

# **Rights of Travellers in Northern Ireland: Real Remedies for Immediate Problems**

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## **1. Introduction**

- 1.1. Irish Travellers, as an indigenous nomadic group, have been recorded officially in Ireland as far back as the fifth century. However, little respect has been shown to their distinct and rich cultural tradition. They have experienced prejudice and social exclusion across the board, which has resulted in them being one of the most disadvantaged groups in Northern Ireland. The cumulative effect of poverty, the limit in the number of stopping places and poor living conditions have led to poor health, low educational achievement, high mortality rates and difficulties in accessing the full range of statutory services.<sup>1</sup> The environmental conditions on the serviced sites, that are available, are extremely poor. Conditions on most emergency and transit sites or sites occupied under the co-operation policy are intolerable due to the lack of basic services such as water, refuse collection and sanitation.
  
- 1.2. The Department for Social Development (DSD), with the Northern Ireland Housing Executive (NIHE) and Registered Housing Associations, is concerned with the provision of accommodation for Travellers. Following the transfer of

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<sup>1</sup> The final report of the Promoting Social Inclusion working group on travellers referred to the multiple disadvantage experienced, all of which were exacerbated by poor living conditions.

responsibility for Traveller specific accommodation from district councils, NIHE carried out an assessment of the accommodation needs of all Travellers in Northern Ireland.<sup>2</sup> According to that review, a proportion of Travellers wish to live in 'settled' accommodation in existing social housing estates or specific 'group housing' schemes which cater for extended family groupings. NIHE drew up and submitted to the DSD, a programme of Traveller specific schemes to be delivered by housing associations. According to anecdotal evidence, however, it seems that some who expressed a wish to live in bricks and mortar accommodation did so because it offered a better quality of life given the lack of site provision, not because they had abandoned the wish to live nomadically.

- 1.3. In respect of type of accommodation, Travellers expressed a preference for grouped housing (71% of those already living on serviced sites and 83% of those on co-operated sites) and serviced sites (68% of those living at the side of the road). As for location, the highest number wished to live in Belfast and then Dungannon or Derry. Grouped housing, which is intended to be culturally appropriate housing, is "residential housing developments with additional facilities and amenities specifically designed to accommodate extended families of Travellers on a permanent basis".<sup>3</sup>

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<sup>2</sup> Travellers Accommodation Needs Assessment in Northern Ireland 2002.

<sup>3</sup> According to the DoE (1999) New Policy on Accommodation for Travellers

1.4. A number of Travellers indicated a desire to live on 'serviced' sites. Serviced sites are managed accommodation where Traveller families have a permanent base to park their caravan or erect timber framed Sectional Buildings (sometimes known as 'Park Homes') where electricity, water and sewerage is provided and where other facilities such as communal or individual amenity units (providing toilet, washing and daytime living arrangements) may be provided.<sup>4</sup> A number of respondents living on serviced sites, at the side of the road or on co-operated sites expressed high levels of dissatisfaction with their current accommodation.<sup>5</sup> NIHE records that it is in the process of providing additional serviced sites and upgrading those already occupied. For Travellers wishing to remain nomadic, NIHE has said that their needs will be catered for by the provision of more transit sites. The progress of the scheme has however been delayed by difficulties finding and acquiring land and thereafter by planning objections.

1.5. NIHE also operates a policy of co-operation. A 'co-operated site' is a site (formerly known as a tolerated site) on land owned by governmental departments where Travellers are located on a temporary basis. A co-operated site tends not to have any services. NIHE described the policy as a humane requirement and necessary addition to adequate permanent provision, which allows Travellers to

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<sup>4</sup> Evaluation of Traveller Grouped Housing, 2005, NIHE.

<sup>5</sup> At 85%, 76% and 70% respectively.

remain on land subject to conditions. The conditions are that (1) occupation does not constitute a measurable public health hazard or cause pollution to water supplies (2) occupation does not create a traffic hazard (3) occupation does not create a right to long-term use of the site with the situation being reviewed at regular intervals not exceeding three months (4) there is no current or immediate use for the land and (5) the Travellers behave in a reasonable and orderly manner.

- 1.6. Many families are remaining on co-operated sites without basic services however for long periods of time because there are insufficient pitches on serviced sites.<sup>6</sup> In 2005, five sites were identified for use as transit sites and NIHE indicated that transit sites would be developed *in tandem* with the introduction of the Unauthorised Encampments (Northern Ireland) Order 2005 (as to which see below). Currently, however, there are only two transit sites.<sup>7</sup> Against that, there are 27 unauthorised encampments noted by NIHE in 2008. There are six serviced sites throughout Northern Ireland but an acknowledgement by NIHE of much greater need.<sup>8</sup> There are three emergency sites, which are similar in character to transit sites but where families reside pending the offer of a serviced site.

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<sup>6</sup> E.g. the Glen Road site has been categorised as a co-operated site but has been in existence for over 30 years.

<sup>7</sup> In Strabane and Derry. The sites proposed for Belfast, Craigavon and Newry have not been developed.

<sup>8</sup> It is recorded that in Craigavon alone there is a need for 3 serviced sites in Craigavon.

1.7. One thing is clear, Travellers have not been provided for in Northern Ireland and contrary to a perception promulgated in some newspapers, they do not seek to 'take advantage of the system', rather they have been routinely denied the same advantage many in the settled community take for granted.

2. **Equality of treatment and factors relevant to public authority decision-making**

2.1. The Race Relations (Northern Ireland) Order 1997 recognises Irish Travellers as a racial group and defines the Irish Traveller community as "a community of people commonly so called who are identified (by themselves and others) as people with a shared history, culture and traditions, including, historically, a nomadic way of life on the island of Ireland". Irish Travellers are protected at law from direct or indirect discrimination<sup>9</sup> on grounds of racial or ethnic origins in the areas of employment (and related matters), social protection, social advantage, education and access to and supply of goods and services which are available to the public, including housing.

2.2. The Belfast Agreement of 1998 introduced a new framework for the people of Northern Ireland guaranteeing human rights, equality and participation. The agreement was translated into legislation by the Northern Ireland Act

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<sup>9</sup> By virtue of the Race Relations (NI) Order 1997, as amended by Regulations SR 2003/341 (from 19 July 2003) which were required to implement Council Directive 2000/43 EC of 29 June 2000.

1998. The Act moved human rights into the mainstream; the domestic law of Northern Ireland underpinning this new notion of 'constitution'. Lawyers are now required to re-evaluate the rights and remedies available at law particularly as they impact on those groups whose human rights, equality and participation have been neglected in the past.

2.3. The Northern Ireland Act provides that a public authority, such as NIHE and a district council, in carrying out its functions relating to Northern Ireland, must have due regard to the need to promote *equality of opportunity* between, amongst others, persons of different religious belief, political opinion and racial group.<sup>10</sup> In carrying out its functions an authority must also have regard to the desirability of *promoting good relations* between those groups. An authority is obliged to publish an equality scheme demonstrating how it proposes to fulfil its obligations.<sup>11</sup>

2.4. The Human Rights Act 1998<sup>12</sup> made the European Convention on Human Rights (ECHR) part of domestic law and therefore the rights enshrined more capable of direct and practical effect in local courts. It is unlawful for a

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<sup>10</sup> Section 75, which also prohibits discrimination on grounds of age, marital status or sexual orientation; between men and women generally; between persons with a disability and persons without; and between persons with dependents and persons without.

<sup>11</sup> Schedule 9 to the 1998 Act.

<sup>12</sup> This came fully into force on 2 October 2000.

public authority<sup>13</sup> to act in a way which is incompatible with ECHR rights and all legislation must be read in a way that is compatible with ECHR rights. Most of the powers exercised by public authorities which impact upon the lives of Travellers are discretionary but must now be interpreted and exercised so as to respect the ECHR rights of Travellers.

2.5. The two most relevant ECHR rights are those contained in articles 8 (right to respect for private and family life, home and correspondence) and 14 (enjoyment of the ECHR freedoms and rights without discrimination). The ECHR rights are dealt with fully by other speakers so suffice it to note here that article 8(1) has been held to guarantee the right to respect for the traditional way of life of a minority such as Travellers.<sup>14</sup>

2.6. A public authority may be challenged by way of judicial review if it fails to have regard to the above duties in carrying out any of its public functions, including any decision to take action in any particular case.<sup>15</sup>

2.7. The evidence suggests that the law and the legal profession are failing to step in and protect Irish Travellers by litigating the rights afforded to them. Travellers have experienced verbal abuse and intimidation and have

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<sup>13</sup> This includes government ministers and departments, planning authorities, housing authorities, district councils, the police and the courts.

<sup>14</sup> *Chapman v UK* [2001] 33 EHRR 399.

<sup>15</sup> See e.g. (1) *McCarthy* (2) *Culligan* (3) *Coyle* (4) *Taylor & Others (Claimants) v Basildon District Council (Defendant) & Equality & Human Rights Commission (Intervener)* (2008) [2008] EWHC 987 (Admin).

experienced differences in treatment by the settled community. Intimidation and harassment has been suffered by those living on sites *and* in public and private housing with the highest numbers suffering being those living at the side of the road or on serviced sites.<sup>16</sup> It is clear therefore that the short fall in the provision of serviced sites and group housing is exacerbating poor relations between Travellers and the settled community rather than promoting good relations.

### 3. **Provision of sites**

- 3.1. In 1999, NIHE became the comprehensive regional housing authority in Northern Ireland with strategic responsibility for accommodation for the Traveller Community.<sup>17</sup> On 1 December 2003, responsibility for the management and maintenance of serviced sites was transferred from local district councils to NIHE.<sup>18</sup> NIHE *must* provide such caravan sites as appear to it to be appropriate for the accommodation of caravans of members of the Irish Traveller community, and *may* manage those sites or lease them to some other person. NIHE may also acquire land on which to construct caravan sites and may provide, for the use of those occupying sites, any services or facilities for health or convenience that appear to NIHE to be appropriate. While NIHE has a duty to provide such sites as appear to it to be

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<sup>16</sup> Needs Assessment 2002 (above).

<sup>17</sup> Policy on Accommodation for Travellers (DOE NI) 1999.

<sup>18</sup> Article 28A of the Housing (NI) Order 1981, as amended by Housing (NI) Order 2003.

appropriate, it has merely the power to provide facilities. NIHE does not have power to provide caravans. In exercising those powers, NIHE *must* have regard to any model conditions specified by the Department of the Environment,<sup>19</sup> as to which see further below, and to its duties under the equality provisions and the Human Rights Act.

3.2. NIHE said at the time “our main priorities will be to carry out Health and Safety checks and condition surveys on the sites. In the short term this will allow us to assess future repairs. All of this will be done in consultation with the Traveller families on the sites. The Housing Executive welcomes this opportunity to develop its work with the Traveller Community. We work closely with our partners in the voluntary, community and statutory sectors to provide decent accommodation for the Traveller Community across Northern Ireland”.<sup>20</sup> A needs survey was carried out in 2002 which resulted in a finding that 42% of Travellers expressed a preference for social housing, 14% for Serviced Sites and 38% for Group Housing.

3.3. There has been a number of Group Housing Schemes developed since then. Group housing is a residential housing development with additional facilities and amenities specifically designed to accommodate extended families of Travellers on a permanent basis. There has also been some work towards improving existing sites, for

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<sup>19</sup> Under section 5(7) of the Caravans Act (NI) 1963.

<sup>20</sup> Statement issued by the Chief Executive in 2002.

example at Ballyarnett. However, there are too few serviced sites and almost no transit sites catering for families who wish to remain nomadic. Exacerbating the problem, the police now have power to direct people who camp illegally to leave land and remove vehicles.<sup>21</sup> Those who refuse to comply may have their vehicles seized and, if prosecuted, face imprisonment and a fine of up to £2,500. Travellers who cannot find a pitch on a legal encampment will be criminalised if they park their caravans elsewhere.

3.4. An Inter Agency Working Group, established by NIHE to consider the need for and location of transit sites concluded that five transit sites located around Strabane, Londonderry, Belfast, Craigavon and Newry should be sufficient to cater for those still wishing to travel. As an interim measure, it is proposed to establish a programme of emergency sites to cater for the immediate needs of Traveller families who continue to live by the roadside. It is intended through this programme, to use a more proactive approach to the Co-operation Policy in respect of Travellers by identifying areas of land in NIHE ownership which could be managed under Co-operation Policy guidelines.

3.5. If NIHE continue to fail to provide such caravan sites as appear to it to be appropriate for the accommodation of caravans of members of the Irish Traveller community

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<sup>21</sup> Unauthorised Encampments (Northern Ireland) Order 2005.

(bearing in mind the disparity between NIHE's own published needs assessment and current provision) it may be possible to bring that failure before the High Court in Belfast on an application for judicial review.

#### 4. **Eviction from sites**

4.1. In respect of the eviction of Travellers from public land and from NIHE sites there is little in the way of statutory protection but it is clear that article 8 ECHR will be engaged in any action taken by a public authority to remove Travellers from a site upon which they have made their home. Where NIHE seek to evict a family by terminating their licence to occupy a site (for example, where there are allegations of nuisance) it is clear that it must take account of various factors before proceeding to evict. In every case it should be remembered that there is a positive obligation to facilitate the Travellers way of life; eviction is a serious interference with the Traveller's article 8 rights to respect for the home requiring weighty reasons of public interest to justify the action; and, the eviction must be justified by reference to a pressing social need.<sup>22</sup>

4.2. Whether article 8 is engaged in the case of an unauthorised encampment is open for debate. It would seem, however, that the answer will depend on the facts of each individual case. Whether or not the occupier has established a home on another's land is likely to turn on

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<sup>22</sup> *Connors v United Kingdom* (66746/01) (2005) 40 EHHR 9.

the length of occupation and attachment to it. An important aspect of recent case-law on Travellers is the judgment of the House of Lords that a Traveller must be able to raise article 8 rights in the possession action itself and not be forced to seek a judicial review of the public landowner's decision to evict.<sup>23</sup>

## 5. **Unauthorised Encampments (NI) Order 2005**

5.1. The Unauthorised Encampments (Northern Ireland) Order 2005 was introduced because Government believed "camping is widespread in Northern Ireland and has long been a cause of complaint from both the public and elected representatives. It has given rise to concerns about environmental and public health issues as well as traffic hazards, and depending on location, the effect on the trade of local businesses. At present, there is no specific Northern Ireland legislation to control unauthorised encampments".<sup>24</sup> The Order gives the police the power to remove trespassers who intend residing on land, together with their vehicles and other property.<sup>25</sup> The provisions are similar to those already in place in Great Britain.<sup>26</sup>

5.2. Importantly, in the context of today's seminar, the power to direct persons to leave land is qualified by certain conditions precedent. The conditions are that the person

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<sup>23</sup> *Leeds City Council v Price* [2006] UKHL 10.

<sup>24</sup> Recorded in the introductory note to the draft Order.

<sup>25</sup> As to which see also the Unauthorised Encampments (Retention and Disposal of Vehicles) Regulations (NI).

<sup>26</sup> Criminal Justice and Public Order Act 1994, as amended by the Anti-Social Behaviour Act 2003.

and one or more others (the trespassers) are trespassing on the land, that the trespassers have between them at least one vehicle on the land, that the trespassers are present on the land with the common purpose of residing there for any period. The police officer may direct the trespassers to leave if it appears to the officer that the person has one or more caravans in his possession or under his control on the land, that there is a *suitable* pitch on a *relevant caravan site* for that caravan or each of those caravans; and, that the occupier of the land or a person acting on his behalf has asked the police to remove the trespassers from the land. The police must consult, where the trespassers are members of the Irish Traveller community, NIHE, as to whether there is a suitable pitch for the caravan or each of the caravans on a relevant caravan site.

- 5.3. "Suitable pitch" is not defined but guidance issued in England<sup>27</sup> (on the like provision) indicates that a pitch should not be considered suitable unless it has basic amenities such as water, toilets and waste disposal facilities, which means it would probably limit it to a serviced site or authorised transit site. Furthermore, the Guidance advises that there should be a reasonable expectation that the pitch will be available for peaceful occupation for at least three months. It will be for the courts to determine what a suitable pitch is for the purposes of the legislation, but it seems to be clear that a

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<sup>27</sup> The ODPM *Guidance on Managing Unauthorised Camping* February 2004.

pitch may not be suitable if it is not located within a reasonable distance of schools, healthcare, work and any other persons upon whom the Travellers are dependent.

- 5.4. A "relevant caravan site" means a caravan site which is provided by NIHE<sup>28</sup> *and* is situated within a reasonable distance of the land. DSD has issued guidance which advises that in deciding what is a reasonable distance the police, in consultation with NIHE and any relevant authorities, should take into account all relevant factors including social, welfare or other needs of the campers, and having regard to prevailing local road and weather conditions, time of day, etc.<sup>29</sup>
- 5.5. Where a suitable alternative site is not available the police may only evict trespassers intent on residing on the land if they have six or more vehicles, or have used threatening, abusive or insulting language or behaviour, or caused damage to the land. The powers available to the police under the Order are discretionary. Decisions requiring trespassers to leave land will be taken by the police in the light of all the relevant circumstances of each case. All public authorities need to be able to demonstrate that they have taken into account any welfare needs of Travellers before making a decision to evict.

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<sup>28</sup> Under Article 28A of the Housing (NI) Order 1981.

<sup>29</sup> Guide to the Unauthorised Encampments Order issued by the Department for Social Development, June 2006.

- 5.6. The Human Rights Act 1998 (the 1998 Act) applies to all public authorities including the police, public bodies and the courts. Case law has determined that all enforcement measures must be 'proportionate' in the context of the 1998 Act. What is proportionate will vary according to the circumstances of each case including the nature of the location and the behaviour and needs of those to be removed. Decisions must always be lawful, in accordance with established policy and procedures, taking into account relevant considerations and disregarding irrelevant considerations. They must be 'reasonable' in the public law sense, that is, not perverse or irrational in the circumstances of the individual case and must take account of the rights and needs of both the settled community and the Traveller community. The decisions must also be proportionate according to the circumstances of each encampment, which means having regard to the nature of the location and the behaviour and needs of the Travellers.
- 5.7. The Order does not require that the Travellers are given a time limit to comply with a direction. It is sufficient to direct them to leave after which they will have an obligation to vacate the land as soon as reasonably practicable. What is reasonably practicable will vary according to the circumstances of each case.
- 5.8. It is an offence, for which a person may be arrested without warrant, if he refuses to comply with a direction to

leave land or re-enters any land in the relevant district council area as a trespasser within 3 months.<sup>30</sup>

5.9. Any decision taken by the police may be challenged by way of judicial review if it was unlawful, irrational, taken without regard to all relevant considerations (which must include the Race Relations Order, the Human Rights Act and the Northern Ireland Act 1998 Act duties) or with regard to irrelevant considerations, or is disproportionate. Even if the eviction under the 2005 Order has taken place, the challenge is not rendered academic because the Travellers may wish to return to the land within three months without being guilty of committing a criminal offence.

## **6. Conditions on sites**

6.1. The law does not provide a right to repairs, even on serviced sites. Unless the Traveller has been issued with a contractual licence or tenancy agreement which provides a right to have repairs carried out no such right will be imported by the law. Currently, in Northern Ireland there is no legislation dealing with security of tenure or repairs (although a Bill is to be put before the Assembly) and in this respect Travellers occupying sites in Northern Ireland are at a much greater disadvantage than those occupying sites in Great Britain.

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<sup>30</sup> The creation of the latter offence enables the police to deal with instances of 'hedge hopping' whereby trespassers simply move to a neighbouring field.

6.2. NIHE must however take account of the guidance issued by the Department of the Environment when providing a permanent residential site. The Design Guide requires the provision of an access road, a hard surface, basic services and amenity blocks.<sup>31</sup> Services such as water, electricity, sewage and drainage are considered to be essential services.<sup>32</sup> A mains water supply must be provided to each individual pitch and within the amenity unit including hot water supply to the bath, wash hand basin and sink. An individually metered electricity supply should be provided to each amenity unit/pitch with all supply cables being underground. Heating should be provided for space, water, and for the purpose of drying clothes. Each site, pitch and amenity unit should have a satisfactory drainage system. There must be provision for the collection and removal of rubbish. Adequate street lighting must be provided and a pay phone should be provided on site to permit calls to the Fire Brigade etc.

6.3. The Guide stipulates pitch design (including factors such as size, space and location) and provides that hard standings should be surfaced which surface should also provide access to the amenity block and the roadway. As for amenity units, each should contain a bath (preferably located in a separate room from the sink, a toilet and wash hand basin (preferably located in a separate

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<sup>31</sup> Design Guide "Permanent Residential Sites for travelling People in Northern Ireland" issued by the Department of the Environment under section 5(7) of the Caravans Act (NI) 1963.

<sup>32</sup> This is not exhaustive and account must be had of conditions and requirement on particular sites, which may change over time.

compartment), a sink and drainer and a ventilated store with access from outside.<sup>33</sup>

6.4. Otherwise, poor conditions must be dealt with under the public health legislation. District councils have a statutory obligation to inspect the housing accommodation in their area to ensure that if any premises<sup>34</sup> are in such a state as to be prejudicial to health or a nuisance, whatever works or measures are required to abate that state of affairs, are carried out.<sup>35</sup> Prejudicial to health means injurious or likely to cause injury to health. Defective sanitation or drains, defective electrical wiring and any interference with the supply of drinking water are obvious examples of a risk to health. Examples where travellers have relied successfully on similar provisions in England include condensation dampness in an amenity block, rodent infestation, inadequate lighting, hard surfacing, refuse collection, sanitation, electricity.<sup>36</sup>

6.5. If the district council either of its own volition or in the result of a complaint made by an individual inspects a property and considers that it is in such a state as to be prejudicial to health or a nuisance, it *must* serve a notice on the person responsible requiring him to abate. The person responsible is the person by whose act, default, or

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<sup>33</sup> Failure by the NIHE to have regard to the Design Guide could leave it amenable to judicial review.

<sup>34</sup> "Premises" include messuages, buildings, lands, casements, and hereditaments of any tenure, art 2 of the Public Health (Ireland) Act 1878. Caravans and caravan sites will be included.

<sup>35</sup> Public Health (Ireland) Act 1878, s.108.

<sup>36</sup> See e.g. *Day v Sheffield CC* Legal Action August 1988.

sufferance the nuisance arises or continues. If that person cannot be found, the notice must be served on the owner or occupier of the premises on which the nuisance arises. If the nuisance arises from any defect of a structural character, the notice must be served on the owner of the premises.<sup>37</sup>

- 6.6. If the person upon whom the abatement notice is served fails to comply with any requirement contained in the notice within the time specified or if the nuisance, although abated since the service of the notice, is likely to recur on the same premises, the district council *must* make a complaint to the magistrates' courts. The court will thereafter issue a summons requiring that person to appear.<sup>38</sup> If the court is satisfied that the alleged nuisance exists, or that although abated it is likely to recur on the same premises, it must make an order requiring that person to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance within a time specified in the order. If works are necessary, the order must include a description of the works required.<sup>39</sup> This is an important remedy in relation to privately owned and managed sites. Note also, if it appears to the satisfaction of the magistrates' court that the person by whose act or default the nuisance arises, or the owner or occupier of the premises is not known or cannot be found, the order of the

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<sup>37</sup> S 110 of the 1878 Act.

<sup>38</sup> S 111 of the 1878 Act.

<sup>39</sup> S 112 of the 1878 Act.

court may be addressed to and executed by the district council.<sup>40</sup>

6.7. In Great Britain the environmental health department of a local authority cannot take such legal proceedings against its own housing department. In Northern Ireland, however, NIHE is an independent statutory corporation from the district councils and formal legal action can be taken against it by a district council, including the service of a statutory abatement notice and thereafter proceedings to enforce that notice. Given the obligation on a district council to take action to deal with statutory nuisances, the failure by a district council to take action against NIHE in relation to conditions on a site which are the responsibility of NIHE, could give rise to a judicial review of that failure. Thereby, an individual applicant could obtain an order from the High Court in Belfast requiring the district council to take action.

6.8. An individual, who is affected by premises which are prejudicial to health, may take court proceedings to prosecute the person responsible and the court may order that person to abate the nuisance.<sup>41</sup> A Traveller may prosecute NIHE as the person responsible for a statutory nuisance but legal aid is not currently available to bring the proceedings. If the claim is successful however costs may be recovered from the other party. It is arguable that the absence of legal aid (without the opportunity to use the

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<sup>40</sup> S 116 of the 1878 Act.

<sup>41</sup> S 121 of the 1978 Act.

contingency fee as in Great Britain) is a breach of the article 6 ECHR right to a fair hearing.

## 7. **Homelessness provisions**

7.1. A Traveller who does not have a pitch on an authorised encampment and cannot afford to buy his or her own land and/or cannot obtain planning permission may have no alternative but to make an application to NIHE as a homeless person. The degree of assistance owed to any particular homeless person will depend upon a number of factors, considered briefly below.<sup>42</sup> In addition to the legislation,<sup>43</sup> NIHE operates its own homeless policy,<sup>44</sup> which should be applied when NIHE is considering the provision of housing. The policy is used as guidance but cannot override the purpose of the legislation or be applied so strictly that it results in the application of a blanket policy without individual consideration of the merits of the application.<sup>45</sup>

7.2. Before any duty is owed to an applicant, he must be homeless within the statutory definition. A person is homeless if he has no accommodation available for his occupation in the United Kingdom or elsewhere.<sup>46</sup> The fact that the definition extends to accommodation "in the

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<sup>42</sup> Homelessness is a vast area of law and reference should be made to specialist texts.

<sup>43</sup> The Housing (NI) Order 1988, as amended by the Housing (NI) Order 2003.

<sup>44</sup> NIHE Code of Guidance and Co-operation on homelessness was withdrawn and has yet to be replaced but a new code is likely to be issued shortly.

<sup>45</sup> The contents of the policy, or the application of it in an individual case, can be judicially reviewed.

<sup>46</sup> Art 3(1) of the 1988 Order as amended by Art 135 of the 2003 Order.

United Kingdom or elsewhere” means that if the applicant has accommodation overseas NIHE can determine simply that he is not homeless and need not continue to the next stage. Temporary accommodation should not be treated as accommodation for this purpose.<sup>47</sup> There is no requirement that the person is ‘resident’ in Northern Ireland to apply for housing assistance, but the applicant must physically present himself or herself in Northern Ireland in order to apply.<sup>48</sup>

- 7.3. While the term ‘homeless’ suggests that only those applicants who do not have a roof over their head will be eligible, ‘homeless’ also includes those who may be deemed homeless and those who are threatened with homelessness.<sup>49</sup> A person is homeless if his accommodation consists of a moveable structure, vehicle or vessel designed or adapted for human habitation and there is no place where he is entitled or permitted to place it and to reside in it. This will apply, for example, to mobile homes and caravans. Reside does not, however, mean with any degree of permanence. All that is required is that the applicant has permission to place and reside in the structure for a period of time.<sup>50</sup> For an encampment to be permitted there must be a positive indication from the landowner that the Traveller could remain for the time being. There must be something more than simple

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<sup>47</sup> Therefore, accommodation in a refuge or hostel should not mean the person is not homeless but *cf* para 2.1.3 below.

<sup>48</sup> Applications by persons from abroad are dealt with below.

<sup>49</sup> See sections xx below.

<sup>50</sup> Article 5(3)(c), of the Housing (NI) Order 1988 as amended by the Housing (NI) Order 2003.

inaction or failure to take eviction proceedings but it need not amount to a licence to occupy.<sup>51</sup>

7.4. If a person is found to be homeless he must also be eligible for assistance.<sup>52</sup> A person is not eligible for assistance under the homelessness provisions if he is a person from abroad who is subject to immigration control and is ineligible for such assistance by virtue of the Immigration and Asylum Act 1999,<sup>53</sup> or he is any other person from abroad who is ineligible by virtue of regulations made by the Secretary of State,<sup>54</sup> or he is a person whom NIHE has decided to treat as ineligible by reason of unacceptable behaviour.<sup>55</sup> If a person is ineligible for assistance, it means he or she is excluded from almost all forms of assistance other than advice and information on how to find accommodation.

7.5. An applicant must not have become homeless intentionally. A person becomes homeless intentionally if he or she deliberately does or fails to do anything in consequence of which he or she ceases to occupy accommodation, whether in Northern Ireland or elsewhere, which is available for occupation and which it would have been reasonable for to continue to occupy.<sup>56</sup> A person becomes threatened with homelessness intentionally if he

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<sup>51</sup> *Steward v Royal Borough of Kingston-upon-Thames* [2007] EWCA Civ 565.

<sup>52</sup> Art 137 of the 2003 Order.

<sup>53</sup> At section 119.

<sup>54</sup> The Homelessness Regulations (NI) 2003 and Allocation of Housing and Homelessness (Eligibility) Regulations SR 2006 No 397 (replacing Homelessness Regulations SR 2004 No 199).

<sup>55</sup> Art 7A 1988 Order as amended by art 137 of the 2003 Order.

<sup>56</sup> Art 6 of the 1988 Order as amended by art 136 of the 2003 Order.

or she deliberately does or fails to do anything the likely result of which is that he or she will be forced to leave accommodation which is available for occupation and which it would have been reasonable to continue to occupy.

- 7.6. Even if an applicant can establish that he or she is homeless or threatened with homelessness, is eligible for assistance and is not intentionally homeless, the extent of the duty owed will depend upon whether s/he is in priority need. If he or she is not in priority need, only a limited duty of advice and assistance is owed. If he or she is in priority need, the full housing duty will be owed.<sup>57</sup>
- 7.7. A Traveller who has nowhere on which to place his or her caravan must first make an application to NIHE as a homeless person. Importantly, if NIHE accepts that he or she is homeless and owed a duty, the requirement to make accommodation available is a requirement that accommodation is made available for that applicant and any person who normally resides with him or her as a member of the family or any person who might reasonably be expected to reside with him or her. Given that Irish Travellers often travel in extended family groups, NIHE should ask itself whether those members of the extended family are persons who either reside with the applicant as a member of the family or might reasonably be expected to reside with the applicant. It must be an assessment made by NIHE based upon the true nature of the family

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<sup>57</sup> Art 5 Duties are dealt with below.

unit concerned. It should consider issues of both emotional and financial dependency as well as blood relationship.<sup>58</sup>

7.8. The accommodation offered in discharge of the duty to the unintentionally homeless in priority need, must be suitable.<sup>59</sup> The accommodation must be suitable for the applicant and those persons who might reasonably be expected to reside with the applicant. Factors, which are relevant to suitability, will include, for example, the size and condition of the accommodation, affordability, personal circumstances, risk of racial harassment or violence in the area, and location. Whether or not accommodation is suitable will require a careful consideration of the applicant's particular circumstances and those of the persons who might reside with him or her. The ultimate decision that accommodation to be offered is suitable must involve a composite assessment of the applicant's circumstances and needs.

7.9. Importantly, if an applicant has a cultural aversion to bricks and mortar accommodation an offer of such accommodation is unlikely to be suitable and would not accord sufficient respect to the applicant's ECHR rights.<sup>60</sup> NIHE therefore, considering an application from a Traveller with a cultural aversion to bricks and mortar accommodation, should enquire whether a site, pitch or

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<sup>58</sup> See *R v Lambeth LBC, ex parte Ly* (1986) 19 HLR 51.

<sup>59</sup> Article 12(1) of the Housing (NI) Order 1988.

<sup>60</sup> *R (Price) v Carmarthenshire CC* [2003] EWHC 42 (Admin); *Codona v Mid-Bedfordshire DC* [2004] EWCA Civ 925..

berth is available either on one of its own sites or on a private site. If there is no reasonable prospect of a suitable site, however, there may be no alternative and an offer of bricks and mortar accommodation may be deemed suitable.

- 7.10. If at a later date, that person then leaves the bricks and mortar accommodation offered pursuant to the duty to house a homeless applicant because of his or her cultural aversion to bricks and mortar, for example, because any prolonged stay conflicts with the nomadic way, NIHE may consider on any subsequent application as a homeless person either that that person made himself or herself homeless intentionally or that the period spent in bricks and mortar accommodation indicates against a cultural aversion. Such a decision may be challenged by judicial review on the ground that the decision is unreasonable and fails to fully consider the ECHR rights of the Traveller and the fact that bricks and mortar accommodation was occupied for no reason other than it was the only available alternative and would not be considered suitable or reasonable to continue to occupy.

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