Neutral Citation Number: [2022] EWCA Civ 1391

Case No: CA-2021-001741

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
Mr Justice Pepperall
[2021] EWHC 1650 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 October 2022

Before:

SIR KEITH LINDBLOM
(SENIOR PRESIDENT OF TRIBUNALS)
LORD JUSTICE HOLROYDE
and
LORD JUSTICE COULSON

- -

Between:

LISA SMITH	**Appellant**
- and -	
(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING & COMMUNITIES	**Respondent**
(2) NORTH WEST LEICESTERSHIRE DISTRICT COUNCIL	
- and -	
(1) AMOS WILLSHORE	**Interested Party**
- and -	
(1) DERBYSHIRE GYPSY LIAISON GROUP	
(2) FRIENDS FAMILIES AND TRAVELLERS,	
(3) LONDON GYPSIES AND TRAVELLERS, AND	**Interveners**
(4) SOUTHWARK TRAVELLERS ACTION GROUP	

- -
- -

Marc Willers KC and Tessa Buchanan (instructed by **Deighton Pierce Glynn**) for the **Appellant**
Timothy Mould KC (instructed by **Treasury Solicitor**) for the **First Respondent**
David Wolfe KC, Owen Greenhall and Tim Jones (instructed by **Community Law Partnership**) for the **Interveners (Written Submissions Only)**

Hearing Dates: 29 and 30 June 2022

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Approved Judgment

This judgment was handed down remotely at not before 3.45pm on 31 October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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SIR KEITH LINDBLOM (SENIOR PRESIDENT OF TRIBUNALS), LORD JUSTICE HOLROYDE AND LORD JUSTICE COULSON:

1. INTRODUCTION

1. This is the judgment of the court, to which we have all contributed.

2. The appellant, Lisa Smith, appeals against the order of Pepperall J dated 28 June 2021, by which he refused her application for an order to quash the decision of the inspector appointed by the first respondent, the Secretary of State, dated 23 November 2018, dismissing her appeal against a decision by the second respondent, North West Leicestershire District Council ("the local planning authority"), to refuse an application for planning permission for a permanent site for Gypsies and Travellers at Coalville in Leicestershire. The principal issue concerns the August 2015 amendment by the Secretary of State of the definition of "Gypsies and Travellers", set out in the policy document "Planning Policy for Traveller Sites" ("PPTS 2015"). Prior to that date, the definition expressly included those who had permanently ceased travelling as a result of, inter alia, disability or old age. The amendment excluded that group of Gypsies and Travellers from the definition ("the relevant exclusion").

3. It was accepted on behalf of the Secretary of State, both before this court and below, that the relevant exclusion indirectly discriminated against elderly and disabled Gypsies and Travellers. In his judgment at [2021] EWHC 1650 (Admin), the judge concluded that the discrimination was not unlawful because he found that it was justified. He therefore rejected the challenge brought by Ms Smith against the inspector's decision, under s.288 of the Town and Country Planning Act 1990 ("the 1990 Act").

4. The appellant appeals with permission granted by William Davis LJ. There are four grounds of appeal:

   (1) Ground 1: The judge applied the wrong test and/or reversed the burden of proof;

   (2) Ground 2: The judge erred in concluding that there was no race discrimination claim;

   (3) Ground 3: The judge erred in his reasoning and conclusions as to the legitimate aim or objective of the relevant exclusion;

   (4) Ground 4: The judge erred in his reasoning and conclusions to the effect that the relevant exclusion was proportionate.

   The issues arising from these four grounds fall to be decided in accordance with legal principles already well established at the highest level. It will be noted that grounds 3 and 4 are closely linked because they consider the two elements of justification – legitimate aim and proportionality.

5. We set out a brief factual background in section 2 below. We address the salient features of the judge's judgment in section 3. We set out the applicable law and legal framework in section 4. Thereafter, in sections 5, 6 and 7, we deal with the four grounds of appeal, taking grounds 3 and 4 together. We consider the questions of remedy and disposal in section 8. We should at the outset of our judgment pay tribute to the clarity of the written

and oral submissions of Mr Marc Willers KC for Ms Smith and Mr Tim Mould KC for the Secretary of State.

6. Mr Mould expressly accepted that Ms Smith was entitled in these proceedings to challenge the legitimacy of the relevant exclusion specifically in its application to her appeal against the local planning authority's refusal of planning permission. We are, however, conscious that there is an element of discordance between that challenge on the one hand and the necessarily limited nature of the application made by Ms Smith under s.288 of the 1990 Act on the other. We must emphasise at the outset that the only relief Ms Smith can seek in these proceedings is the quashing of the inspector's decision in her own particular case. She has not sought, and could not seek, any declarations from the court as to the legitimacy or otherwise of the relevant exclusion. We are also conscious of the time that has elapsed between the publication of PPTS 2015 and these proceedings, including this appeal. We have borne these matters in mind throughout our consideration of the issues raised by this appeal.

2. THE FACTUAL BACKGROUND

7. Ms Smith rents a site at Coalville from Mr Willshore, who is an interested party in the proceedings below. She has lived there with her family in their caravans since 2011. Currently the site is occupied by Ms Smith, her husband, their children and grandchildren. Two of Ms Smith's adult sons, Isaac and Tony, are severely disabled and cannot travel for work.

8. In April 2013, planning permission was granted for a period of four years for the siting of up to six touring caravans on the land. It was a requirement that the site could not be occupied by any persons other than Gypsies and Travellers as defined in the then current planning policy. That permission was subsequently varied on 31 March 2015. At all material times prior to PPTS 2015, Ms Smith and her family were within the planning policy definition of "Gypsies and Travellers".

9. On 8 March 2016, Mr Willshore applied to the local planning authority to vary the permission to allow the permanent residential use of the site as a Gypsy site and to permit the construction of a large dayroom. Although the officers supported that application, on 22 December 2016 the local planning authority refused it. Mr Willshore appealed. In her decision letter of 23 November 2018, the inspector dismissed the appeal. By then, the existing temporary planning permission in respect of the site had expired.

10. The inspector first considered the relevant development plan policy and the character and appearance of the site. She said:

> "18. I acknowledge that the PPTS does not rule out Traveller sites in rural settings although it requires that the scale of such sites does not dominate the nearest settled community. Given the size and scale of the neighbouring villages there is no suggestion that the development dominates those communities in visual terms or places an undue pressure on the local infrastructure.

> 19. However, whilst the PPTS is a material consideration, the proposal would neither safeguard nor enhance the character or appearance of the area and would undermine the physical and perceived separation and open undeveloped character between the two settlements. As such the proposal is contrary to Policies S3 and H7 of the Local Plan as set out above."

11. In paragraphs 20 to 23 of the decision letter, the inspector considered accessibility and concluded that while the proposal was not consistent with Policy H7, "any harm that would arise as a result of this would be limited". In paragraphs 24 to 32, she considered the need for and provision of Gypsy and Traveller sites in the district. She said that she shared Ms Smith's concern that the local plan underestimated the true need for additional pitches for Gypsies and Travellers (paragraph 29). She was also concerned that the local plan policies were outdated (paragraphs 31 and 32). She reiterated in paragraph 32 that the proposal did not meet policy requirements as to compatibility with landscape, environment and the physical and visual character of the area.

12. The inspector then turned to what she called "the Gypsy Status of the Current Occupiers" (paragraphs 33 to 39 of the decision letter). She began this section of her decision letter by stating the terms of the definition in PPTS 2015 and noting the local planning authority's assessment that Ms Smith and her family did not fall within that definition. She found that any travelling had to have an economic purpose (paragraph 33). She noted the "considerable economic, social and emotional inter-dependence between family members given the significant health and social needs" of the disabled adult sons and the three grandchildren (paragraph 37). But she said that she was unable to conclude that the Smith family had Traveller status for planning purposes (paragraph 39).

13. In paragraphs 40 to 43 of the decision letter, she considered the personal circumstances of the Smith family, and the possibility of alternative accommodation. She said:

> "42. I acknowledge the difficulties the family faces in caring for both adult children with severe disabilities and young children. Their desire to stay together to support one another is understandable. The Council can demonstrate a five year supply of housing land, which is not disputed by the appellant. However, I acknowledge the family's cultural aversion to bricks and mortar accommodation and the difficulties of finding appropriate accommodation to meet the complex needs of all of the family members.
>
> 43. The GTAA identifies a need for 6 pitches for gypsy and travellers who do not meet the planning definition. There is no specific provision in the local plan for such pitches and no sites are currently available to this family. Whilst I have no evidence that the family have searched for alternative accommodation in the knowledge of the temporary nature of the previous permission, returning the family to a life on the road is the most likely outcome if this appeal fails. It seems to me that moving from the site would not be in the best interest of the children, the disabled adults or the family group as a whole. These matters therefore carry significant weight in favour of the proposal."

14. In paragraphs 47 to 50 of the decision letter, the inspector undertook the planning balance. She said that the needs and rights of the family and the general welfare of the children, attracted "considerable weight in favour of the development in the

circumstances of this case". Against that, she said that the interference with the Smith family's rights under Article 8 in this case was "consistent with the protection of the characteristics of the countryside" (paragraph 47). She said that "whilst dismissal of the appeal would deprive the Smith family of the opportunity to live on this site, that is set against the serious effect the proposal would have in terms of other planning considerations", and that "[it] does not therefore follow that the appeal should succeed." (paragraph 49).

15. The inspector's conclusion immediately followed, in paragraph 50:

> "50. Taking into account all of these considerations, I conclude that the identified harm that would arise from the development outweighs the other considerations and indicates that a permanent permission should not be granted for the development at this time. There is a conflict with the development plan policies H7 and S3 as set out above. It follows that if there is no permanent permission for the use of the land as a gypsy site, there is no justification for the extension to the day room."

16. In paragraph 51 of the decision letter, the inspector considered whether a further temporary planning permission would be appropriate. She said that, "since a further temporary consent would relate to the occupation of the site by Gypsies and Travellers who met the planning definition, it would provide no certainty for Mr and Mrs Smith." As the judge put it at [94]:

> "94. …On the proper construction of the decision, the last sentence of paragraph 51 was a shorthand way of saying that in any event, even if she had been minded to grant a second temporary planning permission, the inspector would have imposed a condition that the land be occupied only by Gypsies and Travellers as defined in the then prevailing PPTS; and that such condition would not provide any certainty to the Smiths in view of her earlier findings that they did not meet such definition."

17. Ms Smith sought a statutory review of that decision under s.288 of the 1990 Act. Permission was granted for that review, on appeal, by Lewison LJ. The matter was then argued before the judge in December 2020. His judgment was given on 17 June 2021.

3. THE JUDGE'S JUDGMENT

18. At [29] of his judgment the judge identified the two grounds of challenge relied on under s.288: the first being that the relevant exclusion set out in PPTS 2015 unlawfully discriminated against elderly and disabled Gypsies (a case put on the basis both of the European Convention on Human Rights ("the Convention") and s.19 of the Equality Act 2010); and the second that the inspector erred in law in concluding that the grant of temporary planning permission would provide Ms Smith and her family with no benefit.

19. In dealing with the first ground of challenge, the judge noted at [42] Mr Mould's concession that the definition in PPTS 2015 was potentially indirectly discriminatory in its effect on Gypsies and Travellers who have settled permanently due to age or

disability. The judge repeated at [62] the concession that the exclusion of permanently settled Gypsies and Travellers from the benefits of PPTS 2015 "disadvantages older and disabled Gypsies and that, subject to the issue of justification, such exclusion is discriminatory on the grounds of age and disability".

20. At [43] to [53] of the judgment, under the heading "The Gypsy Experience", the judge set out the difficulties that the planning system posed for Gypsies and Travellers, and at [47] expressed his disquiet about the poor outcomes achieved by many Gypsies and Travellers, and the disproportionate difficulty faced by many in obtaining planning permission. He concluded that the planning system was "going wrong". He then went on to address the impact of PPTS 2015. He noted at [52] that the evidence was that this had led to a sharp drop of almost 75% in the provision of pitches, and at [53] that nearly half of those assessed as needing a pitch in the South East fell outside the PPTS 2015 definition.

21. As to the test that he had to apply to Ms Smith's claim, the judge said at [69] that "very weighty reasons will be needed to justify disability discrimination". He went on:

> "70. In view of the Secretary of State's concession, the fundamental issue is to consider whether there was an objective and reasonable justification for the Secretary of State's decision to limit the ambit of the definition of Gypsies and Travellers for the purpose of the discrete planning policy arrangements for meeting their land-use needs. Such question falls to be answered by reference to the four-stage analysis stated by Lord Reed in *Bank Mellat*, at [74]:
>
> '(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right;
>
> (2) whether the measure is rationally connected to the objective;
>
> (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective;
>
> (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.'"

22. However, immediately thereafter, the judge said this:

> "71. Ms Smith's claim is not that the inspector has discriminated against her in the exercise of her planning judgment but that PPTS 2015 itself is inherently discriminatory. In *Christian Institute v. Lord Advocate* [2016] UKSC 51, Baroness Hale, Lord Reed and Lord Hodge said, at [29] [actually [88]]:
>
> > 'This court has explained that an *ab ante* challenge to the validity of legislation on the basis of a lack of proportionality faces a high hurdle: if a legislative provision is capable of being operated in a manner which is compatible with Convention rights in that it will not give rise to an unjustified interference with article 8 rights in all or most cases, the legislation itself will not be incompatible with Convention rights (*R (Bibi) v Secretary of State for*

the Home Department [2015] UKSC 68; [2015] 1 WLR 5055 at [2] and [60] per Baroness Hale, at [69] per Lord Hodge).'

See also Hickinbottom LJ in the *JCWI Case*, at [116]-[117]".

23. The judge's essential reasoning is in his conclusions at [79] to [83], in the following terms:

"79. I am satisfied that PPTS 2015 retains at its core a functional test of nomadism and that its focus is upon the specific land-use needs of those leading a nomadic lifestyle. Further, I am satisfied that the current policy continues to recognise the special needs of nomadic people. Indeed, the 2015 policy explains, at paragraph 3:

> "The Government's overarching aim is to ensure fair and equal treatment for travellers, in a way that facilitates the traditional and nomadic way of life of travellers while respecting the interests of the settled community."

80. In my judgment, the Secretary of State was plainly justified in drawing a distinction between the specific land-use needs of those seeking to lead a nomadic lifestyle and those seeking a more settled existence. The former throws up particular challenges both for applicants and planning authorities, and the Secretary of State was entitled to devise a specific policy focusing on that issue which did not also seek to address the cultural needs of those Gypsies and Travellers now seeking a permanent home. The critical consideration is that PPTS 2015 does not stand alone. While the policy deals specifically with the housing needs of Gypsies and Travellers who follow a nomadic habit of life, it is part of a patchwork of provisions. As I have already identified:

> 80.1 paragraphs 59 and 61 of the NPPF require planning authorities to address the needs of Gypsies and Travellers irrespective of whether they meet the PPTS definition;
>
> 80.2 the specific accommodation requirements of permanently settled Gypsies who seek planning permission in order to maintain their cultural identity as Gypsies are "material considerations" which must be taken into account pursuant to s.70(2)(c) of the 1990 Act; and
>
> 80.3 other personal circumstances of Gypsy applicants can properly be taken into account as part of the material considerations: *Basildon*, at [33]-[34], Ouseley J.

81. It was a matter for the executive and not the judiciary to determine whether:

> 81.1 The PPTS should make provision for the land-use needs of all Gypsies and Travellers irrespective of whether they remain nomadic or have ceased travelling.
>
> 81.2 Alternatively, the policy should make discrete provision only for the land-use needs of Gypsies and Travellers who remain of a "nomadic habit of life" and make provision for the needs of permanently settled Gypsies and Travellers through the mainstream planning system.

82. There is nothing inherently objectionable to the executive choosing to take the latter approach as it did between 1994 and 2006 and again from 2015, provided

that the system is capable of taking into account the article 8 rights of permanently settled Gypsies and Travellers and their particular personal circumstances. I am therefore satisfied that the planning system taken as a whole is capable of being operated such that it respects the article 8 rights both of nomadic Gypsies and Travellers, and of those who through age or disability have been forced to give up a nomadic life.

83. Thus far, I have analysed the position without direct reference to the four principles identified in *Bank Mellat*. Doing so, I conclude that the exclusion of permanently settled Gypsies from PPTS 2015 was objectively and reasonably justified:

83.1 The principal objectives of the policy were to ensure the fair and equal treatment of Gypsies and Travellers in a way that facilitated their traditional and nomadic habit of life while also respecting the interests of the settled community. Such objectives were sufficiently important to justify limiting the advantages of PPTS 2015 to those leading a nomadic lifestyle provided that the planning system overall also ensured that the cultural needs of retired Gypsies and Travellers were respected and taken into account as material considerations.

83.2 Such limitation was rationally connected to the objectives by ensuring that PPTS 2015 focused on the particular land-use needs of nomadic people.

83.3 I am not persuaded that a less intrusive measure could have been used without unacceptably compromising both the policy's focus on the particular land-use needs of nomadic Gypsies and Travellers, and the interests of the settled community.

83.4 The limitation does not have a particularly severe effect on the rights of settled Gypsies since their cultural needs and personal circumstances must be taken into account upon any planning application. I am, in any event, satisfied that the importance of the objectives, to the extent that the limitation will contribute to their achievement, outweighs any effects upon settled Gypsies."

24. That passage dealt with the claim by reference to the Convention. The judge addressed the claim under the Equality Act at [84] to [87] of his judgment, and, for the same reasons, he found that the Secretary of State had made out his case that the indirect discrimination was justified. Thereafter, at [88] to [94], he dealt briefly with the second ground of challenge and concluded that there was no basis for interfering with the decision in respect of a further temporary planning permission.

4. THE LAW

4.1 Planning law and policy in respect of Gypsies and Travellers

25. The judge set out a useful history of planning law and policy in respect of Gypsies and Travellers at [6] to [28] of his judgment. It is sufficient to note for present purposes the following steps on the road.

26. By s.23 of the Caravan Sites and Control of Development Act 1960 ("the 1960 Act"), local authorities were given the power to close common land to Travellers. They embraced that power but failed to make use of the concomitant power provided by s.24 of the 1960 Act to open caravan sites. In consequence, s.6 of the Caravan Sites Act 1968 ("the 1968 Act") imposed a duty on local authorities to provide such sites.

27. Gypsies had long been defined as "persons of nomadic habit of life": see *Mills v Cooper* [1967] 2 QB 459. That definition was enshrined in s.16 of the 1968 Act, and was subsequently reflected in Circular 1/94, which came into effect on 5 January 1994. It said that its main intentions were:

> "To provide that the planning system recognises the need for accommodation consistent with Gypsies' nomadic lifestyle …".

The definition of Gypsies was again taken from s.16 of the 1968 Act, namely "persons of nomadic habit of life, whatever their race or origin".

28. Thereafter, there were a number of authorities applying that definition to those who did not always travel; for example, a Gypsy who had a permanent caravan site to which they returned every year after working seasonally: see *Greenwich London Borough Council v Powell* [1989] 1 A.C. 995. Similar issues arose in the frequently cited case before the European Court of Human Rights, *Chapman v United Kingdom* (2011) 33 E.H.R.R18. In that case, the court said at [73]:

> "73 The Court considers that the applicant's occupation of her caravan is an integral part of her ethnic identity as a gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. This is the case even though, under the pressure of development and diverse policies or from their own volition, many gypsies no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children. Measures which affect the applicant's stationing of her caravans have therefore a wider impact than on the right to respect for home. They also affect her ability to maintain her identity as a gypsy and to lead her private and family life in accordance with that tradition."

29. *Chapman* was considered in the decision of this court in *Wrexham County Borough Council v National Assembly of Wales* [2003] EWCA Civ 835 ("*Wrexham*"), in the context of a claim by a "retired" Gypsy. It was held there that such a person no longer maintained a nomadic habit of life and was therefore not a Gypsy for planning purposes within the definition in s.16 of the 1968 Act, and Circular 1/94. Auld LJ said:

> "46. As Mr. Straker observed, the invocation by Sullivan J, in paragraph 20 of his judgment, of common sense and common humanity misses the purposes and effect of the Circulars, which are there to provide land for those who are nomadic. Those who are not nomadic, for whatever reason, whether through "retirement", as in *Hearne*, or through illness, as here, are outside the ambit of the policy. As Burton J. observed in *Albert Smith*, there is other provision for those who are not nomadic. And, as I have said, though outside the policy, the individual circumstances and needs of former gypsies in the statutory and planning sense may still be taken into account, as provided in sections 54A and 70(2) of the 1990 Act. This feature of every planning decision seems to have been overlooked or confused by Sullivan J,

first, in maintaining, in paragraphs 17 to 22 and 25 of his judgment, that the national policy should be interpreted to apply to traditional gypsies who are no longer nomadic, and in paragraphs 23 and 24, that, when looked at on its own facts, a person who was too old or ill to live a nomadic life, could nevertheless be said to be of "a nomadic way of life"…

48. The effect of the statutory and policy definition is to focus on the current nomadic life-style of applicants for planning permission, that is, their way of life at the time of the planning determination. The rationale for that focus is to be found in the first of the three main intentions of Circular WO 2/94 that I have set out in paragraph 14 of this judgment, namely "to provide that the planning system recognises the need for accommodation consistent with the gypsies' nomadic lifestyle". If that lifestyle, as a matter of fact, is no longer present, there is no justification, as Pill LJ said, at page 10 of the transcript of his judgment in *Hearne*, for applying a more relaxed approach to them…

57. By way of summary, I conclude with the following propositions of law – none of them original – and conclusions on the questions with which these appeals are concerned:

…

> 2) Whether applicants for planning permission are of a "nomadic way of life" as a matter of planning law and policy is a functional test to be applied to their way of life at the time of the determination. Are they at that time following such a habit of life in the sense of a pattern and/or a rhythm of full-time or seasonal or other periodic travelling? The fact that they may have a permanent base from which they set out on, and to which they return from, their periodic travelling may not deprive them of nomadic status. And the fact that they are temporarily confined to their permanent base for personal reasons such as sickness and/or, possibly, in the interests of their children, may not do so either, depending on the reasons and the length of time, past and projected, of the abeyance of their travelling life. But if they have retired permanently from travelling for whatever reason, ill-health, age or simply because they no longer wish to follow that way of life, they no longer have a "nomadic habit of life". That is not to say they cannot recover it later, if their circumstances and intention change, in keeping with Diplock LJ's observation that gypsy status in this sense is an alterable status. But that would arise if and when they made some future application for permission on the strength of that resumption of the status …".

30. On 2 February 2006, the Office of the Deputy Prime Minister issued Circular 1/2006: Planning for Gypsy and Traveller Caravan Sites, which produced a revised definition for "Gypsies and Travellers" as follows:

> "Persons of nomadic habit of life whatever their race or origin, *including such persons who on grounds only of their own or their family's or dependants' education or health needs or old age have ceased to travel temporarily or permanently*, but excluding members of an organised group of travelling show people or circus people travelling together as such." (emphasis added)

This revised definition addressed head-on the result in *Wrexham*, by providing that a Gypsy or Traveller could retain that status, despite having permanently ceased travelling, provided that he or she was otherwise of nomadic habit of life and had only ceased travelling on these specific grounds of educational or health needs, or old age.

31. In March 2012, the Government issued the first "Planning Policy for Traveller Sites" ("PPTS 2012"), in which the definition of "Gypsies and Travellers" remained unchanged. We note that the aim of PPTS 2012 was described at paragraph 3 of the introduction in the following terms:

> "The Government's overarching aim is to ensure fair and equal treatment for travellers, in a way that facilitates the traditional and nomadic way of life of travellers while respecting the interests of the settled community."

32. In August 2015, PPTS 2015 was published. The overarching aim of the policy was expressed in precisely the same words as in PPTS 2012 (above). However, the definition of "Gypsies and Travellers" was amended to exclude those who, because of their education or health needs, or old age, had permanently ceased to travel. This was achieved by the simple deletion of the words "or permanently" from the definition noted in paragraph 30 above. Those who had ceased to travel temporarily for those reasons remained within the definition. The effect of this – the relevant exclusion – was that those who, for the stated reasons, had ceased to travel permanently were within the policy definition in July 2015, but excluded from it by PPTS 2015 in August 2015.

33. On behalf of Ms Smith, Mr Willers referred to a number of cases where the courts have recognised that, at least in its operation, the planning system has found it difficult to accommodate the interests of the Gypsy and Traveller community. It is unnecessary to set out all the authorities in which that difficulty has been identified. Simply by way of example, we would refer to the decision of this court in *London Borough of Bromley Council v Persons Unknown* [2020] EWCA Civ 12, in which the appellant council's appeal against the judge's refusal to grant a borough-wide injunction against Gypsies and Travellers was dismissed, and the cases cited there.

34. The judge also noted that the difficulties faced by Gypsies and Travellers in obtaining either temporary or permanent planning permission for sites for their caravans have not yet been overcome. In the light of the evidence (which we have summarised at paragraph 20 above), it would seem that those difficulties persist. We return to that issue when considering grounds 3 and 4 below.

4.2 The Convention

35. Ms Smith's claim was put by reference to Articles 8 and 14 of the Convention. They provide as follows:

> "**Article 8 – Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-

> being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others …"

and

> **"Article 14 – Prohibition of discrimination**
>
> The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

36. There can be no room for a claim under Article 14 unless the facts "fall within the ambit" of another Convention right: *Petrovic v Austria* [1998] 33 E.H.R.R.14 at [22]. Thus, as the judge noted at [56], in order to bring her claim within Article 14, Ms Smith had to show that her complaint fell within the ambit of Article 8: *Smith v Lancashire Teaching Hospital NHS Foundation Trust* [2017] EWCA Civ 1916, [2018] Q.B. 804 at [41]. As the Master of the Rolls put it in *Smith*, at [55]:

> "If the state has brought into existence a positive measure which, even though not required by Article 8, is a modality of the exercise of the rights guaranteed by Article 8, the state will be in breach of Article 14 if the measure has more than a tenuous connection with the core value protected by Article 8 and is discriminatory and not justified."

37. The claims in this case under Article 8 and Article 14 focused on what was said to be the unlawful nature of the relevant exclusion in PPTS 2015. When the court considers an attack of that kind, the general test to be applied is that set out by Lord Reed in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700 at [74]:

> "74. The judgment of Dickson CJ in *Oakes* provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in *Oakes* can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in *De Freitas,* and the fourth reflects the additional observation made in *Huang.* I have formulated the fourth criterion in greater detail than Lord Sumption, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure."

38. As to the issues of justification and proportionality, the development of the law has not perhaps been assisted by the various attempts by the European Court of Human Rights

to formulate the applicable test in different circumstances. In consequence, there are several different formulations. By way of example, the European Court of Human Rights noted in *Stec v United Kingdom* [2006] E.H.R.R.47, that "very weighty reasons" will be required to justify a difference in treatment based on gender. The same test was applied to "a particularly vulnerable group in society" (see *Guberina v Croatia* (2018) 66 EHRR 11), and to a claim involving disability discrimination (see *JD and A v United Kingdom* [2020] H.L.R. 5, which the judge cited in this case). However, in cases involving economic or social strategy, the test has been said to be whether the policy choice is "manifestly without reasonable foundation" (see *JD and A*). In other cases, such as *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213, the court has spoken of the need to make "a stringent assessment of the justification advanced".

39. These and other formulations were the subject of detailed consideration by Lord Reed (with whom Lord Hodge, Lord Lloyd-Jones, Lord Kitchin and Lady Black agreed) in *R (SC) v Work and Pensions Secretary* [2021] UKSC 26; [2022] AC 223 between [97] and [162]. His conclusions were set out at [159] to [162]. He favoured a suitably flexible approach, giving "appropriate respect to the assessment of democratically accountable institutions", but also taking "appropriate account of such other factors as may be relevant". Whilst "the courts should generally be very slow to intervene" in social and economic policy such as housing and social security, "differential treatment on grounds such as sex or race nevertheless requires cogent justification". That flexible approach reflects the short concurring judgment of Davis LJ in *R (Joint Council for the Welfare of Immigrants) v SSHD* [2020] EWCA Civ 542; [2021] 1 WLR 1151, where he accepted that "particularly close scrutiny may be called for" if the discrimination involved what he called the "suspect" characteristics, such as race or religion or sexual orientation. We would include disability in that list. In cases of admitted indirect discrimination on the grounds of disability, there is generally less margin of appreciation and a greater burden faced by the defendant policy-maker.

40. Finally on this point, the relevant authorities were recently the subject of detailed analysis by this court in *R (The Motherhood Plan, Kerry Chamberlain) v Her Majesty's Treasury* [2021] EWCA Civ 1703 at [99] to [112]. In that case this court endorsed the summary of the effect of the decision in *SC* set out in *R (Salvato) v Secretary of State for Work and Pensions* [2021] EWCA Civ 1482 at [34] as follows:

> "34. Lord Reed concluded [in *SC*] that the "manifestly without reasonable foundation" formulation still had a part to play, but that the approach which the Court had followed since *Humphreys* should be modified in order to reflect the nuanced nature of the judgment which is required. He stressed the importance of avoiding a mechanical approach based on the categorisation of the ground of the difference in treatment. A more flexible approach will give appropriate respect to the assessment of democratically accountable institutions, but will also take appropriate account of such other factors as may be relevant. The Courts should generally be very slow to intervene in areas of social and economic policy such as housing and social security, but as a general rule, differential treatment on grounds such as sex or race nevertheless requires cogent justification."

4.3 The Equality Act 2010

41. Section 19(1) of the Equality Act 2010 provides a complete code:

> "**19 Indirect discrimination**
>
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

42. Translating that into the present case, it is said that the single criterion of nomadism, namely the requirement that Gypsies and Travellers continue to travel and move from one part of the country to another, in the new definition in PPTS 2015, puts elderly, retired or disabled Gypsies or Travellers at a particular disadvantage when compared to younger and more able-bodied Gypsies and Travellers. As the judge noted, the Secretary of State did not suggest otherwise.

43. In such circumstances, under s.19(2)(d) of the Equality Act 2010, such a policy would be discriminatory unless the Secretary of State can justify it; he must show that it is "a proportionate means of achieving a legitimate aim". It is ultimately for the court, not the Secretary of State, to make that judgment: see *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15; [2012] 3 All ER 1287 at [20]**,** a case concerned with discrimination on the grounds of age, where Baroness Hale, with whom Lord Hope, Lord Mance, Lord Brown and Lord Kerr agreed, emphasised that "… it is not enough that a reasonable employer might think the criterion justified" and that "[the] tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement". Again, both the *Bank Mellat* test and the flexible approach outlined in paragraphs 39 and 40 above are directly applicable.

44. Section 149 of the Equality Act 2010 is concerned with the Public Sector Equality Duty ("PSED"). Section 149(1) provides as follows:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to –
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

In the present case, the Secretary of State undertook a detailed PSED analysis in respect of PPTS 2015, which we address in section 7 below.

5. GROUND 1: THE RELEVANT TEST AND BURDEN OF PROOF

5.1 Submissions

45. On behalf of the appellant, Mr Willers submitted that the starting point for any consideration of this claim, and therefore this appeal, is the concession made on behalf of the Secretary of State: that the relevant exclusion amounted to indirect discrimination. Thus, he said, the judge was right to focus on the issue of justification and to say that "very weighty reasons" would be needed to justify such discrimination. However, Mr Willers pointed to [71] and following of the judge's judgment where, having set out the need for very weighty reasons and the test in *Bank Mellat,* he then referred to *Christian Institute v Lord Advocate* in the passage we have cited in paragraph 22 above, and went on to refer to the decision of this court in *JCWI*. In those cases the court referred to the "high hurdle" a claimant can face when seeking to impugn legislation on grounds of proportionality.

46. Mr Willers submitted that those cases concerned blanket challenges to the lawfulness of legislation or policy in the abstract, made at the outset, and before such legislation or policy had been tested in practice (the effective meaning of "ab ante"*,* the expression used by Lord Reed in *Christian Institute)*. He said that this was not an "ab ante" challenge, but instead a classic claim by an affected person for indirect discrimination. Moreover, he submitted that the judge's error was maintained at [82], where he referred to the planning system as a whole as being "*capable of being operated* such that it respects the Article 8 rights" of those who, through age and disability, had been forced to give up the nomadic life (emphasis added). Mr Willers said that that was a direct echo of the test applied in *Christian Institute* at [88]. His submission was that, since what was in issue was justification, theoretical questions of whether or not the system was capable of operating fairly were either irrelevant or, at best, material only as part of the *Bank Mellat* considerations. In short, he submitted that the judge had imposed a "very high hurdle" on Ms Smith when, in reality, the burden was on the Secretary of State to justify the admitted discrimination.

47. On behalf of the Secretary of State, Mr Mould maintained the concession that the exclusion amounted to indirect discrimination, but said that the judge had been justified in approaching the question of justification on the basis set out in *Christian Institute.* He said that was really just a paraphrase of the flexible test set out by Lord Reed in *SC*. He suggested in his written submissions that the underlying complaint here was that PPTS 2015 was inherently discriminatory and that therefore the case was, or was akin to, the kind of root and branch challenge that was made in *Christian Institute.* Accordingly, he submitted there was no error.

5.2 Analysis

48. For the reasons set out below, we have concluded that the judge was wrong to refer to *Christian Institute* and "the very high hurdle" it presented to a claimant in the position of Ms Smith.

49. First, this was not a blanket challenge to legislation or policy, the proportionality of which was being attacked on theoretical or hypothetical grounds. That sort of abstract challenge naturally faces a high hurdle, because it will usually be impossible for the court to conclude that, merely as a result of the words alone, the legislation or policy is unlawful. But this is a very different case involving, not a hypothetical challenge, but a challenge affecting real people in the particular circumstances of the case in hand.

50. This point also recalls what Lord Reed said at [162] of his judgment in *SC.* There he noted:

> "162. … In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign. The favoured ground of challenge is usually article 14, because it is so easy to establish differential treatment of some category of persons, especially if the concept of indirect discrimination is given a wide scope. Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process …".

51. Those considerations may be compared with the circumstances of this case. These proceedings have been brought by an individual, Ms Smith, who has suffered admitted indirect discrimination, rather than a campaigning organisation; and she is a member of a particular group in society (namely Gypsies and Travellers) which, in accordance with *Chapman* and other authorities, the State has a positive obligation to assist. So this is some way from the situation typical of those in which Lord Reed warned against "undue interference" with the political process by the courts – a fundamental principle, which, as we have already indicated, we have well in mind.

52. Secondly, the reference to the approach in cases such as *Christian Institute* obscures the fact that, in the present case, indirect discrimination is admitted. That was not the case in either *Christian Institute* or *JCWI*. In cases where indirect discrimination is admitted, what becomes critical is whether or not it can be justified. It was, in our view, incorrect for the judge to say that, notwithstanding the concession that there was discrimination, the challenger faced "a high hurdle". On the contrary, in the light of the concession, the burden was on the Secretary of State to demonstrate the necessary justification.

53. Thirdly, we agree with Mr Willers' submission that the judge was wrong at [71] of his judgment to find that the inspector did not discriminate against Ms Smith in the exercise of her planning judgment. What evidently happened here is what sometimes happens in cases of indirect discrimination: the inspector applied to Ms Smith a discriminatory element of policy which put persons with the protected characteristics of disability and age at a particular disadvantage. Ms Smith was put at that disadvantage. Again, what matters is justification.

54. Fourthly, we also accept Mr Willers' submission that if the judge's approach at [71] was right, then it would mean that the so-called "high hurdle" would apply in all – or at least most – claims for indirect discrimination. Most such claims are based, in one way or another, on some element of legislation or policy. It is not the law that, in such claims, despite the admission of discrimination, the claimant must demonstrate that the measure was wholly incapable of lawful operation.

55. An example of this can be seen in *R (Ward and others) v Hillingdon London Borough Council* [2019] EWCA Civ 692: [2019] PTSR 1738. That case concerned the relevant council's housing allocation scheme which indirectly and unlawfully discriminated against Irish Travellers and Kurdish refugees, because of its insistence on a 10-year continuous residence requirement. It was this requirement which formed part of the council's policy and created the issue in contention. The court did not approach that issue on the basis that the claimants needed to clear a high hurdle because their attack was on the policy as a whole. We acknowledge that *Ward* was a judicial review claim, whilst this is a s.288 challenge, but we do not think that this makes any difference to the substance of this point.

56. Accordingly, we accept Mr Willers' submission that the judge erred in his approach to the applicable test and the burden of proof. A "high hurdle" is not a paraphrase of the flexible approach outlined in *SC*.

57. Although it was not an argument expressly set out in Mr Mould's skeleton argument, Mr Willers also addressed under ground 1 the question whether, notwithstanding the references to the test in *Christian Institute* and *JCWI*, those references actually made any difference to the judge's reasoning. For two reasons, we agree with Mr Willers that the judgment was tainted by this error.

58. First, we consider that the judge's express inclusion of and reference to "the high hurdle" faced by Ms Smith should be seen as a material element of his reasoning, and therefore cannot be discounted on the basis that it may not have made a difference to the result. Secondly, whether or not this made a difference to the outcome is connected with the answer to ground 4, and the judge's approach to the issue as to whether, on all the available material, the relevant exclusion was justified. We address that issue in section 7 below.

59. For these reasons, therefore, we conclude that ground 1 of the appeal must succeed. The judge erroneously imposed a burden of proof, a "high hurdle", on Ms Smith in circumstances where the onus was on the Secretary of State to make good his case on justification.

6. GROUND 2: RACE DISCRIMINATION

6.1 Submissions

60. Mr Willers criticised the judge's conclusion in [65] of the judgment, that Ms Smith could not rely on discrimination on the grounds of race because it had not been pleaded. Mr Willers submitted that that was wrong. He argued that the whole case depended on the status of Ms Smith and her family as Gypsies, and that this was a protected

characteristic of race. He also said that this finding was "procedurally unfair" because, if the judge had been concerned about the point, he ought to have shared this concern with the appellant at the time of the hearing, and given her the opportunity to amend her case, before rejecting the argument out of hand.

61. On behalf of the Secretary of State, Mr Mould said that the conclusion was justified and that the claim form was put on the grounds of age and disability, not race. He urged us to limit the claim to the pleaded grounds. He did not separately address the procedural issue.

6.2 Analysis

62. Race, or more properly here the ethnicity of Ms Smith and her family as Romany Gypsies, is a protected characteristic under the Equality Act 2010. That was an inherent element of this case from the outset. The inspector expressly referred to the appellant's ethnicity in her decision letter, at paragraphs 43 and 49. It is right that, unlike age and disability, ethnicity/race was not expressly raised in the claim form. But the Secretary of State did not take this as a pleading point, and did not object to the submissions of the interveners – which focussed particularly on the traditional characteristics of Romany Gypsies – nor the extensive evidence on these matters that was provided on behalf of Ms Smith.

63. It is worth pausing here to consider both those submissions and that evidence. There are four interveners[1], all of whom are groups representing Gypsies and Travellers. Their submissions before the judge, now consolidated in the single skeleton argument on appeal prepared by Mr David Wolfe KC, Mr Owen Greenhall and Mr Tim Jones, concentrated on particular elements of the traditional lifestyle of Gypsies and Travellers. Thus, in their submissions to this court, the interveners dealt, at [35] and [41], with the importance of living in caravans to the ethnic identity of Gypsies. As they summarised the position at [41], "the cultural aversion to bricks and mortar accommodation that many Gypsies and Travellers have is not dependent on whether they travel for economic purposes." Those submissions go on to support Ms Smith's appeal on ground 2. Mr Wolfe submitted at [44], "the claim in race discrimination was clearly set out and formed the basis for the Interveners' intervention in the court below."

64. It is also important to remind ourselves of the evidence before the judge (to which no objection was taken) from the four interveners. There were two witness statements of Dr Siobhan Spencer MBE, and one each of Dr Simon Ruston, Chelsea McDonagh, Alison Blackwood, Ilinca Diaconescu and Abbie Kirkby. These witness statements explain many of the cultural traditions of ethnic Gypsies and Travellers, and spell out the adverse consequences of the relevant exclusion to those who are ethnic Gypsies and Travellers. The report of the Equality and Human Rights Commission, dated September 2019, also made clear the widespread effect of the relevant exclusion.

65. Romany Gypsy is an ethnicity: see *CRE v Dutton* [1989] 2 WLR 17; *Moore & Coates v Secretary of State for Communities and Local Government* [2015] EWHC 44 (Admin). The relevant defining feature of that ethnicity is not "being nomadic": as the judgment in *Chapman* at [73] and [96] made plain, it is the act of living in caravans

[1] Friends, Families and Travellers; London Gypsies and Travellers; Southwark Travellers Action Group; and Derbyshire Gypsy Liaison Group.

which is an integral part of the Gypsy/Traveller way of life. The aversion of Gypsies and Travellers to "bricks and mortar" has been noted in numerous cases: see, for example, *Clarke v Secretary of State for the Environment, Transport and the Regions* [2002] JPL 552 at [34], upheld by this court at [2002] EWCA Civ 819; [2002] J.P.L. 1365. As with any other ethnicity, an individual is either a Romany Gypsy or not; there is no in-between status here. Moreover, as was also emphasised in *Chapman* at [96], the State has a positive obligation to facilitate the Gypsy way of life.

66. Accordingly, we agree with Mr Willers and Mr Wolfe: the nature of the discrimination before the judge was the negative impact on those Gypsies and Travellers who had permanently ceased to travel due to old age or illness, but who lived or wanted to live in a caravan. This discrimination was inextricably linked to their ethnic identity.

67. That conclusion makes it unnecessary to decide the subsidiary argument on ground 2, namely the suggestion that the judge's decision not to have regard to ethnicity was, as it was put, "procedurally unfair", in particular because no objection was taken by the Secretary of State, and no warning had been given prior to the handing down of the judgment. In the circumstances, while we see the force of the contention that at the hearing this matter was understood by both sides to be live before the court, and that it was therefore appropriate for the judge to address it in his judgment or, if he was intending not to do that, to make plain to the parties why that was so, this is not an issue on which the outcome of the appeal depends. We therefore say no more about it.

68. It might be said that adding the additional protected characteristic of race/ethnicity may not make any real difference, given that the burden here remains on the Secretary of State to justify the indirect discrimination in any event. We do not consider that to be right, for two reasons. First, as Mr Willers and Mr Wolfe submitted, ethnicity is, at least potentially, bound up with age and disability discrimination in this case. But more importantly, it seems to us that ethnicity is a significant element in the need for justification. We note that in the consultation document (referred to below) prior to PPTS 2015, at paragraph 2.4, the Secretary of State said that the relevant exclusion "is not about ethnicity or racial identity". That was perhaps a surprising statement in the circumstances and, for the reasons we have given, we consider it to have been incorrect.

69. For those reasons we conclude that ground 2 of the appeal must succeed. Race discrimination was always an element of Ms Smith's s.288 challenge.

7. GROUND 3: LEGITIMATE AIM AND GROUND 4: PROPORTIONALITY

70. Whether or not the relevant exclusion had a "legitimate aim" or objective, and whether or not the importance of that objective outweighed the severity of its effect – which we shall call, by way of shorthand, "proportionality" – are linked in this case, and we therefore address them together.

7.1 Submissions

71. The first element of the justification issue is whether the discrimination arose out of a legitimate aim. On behalf of Ms Smith, Mr Willers made four complaints about the way in which the judge addressed the legitimate aim of the relevant exclusion. First, he

submitted that the judge addressed the aim of PPTS 2015 generally, and not the aim of the particular amendment (the relevant exclusion) in question. Secondly, he said that the judge appeared to identify two different aims in his judgment. At [83.1] of his judgment the judge said that the principal objectives of the policy "were to ensure the fair and equal treatment of Gypsies and Travellers in a way that facilitated their traditional and nomadic habit of life while also respecting the interests of the settled community". At [87.1] the judge said that "it was a legitimate aim to distinguish between the land-use needs of nomadic people and the settled community". Thirdly, Mr Willers submitted that neither of these aims was the subject of any evidence, a point he repeated in response to further submissions made by Mr Mould as to the overall aim of PPTS 2015. Finally, Mr Willers submitted that, insofar as the aim was "to distinguish between the land-use needs of nomadic people and of the settled community" the judge was wrong to accept that it was legitimate to pursue such an aim in the absence of any evidence.

72. In response, Mr Mould accepted that what mattered was the aim of the measure concerned, in this case the relevant exclusion. He went on to say that there was no substantial divergence between the two aims identified by the judge at [83.1] and [87.1]. Furthermore, he did not accept that the Secretary of State's evidence in relation to the legitimate aim had changed. His skeleton argument for the appeal contained extensive citations from the Secretary of State's consultation response document of August 2015. This document was exhibited to the witness statement of Mr Gallagher, a Planning Director in the Department of Housing, Communities and Local Government, which was before the judge, although it is not clear if these specific passages were expressly brought to his attention.

73. As to the second issue of proportionality, namely whether the aim outweighed the severity of the effect of the relevant exclusion, Mr Willers focused on the judge's conclusion that, because the planning system was theoretically capable of meeting the needs of formerly-nomadic Gypsies and Travellers, the measure was justified. He submitted that this ignored the need for evidence to show whether or not the planning system was working in such a way in practice. Secondly, he said that the judge erred in finding that the measure was justified by reference to matters – namely other general provisions of the National Planning Policy Framework ("NPPF"), Article 8 and the common law – that were of universal application. He said that such general provisions could not outweigh or justify the discriminatory effect of the relevant exclusion on elderly and disabled Gypsies and Travellers.

74. On ground 4, Mr Mould relied on the contemporaneous material produced by the Secretary of State at the time of PPTS 2015 to justify the relevant exclusion. He also maintained that the relevant exclusion did no more than restore the position for planning purposes to that which existed prior to 2006. This, he argued, had been addressed in *Wrexham*, which was a decision binding on this court.

7.2 Analysis

75. As we see it, the first question to ask, logically, is whether the court should consider the legitimate aim of PPTS 2015 as a whole, or the legitimate aim of that part of the policy with which this claim is concerned, namely the relevant exclusion of those who had been forced by old age or disability to cease travelling. In our view, although it is of course necessary to consider the relevant exclusion in the context of PPTS 2015 as

a whole, what matters is the exclusion itself, and, in particular, the application of that exclusion in the circumstances of the decision made by the inspector in this case.

76. That seems right as a matter of common sense. Whilst it would be wrong to divorce the exclusion from PPTS 2015 as a whole, it is the particular decision to exclude those who had previously been included in the definition of "Gypsies and Travellers" that matters for the purposes of this challenge. That is its focus. It is this element of the policy which has to be justified. Of course, if there was another part of PPTS 2015 which balanced that exclusion with some sort of additional or different inclusion, then that would also be important. But it is not suggested that there was any such balancing provision here.

77. Accordingly, we consider, with respect, that the judge concentrated too much on the legitimate aim of PPTS 2015 as a whole, rather than focusing on the legitimacy or otherwise of the relevant exclusion itself. Indeed, when dealing with the legitimate aim at [80] to [83] and [87], the judge did not seek to concentrate specifically on the relevant exclusion, and its application in this case, rather than on PPTS 2015 as a whole. In our view, that was inappropriate.

78. As we have noted above, the judge identified two aims of the policy at [83.1] and [87.1] of his judgment. The aim at [83.1] was said to be a balance between facilitating the traditional nomadic habits of life of Gypsies and Travellers, "whilst also respecting the interests of the settled community". That may be intended to equate to the aim, described at [87.1], of distinguishing between the land-use needs of nomadic people and the land-use needs of the settled community. "Land-use needs" are not referred to in the contemporaneous material, outlined below. In any event, neither of the aims identified by the judge expressly addressed the needs of Gypsies and Travellers who, through age or disability, are no longer able to travel.

79. In our view, the confusion over the legitimate aim of the relevant exclusion stemmed, at least in part, from the changing emphasis of the Secretary of State's submissions as these proceedings have progressed. Thus, in the Secretary of State's detailed grounds, the objective was said to be a fair and equal planning system. Certainly, the evidence of Simon Gallagher appeared to go to that point. It was accepted that there was no evidence in the contemporaneous documentation about an aim to distinguish between the land-use needs of nomadic people and the land-use needs of the settled community, which was a point made orally to the judge.

80. Furthermore, it appears that another new objective was identified at the hearing before the judge, namely an aim to limit the allegedly advantageous planning policies enjoyed by Gypsies and Travellers who still travelled, rather than those who no longer did. That aim was identified in the contemporaneous material, and for the reasons we come on to explain, it has a potentially significant effect on the issue of justification.

81. Accordingly, because he did not focus on the relevant exclusion, but considered PPTS 2015 as a whole, and because of the uncertainty about what the aim actually was or was said to be, we consider that the judge's analysis of the legitimate aim of the relevant exclusion cannot stand. We propose to accept the invitation of both leading counsel at the appeal hearing that, if this was the conclusion we reached, we should consider afresh all the arguments as to justification. We do so by first considering the relevant material; then analysing the aim of the relevant exclusion to decide whether it was legitimate;

then considering the proportionality balance; and finally addressing the decision in *Wrexham*.

7.3 The relevant material

82. In our view, the relevant material arose in two stages. There was an original PSED analysis, which was completed by 29 January 2015. At the same time a consultation document was sent out to various interested parties. The response to the consultation document was published in August 2015, at the same time as PPTS 2015. By then, a further PSED analysis had been completed. However, with the exception of the point made at paragraph 85 below, the relevant parts of that final PSED analysis were in the same terms as the one produced before the consultation.

83. Both the original PSED analysis, and the final version, said this about the relevant exclusion:

> "PSED Analysis
>
> Ensuring Fairness in the Planning System
>
> **Proposal 1 – Amend planning definition**
>
> **1. The proposal**
> Amend the planning definition of travellers to remove the words "or permanently" to limit the definition to those who have a nomadic way of life.
>
> **2. The objective/s**
> To ensure that the planning system applies fairly to all.
>
> **3. Section 149(1) considerations**
> **(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act**
> **(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it**
> **(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it**
>
> This does not a) eliminate discrimination, harassment, victimisation, b) advance equality of opportunity or c) foster good relations between those who do and do not share protected characteristics.
>
> We recognise that this proposal will have an impact on the identified racial group i.e. Gypsies and Travellers. We note, for example, that Romany Gypsies and Irish Travellers are a protected race under the Equality Act 2010 ("the Act"). Additionally, within this group there is likely to be a specific impact on the elderly, disabled and possibly women (particularly those from single parent families). We recognise that age, disability and gender are also protected characteristics under the Act.
>
> The impacts are likely to be on Article 8 rights to private and family life, home and correspondence. For example, this could mean that those persons without family

connections will no longer be able to live with other members of their Gypsy and Traveller community.

4. Balancing exercise and alternative options

This definition change meets the legitimate policy objective of achieving fairness in the planning system.

Whilst we recognise the Article 8 interference set out above and the impact this may have on those with protected characteristics within the identified racial groups, i.e. the elderly, the disabled and women, on balance we think that this interference is necessary and proportionate. Overall it is important for this Government to implement a fair planning system for all, and that where Gypsies and Travellers have settled permanently, they should be treated no differently to the rest of the settled community for planning purposes. The proposal will also support the Government's aim of reducing tensions between the traveller community and the settled community. Evidence, in the form of departmental correspondence and supported by responses to the consultation, raises concerns about fairness in the treatment of planning applications from travellers, who have ceased to travel, yet are still defined as travellers under planning policy. On balance the interference is proportionate.

We recognise that when implementing this new definition there will remain the need to consider Article 8 and the best interests of the child, therefore the impact of the change is likely to be focused on a small group. In cases involving families where some members do not travel, it may continue to be appropriate to grant permission for traveller sites on the grounds that it is proportionate to do so and would be an unlawful interference with human rights (Article 8) to limit the permission to particular family members only. As such, we consider that the group of persons most likely to be affected by this change are quite small (elderly, disabled and possibly women (particularly those from single parent families) without family connections). These persons would not be prohibited from applying for a caravan pitch or site but such an application would be considered under the provisions of the NPPF and not Planning Policy for Traveller Sites. Further, it will always be for the decision maker to consider any personal circumstances of the applicant and weigh such circumstances in the balance.

We recognise that there is a risk that homelessness, unauthorised camping (including roadside camping) may increase as Gypsies and Travellers may try to ensure that they fulfil the new definition by demonstrating that they have not permanently ceased to travel. This may impact on their ability to access services such as education and health and would impact on Gypsies and Travellers particularly, the elderly, disabled and women. Such risks will be kept under review. In relation to plan-making, while the persons impacted by this change would not have their needs planned for under the specific provisions of the Planning Policy for Traveller Sites, they would be planned for under the general provisions of the National Planning Policy Framework. This helps mitigate negative impact …".

84. The PSED analysis also addressed the cumulative effect of the proposed changes. The original version said:

> "We recognise that these proposals when considered together as a whole will have a cumulative impact on the identified racial group i.e. Gypsies and Travellers. We also recognise that there will be cumulative impact on groups within that racial group, for example, the elderly, disabled and women (age, disability and gender are protected characteristics). The impacts are likely to be on Article 8 rights to private and family life, home and correspondence. However, we consider that the impact will be limited to those individuals, disabled and elderly, who are living on their own.
>
> *Overall, the cumulative effect of the proposals would be to reduce Gypsies and Travellers' ability to secure both permanent and temporary planning permission and mean that for some Gypsies and Travellers, they would not have their accommodation needs planned for separately under Planning Policy for Traveller Sites and as part of their family group*.
>
> This could lead to more unauthorised sites, camping and homelessness." (emphasis added)

85. The final version of the PSED analysis, completed after the consultation, was in the same form as quoted in the preceding paragraph, except that the paragraph in italics ceased after the words "temporary planning permission", thus excluding the words from "and mean that" to the end of the sentence. That seems a slightly curious excision, since the excised words merely spelt out what was evidently accepted to be the position, namely that the Gypsies and Travellers caught by the relevant exclusion would not have their accommodation needs planned for separately under PPTS 2015 and as part of their family group.

86. Finally, Annex C to the original PSED analysis, which became Annex H in the final version, stated that "those who genuinely travel will no longer be competing for sites with those who have given up permanently." This is consistent with the previous references in the PSED analysis to the reduction in the ability of Gypsies and Travellers generally to secure planning permission.

87. The consultation document that was sent out in September 2014 contained the following passages, concerning the aim of the relevant exclusion:

> "2. Ensuring fairness in the planning system
> …
>
> 2.2 Current policy requires that those who have ceased travelling permanently for reasons of health, education or old age (be it their needs or their family's or dependents') are for the purposes of planning treated in the same way as those who continue to travel.
>
> 2.3 The Government feels that where a member of the travelling community has given up travelling permanently, for whatever reason, and applies for a permanent site then that should be treated no differently to an application from the settled population (for example, seeking permission for a Park Home). This would not prevent applications for permanent sites, but would mean that such applications would be considered as any other application for a permanent caravan site would be: i.e. not in the context of Planning Policy for Traveller Sites.

2.4 This is not about ethnicity or racial identity. It is simply that for planning purposes the Government believes a traveller should be someone who travels.

2.5 The Government therefore proposes amending the current definition of both "gypsies and travellers" and "travelling showpeople" in Annex 1 to Planning Policy for Traveller Sites to remove the words *or permanently* (underlined in the current definitions in paragraph 2.1 above) to the effect that it would be limited to those who have a nomadic habit of life. The Government is conscious of the need to facilitate the traveller way of life, including the right to family life and in considering whether there should be amendment to the definition will continue to bear this in mind.

2.6 We therefore propose to amend the definition of "gypsies and travellers" for the purposes of planning policy to:

> *Persons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family's or dependants' educational or health needs or old age have ceased to travel temporarily, but excluding members of an organised group of travelling showpeople or circus people travelling together as such …*

2.8 In determining whether applicants for traveller sites would fall under the proposed new definition, decision takers should give close scrutiny to whether the applicants are in fact living a nomadic lifestyle.

Q1 – Do you agree that the planning definition of travellers should be amended to remove the words *or permanently* to limit it to those who have a nomadic habit of life? If not, why not?

2.9 To complement the proposals set out above, the Government wishes to seek views on further measures to support those travellers which fall under the proposed new definition in order to facilitate their nomadic habit of life. For example, through the use of conditions which ensure that transit sites are available at certain times of the year for travellers to occupy on a temporary basis. This of course would be a matter for the local authority but may go towards making provision for those travellers who do travel. We are open to views on how we could further facilitate travellers' nomadic habit of life including its potential effects on the traveller community."

88. In the consultation response document of August 2015, at section 2, the Secretary of State identified 771 responses to the consultation. 423 responses, or about 60%, came from Gypsies and Travellers, although none are quoted or summarised in the consultation response document. Another 7% came from charities and the voluntary sector, which included some Traveller groups and organisations. There were 73 responses from parish and town councils, 52 from borough and district councils and a smaller, unspecified number from county and county borough councils. In this way, the consultation response document identified that not more than 21% of the total number of responses were from local planning authorities.

89. The text of the consultation response document concerning the relevant exclusion was as follows:

> "Ensuring fairness in the planning system
>
> *Change of planning definition*
>
> 3.6 The Government notes that responses from the traveller community and their representatives raised concerns about the new definition, and its possible impact on their traditional way of life. The Government has also noted that the change was supported by the majority of local planning authorities who expressed a view. Many shared the Government's view that the new definition would be – and seen to be – fairer. This was supported by evidence that the permanent occupation of some sites by some travellers causes resentment amongst the settled community.
>
> 3.7 The Government has therefore decided that the words "or permanently" should be removed from the definition of "travellers" in Annex 1 of Planning Policy for Traveller Sites. For the avoidance of doubt, this change applies to both "Gypsies and Travellers" and "Travelling Showpeople" as defined in Annex 1 of Planning Policy for Traveller Sites. The Government believes it is fair that if someone has given up travelling permanently then applications for planning permission should be considered as they are for the settled community within national planning policy rather than Planning Policy for Traveller Sites. When applying the new definition, local planning authorities will need to be mindful of Article 8 of the European Convention on Human Rights and the best interests of the child."

7.4 What was the aim of the relevant exclusion, and was it legitimate?

90. The stated objective of the relevant exclusion was "to ensure that the planning system applies fairly to all". This was amplified in the PSED analysis to say that "where Gypsies and Travellers have settled permanently, they should be treated no differently to the rest of the settled community for planning purposes."

91. It is clear that, if the Secretary of State were able to demonstrate that the objective of the exclusion was to create fairness, this would be a legitimate aim. Furthermore, we do not consider that the Secretary of State is required to demonstrate exhaustively that that was the aim of the relevant exclusion. It would be enough if the contemporaneous documentation could generally be said to support the objective of fairness. But in our view the Secretary of State has to go beyond mere assertion. In this legal context a particular policy might be asserted to be fair, but if in fact the accompanying material does not support that assertion the court may be unable to conclude that the relevant exclusion was legitimate.

92. Here, when the assertion that fairness was the aim of the relevant exclusion is analysed, the Secretary of State's argument encounters difficulties. We have concluded, for the reasons we give below, that the Secretary of State has not succeeded in demonstrating, on the evidence before the court, that fairness could properly be seen as the aim of the relevant exclusion.

93. First, it was apparent on the face of the PSED analysis that the relevant statutory considerations in s.149(1) of the Equality Act 2010 were not met. It seems an unpromising starting point for the suggestion that the relevant exclusion would achieve fairness, to note that, at the outset, the advice to the Secretary of State was that the relevant exclusion did not eliminate discrimination; did not advance equality of opportunity between persons who shared a relevant protected characteristic and persons who did not share it; and did not foster good relations between persons who shared the relevant protected characteristic and persons who did not share it.

94. That last point seems to us to be important. The PSED analysis asserts that the exclusion "will also support the Government's aim of reducing tensions between the traveller community and the settled community." As was pointed out during argument, this assertion is at odds with the admission that the exclusion will not foster good relations between Gypsies and Travellers and the settled community. These two propositions appear irreconcilable.

95. Secondly, there was in any event some uncertainty surrounding the evidence, identified in the PSED analysis, that was said to "[raise] concerns about fairness in the treatment of planning applications from Travellers, who have ceased to travel, yet are still defined as Travellers under planning policies". Although there is a reference to "departmental correspondence", this has not been further identified and was not relied on during these proceedings. That leaves the responses to the consultation. As we know, 21% of the responses came from local planning authorities. Moreover, although the consultation document said that the exclusion was "supported by the majority of local planning authorities who expressed a view", no precise numbers are identified, either of those who expressed a view, or what the majority was. It appears that, on the information provided, those who shared the view about fairness were a relatively small percentage of the total of those who responded to the consultation. Annex A of the PSED analysis states that "many respondents agreed with the underlying principle that where someone had given up travelling permanently then they should be treated no differently from the settled population". Plainly, however, this cannot be taken as meaning that a majority of all respondents were necessarily of this view.

96. Thirdly, and of more substantial significance in our view, there is the related question of whether the new definition was "seen to be fairer". Mr Mould submitted that the Secretary of State was entitled to have regard to what he called the "perception" that the existing planning regime was advantageous to Gypsies and Travellers, and that this demonstrated that the exclusion was in pursuit of a legitimate aim. We disagree. In looking at the legitimate aim of a policy with a view to justifying it, mere perception is no substitute for substantive evidence. In a case where indirect discrimination is admitted, it would not be possible to say that the discrimination was the result of a legitimate aim if such an objective was based solely on an unexplained or unfounded "perception". Such "perception" may be erroneous or misconceived. But in any event, without some identifiable basis in fact, it is not a proper foundation for a legitimate policy objective. There was some debate about the resentment said to be caused amongst the settled community, because planning permission is perceived to be granted more easily to Gypsies and Travellers than to the population at large. Mr Mould properly accepted that such resentment was not a material consideration in this context. This seems to be confirmed by the facts of this case. Here, any perception that the planning regime generally favoured Gypsies and Travellers was misplaced: the

evidence, which clearly troubled the judge, highlighted the difficulties which Gypsies and Travellers generally face when making applications for planning permission. It was for this reason that the judge asked Mr Mould why the planning system was failing in this context.

97. Fourthly, "fairness" here appears to be based on the assertion or assumption that, once Gypsies and Travellers can no longer travel because of age or disability, it is fair that they should be in the same position in planning terms as "the settled community". This reflects the assertion in the consultation document that the relevant exclusion was "not about ethnicity". But for the reasons we have given in discussing ground 2, that was, in our view, an incorrect statement.

98. Ms Smith and her family live in caravans. They are Romany Gypsies. Their land-use needs relate to that ethnicity. The relevant exclusion in PPTS 2015 characterises nomadic Gypsies and Travellers as different from Gypsies and Travellers who, as a result of age or disability, are no longer able to travel. But that, it seems, is to create sub-classes of an ethnicity and to distinguish between those sub-classes. In our judgment, that would require specific justification, which has not been provided. It also seems to sit uneasily with the stated aim of PPTS 2015 to facilitate the "traditional" way of life of Gypsies and Travellers, and not simply the "nomadic" way of life.

99. For these reasons, we have concluded that the evidence before the court does not succeed in demonstrating that, in substance, "fairness" could realistically be regarded as the objective of this exclusion. The acknowledged likely effect of the exclusion was that identified in the PSED analysis: to reduce the number of Gypsies and Travellers who can obtain permanent or temporary planning permission, and to ensure that those excluded by the new definition would not have the benefit of the policy applicable to those who remain within the definition. It was not suggested, either before the judge or before us, that this was, or could be, a legitimate aim.

100. We do not go so far as to conclude that, because there was an acknowledged deficiency in the inadequate number of sites and pitches for Gypsies and Travellers in the United Kingdom, the relevant exclusion was designed to provide a solution to that problem, because it would reduce the number of those defined as Gypsies and Travellers for planning purposes. That aim is not expressed in the contemporaneous material, and we shall not conjecture that it informed the exclusion with which we are concerned.

101. For those reasons, therefore, we uphold ground 3 of the appeal.

7.5 The proportionality balance

102. Given our conclusion that the Secretary of State has not established that the relevant exclusion had a legitimate aim, it is strictly speaking unnecessary for us to deal with ground 4, and to consider the question of the balance between the harshness of the exclusion, on the one hand, and the legitimate aim of the exclusion, on the other. But we have formed a clear conclusion on this point, and it seems appropriate to indicate what that conclusion is. Moreover, we should do so on the basis that we are wrong about ground 3, and that the Secretary of State has established that the aim of the exclusion was to create fairness as between Gypsies and Travellers, on the one hand, and the settled community, on the other.

103. The harshness of the relevant exclusion in practice is the subject of the evidence of the interveners (summarised at paragraph 64 above). But in our view, an important element of this appeal is that the harshness of what was being proposed was clearly spelt out in the PSED analysis produced both before and after the consultation. We note the following:

> (1) The PSED analysis said that the exclusion could mean that those persons without family connections would no longer be able to live with other members of their Gypsy and Traveller community. Indeed, as Mr Mould accepted during argument, even those with family connections would potentially be separated from their families: for example, a young Gypsy or Traveller who lived with older Gypsies and Travellers who had to give up travelling.
>
> (2) The PSED analysis indicated that the people "most likely" to be affected by the exclusion are "elderly, disabled, and possibly women, particularly those from single parent families, without family connections". The discrimination here seems plain. Moreover, although it is suggested that this was likely to be a small group, there is nothing by way of evidence to support that suggestion and, for the reasons identified below, we consider that it was incorrect.
>
> (3) The PSED analysis said that "there is a risk that homelessness, unauthorised camping (including roadside camping) may increase as Gypsies and Travellers may try to ensure that they fulfil the new definition by demonstrating that they have not permanently ceased to travel". There was a reference to the impact on their ability to access services such as education and health. Although the PSED analysis said that "[such] risks will be kept under review", Mr Mould confirmed that there has been no review since the relevant exclusion was introduced.

These were all obviously harsh consequences or potential consequences of the relevant exclusion.

104. As we have said in paragraph 103(b) above, the suggestion that the number of those affected by the relevant exclusion would be "small" is an assertion. And as we have said, it seems incorrect. As Mr Mould accepted, the relevant exclusion will eventually exclude all Gypsies and Travellers, with the exception of those who are determined to live their whole lives on the road. In other words, far from affecting a small group, the relevant exclusion potentially affects all Gypsies and Travellers.

105. It is a feature of the PSED analysis that its authors, although aware of the harshness of the effects of the exclusion, evidently seek to emphasise the relatively small number of those affected. We have addressed the question of the "small group" above. Another example is the assertion that the impact might be concentrated on those individuals, disabled and elderly, "without family connections" (see paragraph 83 above). We consider that this concept, too, is incorrect. It seems contrary to other parts of the same paragraph of the analysis which suggest that it might be an unlawful interference with human rights, in particular Article 8, to limit any planning permission to particular family members only. Moreover, the PSED analysis suggests that the relevant exclusion will largely affect those who live on their own because it assumes that those who live in family groups would be unaffected because of their Article 8 rights. Yet since that protection is not addressed in PPTS 2015, and no subsequent relevant

guidance has been provided to local planning authorities, the exclusion seems liable to have the opposite effect to that which the PSED analysis asserts.

106. Furthermore, the consequence of the relevant exclusion was that there would be people who, in July 2015, were defined as Gypsies and Travellers, and therefore had the alleged planning advantages of that status, but who in August 2015, following the publication of PPTS 2015, were excluded from that categorisation and therefore denied those alleged advantages. In its starkest form, it meant that some Gypsies or Travellers whose circumstances were the same as Ms Smith's would one day be occupying a site in accordance with national policy and with the concomitant status in planning decision-making, which may in many cases be embodied in conditions on a grant of planning permission, and the next day would not. Mr Mould again accepted that no consideration was given in any of the contemporaneous material to those who had certainty as a result of PPTS 2006 and PPTS 2012, but who would lose that certainty as a result of the relevant exclusion. He said that this was an unintended consequence of the relevant exclusion, although it seems to us to have been implicit in the PSED analysis itself.

107. The particular effect on that group of Gypsies and Travellers touches on the third consideration in *Bank Mellat*, namely whether some less intrusive measure could have been used. In our view, the Secretary of State's defence of the relevant exclusion would at least have been strengthened if those who had ceased travelling permanently due to age or disability by August 2015 remained within the PPTS 2015 definition, so that the exclusion only related to those who ceased travelling after that date. That would, at the very least, have avoided the unfairness of the exclusion for those like Ms Smith, who occupied the site near Coalville in accordance with national policy and then found that she did not. As we have said, the PSED analysis appeared, at least up to a point, to recognise this, but the policy was not amended accordingly.

108. Another point made in the contemporaneous documentation is the suggestion that the need for fairness in the planning system was particularly necessary in the Green Belt. However, if that was the case, it would have been possible to limit the relevant exclusion to the Green Belt. And that was not done.

109. How were the undoubtedly harsh consequences of the relevant exclusion outweighed by the aim of putting Gypsies and Travellers who had ceased to travel in precisely the same position as the settled community: those who had never travelled, or wanted to do so, and never would? That is not explained in the contemporaneous material. There is nothing beyond an assertion that the harsh measures were "proportionate" to explain how the potentially deleterious effects of the relevant exclusion were outweighed by treating old or ill Gypsies and Travellers in the same way as the settled community. Moreover, in our view, there are two elements in any such balancing exercise which, although referred to in the PSED analysis, did not eventuate in practice, and this seems further to weaken the suggestion that fairness outweighed the consequences.

110. The first is the concept that those most affected by the change would be able when making applications for planning permission to rely upon the general provisions of the NPPF and that, in any such applications, personal circumstances would be relevant. As we have said, this point did not find its way into PPTS 2015, even as a "signpost"; nor was there any guidance provided, though it was apparently promised, as to how local planning authorities should deal with applications by those who have been referred to

as "non-PPTS Gypsies and Travellers". The ability to resort to the general policies in the NPPF was said in the PSED analysis to be a mitigating factor. It could presumably have been spelt out in PPTS 2015, at least to make the position clear both to the Gypsies and Travellers concerned, and the local planning authorities addressing their applications.

111. Secondly, there is the related point that, because the PSED analysis expressly accepted that there would be adverse consequences, it was important that those consequences would be kept under review. They have not been: indeed, no mechanism was set up by which such a review could be carried out. In this context Mr Mould fairly conceded that he "could not resist the conclusion that there is a good deal of work to be done". In any event, the report of the Equality and Human Rights Commission (to which we have referred in paragraph 64 above) made plain that the need for pitches for Gypsies and Travellers as assessed by local planning authorities fell by up to 75% since the relevant exclusion became effective.

112. What emerges, therefore, is that there are undeniably harsh consequences of the policy. It is clear that these were, in part at least, expected by the Secretary of State because they were referred to in the PSED, with two potential methods of alleviation, one of which was not identified in the exclusion (the possible recourse to the general provisions of the NPPF) and the other not actually implemented (the review). That is to be set against a general assertion of fairness in the planning system, without elaboration or explanation as to how such fairness was to be achieved. Furthermore, no evidence was adduced by the Secretary of State to demonstrate that the relevant Article 8 rights were protected in practice, or how. The only evidence of potential relevance on this point – namely the 75% reduction identified above – seems to suggest otherwise.

113. Since the judge concluded that the indirect discrimination that had been conceded by the Secretary of State was justified because, as he put it, "PPTS 2015 does not stand alone", it is appropriate to consider briefly the relevant policies of the NPPF, the salient provisions of the 1990 Act, and the common law. There can be no doubt that Gypsies and Travellers can depend on their ethnicity within the planning system regardless of the definition: see [80], [82],[83.4], and [87.2] of the judgment below. However, we do not consider that this provides an answer to the claim under the Equality Act 2010 in particular, or is sufficient to justify the admitted discrimination.

114. First, as we have already said in paragraphs 46 and 58 above, the judge's approach was based on asking whether the planning system "taken as a whole is capable of being operated" in an appropriate way: see [82]. But that was a direct reference to the test in *Christian Institute*, which we have concluded was the wrong test.

115. Secondly, the judge here did no more than adumbrate the theoretical capability of the planning system to meet the need of Gypsies and Travellers. We agree that that was a relevant consideration. But what matters is how the planning system operates in practice: this is implicit in s.19(1) of the Equality Act 2010. This was a point emphasised in *R (Nur) v Birmingham City Council(2)*[2021] EWHC 1138 (Admin); [2021] H.L.R.41 and by this court in *R (Ward) v Hillingdon London Borough Council* [2019] EWCA Civ 692; [2019] PTSR 1738.

116. *Ward* concerned indirect discrimination in a housing allocation scheme. The housing authority sought to rely on other elements of the allocation scheme and, more widely,

duties imposed by Part 7 of the Housing Act 1996, in order to argue that there were what they called "safety valves" which made up for the indirect discrimination. This court rejected that argument because, as Lewison LJ pointed out at [87] of his judgment, there was no evidence that the "safety valves" within the allocation policy had actually operated to eliminate the disadvantages to the protected groups involved in the appeal. In fact, in *Ward* they had not achieved that, because the claim had been dismissed by the hardship panel, which was intended to be the primary "safety valve".

117. Thirdly, in the present case there was no evidence that any of the inherent capabilities of the planning system actually made up for the admitted indirect discrimination.

118. The weight of the evidence here was strongly that the other rights did not overcome the discrimination; indeed, they were not sufficient to avoid a significant reduction in the assessed need for pitches. The evidence shows that Gypsies and Travellers fare relatively badly under the existing planning system, and that this remains so after the introduction of the relevant exclusion. Although Mr Mould said that it would be wrong for this court to take that general evidence into account, we do not agree. The judge considered those elements of the NPPF which were available to all applicants for planning permission, including Gypsies and Travellers. It would therefore be appropriate to take into account the evidence that showed, in general terms at least, how the planning system operates for Gypsies and Travellers.

119. It was put to Mr Mould in the course of argument that there would have been a number of Gypsies and Travellers who fell outside the definition in PPTS 2012 and would therefore have had to rely on the general policies in the NPPF. That group would have been added to by those who now fell outside the narrower definition in PPTS 2015. One might therefore have expected the number of successful applications for planning permission made by those in that cohort to go up, but there is no evidence of that and the Equality and Human Rights Commission report suggests the opposite. Mr Mould said that was the difference between policy itself and its operation. It seems likely, however, that the effect overall was the consequence of the relevant exclusion, seen in the context of PPTS 2015 and the policies in the NPPF as a whole.

120. Fourthly, we consider that Mr Willers was also right to suggest that Ms Smith's asserted ability to rely on policies in the NPPF and the various other recourse identified by the judge was inconsistent with the Secretary of State's attempted justification of the relevant exclusion. As Mr Willers submitted, if, as the judge said, Ms Smith and the otherwise excluded Gypsies and Travellers could make successful applications for planning permission on Article 8 grounds, that might do little to address the "perception" that the operation of the planning system worked in their favour, or to reduce the resentment that this allegedly caused.

121. Finally, the factors identified by the judge as outweighing the indirect discrimination apply to everyone, including those who are not Gypsies and Travellers. So they could not in principle justify the discriminatory effect of the relevant exclusion on elderly or disabled Gypsies or Travellers. As Mr Willers submitted (in paragraph 73 of his skeleton argument), the fact that elderly and disabled Gypsies and Travellers, who are no longer travelling because of their age or disability, have to rely on general planning policy is inherently the disadvantage. It is not logically capable of justifying that disadvantage.

122. For those reasons, looking at the fourth consideration in *Bank Mellat*, we would conclude that the severity of the effect on the rights of aged and disabled Gypsies and Travellers outweighs the alleged aims or objectives of the measure.

7.6 Wrexham

123. Finally, on the issues of justification and proportionality, Mr Mould placed considerable reliance on the decision of this court in *Wrexham* (see paragraph 29 above). He submitted that the effect of the relevant exclusion was to put planning policy back to the position it was in at the time of that decision and that, just as the claim by elderly Gypsies failed in that case, so should the challenge here. He said that *Wrexham* was binding on this court and in any event served to demonstrate that the aim of the relevant exclusion must be legitimate and justified.

124. We do not accept those submissions. This court's decision in *Wrexham* was concerned with the proper construction of the words "a nomadic habit of life". Those are the words in the 1968 Act and Circular 1/94. We accept that the decision would be binding on us if we had to construe or consider that definition. But those are not words used in PPTS 2015.

125. This court is involved in a different exercise to the one undertaken in *Wrexham*. It is concerned with Article 8 and Article 14 of the Convention, which did not arise for consideration in *Wrexham*. It is also concerned with the claim under s.19 of the Equality Act 2010, a statutory provision which post-dates *Wrexham*. In the present case indirect discrimination is admitted, which was not the case in *Wrexham*. Finally, *Wrexham* was decided at a time when those who had previously stopped travelling due to old age or disability were not included in the definition of "Gypsies and Travellers". That was changed in 2006. This appeal has to do with the application of a policy which excludes that group, taking away the status they had previously enjoyed.

126. A further difference concerns the wording of the introduction to the PPTS 2015 (to which we have already referred at paragraphs 31 and 32 above). That refers to the overarching aim "to ensure fair and equal treatment for travellers, in a way that facilitates the traditional and nomadic way of life of travellers while respecting the interests of the settled community". PPTS 2015 does not focus only on the "nomadic" way of life, as the court was obliged to do in *Wrexham*. The introduction to PPTS 2015 clearly goes wider than that, because it also refers to the "traditional" way of life of Gypsies and Travellers. For the reasons set out above, we consider this to be an important distinction: it might be said to embrace the point, amongst others, that Gypsies and Travellers who are too old or ill to travel any more still wish to adhere to their cultural traditions, and live in caravans.

127. Mr Mould submitted that, by promulgating the relevant exclusion in PPTS 2015, the Secretary of State was only turning the clock back to the position that obtained in the 1990s, conscious that this court had accepted in *Wrexham* that those of "a nomadic habit of life" could not include those who had retired. He suggested that, since this court did not doubt the lawfulness of the provision that had to be considered in *Wrexham*, it could properly be assumed that the court accepted it.

128. In our view, neither of those arguments is cogent. Nothing in the contemporaneous material (to which we have referred above) suggested that the Secretary of State relied on this court's decision in *Wrexham* to justify or support the relevant exclusion. But in any event what this court was doing in *Wrexham* was, essentially, to construe a statutory provision. It would not have been for this court to question the lawfulness of the provision on its own initiative, when the claimants were not seeking to do so.

129. For these reasons, we do not accept the suggestion that *Wrexham* is binding on us beyond the point identified above. Furthermore, and for the same reasons, we do not accept the suggestion that the Secretary of State was entitled to conclude that the exclusion was lawful because he was seeking to revert to the position considered in *Wrexham*. There is nothing to suggest that he reached that conclusion and, in our view, he was right not to do so.

7.7 Summary on grounds 3 and 4

130. For the reasons that we have given, we conclude that grounds 3 and 4 of the appeal should succeed.

8. REMEDY AND DISPOSAL

131. It follows that the appeal against the judge's decision is, in our view, well founded. Two further questions remain: first, and crucially for the purposes of this appeal, what is the consequence of our conclusions on the grounds of appeal for the inspector's decision under challenge in the s.288 application, and second, what relief, if any, should be granted?

132. As to the first question, we consider that Ms Smith has made good her claim under the Equality Act 2010 and the Convention. She suffered indirect discrimination, on the basis of age, race and disability, which has not been justified. In those circumstances, it is unnecessary to go on and consider the alternative ways in which she put her case.

133. As to the second question, this court has a discretion as to whether or not to grant the relief sought by Ms Smith in her claim form, namely to quash the inspector's decision and to remit the matter to the Secretary of State. There are two relevant considerations. First, there is our concern that Ms Smith's challenge necessarily entailed, in part, a collateral attack on a change of policy which occurred seven years ago, and which has not been the subject of any previous judicial consideration. Secondly, although Mr Mould properly accepted that it was not an argument that he had put before the judge, he asked the court, if minded to allow Ms Smith's appeal, to consider whether, notwithstanding its adverse findings in relation to PPTS 2015, the inspector would necessarily have come to the same conclusion, so that, in accordance with *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* (1989) 57 P. & C.R. 306, the court should exercise its discretion and refuse to grant the relief sought.

134. As we emphasised at the beginning of this judgment, we have not been asked, and under s.288 of the 1990 Act we do not have jurisdiction, to grant a declaration that PPTS 2015, or, in particular, the relevant exclusion, is unlawful. We therefore make it clear, lest there be any doubt, that we do not go beyond our conclusion that in the particular

circumstances of this case Ms Smith's Equality Act 2010 claim, and her Convention claim, based on admitted discrimination, has been made out in her challenge to the inspector's decision on her appeal.

135. As to our discretion, we do not consider that, in the absence of the relevant exclusion, the inspector would necessarily have come to the same decision. Although, as we have said (in paragraphs 14 and 15 above), the inspector endeavoured to undertake a planning balance, the fact that Ms Smith and her family fell outside the policy definition of "Gypsies and Travellers" in PPTS 2015 was plainly a consideration of relevance and some significance in the decision (see, in particular, paragraphs 33 to 39 of the decision letter). Mr Mould fairly conceded that it was "an operative factor" in the decision-making process.

136. There is also the question of the extension of the temporary planning permission (see paragraph 16 above). It seems to us clear that the reason why the inspector did not address this more fully than she did was because of her earlier conclusion that Ms Smith and her family were the subject of the relevant exclusion and fell outside the definition of "Gypsies and Travellers" in PPTS 2015. In our view it is not possible to say that, had they been within the definition, the inspector would not have reached a different conclusion on that question.

137. Furthermore, although we accept that the inspector undertook a planning balance, we are bound to say that that part of her decision letter is not entirely easy to understand. She concluded that the personal circumstances of Ms Smith and her family deserved to be given "considerable" weight in the planning balance, a position that could only have been strengthened if they had fallen within the definition of "Gypsies and Travellers". The countervailing factors, in particular the effect on the countryside, which the inspector said weighed against the proposal, were not said to be of considerable weight or of any particular weight at all. However, it was those considerations which she found outweighed the factors in favour of Ms Smith, to which she had given "considerable" weight. This, we think, lends some support to the conclusion that we should quash the inspector's decision and remit the matter to the Secretary of State for redetermination.

138. Accordingly, we allow the appeal; we quash the inspector's decision of 23 November 2018; and we remit the case to the Secretary of State for redetermination of Ms Smith's appeal.

139. This case and the appeal before us, as we have said, are ultimately concerned with a challenge only to the inspector's decision, and not to the relevant exclusion itself, or to PPTS 2015 as a whole. The application under s.288 is directed, as it had to be, at that particular decision. We emphasised this at the outset (see paragraph 6 above), and we do so again now. Inevitably, however, in disposing of the issues raised by the appeal and with the assistance of all parties, including the Secretary of State, we have had to consider the substance and effect of the relevant exclusion itself. We have concluded that, in its application to Ms Smith's appeal before the inspector, the effect of the relevant exclusion was – as the Secretary of State has conceded – discriminatory, and that, on the evidence before the court in these proceedings, there was no proper justification for that discrimination. These conclusions have led us to the view that the challenged decision itself is unlawful and must be quashed. The consequences of this outcome for future decision-making on applications for planning permission and appeals in which the relevant exclusion is engaged will inevitably depend on the

particular circumstances of the case in hand. In every such case it will be for the decision-maker – whether a local planning authority or an inspector – to assess when striking the planning balance what weight should be given, as material considerations, to the relevant exclusion and to such justification for its discriminatory effect as obtains at the time, and also to undertake such assessment as may be required under Article 8 of the Convention. As is always so, the result of that process of decision-making will emerge from the facts and circumstances of the individual case.