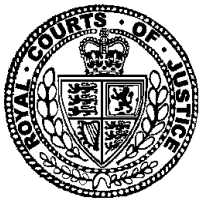

Neutral Citation Number: [2020] EWCA Civ 12

Case No: A2/2019/1328

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Ms Leigh-Ann Mulcahy QC
(Sitting as a Deputy High Court Judge)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2020

Before:

SENIOR PRESIDENT OF TRIBUNALS
LORD JUSTICE COULSON
and
LORD JUSTICE HADDON-CAVE

- -

Between:

THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF BROMLEY	**Appellant**
- and -	
PERSONS UNKNOWN	**Respondents**
- and –	
LONDON GYPSIES AND TRAVELLERS	**First Intervener**
- and –	
THE LONDON BOROUGHS OF MERTON AND SUTTON AND THE ROYAL BOROUGH OF KINGSTON UPON THAMES	**Second Intervener**
- and –	
LIBERTY	**Third Intervener**
- and –	
HARLOW DISTRICT COUNCIL, THE LONDON BOROUGH OF BARKING AND DAGENHAM, THE LONDON BOROUGH OF REDBRIDGE, AND THURROCK COUNCIL	**Fourth Intervener**

- -
- -

Mr Richard Kimblin QC and Mr Jack Smyth (instructed by **London Borough of Bromley Corporate Services**) for the **Appellant**

The Respondents did not appear and were not represented

Mr Mark Willers QC and Ms Tessa Buchanan (instructed by **The Community Law Partnership**) for the **First Intervener**

Mr Stephen Woolf (instructed by **South London Legal Partnership**) for the **Second Intervener**

Mr Jude Bunting (written submissions only) for **the Third Intervener**

Ms Caroline Bolton (written submissions only) for **the Fourth Intervener**

Hearing Date: 3 December 2019

- -

Judgment

LORD JUSTICE COULSON:

1. INTRODUCTION

1. This is an appeal against the refusal by the High Court to grant what the judge called "a *de facto* boroughwide prohibition of encampment and upon entry/occupation…in relation to all accessible public spaces in Bromley except cemeteries and highways". Although the stated target of the injunction was "persons unknown", it was common ground that the injunction was aimed squarely at the Gypsy and Traveller community. The points arising from the appeal itself are of relatively narrow compass, but all parties were anxious that, in the light of the recent spate of similar cases, this court should provide some guidance as to how local authorities might address this issue in future.

2. Numerous similar injunctions have been granted by the High Court in recent years and months. We refer to a number of those judgments below. One common feature of those cases was that the Gypsy and Traveller community was not represented before the court at either the interim or final hearing. Although that did not stop the judges concerned looking very carefully at the orders which they were being asked to make, I do not doubt that, in an adversarial system, there can be no substitute for reasoned submissions from those against whom an injunction is directed.

3. This, therefore, was the first case involving an injunction in which the Gypsy and Traveller community were represented before the High Court. As a result of their success in discharging the interim injunction, it is also the first such case to be argued out at appellate level. I would wish to express my thanks to all counsel, but in particular to Mr Willers QC and Ms Buchanan (and their solicitors, Community Law Partnership), who have acted substantially *pro bono* throughout and have put the points on behalf of the First Intervener and the Gypsy and Traveller community with clarity and concision.

2. THE FACTUAL BACKGROUND

4. Romany Gypsies have been in Britain since at least the 16th century, and Irish Travellers since at least the 19th century. They are a particularly vulnerable minority. They constitute separate ethnic groups protected as minorities under the Equality Act 2010 (see *Moore and Coates v Secretary of State for Communities and Local Government* [2015] EWHC 44 (Admin)), and are noted as experiencing some of the worst outcomes of any minority across a broad range of social indicators (see, for example, Department for Communities and Local Government, *Progress report by the ministerial working group on tackling inequalities experienced by Gypsies and Travellers,* 2012, and Equality and Human Rights Commission, *England's most disadvantaged groups: Gypsies, Travellers and Roma*).

5. A nomadic lifestyle is an integral part of Gypsy and Traveller tradition and culture. While the majority of Gypsies and Travellers now reside in conventional housing, a significant number (perhaps around 25%, according to the 2011 UK Census) live in caravans in accordance with their traditional way of life. The centrality of the nomadic lifestyle to the Gypsy and Traveller identity has been recognised by the European Court. In *Chapman v United Kingdom* (2001) 33 EHRR 18, the court held at [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 by their own choice, 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 affecting the applicant's stationing of her caravans therefore have an impact going beyond the right to respect for her 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."

6. In the UK, there is a long-standing and serious shortage of sites for Gypsies and Travellers. A briefing by the Race Equality Foundation found that Gypsies and Travellers were 7.5 times more likely than White British households to suffer from housing deprivation (Race Equality Foundation, *Ethnic Disadvantage in the Housing Market: Evidence from the 2011 census,* April 2015). The lack of suitable and secure accommodation includes not just permanent sites but also transit sites. This lack of housing inevitably forces many Gypsies and Travellers onto unauthorised encampments.

7. The evidence is that Gypsies and Travellers had a particular association with the appellant, whose own Accommodation Assessment of November 2016 ("the Accommodation Assessment") said at paragraph 1.3 that Gypsies and Travellers had been stopping in Bromley for many years. Traditionally they had done so:

> "... whilst working in and travelling through the Borough. Historically, Gypsies moved between farms in Bromley and Kent picking fruit and vegetables in the summer, hops and potatoes in early autumn. [However] as traditional forms of work diminished, travelling patterns changed both nationally and locally. More recently Irish Travellers have also visited the Borough."

8. The evidence was that Bromley had also had a history of unauthorised encampments, albeit in relatively small numbers. In 2016 there were eleven such unauthorised encampments; in 2017 there were twelve; and in 2018, prior to the application for an interim injunction in the middle of August 2018, there were again twelve. The average length of stay was between five days and two weeks.

9. There are no transit sites to cater for this need, whether in Bromley or anywhere else in Greater London. The court was told that the closest transit site is in South Mimms in Hertfordshire. As to permanent pitches in Bromley, in 2016 there was a shortage of between ten to fourteen pitches with a recognised need for a further six by 2021. Despite all that, Ms Slater, the appellant's acting planning policy manager, has previously suggested that there was insufficient need for a transit site in Bromley.

10. In the South East, the recent spate of wide-ranging injunctions has been aimed at the Gypsy and Traveller community. This process began in 2015 with *Harlow District Council v Stokes and others* [2015] EWHC 953 (QB). The prohibition on encampments in that borough, and the subsequent perception that the injunction had been effective, led to a large number of similar injunctions in 2017-2019. Most of these injunctions, such as the injunction granted in the recent case of *London Borough of Kingston Upon Thames v Persons Unknown* [2019] EWHC 1903, as well as the interim injunction

granted in this case, did not identify any named defendants. The second and fourth interveners in this case all obtained similar injunctions following what were uncontested hearings.

11. It appears that, in total, there are now 38 of these injunctions in place nationwide. It would be unrealistic to think that their widespread use has not led to something of a feeding frenzy in this contentious area of local authority responsibility. First, these injunctions have had the effect of forcing the Gypsy and Traveller community out of those boroughs which have obtained injunctions, thereby imposing a greater strain on the resources of those boroughs or councils which have not yet applied for such an order. Secondly, they have created an understandable concern amongst those local authorities who have not yet obtained such injunctions to seek them forthwith.

12. The appellant sought and was granted an interim injunction on a without notice basis on 15 August 2018. It covered 171 sites in Bromley: 139 parks, recreation grounds or open spaces, and 32 public car parks. The 171 sites amounted to all the public spaces in the borough: they excluded only highways and cemeteries, and that seemed to be because there had not been a particular problem with incursions on those sites in the past.

13. The basis for the application has never been entirely clear. When it came before Ms Leigh-Ann Mulcahy QC, sitting as a deputy judge of the High Court ("the judge"), she commented at [23] – [24] of her judgment, that, although the appellant had said in its evidence that there had been a "sharp increase" in incursions in 2018, that was not in fact the case. The number of incursions had not increased prior to the application for an injunction, a point borne out by the fact that Ms Slater stated publicly (albeit in a slightly different context) that Bromley "did not suffer particularly from gypsy and traveller incursions". At best it appears that, prior to the original application in August 2018, there had been an increase in the frequency with which the incursions occurred (again, see [24] of the judgment).

14. The hearing for the final injunction took place on 17 May 2019. As I have said, it was the first time that the Gypsy and Traveller community had been represented at a hearing, through the offices of the first intervener. Having considered the various arguments, the judge refused to grant the final injunction sought in respect of entry and encampments. She did grant a wide injunction in relation to fly-tipping and waste.

3. THE JUDGMENT

15. At the start of her careful *ex tempore* judgment, at [2019] EWHC 1675 (QB), the judge addressed the effect of other boroughs in London and the South East obtaining such injunctions ([6]); the fact that there were 34 injunctions nationwide ([9]); and the cumulative effect of such injunctions ([11] – [12]). At ([13] – [15]) the judge dealt with the first intervener's argument that the granting of widespread injunctions was in danger of supplanting the existing statutory scheme, parts of which she set out. It does not appear that she reached any conclusions on that specific aspect of the case.

16. It is clear that the judge was concerned about the width of the injunction being sought and the conduct at which it was aimed. This is apparent from [16] and [17] as follows:

> "16. It is important to recognise that the injunction that is being sought, and the injunctions that have been sought and granted in other cases, are not limited to preventing fly tipping, and no one, including the intervenor, is suggesting that this kind of behaviour should not be prevented by legal means if necessary. The injunctions are not specifically addressed to antisocial behaviour or criminal acts. They are focused on prohibiting (with, of course, the penal sanction of potential committal to prison if breached) anyone from setting up an encampment without permission of the local authority and the landowner and entering and/or occupying land for residential purposes, and bringing onto the land any caravans or mobile homes and bringing vehicles onto the land in question for the purpose of disposal of waste or materials.
>
> 17. Mr Smyth accepted during the course of argument that the order that he was seeking amounted, on at least a **de facto** basis, to a boroughwide exclusion save that Gypsies and Travellers could still go onto private land, cemeteries and highways which were not subject to the order. There is clearly a potential issue when one takes the cumulative effect of all the injunctions granted and potentially to be granted in future into account, as to whether Gypsies and Travellers will be prevented from exercising what is recognised in both UK equalities law and human rights law to be their right to pursue their traditional nomadic lifestyle. I am told that three-quarters of the 30,000 or so Gypsies or Travellers in London are in permanent accommodation, and on the evidence there is some provision in that regard in Bromley, albeit with a shortfall based on need, but one-quarter of that number are nomadic and travel rather than remaining in one place. Whilst there is no general entitlement to encamp or reside on public or recreational spaces and it is a matter for the planning system to ensure suitable provision is made for Gypsies and Travellers, I am told that there are no authorised transit sites available for nomadic Gypsies and Travellers anywhere in London, including Bromley, which then raises the question of where they are to go."

17. At [18] and [19] the judge addressed a separate argument about whether the Town and Country Planning (General Permitted Development) (England) Order 2015 ("GPDO") permitted the limited occupation of land by caravans in certain circumstances, because the first intervener was arguing that such permitted development could not amount to a breach of planning control. As the judge noted, the appellant's answer was to say that this issue did not affect the proposed injunction in relation to three-quarters of the sites, because those were owned outright by Bromley (and therefore covered by the separate claim in trespass). At the hearing there had been a debate about whether the appellant would be content with an injunction which carved out any permitted development rights. The judge recorded that, through counsel, the appellant had made plain that the proposal would constitute a "second rate" injunction, "and not something that the local authority would wish to have".

18. At [20], the judge identified three issues which, she said, had not been the subject of appellate review. Those were: i) the cumulative effect of the injunctions granted

elsewhere; ii) the interrelationship between judicially created relief in the form of injunctions and the statutory scheme of enforcement laid down by Parliament; and iii) the impact of permitted development rights on the proper scope of any injunction. However, having identified those three points, the judge then went on to say at [21] that it was her role as a first instance judge to apply existing law to the claim and to the evidence. She then set out the detailed factual background to the claim at [22] – [31].

19. Having completed her review of the facts, the judge noted that the legal basis of the claim to an injunction in respect of the 171 sites was a claim for (anticipated) trespass, in relation to approximately three-quarters of them (being the sites that Bromley owned). She identified some of the relevant authorities at [33] – [38]. She dealt with the particular requirements of an application for an injunction against persons unknown at [39] – [42]. She addressed the issue of permitted development rights which related both to the sites owned by the local authority and the approximately one-quarter of the sites which were not. She then referred at [46] – [47] to the appellant's public sector equality duty ("PSED") and Article 8 of the European Convention on Human Rights ("the Convention").

20. When turning to apply the relevant principles to the facts, the judge began at [48] with a consideration of the requirements of a *quia timet* injunction against persons unknown. She concluded that it was impossible in this case to name the persons who were likely to commit the conduct which it was sought to restrain. Similarly, at [49] the judge was satisfied that it was possible to give effective notice of the injunction to those affected by it. Finally, on this aspect of the application, the judge concluded at [51] that there was "a strong probability" that, unless restrained by an injunction, the defendants would act in breach of the appellant's rights.

21. As to the likelihood and degree of potential harm required for a *quia timet* injunction, the judge's conclusions were as follows:

> "54. The key question is the second part of the test which has been expressed slightly differently in different cases. In *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch) it was expressed as follows:
>
> > 'Secondly, if the defendant did an act in contravention of the claimant's rights, would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at the time of actual infringement of the claimant's rights) to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate?'
>
> 55. There was some disagreement between counsel as to whether irreparable harm was actually required as a matter of law by the authorities. Clearly, substantial harm has been caused which is sufficient, in my view, to amount to grave harm to local residents as a result of their inability to access and use public and recreational areas they are entitled to access and use [news] and the environmental impact in the respects I have already outlined, together with the clean-up costs which are borne by the Bromley taxpayer.

> 56. It is a more difficult question whether the harm can be said to be "irreparable", if that is a requirement, since the damage, for example, to points of entry and so on can be repaired, albeit at a cost in terms of time and money. It could be said that the damage to community relations and the distress to residents is irreparable."

Accordingly, the judge found that all the necessary ingredients for a *quia timet* injunction against persons unknown were in place, and that what remained was the discretionary exercise of weighing up whether or not it was proportionate to grant such an injunction in all the circumstances of the case.

22. The judge dealt with proportionality from [57] – [72]. Her conclusion was that it was not proportionate to grant the injunction sought. During the course of his submissions on behalf of the appellant, Mr Kimblin QC identified 7 factors from these paragraphs which he said comprised the critical elements of the judge's assessment of proportionality, and which he went on to criticise in various ways. I use those 7 factors to address the bulk of the appeal in Section 6 of this Judgment.

23. The 7 factors were:

a) The wide extent of the relief sought and its geographical compass, amounting to "a *de facto* boroughwide prohibition of encampment and upon entry/occupation for residential purposes… in relation to all accessible public spaces in Bromley except cemeteries and highways" [59].

b) The fact that the injunction was not aimed specifically at prohibiting antisocial or criminal behaviour, but just entry and occupation [60].

c) The lack of availability of alternative sites. As to this important factor, the judge said:

> "61. However, one factor that is clearly relevant to my consideration, as was made clear in the *South Buckinghamshire* case by Simon Brown LJ, is the availability of suitable alternative sites. I note this was an important factor that influenced the decision of Jefford J in the *Wolverhampton City Council v Persons Unknown* [2018] EWHC 3777 QB case when granting an injunction similar to the one sought here. At paragraph 10 she makes clear that she was concerned but was reassured that the result of the injunction would not be a boroughwide prohibition on Traveller sites in Wolverhampton because there were other sites that could be occupied, not all sites were subject to the injunction, and the local authority had taken steps to consider and was seeking to put in place the provision of a transit site. She granted the injunction for a period of three years but with an annual review at which the council would be required to provide evidence of the steps it had actually taken to provide the said transit site.
>
> 62. That is not the case here. Here there is no transit site and there is no proposal for a transit site. Further, it would seem that Bromley is not supporting the provision of a transit site in Bromley, at least based on Ms Slater's evidence at the examination in public."

d) The cumulative effect of other injunctions. The judge said:

> "63. Mr Smyth's answer to this was that the Gypsy and Traveller community can occupy private land or they can go elsewhere outside the Borough. I do not regard transferring the undoubted problems the local authority has experienced to private landowners, who would themselves be entitled to seek possession orders evicting such occupants from their land, as a solution. The 'going elsewhere' option (which is apparently what has happened following the grant of an interim injunction) transfers the difficulties to another borough, who will then in turn invoke and seek to rely on the grant of the previous injunction to seek theirs on a "me too" approach. The problem, as I indicated before, is now the cumulative effect of all these injunctions which are reaching significant numbers and continue to be applied for by new local authorities as the problem gets transferred into their area, which means there is now more force in the argument that this is a relevant factor to be considered in deciding whether to grant the relief sought."

e) Various specific failures on the part of the appellant, as the judge found, in respect of its duties under the Convention and in particular, its PSED. The judge found that, in contrast to the approach taken by other boroughs in other cases, there was no evidence that any proper equality impact assessment ("EIA") had been carried out "whether in form or indeed in substance" [65]. She found in the same paragraph that there had been no engagement with Gypsy and Traveller families. She also found that it was not clear how any infringements of the injunction would be dealt with in future and that, from the one recent incident (at Leaves Green, first referred to at [27]), it did not appear that any welfare assessments had been carried out [67]. This led to her conclusion on this topic in the following terms:

> "68. In my view, the decision to apply for an injunction was not made having had regard to all the material considerations and did not properly pose and approach the article 8(2) questions as to necessity and proportionality or indeed the need to have regard to the best interests of children (and there are clearly children who are going to be affected by the policy that is being adopted)."

f) The length of time – 5 years – for which the proposed injunction would be in force. The judge found that this was "an unduly wide and disproportionate temporal limit" [69].

g) The issue of permitted development rights had not been satisfactorily addressed by the appellant. The judge reiterated at [70] the fact that the appellant had told her that it did not want an injunction which excluded lawfully exercised permitted development rights.

24. For these reasons, therefore, the judge concluded that, on a consideration of the proportionality test, the appellant had not satisfied her that it was proportionate to grant an injunction in the terms sought.

4 THE GROUNDS OF APPEAL

25. It was perhaps inevitable that the judge herself gave permission to appeal, given what she had said in the judgment about the various elements of these injunction cases which had never been considered at appellate level. The judge gave permission on two bases:

> "1. Although the proposed appeal against the refusal to grant an injunction prohibiting persons unknown from unauthorised occupation of public land is an appeal against the exercise of a discretion and an assessment of proportionality, in circumstances where (a) it appears that injunctions that are wider even than in this case have previously been granted in a number of cases without being held to be disproportionate, and (b) there is room for legitimate differences of view as to how local authorities should strike the necessary 'fair balance' between the Art. 8 ECHR rights of gypsies and travellers on the one hand and the rights of the residents who have been adversely affected by the existence of unauthorised encampments on the other, the appeal has a real prospect of success pursuant to CPR 52.6(1)(a).
>
> 2. There is in any event a compelling reason for an appeal to be heard pursuant to CPR 52.6(1)(b). Some 34 injunctions to date have been granted by the courts to local authorities in similar terms (all apparently undefended). This is the first case which has had the benefit of a formal intervention, evidence and argument by leading and junior counsel on behalf of the gypsy and traveller community. The cumulative effect of such injunctions now merits consideration in circumstances where it is common ground that their grant has the effect of displacing the difficulties into the area of a nearby local authority which then applies for a similar injunction relying on those difficulties and the previous grant of such relief. Further, injunctive relief, if it continues to be sought and granted as it has been to date, would appear to carry a risk of supplanting the existing statutory scheme for the removal of gypsies and travellers supported by government guidance. In addition, the injunctions which have previously been granted pursuant to s.187B Town & Country Planning Act 1990 arguably proscribe the lawful exercise of permitted development rights. All these matters appear to me to merit appellate consideration."

26. There is some tension between the judge's reasons for granting permission to appeal and the subsequent Grounds of Appeal prepared by the appellant. This sets out 5 Grounds.

a) Ground 1: The judge erred in finding that the order sought was disproportionate;

b) Ground 2: The judge erred in setting too high a threshold for the harm caused by the threat of trespass;

c) Ground 3: The judge erred in approach to the cumulative effect issue;

d) Ground 4: The judge was wrong to conclude that the appellant had failed to discharge its PSED;

e) Ground 5: The judge erred in ruling that the issue of 'permitted development' rights had not been satisfactorily addressed.

On one view, only Grounds 1 and 3 were covered by the judge's grant of permission. In addition, under Ground 1, the written grounds of appeal only identified two ways in which it was said that the judge erred in finding that the order sought was disproportionate, whilst Mr Kimblin's skeleton argument, and his oral submissions, asserted numerous other ways in which it was said that the judge failed to carry out the proportionality test correctly.

27. However, despite these potential difficulties, at the hearing of this appeal all parties were able to focus on the handful of relatively short issues between them. Moreover, Mr Kimblin did not at any time underestimate the burden which any appellant has to discharge when seeking to challenge the exercise of discretion by a judge at first instance.

5 THE RELEVANT LAW

5.1 General

28. I set out below what I consider to be the relevant law. This is perhaps more important in underpinning the guidance which this court has been asked to provide (Section 7 below) than for the disposal of the appeal itself. I do this under four broad headings: i) *Quia timet* injunctions against Persons Unknown; ii) *Quia timet* injunctions to prevent trespass; iii) Article 8 and the Gypsy and Traveller community; and iv) The relevant statutory and other guidance relating to the Gypsy and Traveller community.

5.2 *Quia Timet* Injunctions Against Persons Unknown

29. The law in relation to injunctions against persons unknown has been recently considered by this court in *Joseph Boyd and another v Ineos Upstream Ltd and 9 others* [2019] EWCA Civ 515. That was a case involving protesters concerned about the fracking process. Having said at [32] that it was not easy to formulate the broad principles on which an injunction against unknown persons can properly be granted, Longmore LJ "tentatively" framed the requirements at [34] in the following way:

> "1) there must be a sufficiently real and imminent risk of a tort being committed to justify *quia timet* relief;
>
> 2) it is impossible to name the persons who are likely to commit the tort unless restrained;
>
> 3) it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order;
>
> 4) the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct;
>
> 5) the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do; and
>
> 6) the injunction should have clear geographical and temporal limits."

30. Those requirements comprise an elegant synthesis of a number of earlier statements of principle, which makes it now unnecessary to refer to other authorities. I respectfully endorse them.

31. It is, however, appropriate to add something about procedural fairness, because that has arisen starkly in this and the other cases involving the Gypsy and Traveller community.

32. Article 6 of the Convention provides that:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

33. This is reflective of a principle of English law that civil litigation is adversarial: "English civil courts act *in personam*. They adjudicate disputes between the parties to an action and make orders against those parties only" (*A-G v Newspaper Publishing Plc* [1988] Ch 333, per Sir John Donaldson MR at [369C]). This allows disputes to be decided fairly: a defendant is served with a claim, obtains disclosure of the evidence against them, and can substantially present their case before the Court (*Jacobsen v Frachon* (1927) 138 LT 386, per Atkins LJ at [393]). This allows arguments to be fully tested.

34. The principle that the court should hear both sides of the argument is therefore an elementary rule of procedural fairness. This has the consequence that a court should always be cautious when considering granting injunctions against persons unknown, particularly on a final basis, in circumstances where they are not there to put their side of the case.

35. The other area of potential debate which did not arise in *Ineos* concerns the nature and extent of the likely harm which the claimant must show in order to obtain the injunction. In my view, the approach which the judge in the present case adopted, that what was required was "irreparable harm", was in accordance with authority:

    a) In *Fletcher v Bealey* (1884) 28 Ch 688, Pearson J said that "it must be proved that it [the apprehended damage] will be irreparable…"

    b) In *Lloyd v Symonds* [1998] EWCA Civ 511, Chadwick LJ stated that "such an injunction should not, ordinarily, be granted unless the plaintiff can show a strong probability that, unless restrained, the defendant will do something which will cause the plaintiff irreparable harm – that is to say, harm which, if it occurs, cannot be reversed or restrained by an immediate interlocutory injunction and cannot be adequately compensated by an award for damages."

    c) In *London Borough of Islington v Elliott* [2012] EWCA Civ 56, Patten LJ agreed with and approved both *Fletcher v Bealey* and *Lloyd v Symonds*.

    d) Finally, as already noted, in *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456, (a case about illegal raves) Marcus Smith J said at paragraph 31 (3) that the relevant question was:

> "Would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate injunction… to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate?"

5.3 *Quia Timet* Injunctions to Prevent Likely Trespass

36. *Secretary of State for Environment, Food and Rural Affairs v Meier and Another* [2009] UKSC 11 was concerned with travellers who set up camp on woodland owned by the Forestry Commission and who, on the evidence, if moved on from that camp, would move to another part of the same woodland. The Supreme Court upheld the Court of Appeal's decision to grant an injunction (against some named defendants and some persons unknown) restraining them from entering any other part of the woodland (including those parts which had never been the subject of an encampment). Lady Hale said:

> "38. The main objection to extending the order to land some distance away from the parcel which has actually been intruded upon is one of natural justice. Before any coercive order is made, the person against whom it is made must have an opportunity of contesting it, unless there is an emergency. In the case of named defendants, such as the appellants here, this need not be an obstacle. They have the opportunity of coming to court to contest the order both in principle and in scope. The difficulty lies with "persons unknown". They are brought into the action by the process of serving notice not on individuals but on the land. If it were to be possible to enforce the physical removal of "persons unknown" from land on which they had not yet trespassed when the order was made, notice would also have to be given on that land too. That might be thought an evolution too far. Whatever else a possession order may be or have been, it has always been a remedy for a present wrongful interference with the right to occupy. There is an intrusion and the person intruded upon has the right to throw the intruder out.
>
> 39. Thus, while I would translate the modern remedy into modern terms designed to match the remedy to the rights protected, and would certainly not put too much weight on the word "recover", I would hesitate to apply it to quite separate land which has not yet been intruded upon. The more natural remedy would be an injunction against that intrusion, and I would not be unduly hesitant in granting that. We should assume that people will obey the law, and in particular the targeted orders of the court, rather than that they will not. We should not be too ready to speculate about the enforcement measures which might or might not be appropriate if it is broken. But the main purpose of an injunction would be to support a very speedy possession order, with severely abridged time limits, if it is broken.
>
> 40. However, I would not see these procedural obstacles as necessarily precluding the "incremental development" which was sanctioned in Drury. Provided that an order can be specifically tailored against known individuals who have already intruded upon the claimant's land, are threatening to do so again, and have been given a proper opportunity to contest the order, I see no reason in principle why it should not be so developed. It would be

> helpful if the Rules provided for it, so that the procedures could be properly thought through and the forms of order properly tailored to the facts of the case. The main problem at the moment is the "scatter-gun" form of the usual order (though it is not one prescribed by the Rules)."

37. In the same case, Lord Neuberger said:

> "58. Particularly with the advent of the Civil Procedure Rules, it is clear that judges should strive to ensure that court procedures are efficacious, and that, where there is a threatened or actual wrong, there should be an effective remedy to prevent it or to remedy it. Further, as Lady Hale points out, so long as landowners are entitled to evict trespassers physically, judges should ensure that the more attractive and civilised option of court proceedings is as quick and efficacious as legally possible. Accordingly, the Court of Appeal was plainly right to seek to identify an effective remedy for the problem faced by the Commission as a result of unauthorised encampments, namely that, when a possession order is made in respect of one wood, the travellers simply move on to another wood, requiring the Commission to incur the cost, effort and delay of bringing a series or potentially endless series of possession proceedings against the same people."

38. We were referred to eight cases in which wide injunctions were obtained against the Gypsy and Traveller community. They were, in chronological order: *Harlow District Council v Stokes and Others* [2015] EWHC 953 (QB); *Tendring District Council v Persons Unknown* [2016] EWHC 2050 (QB); *Harlow District Council v McGinley and Others* [2017] EWHC 1851 (QB); *Wolverhampton City Council v Persons Unknown* [2018] EWHC 3777 (QB); *Waltham Forest London Borough Council v Persons Unknown* [2018] EWHC 2400 (QB); *London Borough of Sutton v Persons Unknown* [Unreported] 7 November 2018; *London Borough of Kingston Upon Thames* [2019] EWHC 1903; and *London Borough of Havering v Stokes and Others* [2019] EWHC 3006 (QB). As I have said, the one common denominator in relation to all of these decisions is that, although it was the target of all the injunctions sought, the Gypsy and Traveller community was not legally represented.

39. It is unnecessary to go through each of these cases in any detail. It is however instructive to note the following:

a) In *Harlow v Stokes*, Patterson J described the scale of the problem (109 encampments) at [3] and [4]. She identified that there would be ten new sites for Gypsies and Travellers in the borough by 2018 at [4] and [8]. She noted the liaison meetings with the Gypsy and Traveller community at [6]. She also identified the graphic evidence of criminality and the risks posed to public health and safety [10] and the fact that assessments had been offered and not taken up [12]. It was therefore a case where the proportionality assessment clearly favoured the granting of the interim injunction.

b) In the *Wolverhampton* case, Jefford J was troubled about the width of the injunction sought and, in particular, whether there were other council-owned sites that could still be occupied. She was also concerned about the need for a transit site. Positive evidence on both these points had a major impact on her decision:

> "10. It is, nonetheless, necessary for me to consider whether it is just and proportionate to grant such an injunction. One matter that needs to be addressed is whether there are lesser alternatives to such an injunction. I am satisfied that, in terms of the efficacy of preventing unauthorised encampments, there is no adequate alternative remedy. There have been plenty of instances in which the council has tried to make it more difficult to access a site. Indeed, businesses have done the same. But measures taken to prevent access have simply been torn down, gates climbed over and ignored. Actions for possession take time and also eat up further council resources. My concern, however, has been, as I said at the outset of this application, that even bearing all that in mind, there is a potential risk in this injunction that it would have the draconian impact of leaving travellers with nowhere to go within the city council of Wolverhampton's area of control. That is one of the reasons why the identification of the relevant sites is material. It appeared to me that it might be the case that the 60 sites that have been identified were the only sites that might be available to travellers within the relevant area and that, if that were the case, the net result of the injunction which was sought would be a borough-wide prohibition on travellers' sites in Wolverhampton. I have been told today, and I accept, that that is not the case and that the 60 sites identified are those that are the most vulnerable, that other sites could still be occupied, and indeed that, since this application was made, one such site not covered by the scope of the injunction sought has been the subject of an unauthorised encampment. That is a relevant consideration.
>
> 11. The second matter, however, is this. The council recognises, very fairly and properly, that there is a balancing act to be carried out between the protection of sites from unauthorised encampments and the provision of facilities for those who choose to adopt, as it was put, a nomadic lifestyle. The council has therefore taken steps set out in the evidence before me to consider the provision of a transit site. In the absence of that transit site, all that is available to travellers within this area are the sites that would be unaffected by this proposed injunction. Efforts have been made to identify such a transit site, and a shortlist of three has been drawn up. I was told today that matters are progressing well in that respect. The preferred site is the fishing pool site, which is a privately owned site, and negotiations are taking place with the owner with a view to renting that site to the claimant so that it can be established as an appropriate transit site."

c) In *Harlow v McGinley,* Jay J expressly noted that the cumulative effect of other injunctions was a relevant factor to be taken into account in any proportionality exercise. In that case, the injunction was justified in part because of the extent and nature of the criminality identified by the judge at [17] - [18].

d) Although the *Tendring* case was very specific because it related to a particular event (namely the Clacton Air Show), Knowles J refused the injunction, partly because of the lack of alternative sites. Presciently, he observed at [46] that the council's methodology "could lead to injunctions of ever-increasing compass year by year". The *Waltham Forest* case was largely concerned with fly-tipping (in respect of which the judge

granted an injunction in the present case). I note too that, in *Waltham Forest*, the injunction was for three years, not the five years sought in the present case.

e) Fly-tipping was also the principal concern in the *Sutton* case: see [18], [19], [36] and [38] of the judgment of Warby J. The judge went on to note that the granting of this sort of injunction could be unjustified and disproportionate, but he concluded that, on the facts of that particular case, it was not. Amongst the factors that led him to that conclusion were the careful making of assessments on the part of the local authority ([40] - [44]). In particular, there was evidence of a policy of 'negotiated stopping' which demonstrated both a degree of flexibility and a willingness to engage which, on the judge's findings in the present case, was absent here.

f) I also note that, in the *Sutton* case, an EIA had been carried out. Although a perusal of that document demonstrated that it was a rather one-sided exercise, I think that Mr Willers was right to say that it at least showed that the second intervener was aware of its PSED. Again, the judge in the present case reached a contrary view on the different evidence before her.

5.3 Article 8 and the Gypsy and Traveller Community

40. The starting point is *South Bucks District Council v Porter and another* [2003] UKHL 26; [2003] 2 AC 558. That was a case in which injunctions granted against the Gypsy and Traveller community to enforce planning requirements were refused by the Court of Appeal and House of Lords on the basis that it was inherent in the injunctive remedy that its grant depended on the court's judgment of all the circumstances of the case. Two aspects of the judgment of Lord Bingham should be set out: the first concerned with the history (which demonstrates that, 15 years on, very little has changed) and the second concerned with principle.

41. As to history, Lord Bingham said:

> "13… The means of enforcement available to local planning authorities under the 1990 Act and its predecessors, by way of enforcement orders, stop orders and criminal penalties, gave rise to considerable dissatisfaction. There were a number of reasons for this, among them the delay inherent in a process of application, refusal, appeal, continued user, enforcement notice, appeal; the possibility of repeated applications, curbed but not eliminated by section 70A of the 1990 Act; and the opportunities for prevarication and obstruction which the system offered. In the case of Gypsies, the problem was compounded by features peculiar to them. Their characteristic lifestyle debarred them from access to conventional sources of housing provision. Their attempts to obtain planning permission almost always met with failure: statistics quoted by the European Court of Human Rights in *Chapman v United Kingdom* (2001) 33 EHRR 399, page 420, paragraph 66, showed that in 1991, the most recent year for which figures were available, 90 per cent of applications made by Gypsies had been refused whereas 80 per cent of all applications had been granted. But for many years the capacity of sites authorised for occupation by Gypsies has fallen well short of that needed to accommodate those seeking space on which to station their caravans. Sedley J alluded to this problem in *R v Lincolnshire County*

Council, Ex p Atkinson (1995) 8 Admin LR 529 at 533, in a passage quoted in *Chapman* at paragraph 45:

> "It is relevant to situate this new and in some ways Draconic legislation in its context. For centuries the commons of England provided lawful stopping places for people whose way of life was or had become nomadic. Enough common land had survived the centuries of enclosure to make this way of life still sustainable, but by s.23 of the Caravan Sites and Control of Development Act 1960 local authorities were given power to close the commons to travellers. This they proceeded to do with great energy, but made no use of the concomitant power given to them by s.24 of the same Act to open caravan sites to compensate for the closure of the commons. By the Caravan Sites Act 1968, therefore, Parliament legislated to make the s.24 power a duty, resting in rural areas upon county councils rather than district councils (although the latter continued to possess the power to open sites). For the next quarter of a century there followed a history of non-compliance with the duties imposed by the Act of 1968, marked by a series of decisions of this court holding local authorities to be in breach of their statutory duty, to apparently little practical effect. The default powers vested in central government, to which the court was required to defer, were rarely if ever used."

The essential problem was succinctly stated in a housing research summary, "Local Authority Powers for Managing Unauthorised Camping" (Office of the Deputy Prime Minister, No 90, 1998, updated 4 December 2000):

> "The basic conflict underlying the 'problem' of unauthorised camping is between Gypsies/Travellers who want to stay in an area for a period but have nowhere they can legally camp, and the settled community who, by and large, do not want Gypsies/Travellers camped in their midst. The local authority is stuck between the two parties, trying to balance the conflicting needs and often satisfying no-one."

42. As to principle, Lord Bingham said at [18] that it was "for the court to reach its own independent conclusion on the proportionality of the relief sought to the object of the attained." He had regard to a number of European decisions at [34] – [36] and concluded at [37]:

> "It follows, in my opinion, when asked to grant injunctive relief under section 187B the court must consider whether, on the facts of the case, such relief is proportionate in the Convention sense, and grant relief only if it judges it to be so. Although domestic law is expressed in terms of justice and convenience rather than proportionality, this is in all essentials the task which the court is any event required by domestic law to carry out."

43. As to matters of detail, at [38] Lord Bingham endorsed the practical guidance given by the Court of Appeal in that case, which he had set out at [20]. This included the following passage in the judgment of Simon Brown LJ (as he then was):

> "38. I would unhesitatingly reject the more extreme submissions made on either side. It seems to me perfectly clear that the judge on a section 187B application is not required, nor even entitled, to reach his own independent view of the planning merits of the case. These he is required to take as decided within the planning process, the actual or anticipated breach of planning control being a given when he comes to exercise his discretion. But it seems to me no less plain that the judge should not grant injunctive relief unless he would be prepared if necessary to contemplate committing the defendant to prison for breach of the order, and that he would not be of this mind unless he had considered for himself all questions of hardship for the defendant and his family if required to move, necessarily including, therefore, the availability of suitable alternative sites. I cannot accept that the consideration of those matters is, as Burton J suggested was the case in the pre-1998 Act era, 'entirely foreclosed' at the injunction stage. Questions of the family's health and education will inevitably be of relevance. But so too, of course, will countervailing considerations such as the need to enforce planning control in the general interest and, importantly therefore, the planning history of the site. The degree and flagrancy of the postulated breach of planning control may well prove critical. If conventional enforcement measures have failed over a prolonged period of time to remedy the breach, then the court would obviously be the readier to use its own, more coercive powers. Conversely, however, the court might well be reluctant to use its powers in a case where enforcement action had never been taken. On the other hand, there might be some urgency in the situation sufficient to justify the pre-emptive avoidance of an anticipated breach of planning control. Considerations of health and safety might arise. Preventing a gipsy moving onto the site might, indeed, involve him in less hardship than moving him out after a long period of occupation. Previous planning decisions will always be relevant; how relevant, however, will inevitably depend on a variety of matters, including not least how recent they are, the extent to which considerations of hardship and availability of alternative sites were taken into account, the strength of the conclusions reached on land use and environmental issues, and whether the defendant had and properly took the opportunity to make his case for at least a temporary personal planning permission."

44. In *Chapman v United Kingdom* (2001) (referred to by Lord Bingham at [38] of his judgment), the European Court of Human Rights made a series of important observations:

a) The occupation of a caravan by a member of the Gypsy and Traveller community was an "integral part of her ethnic identity" and her removal from the site interfered with her Article 8 rights not only because it interfered with her home, but also because it affected her ability to maintain her identity as a Gypsy [73];

b) There was an emerging international consensus amongst Council of Europe States recognising the special needs of minority communities and an obligation to protect their security, identity, and lifestyle [93];

c) Members of the Gypsy and Traveller community were in a vulnerable position as a minority, with the result that "special consideration should be given to their

needs and their different lifestyle"; to that extent there was a positive obligation on States to facilitate the Gypsy way of life [96];

d) The fact that a home had been established unlawfully was highly relevant [102];

e) If no alternative accommodation is available, the interference was more serious than where such accommodation is available [103];

f) Individuals affected by an enforcement notice ought to have a full and fair opportunity to put any relevant material before the decision-maker before enforcement action was taken [106].

45. In *Connors v United Kingdom* (2005) 40 EHRR 9, the ECtHR again emphasised the vulnerable position of Gypsies and Travellers as a minority, reiterating that "some special consideration should be given to their needs and their different lifestyle" to the extent that there is a positive obligation on the State to "facilitate the gypsy way of life" [84]. The Court distilled three further principles of importance:

a) Given that the applicant was rendered homeless by the decision under challenge, "particularly weighty reasons of public interest" were required by way of justification [86];

b) The mere fact that anti-social behaviour occurred on local authority Gypsy and Traveller sites could not, in itself, justify a summary power of eviction [89];

c) Judicial review was not a satisfactory safeguard as it did not establish the facts [92] and because there was no means of testing the individual proportionality of the decision to evict [95].

46. In *Yordanova and other v Bulgaria* (App. no. 25446/06), the ECtHR noted a series of resolutions in the Council of Europe which called upon Member States to exercise restraint when carrying out eviction measures that impacted upon the Gypsy and Traveller community. The court considered that such measures should include consultation with the community or individual concerned, reasonable notice, provision of information, and a guarantee of alternative housing measures [76-79]. In its judgment, the court reiterated and expanded upon the principles developed in the case law:

a) Although it was legitimate for the authorities to seek to regain possession of land from persons who did not have a right to occupy it [111], orders should not be enforced without regard to the consequences upon the Gypsy and Traveller residents or without the securing of alternative shelter for the community [126];

b) The authorities should consider approaches specifically tailored to the needs of the Gypsy and Traveller community [128] and should consider Gypsy and Traveller groups as part of "an outcast community and of the socially disadvantaged groups", who "may need assistance in order to be able effectively to enjoy the same rights as the majority population" [129];

c) The underprivileged status of the community "must be a weighty factor in considering approaches to dealing with their unlawful settlement and, if their

removal is necessary, in deciding on its timing, modalities, and, if possible, arrangements for alternative shelter" [133].

47. In *Buckland v United Kingdom* (2013) 56 EHRR 16, the Court built upon the principle set out at [95] of *Connors*, namely that the absence of any measure enabling a member of the Gypsy and Traveller community to challenge the proportionality of a possession order was a violation of Article 8. At [65] the court held that:

> "As the Court has previously emphasised, the loss of one's home is the most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right to occupation has come to an end."

48. Finally, in *Winterstein and Others v France (App no. 27013/07*, a decision also dating from 2013, the ECtHR again emphasised that occupation of a caravan was an integral part of the identity of the Gypsy and Traveller community so that measures affecting the stationing of caravans affected their ability to maintain their identity. The margin of appreciation left to local authorities was narrower where the right at stake was crucial to the individual's enjoyment of their Article 8 rights.

5.4 Relevant Statutes and Other Guidance

5.4.1 Statutes

49. Romany Gypsies and Irish Travellers are separate ethnic minorities protected by the Equality Act 2010. Pursuant to S29(6) of the Act, "a person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation." This includes indirect discrimination, which is when a practice, criterion or procedure puts or would put the protected group at a particular disadvantage when compared with people who do not share the protected characteristic. Indirect discrimination by a public authority is capable of justification.

50. The Act imposes upon public authorities a public sector equality duty at S149. This duty requires a public authority, in the exercise of its functions, to 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.

51. By s.149(3), having due regard to the need to advance equality of opportunity between persons who share a relevant characteristic and those who do not share it involves, in particular, the need to:

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

52. Whilst it has been repeatedly accepted that the PSED does not require an EIA, the reality is that undertaking an EIA will be a factor in a case of this sort that points towards a proportionate approach on the part of a local authority. It is the substance of the EIA undertaken that matters, not its formal existence (*R (Brown) v Secretary of State for Work and Pensions and another* [2008] EWHC 3158 (Admin) at [93]). An EIA undertaken prior to the seeking of injunctive relief will be evidence of good practice. Further, the carrying out of a welfare assessment on unauthorised campers to identify any welfare issues that need to be addressed, prior to the taking of any enforcement action against them, is good practice.

53. As to statutory enforcement powers, the court was taken to Sections 61 and 62A of the Criminal Justice and Public Order Act 1994 ("the CJPOA"), which gives the police powers to direct trespassers to leave land if (in the words of s.61) they consider that "they are present there with the common purpose of residing there for any period.". The same power is given to the relevant local authority pursuant to s.77 of the CJPOA, although this is limited to "unauthorised campers".

5.4.2 Guidance

54. The issue of unauthorised encampments is the subject of voluminous guidance. *DoE Circular 18/94* states that "it is a matter for local discretion whether it is appropriate to evict an unauthorised Gypsy encampment" (paragraph 6); where there are no authorised sites but an unauthorised encampment is not causing a level of nuisance which cannot be effectively controlled, the authorities should consider providing basic services (paragraph 6); that local authorities should try and identify possible emergency stopping places as close as possible to the transit routes used by Gypsies where Gypsy families would be allowed to camp for short periods (paragraph 7); that, where Gypsies are unlawfully camped, it is for the local authority to take any necessary steps to ensure that the encampment "does not constitute a hazard to public health" (paragraph 8); and that "local authorities should not use their powers to evict Gypsies needlessly…local [authorities] should use their powers in a humane and compassionate way" (paragraph 9).

55. In the Home Office *Guide to Effective Use of Enforcement Powers (Part 1; Unauthorised Encampments)*, published in February 2006, it was emphasised at paragraphs 9 and 77 that local authorities had an obligation to carry out welfare assessments on unauthorised campers to identify any welfare issue that needed to be addressed before taking enforcement action against them. In addition, paragraph 83, entitled '*Avoiding unnecessary enforcement action'*, requires landowners to consider "whether enforcement is absolutely necessary" and identifies alternatives to eviction action.

56. And in May 2006, in a document entitled *Guidance on Managing Unauthorised Camping*, the Department for Communities and Local Government provided 66 pages of guidance to local authorities as to how they should best manage unauthorised camping. Chapter 5, entitled '*Making Decisions on Unauthorised Encampments*', stresses the importance of striking a balance between "the needs of all parties".

5.4.3 UNCRC

57. Article 3(1) of the United Nations Convention on the Rights of the Child 1989 ("UNCRC") states that:

> "In all actions concerning children, whether undertaken by public bodies or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

58. As the Supreme Court explained in *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74 at [10], the best interests of a child are an integral part of the proportionality assessment under Article 8 the Convention.

6 ANALYSIS OF THE APPEAL

6.1 Proportionality Generally

59. I turn now to an analysis of the appeal. I undertake that task principally by reference to Ground 1 of the appeal, and the 7 aspects of the judge's proportionality exercise identified by Mr Kimblin (and set out at paragraph 23 above). As will be seen, this analysis also sweeps up all but one of the other Grounds of Appeal. However, before embarking on that exercise, two preliminary points need to be made.

60. First, as I have said, the judge found in favour of the appellant that the test for a *quia timet* injunction against persons unknown had been made out. In other words, she found that the 6 requirements noted in *Ineos* had been satisfied and that there was a strong probability of irreparable harm[1]. Accordingly, it seems to me to be unnecessary to trawl over those points again, since they do not affect the outcome of this appeal.

61. Secondly, since the appeal turns on the judge's approach to proportionality, it is necessary to record the high hurdle which must be overcome in order to set aside the exercise of a judge's discretion when undertaking a proportionality analysis. The constraints inherent in such an exercise are apparent from:

    a) *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647 at 642, where Lord Fraser of Tullybelton said:

    > "The appellate court should only interfere when they consider that the judge at first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal

[1] Because the appellant has raised a separate issue about harm, set out in Ground 2 of the Appeal, I deal with it shortly at section 6.9 (paragraphs 94-96 below).

might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible".

b) In *AEI Rediffusion Music Limited v Phonographic Performance Limited* [1999] 1 WLR 507, Lord Woolf MR confirmed at 1523:

"Before the court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered, or that his decision was wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale".

c) In *R v Secretary of State for the Home Department ex parte Bulger* [2001] EWHC Admin 119 at 50, the judge said:

"A submission that undue or insufficient weight has been given to a relevant factor does not raise any arguable error of law"

6.2 Factor 1: The Extent of the Injunction

62. As I have said, the judge described the relief sought and its geographical compass as being "very broad…" amounting to "a de facto boroughwide prohibition of encampment and upon entry/occupation for residential purposes". Mr Kimblin submitted that this was an inaccurate description of what was being sought. He relied on two things: the fact that the proposed injunction excluded cemeteries and highways, and the fact that there was a good deal of green space in the southern part of the borough which, being privately owned, was not the subject of the proposed injunction at all.

63. In my view, these are not proper criticisms of the judge's finding. Her description of the injunction as a boroughwide prohibition was expressly accepted by the appellant's junior counsel at the hearing.

64. As to the two specific points raised, the evidence is that Gypsies and Travellers do not camp in cemeteries and no-one could regard highways as being an appropriate place for any sort of encampment. This is borne out by the fact that there had been no recorded encampments in cemeteries or highways in Bromley in any event. In addition, I reject the submission that, because the proposed injunction did not cover private land, its width was overstated. The judge expressly dealt with that at [63]. She said that she did not regard transferring the undoubted problems that the appellant had experienced to private landowners, who would themselves be entitled to seek possession orders evicting the occupants from their land, as a solution. I respectfully agree.

65. Accordingly, the judge's description of the width of the injunction, accepted as it was at the hearing, was an accurate description of what was being sought. The judge was quite right to be concerned about its width, and to regard that as a highly relevant factor in the proportionality exercise.

6.3 Factor 2: Entry/Occupation

66. Mr Kimblin suggested that the judge had been wrong to be concerned by the fact that the injunction went only to entry/occupation and was unconnected to antisocial or criminal behaviour. This was a point that she first raised at [16] of her judgment and

was referred to again at [60]. He suggested that the fact that there was no specific evidence of such conduct in the past could not be a relevant factor.

67. In my view, although it could not be said to be determinative, the absence of any substantial evidence of past criminality (leaving aside fly-tipping) was a factor that was relevant to the proportionality exercise. The fact that the sort of criminal and quasi-criminal conduct which was the basis of the injunctions in the *Harlow* cases was absent here was not unimportant, because it meant that the mischief at which the injunction was aimed was simply entry and occupation. Beyond that, the weight to be given to this factor was entirely a matter for the judge. She was entitled to take it into account when considering proportionality.

6.4 Factor 3: Alternative Sites

68. Here the principal criticism of the judge is that, because she was concerned that there were no suitable alternative sites, she failed to consider whether this should have led to an injunction in different terms, or what Mr Kimblin called "a lesser outcome". He said that it was incumbent upon the judge to consider lesser alternatives as part of the proportionality exercise.

69. This needs to be unpicked a little. It appears to be inherent in that criticism that the appellant accepted that the absence of any alternative sites was a relevant factor in the proportionality exercise. For the avoidance of doubt, I consider that it was plainly relevant. There was an irreconcilable conflict between, on the one hand, Ms Slater's statement that Bromley did not need a transit site because it did not suffer particularly from incursions, and Bromley's claim for a boroughwide injunction preventing *any* entry or encampment.

70. I note that the fact that the injunction only related to some but not all sites, coupled with the proposal of a transit site, were important factors for Jefford J in the *Wolverhampton* case (see paragraph 39 b) above). That approach is in accordance with the ECtHR authorities set out at paragraphs 44-48 above. These important safety valves were not in play here, because of the width of the injunction which the appellant was seeking and the absence of any proposal for a transit site (despite the clear need).

71. The main difficulty for the appellant in relation to its suggestion that the judge did not consider a lesser order is that at no time did they themselves put forward any alternative or lesser order. As we have seen in relation to the permitted development point, when a lesser alternative was expressly mooted, the appellant made plain that it was not interested in any "second rate" solution. So whilst I accept that, in appropriate circumstances, a judge should consider whether the problem can be dealt with in a less draconian way, there must always be realistic limits to that exercise. A proportionality analysis requires a judge primarily to consider whether what is being proposed is proportionate in all the circumstances. The fixed point therefore is that which is actually sought, not that which might have been sought in other circumstances.

72. In cases such as this, what is being sought is a matter for the local authority. It is a matter for the authority carefully to consider the temporal and geographical range of the order sought, and the steps that could be taken to explore alternative sites and other solutions. That is particularly important when they are seeking an injunction against persons unknown, when they know that the defendants will almost certainly not be

represented at either the interim or final hearings. Of course the judge will want to scrutinise carefully what is being sought (and the cases referred to in paragraphs 38 and 39 above make plain just how scrupulously the first instance judges have undertaken that exercise in these cases) but, ultimately, the burden remains on the local authority.

73. What is more, that makes practical sense. Only the appellant would know which of the 171 sites might be regarded as a priority, and which of them might be considered as suitable for exclusion from the terms of any proposed injunction. Only the appellant would know what its proposals were in respect of transit sites (and if there were no such proposals, how that could be squared with the alleged need for the boroughwide injunction). It was not explained how the judge could have satisfactorily undertaken such tasks. In my view, therefore, this criticism of the judge was unfair and unrealistic.

74. Accordingly, it seems to me that, not only is there nothing in this third criticism of the judge's proportionality exercise, but the absence of any transit or other alternative sites was a very important factor militating against the imposition of the boroughwide injunction.

6.5 Factor 4: Cumulative Effect

75. Although the judge dealt with the cumulative effect in her proportionality exercise quite shortly (the second part of [63]), she had referred to the effect of other injunctions granted in favour of other local authorities on a number of occasions in the earlier parts of her judgment.

76. The appellant's criticism of the judge is that, in essence, she should not have placed any weight on the cumulative effect of other injunctions. This is also reflected in the separate Ground 3 of the appeal. Mr Kimblin said that *Meier* was a strong indication that the use of a *quia timet* injunction to deal with an anticipated problem like this was an appropriate course. He said that it then became a matter for each local planning authority independently (although he did not go as far as to say that the cumulative effect was not a material consideration at all). Mr Kimblin also said that, if the cumulative effect was overstated, it might mean that the competing needs of different local authorities would be ignored.

77. There are a number of points to be made about those submissions. First, I do not consider that *Meier* is authority for the wide proposition advanced by Mr Kimblin. On the contrary, I note that Lady Hale expressly said that she was hesitant about granting an injunction in respect of "quite separate land which has not yet been intruded upon". That is this case.

78. Secondly, although I accept that each case has to be looked at on its own merits (that is the whole force of the House of Lords' decision in *South Bucks)* and that the situation in respect of each local authority will be different, it would be wrong to ignore the plain fact that a neighbouring authority's successful injunction potentially narrows the options for everyone else, including other local authorities and the Gypsy and Traveller community itself. If every local authority obtains an injunction, the community has literally nowhere to go. So, as the judge acknowledged, it would be unrealistic to say that the cumulative effect of all the injunctions which have been granted so far was anything other than a relevant factor when carrying out the proportionality exercise.

79. Thirdly, Jay J said in *Harlow v McGinley* that the cumulative effect of other injunctions was a material consideration, but that the weight to be afforded to it was a matter for the judge. I agree with that approach[2]. Here, the judge clearly had the cumulative effect in mind, but she does not say anything which suggests that she gave it undue weight or significance. It was simply a factor that she took into account in her assessment of proportionality. Since Mr Kimblin rightly accepted that he could not say that the cumulative effect of other injunctions was something to which the judge should have paid no attention at all, the difference between the judge's approach and Mr Kimblin's ultimate position was nugatory. I therefore reject this fourth criticism of the judge's proportionality exercise.

6.6 Factor 5: Article 8 and the EIA

80. The judge found a number of specific failures on the part of the appellant, including a failure to comply with its PSED and its failure to carry out an EIA. These failures distinguish the appellant's position from at least the majority of the second and fourth interveners. The scope for any challenge to these findings was inevitably limited. For the reasons noted at paragraphs 49-52 above, this is an extremely important element of the case.

81. The narrow point taken on appeal by the appellant, which is also reflected in the separate Ground 4 of the appeal, is that there was no statutory duty or requirement to carry out an EIA. I have dealt with that at paragraph 52 above. Regardless of whether the failure to undertake an EIA was a specific breach of duty on the part of the appellant, this was a case where the judge found that, not only was there no EIA in fact, but there had been no proper engagement with the Gypsy and Traveller community at all. There was therefore a failure by the appellant to comply with its PSED.

82. Both the Equality Act duties at paragraphs 49-52 above, and the lengthy existing guidance to which I have referred at paragraphs 54-56 above, mean that assessments of various kinds are required in many circumstances when dealing with Gypsy and Traveller encampments. There is evidence that, for example, some of the second interveners considered these obligations and undertook full assessments before seeking the injunction. As the judge below noted, in the *Sutton* case, there was detailed evidence about the second interveners' engagement with the Gypsy and Traveller community and the proposed completion of various welfare and equality assessments. The judge found that this simply had not happened in the present case and, with one exception, there was no substantive answer to that criticism at the appeal hearing.

83. The exception which Mr Kimblin relied on in this connection was the Accommodation Assessment of 2016, referred to in paragraph 7 above. He said that this showed the appellant had given careful consideration to the needs of this particular group and that it was wrong and unfair for the judge to make the criticisms that she did at [64] – [68] of her judgment.

84. In my view there are a number of answers to that submission. First, it was common ground that the judge was shown the Accommodation Assessment, and there is nothing to say that she did not have regard to it. Secondly, since the Accommodation Assessment itself expressly referred at paragraph 2.31 to the outstanding demand for

[2] There were also shades of the same approach in *Tendring*: see paragraph 39(d) above.

additional sites in the borough, which demand had not been acted upon by the appellant in the time since the Accommodation Assessment was completed, it does not seem to me that it demonstrated any particular engagement with this issue by the appellant. Thirdly, and most important of all, the Accommodation Assessment was prepared before the appellant had even thought about, let alone obtained, the wide interim injunction in this case. It was therefore already out of date by the time of the hearing before the judge and of little relevance to the issues before the court.

85. Take an example: the judge had to address how infringements of the injunction might be dealt with in the future and did so at [67], noting that no proper welfare assessment was carried out in relation to the one incident that had been addressed in the evidence. That was a serious matter and directly referred to an event close in time to the hearing before the judge. The Accommodation Assessment of 2016, on the other hand, could not contain any answer to that question.

86. Accordingly, I consider that the particular factual criticisms that the judge made of the appellant in this case were plainly open to her on the evidence. As I have noted, these criticisms (and in particular the various failings under the Equality Act) go a long way towards distinguishing the appellant's case from those of the majority of the second and fourth interveners. I note that Mr Woolf, who made short oral submissions on behalf of the second intervener, was anxious to emphasise those differences, and in particular the failings of the appellant in relation to its PSED and its general dealings with the Gypsy and Traveller community.

87. For all these reasons, I consider that there is nothing in the fifth criticism of the judge's proportionality exercise and Ground 4 of the appeal.

6.7 Factor 6: Duration

88. The judge concluded that the five-year term sought was unduly long and therefore disproportionate. The criticism is that she should have considered whether a lesser period was appropriate. Again, therefore, it appears to be accepted that the issue of duration was a relevant factor (as it was said to be by Longmore LJ in *Ineos*). In my view it was plainly a relevant factor.

89. As to the argument that the judge should have explored the possibility of a shorter timescale, my view is similar to that noted in paragraphs 69-71 above. The appellant never suggested a shorter period. Whilst that would have been something which the judge could have considered, she was primarily obliged to test the proportionality of the injunction in the terms sought by the appellant. She was certainly entitled to conclude that the five-year term was, for a variety of reasons, much too long. I therefore reject this criticism of the judge.

6.8 Factor 7: Permitted Development

90. By reference back to schedule 1 of the Caravan Sites and Control of Development Act 1960, the GPDO grants deemed planning permission for the stationing of a single caravan on land for not more than 2 nights, or not more than 3 caravans on a larger site, or use of land as a caravan site for a travelling showman. The argument before the judge was that this injunction would potentially cut across those permitted development

rights. She concluded that the appellant had not dealt with this in a satisfactory way and that that was a seventh and final factor in proportionality exercise.

91. The appellant took three points on appeal. First, they said that the permitted development rights were irrelevant because the injunction was aimed at larger encampments. Secondly, they submitted that the judge could have drafted the injunction so as to expressly preserve any permitted development rights. Thirdly, they argued (for the first time) that permitted development rights could not change the use of land for which permission had not already been granted and/or that such rights cannot be exercised without the consent of the landowner. The 'permitted development rights' issue is also reflected in Ground 5 of the Grounds of Appeal.

92. In my view, it is unnecessary and possibly unwise to decide this third (and highly technical) point for the purposes of this appeal. I am aware that planning law in respect of caravans and camping has been described as "particularly complex"[3] and the issue about permitted development rights was never a significant part of the argument before the judge (which probably explains why it was dealt with last). But I consider that the judge was plainly entitled to conclude that the matter had not been dealt with satisfactorily by the appellant. This was in part because, on the arguments before her, it was said that this point only related to a quarter of the sites, but those sites could not be identified (see [70]). Furthermore, on the face of it, the existence of such permitted development rights would seem to require the appellant, as part of its application, at least to explain how or why they had been exhausted or did not apply. Finally, the criticism that the judge should have expressly preserved any permitted development rights in the injunction is most unfair, given that she expressly raised it and the offer was declined by the appellant's junior counsel.

93. The permitted development rights were, in my view, a factor which was relevant to proportionality. The travelling showman exception in the GPDO is perhaps a good example of this. The judge needed to be satisfied that the proposed injunction would not cut across that permitted development right, because the Accommodation Assessment showed that there were large numbers of travelling showmen in Bromley. The appellant did not demonstrate that to her (or my) satisfaction. This may be something which, in another case, could be resolved, either by way of the wording of the injunction, or by the designation of particular sites for this permitted development. But the judge was entitled to reach the view that she did on this issue, based on the evidence before her. There is therefore nothing in this last criticism of the judge's proportionality exercise.

6.9 Irreparable Harm

94. As noted at paragraph 21 above, the judge concluded that the required threshold of harm had been made out by the appellant. It is therefore curious that Ground 2 of the Appeal (the only ground not yet covered) sought to challenge the judge's conclusion that the necessary threshold was one of "irreparable harm". Even if, as the appellant maintains, that was too high a threshold, the judge found that the appellant had satisfied the test in this case, so the point simply does not arise on appeal.

[3] See paragraph 3B-1144.2 of Volume 6 of the *Encyclopaedia of Planning Law and Practice*.

95. However, as noted in paragraphs 35 and 60 above, I consider that the test of "irreparable harm" is the right one, supported as it is by a number of authorities. Contrary to Mr Kimblin's submissions, that conclusion is not contrary to *Meier*, because that was not a case in which the test for a *quia timet* injunction was in issue: all that mattered in that case was whether or not such an injunction was at least potentially available to the claimant.

96. For those reasons, therefore, the judge was right to apply the test of irreparable harm as a matter of law.

6.10 Summary

97. For the reasons set out above, I would dismiss this appeal. The judge considered all of the relevant factors when undertaking her proportionality exercise. She did not have regard to anything irrelevant. She came to a conclusion which she was entitled to reach. Whilst I would not accept Mr Willers' description of the appellant's arguments as "just a list of grouches", I agree with his summary submission that the appellant has struggled and failed to find any error of principle in the judge's reasoning. There is therefore no basis for this court to interfere with her conclusions.

98. I would not wish to move on to the wider guidance sought in this case without expressing my admiration for the judge's impressive *ex tempore* judgment. Not only did she have a good deal to consider, and not only was she able to marshal all of that material into a cogent judgment, but she took a clear-eyed view of the underlying problems and was not unduly swayed by the number of other cases in which wide injunctions had been granted in ostensibly similar circumstances.

8 WIDER GUIDANCE

99. As noted at the outset of this judgment, the parties were anxious for this court to provide some wider guidance as to how local authorities should deal with this plainly pressing issue. I am wary of offering too prescriptive a set of suggestions, particularly in circumstances where the appeal itself raised a number of fact-specific matters and has been refused. However, in deference to the parties' requests, I will endeavour to set out in brief terms what I consider to be the overall position.

100. I consider that there is an inescapable tension between the article 8 rights of the Gypsy and Traveller community (as stated in such clear terms by the European caselaw summarised at paragraphs 44-48 above), and the common law of trespass. The obvious solution is the provision of more designated transit sites for the Gypsy and Traveller community. It is a striking feature of many of the documents that the court was shown that the absence of sufficient transit sites has repeatedly stymied any coherent attempt to deal with this issue. The reality is that, without such sites, unauthorised encampments will continue and attempts to prevent them may very well put the local authorities concerned in breach of the Convention.

101. This tension also manifests itself in much of the guidance documentation to which I have referred at paragraphs 54 - 56 above. That guidance presupposes that there will be unlawful encampments, and does not suggest, save as a last resort, that such encampments should be closed down, unless there are specific reasons for so doing. There is no hint in the guidance that it is or could be a satisfactory solution to seek a

wide injunction of the sort in issue in this case: indeed, on one view, much of that guidance would be irrelevant if the answer was a boroughwide prohibition on entry or encampment.

102. It therefore follows that local authorities must regularly engage with the Gypsy and Traveller community (and/or, in the Greater London area, the first intervener). Through a process of dialogue and communication, and following the copious guidance set out above, it should be possible for the need for this kind of injunction to be avoided altogether. 'Negotiated stopping' is just one of many ways referred to in the English caselaw in which this might be achieved.

103. If a local authority considers that a *quia timet* injunction may be the only way forward, then it will still be of the utmost importance to seek to engage with the Gypsy and Traveller community before seeking any such order if time and circumstances permit. Welfare assessments should be carried out, particularly in relation to children. An up-to-date EIA will always be important because the impact on the Gypsy and Traveller community will vary from borough to borough and area to area. In my view, if the appropriate communications, and assessments (like the EIA) are not properly demonstrated, then the local authority may expect to find its application refused.

104. Three particular considerations should be at the forefront of a local authority's mind when considering whether a *quia timet* injunction should be sought against persons unknown, and where the proposed injunction is directed towards the Gypsy and Traveller Community:

a) Injunctions against persons unknown are exceptional measures because they tend to avoid the protections of adversarial litigation and article 6 ECHR.

b) In order for proportionality (or an equilibrium) to be met in these cases, it is important that local authorities understand and respect the Gypsy and Traveller community's culture, traditions and practices, in so far as those factors are capable of being realised in accordance with the rule of law. That will normally require some positive action on the part of the authority to consider the circumstances in which the article 8 rights of the members of those communities are 'lived rights' i.e. are capable of being realised.

c) The vulnerability and protected status of the Gypsy and Traveller community, as well as the integral role that the nomadic lifestyle plays as part of their ethnic identities, will be given weight in any assessment as to the proportionality of an injunction or eviction measure.

d) The equitable doctrine of 'clean hands' may require local authorities to demonstrate that they have complied with their general obligations to provide sufficient accommodation and transit sites for the Gypsy and Traveller community.

e) Common sense requires the court, when carrying out the proportionality exercise, to have careful regard to the cumulative effect of other injunctions granted against the Gypsy and Traveller community.

105. In my view, boroughwide injunctions are inherently problematic. They give the Gypsy and Traveller community no room for manoeuvre. They are much more likely to be refused by the court as a result (as happened here). The solution in *Wolverhampton*, which identified particularly vulnerable sites but did not include all the sites owned by the council, seems to me to be a much more proportionate answer. I do not accept that this automatically means that the remaining sites will be the subject of unauthorised encampment, as Mr Kimblin suggested, but even if that happens, it is likely to be a better solution than a potentially discriminatory blanket ban.

106. The same is true of the duration of the injunction. Again, in the *Wolverhampton* case, the injunction was limited to a period of one year after which there was a review. That again seems to me to be sensible. I consider that it is - without more - potentially fatal to any application for a local authority to seek a combination of a boroughwide injunction and a duration of a period as long as five years.

107. Credible evidence of criminal conduct in the past, and/or of likely risks to health and safety, are important if a local authority wishes to obtain a wide injunction. In my view, the injunctions in the *Harlow* cases were explicable on the grounds of criminality and the grave risks to health and safety. Injunctions which are designed to prevent entry and encampment only, and without evidence of such matters, should be correspondingly more difficult to obtain.

108. Whilst I do not accept the written submissions produced on behalf of the third intervener, to the general effect that this kind of injunction should never be granted, the following summary of the points noted above may be a useful guide:

a) When injunction orders are sought against the Gypsy and Traveller community, the evidence should include what other suitable and secure alternative housing or transit sites are reasonably available. This is necessary if the nomadic lifestyle of the Gypsy and Traveller community is to have effective protection under article 8 and the Equality Act.

b) If there is no alternative or transit site, no proposal for such a site, and no support for the provision of such a site, then that may weigh significantly against the proportionality of any injunction order.

c) The submission that the Gypsy and Traveller community can "go elsewhere" or occupy private land is not a sufficient response, particularly when an injunction is imposed in circumstances where multiple nearby authorities are taking similar action.

d) There should be a proper engagement with the Gypsy and Traveller community and an assessment of the impact of an injunction might have, taking into account their specific needs, vulnerabilities and different lifestyle. To this end, the carrying out of a substantive EIA, so far as the needs of the affected community can be identified, should be considered good practice, as is the carrying out of welfare assessments of individual members of the community (especially children) prior to the initiation of any enforcement action.

e) Special consideration is to be given to the timing and manner of approaches to dealing with any unlawful settlement and as regards the arrangements for alternative pitches or housing.

109. Finally, it must be recognised that the cases referred to above make plain that the Gypsy and Traveller community have an enshrined freedom not to stay in one place but to move from one place to another. An injunction which prevents them from stopping at all in a defined part of the UK comprises a potential breach of both the Convention and the Equality Act, and in future should only be sought when, having taken all the steps noted above, a local authority reaches the considered view that there is no other solution to the particular problems that have arisen or are imminently likely to arise.

LORD JUSTICE HADDON-CAVE:

110. 1 agree.

SENIOR PRESIDENT OF TRIBUNALS:

111. I also agree.