HIGH COURT ISSUES DECLARATION OF INCOMPATIBILITY FINDING THAT PROVISIONS IN THE POLICE ACT UNLAWFULLY DISCRIMINATE AGAINST GYPSIES AND TRAVELLERS

The successful claimant, Wendy Smith, was represented by Marc Willers KC and Ollie Persey of Garden Court Chambers. They were instructed by Chris Johnson of Community Law Partnership ('CLP'). Chris was assisted by Andy Marlow of CLP.

Stephen Simblet KC and Nadia O'Mara acted for the First Intervener, Friends, Families and Travellers ('FFT'), instructed by Parminder Sanghera of CLP.

In a landmark decision handed down on 14 May 2024, the High Court decided that certain provisions in the Criminal Justice and Public Order Act 1994 ('CJPO Act ') introduced by the Police, Crime, Sentencing and Courts Act 2022 ('Police Act'), are incompatible with Article 14 of the European Convention on Human Rights ('ECHR' (the prohibition on discrimination) read with Article 8 ECHR (the right to private life) as they amount to unjustified discrimination against Gypsies and Travellers. The High Court has taken the significant and unusual step of issuing a declaration of incompatibility under section 4 of the Human Rights Act 1998, which means that Parliament will have to review those provisions to ensure their compatibility with the ECHR.

This case was brought by Wendy Smith, a Romani Gypsy. She challenged amendments to the CJPO Act made by the Police Act that gave the police new and extended enforcement powers to evict Gypsies and Travellers from unauthorised encampments. These powers include section 60C, which makes it an offence punishable with up to three months' imprisonment for someone residing on land with a vehicle to fail to comply with a request to leave the land. The offence applies if a person is residing, or intending to reside, on land without the consent of the occupier of the land, and has, or intends to have, a vehicle (including a caravan) on the land. Under section 60C, a person issued with a request to leave by an owner or occupier of land will commit an offence if they re-enter the land with the intention of residing there within the prohibited period of 12 months. The claimant also challenged amendments to section 61 and section 62A of the CJPO Act that similarly extended the prohibited period of return to land covered by requests to leave under those provisions from 3 to 12 months.

Mr Justice Swift found the 12 month no return periods in all three provisions to constitute unjustified race discrimination in circumstances where there was a lack of authorised transit site provision on which Gypsies and Travellers could camp lawfully. At paragraphs 54-55 of his judgment the Judge held:

> *"54…The Claimant submits that the decision to extend the non-return periods is largely unexplained, and that the mismatch between the 12-month period and the 3-month maximum stay at a transit pitch is a matter calling for explanation as it means that Gypsies will no longer be able avoid the risk of criminal penalty by resort to transit pitches. The position might be different if transit pitches were readily available: moving between several different pitches over the course of a 12-month period would be a feasible option. But the evidence shows this is not the position. The Claimant's submission is that the increased protection to land owners given by the 12 month no-return periods places a disproportionate burden on Gypsies. It expands the scope of*

the criminal penalties and at the same time makes it more difficult to comply with the law

55 I accept this submission. The point here is not simply that the no-return periods have been extended. That of itself does revisit the balance struct between the property rights of landowners and occupiers and the interest of Gypsies, but if this point stood alone the likely success of the submission that the change produced a disproportionate outcome would be in the balance. The matter that is decisive in the Claimant's favour is that the extension of the no-return period of itself narrows the options available to comply with the new requirement. Resort to a transit pitch will ***no*** *longer suffice as the maximum stay on a transit pitch is 3 months. The under supply of transit pitches renders it much less likely that the opportunity exists to move from one to another. In this way, extending the no-return period not only puts Gypsies at particular disadvantage but also and of itself, compounds that disadvantage…"*

When giving judgment, Mr Justice Swift also made it clear that the police must comply with statutory guidance limiting the use of section 60C before taking a decision to exercise the new enforcement power, as it included important safeguards to protect Gypsies and Travellers. For example, at paragraph 34 of the judgment, the Court held that:

"[The]guidance includes a requirement to follow the operational advice issued by the National Police Chiefs' Council, "Operational Advice on Unauthorised Encampments". Any officer following this operational advice would not act precipitately. This ought to be sufficient to filter out the possibility of malicious or discriminatory action by the legal occupiers of land."

Marc Willers KC, lead counsel for the claimant, commented:

"This is a hugely significant judgment. In granting the declaration of incompatibility, the Court recognised that there is a lack of lawful stopping places for Gypsies and Travellers and that unless the government increases provision, the law as currently drafted will amount to unjustified race discrimination."

Chris Johnson, the claimant's solicitor, commented:

"I am delighted for Ms Smith. Key parts of the enforcement powers introduced by the Police Act have been found to be unlawful race discrimination against Gypsies and Travellers. The National Police Chiefs Council never wanted these new powers and following this judgment, it is hard to see what the new powers will add in practice. I hope that Parliament takes this opportunity to look again at the new powers as a whole."

The claimant's case was supported by FFT, which provided invaluable evidence of the impact that the new powers would have on Gypsies and Travellers. FFT intervened at the hearing by way of written and oral submissions and Liberty intervened by way of written submissions to highlight its concerns about the human rights implications of the new powers. Richard Drabble KC of Landmark Chambers acted at an earlier stage of proceedings and helped the claimant to secure permission to proceed to a full hearing.

This was Chris Johnson's final case before retirement. For decades, Chris and his team at CLP have been at the forefront of legal challenges protecting and advancing the rights of Gypsies

and Travellers. It is fitting that in his final case the Court has issued a declaration of incompatibility, which will have significant wider implications for Gypsies and Travellers.

The approved judgment is here: