Romani Gypsy, in circumstances where the Inspector had taken into account a previous offer from the local authority of conventional housing. Burton J concluded that, if a cultural aversion to conventional housing was established, such an offer would be unsuitable ‘*just as would be the offer of a rat-infested barn*’.

The concept was then utilised in the homelessness case of *R(Price) v Carmarthenshire CC*.⁹ Mrs Price and her family are Irish Travellers and they were homeless since they were living on an unauthorised encampment on land owned by the County Council. They made a homelessness application to the latter. In 2001 Mrs Price had made an

⁵ Housing Act 1996 ss206(1) and 210(1).

⁶ For a detailed discussion of the question of suitability, see Arden, Hunter & Johnson, eds, *Homelessness and Allocations*, Legal Action 7th edition 2006, Chapter 10.

⁷ See, for example, *R v Newham LBC ex p Sacupima* [2001] 33 HLR 1. Interestingly, in *R v Southampton CC ex p Ward* [1984] 14 HLR 114, a pitch on a caravan site, which site was described by a social worker as being in appalling condition, was nonetheless held to be a sufficient discharge of the temporary duty having regard to the family’s need to have a pitch as opposed to conventional housing.

⁸ [2002] JPL 552.

⁹ [2003] EWHC 42 (Admin).

enquiry about conventional housing. She later explained that this was solely because of pressure from a local authority officer and that she had had no intention of moving into or accepting such accommodation.

The County Council had regard to the *Clarke* judgment but concluded that Mrs Price did not have a cultural aversion to conventional housing since she had made the previous enquiry, her mother lived in conventional housing and her sister (who travelled with her) had previously lived in conventional housing for a short period of time. They offered her conventional housing which she duly refused. They then sought to evict her from the unauthorised encampment on their land.

Quashing that decision to evict, Newman J stated that:

In order to meet the requirements and accord respect, something more than 'taking account' of an applicant's gypsy culture is required. As the Court in Chapman¹⁰ stated, respect includes the positive obligation to act so as to facilitate the gypsy way of life, without being under a duty to guarantee it to an applicant in any particular case.

Newman J felt that the approach of the County Council was flawed because it had given too much weight to her previous enquiry about housing and had used this as sufficient reason for disregarding her Gypsy way of life altogether when considering her needs. However, whilst her cultural commitment was a significant factor in this process, he also found that the County Council was not bound by duty to find her a pitch.

Subsequent cases have indicated that, whilst local authorities must clearly use their best endeavours to try and obtain a pitch for a homeless Gypsy or Traveller with a cultural aversion to conventional housing¹¹, if they cannot succeed in that process then conventional housing may have to be offered in discharge of the local authority's duty to accommodate. The attempts of Leanne Codona, a Romani Gypsy with what was accepted by all parties as a most extreme cultural aversion to conventional housing, to gain a pitch were unsuccessful in the Court of Appeal in trying to challenge an offer of bed and breakfast accommodation¹² and in the county court in trying to challenge a 'permanent' offer of conventional housing.¹³

¹⁰ *Chapman v UK* [2001] 33 EHRR 399, European Court of Human Rights.

¹¹ It should be pointed out that a New Traveller may well have an 'aversion to conventional housing' even if that aversion is not 'cultural'. There are now at least one generation of New Travellers who were, in fact, born on the road and who have never lived in conventional housing.

¹² *Codona v Mid-Bedfordshire DC* [2005] HLR 1.

¹³ *Codona v Mid-Bedfordshire DC* Luton County Court, March 20th 2006, HHJ Farnworth.

Following the dismissal of her appeal to the Court of Appeal, Ms Codona made an application to the European Court of Human Rights (ECtHR). The ECtHR found her application inadmissible.¹⁴ It stated:

Following Chapman the Court does not rule out that, in principle, Article 8¹⁵ could impose a positive obligation on the authorities to provide accommodation for a homeless gypsy which is such that it facilitates their 'gypsy way of life'. However, it considers that this obligation could only arise where the authorities had such accommodation at their disposal and were making a choice between offering such accommodation or accommodation which was not 'suitable' for the cultural needs of a gypsy. In the instant case, however, it appears to be common ground that there were, in fact, no sites available upon which the applicant could lawfully place her caravan. In the premises, the Court cannot conclude that the authorities were then under a positive obligation to create such a site for the applicant (and her extended family).

Following the *Price* judgment, Communities and Local Government amended the Homelessness Code of Guidance for Local Authorities¹⁶. At para 16.38 the amended Code states:

Where a duty to secure accommodation [for a Gypsy or Traveller] arises but an appropriate site is not immediately available, the housing authority may need to provide an alternative temporary solution until a suitable site or some other suitable option, becomes available. Some Gypsies and Travellers may have a cultural aversion to the prospect of 'bricks and mortar' accommodation. In such cases, the authority should seek to provide an alternative solution.¹⁷

This would seem to potentially go beyond the position reached in the *Codona* judgments, holding out the possibility of what many representatives of Gypsies and Travellers had long argued for – imaginative use of temporary 'tolerated' sites, even if such sites did not have planning permission. Unfortunately the most recent judgment from the Court of Appeal on this issue, *Lee v Rhondda Cynon Taf BC*,¹⁸ does not appear to have advanced matters much further from the point of view of Gypsy and Traveller applicants. Once again the Gypsy applicant had

¹⁴ *Codona v UK* App no 485/05.

¹⁵ The right to respect for private and family life and home.

¹⁶ With effect from September 2nd 2006.

¹⁷ See also the CLG *Gypsy and Traveller Site Management Good Practice Guide* (July 2009) which gives as an example of accommodation need 'people who have a genuine need for caravan site accommodation based on an aversion to bricks and mortar housing' (p29).

¹⁸ [2008] EWCA Civ 1013, July 16th 2008.

refused an offer of conventional housing largely on the basis of cultural aversion. She had previously indicated an interest in conventional housing. No psychological report to support her aversion was available before the court.

In dismissing her appeal, Longmore LJ (giving the leading judgment) stated:

Mr Knafler [counsel for Ms Lee] submits that [the consideration by the local authority of her position as a Gypsy] was not lawful or adequate because [the local authority] did not consider whether they should acquire an alternative site. That however seems to me to be, in the context of a homelessness application, wrong. Homelessness applications are expected to be determined within a short timeframe, ideally at least within 33 days of an acceptance of a requisite duty. If a new site is to be acquired for stationing a caravan for residential purposes, that will usually mean a new use which will typically require planning permission. That will require determination by the local authority planning committee, especially if it means a departure from the local development plan...After all that, land would have to be bought if it is not already owned by the local authority itself. At this is, in my judgment, inconsistent with the manner in which homelessness applications are expected to be dealt with by the housing department, and especially since they are expected to be dealt with with a degree of promptness. As, moreover, the recorder himself observed that is really inconsistent with the law as laid down by Price and Codona, to the effect that bricks and mortar accommodation is at any rate capable of being suitable accommodation even for a Gypsy.

Longmore LJ did go on to say:

All that is not to say that there might not be unusual circumstances in which a local housing authority might be expected to do more than consider availability and sites within their area. If, for example, there was a question of an applicant being at risk of suffering psychiatric harm, it might well be that the local authority should take that consideration into account, specifically in deciding what, or what further enquiries, they should make. In the present case, however, there is no risk of any such psychiatric harm.

Conclusion

The current position of the case-law, therefore, means that there is no automatic link between an aversion to conventional housing and the provision of site accommodation. This is despite the fact that the *Lee*

judgment does suggest that proof of psychiatric harm may mean that a different solution might be required though quite how far this might go is, as yet, unclear.

It is hoped that the Office of the Deputy Prime Minister Circular 01/2006 and the Welsh Assembly Government Circular 30/2007¹⁹, which have brought about the process of Gypsy and Traveller Accommodation Assessments which should now lead through to the identification of 'locations' by local authorities, might have stepped up the requirements that a court might now expect from a local authority under the homelessness legislation.

None of this would seem to assist those Gypsies and Travellers (for example, who currently are in conventional housing) who cannot show any or any strong aversion to conventional housing but whose need, culturally and, it might be said, so as to facilitate their Gypsy way of life, is for site accommodation. This is not because of any lack of logic in their case. It is to be noted that the Homelessness Code of Guidance also states:

Caravans designed for short-term holiday use should not be regarded as suitable for temporary accommodation for [non-Gypsy/Traveller] applicants.

This begs the question: why should a Gypsy or Traveller have to accept conventional housing as being 'suitable' for their needs.

October 6th 2009

¹⁹ Especially since the implementation of both circulars post-dates all the above judgments.