Case Name: *Smith v Secretary of State for Levelling Up, Housing & Communities & Anor* [2022] EWCA Civ 1391 (31 October 2022)

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Commentary:
This was an appeal against an order refusing an application to quash a decision (dated 23 November 2018) of an inspector appointed by the Secretary of State dismissing an appeal against the refusal of planning permission by North West Leicestershire District Council (the "Council").

In the present case, the judge allowed the appeal and quashed the inspector's decision of 23 November 2018, remitting the case to the Secretary of State for redetermination of Ms Smith's appeal against the refusal of planning permission.

Background
Ms Smith lives on a rented site with her family in their caravans and has done since 2011. Two of the Ms Smith's adult sons are severely disabled and cannot travel for work. In April 2013, planning permission (as varied in March 2015) was granted for a period of 4 years for the siting of up to six touring caravans on the land. A requirement of the permission was that the site could not be occupied by any persons other than Gypsies and Travellers as defined in the planning policy – which included Ms Smith until changes to the definition were introduced in August 2015.

An application to vary the permission to allow for the permanent residential use of the site as a Gypsy site and to permit the construction of a large dayroom was submitted in March 2016. Despite officer support, the Council refused the application in December 2016. The refusal flowed from the fact that Ms Smith, nor any member of her family, was recognised as a Gypsy under an amendment to the definition of "Gypsies and Travellers" in the policy document "Planning Policy for Traveller Sites" issued in August 2015 ("PPTS 2015"). The definition was changed to exclude those who had inter alia permanently ceased travelling as a result of disability or old age (the "relevant exclusion").

An appeal of the inspector's decision was dismissed on 23 November 2018. The Secretary of State accepted that the relevant exclusion indirectly discriminated against elderly and disabled Gypsies and Travellers. The judge in case [2021] EWHC 1650 (Admin) rejected the section 288 of the Town and Country Planning Act 1990 challenge (the "s.288 Challenge") against the inspector's decision. The judge in deciding the s.288 Challenge concluded that the discrimination was not unlawful because it was justified.

The grounds of appeal
Ms Smith appealed the s.288 Challenge decision on four grounds:

1. Ground 1 – The judge applied the wrong test and / or reversed the burden of proof;
2. Ground 2 – The judge erred in concluding that there was no race discrimination claim;
3. Ground 3 – The judge erred in his reasoning and conclusions as to the legitimate aim or objective of the relevant exclusion;
4. Ground 4 – The judge erred in his reasoning and conclusions to the effect that the relevant exclusion was proportionate.

Ground 1

The judge in this case distinguished Ms Smith's circumstances from those in Christian Institute on the basis that the proceedings were brought by an individual who has suffered admitted indirect discrimination and not a campaigning organisation where the indirect discrimination was not admitted. The judge found that the State has a positive obligation to assist under Chapman. In light of the Secretary of State admitting the discrimination, the burden was on the Secretary of State to demonstrate the necessary justification.

The judge in the present case found that the judge in the s.288 Challenge was wrong to determine that the inspector did not discriminate against Ms Smith in the exercise of her planning judgment, adding that "it is not the law that, in such claims, despite the admission of discrimination, the claimant must demonstrate that the measure was wholly incapable of lawful operation."

Ground 1 of the appeal succeeded finding that the s.288 Challenge judge erroneously imposed a "high hurdle" burden of proof.

Ground 2

Ms Smith submitted that her ethnicity is Romany Gypsy. Evidence was given demonstrating the importance of living in caravans to the ethnic identity of Gypsies. Chapman was used to emphasise that the State has a positive obligation to facilitate the Gypsy way of life.

The judge found that the "nature of the discrimination before the judge was the negative impact on those Gypsies and Travellers who [have] permanently ceased to travel due to old age or illness but who… [want] to live in a caravan. This discrimination was inextricably linked to their ethnic identity". Consequently, the judge found that race discrimination was always an element of Ms Smith's s.288 Challenge.

Ground 2 of the appeal succeeded.

Grounds 3 and 4

The judge dealt with the issues raised in grounds 3 and 4 together as it dealt with "proportionality" – whether the relevant exclusion had a legitimate aim or objective and whether the importance of that objective outweighed the severity of its effect.

The court considered how the planning system operates in practice over the "theoretical capability of the planning system to meet the need of Gypsies and Travellers". Despite there being "no doubt that Gypsies and Travellers can depend on their ethnicity within the planning system regardless of the definition", this was not considered "sufficient to justify the admitted discrimination". Moreover, "in the present case there was no evidence that any of the inherent capabilities of the planning system actually made up for the admitted indirect discrimination". The fact that elderly and disabled Gypsies and Travellers (who are no longer travelling) have to rely on general planning policy is inherently a disadvantage.

The judge concluded that the severity of the effect outweighed the alleged aims or objectives of the measure.

Additionally, the judge did not accept that the contemporaneous material suggested that the Secretary of State, by making the relevant exclusion in PPTS 2015, was "turning back the clock" to a position held in the 1990s – the decision in Wrexham.
Accordingly, grounds 3 and 4 of the appeal succeeded.

Outcome

The judge allowed the appeal and quashed the inspector's decision of 23 November 2018 remitting the case to the Secretary of State for redetermination of Ms Smith's appeal.

Case summary prepared by Amy Penrose