



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

RESPONSE TO DEPARTMENT OF ENVIRONMENT CONSULTATION ON REFORM OF THE PLANNING SYSTEM IN NORTHERN IRELAND

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,¹ and advising on whether a Bill is compatible with human rights.² In all of that work, the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies. In accordance with its mandate the Commission has also recently delivered advice to government on the content of a Bill of Rights for Northern Ireland.³
2. The Commission welcomes the opportunity to provide advice on the proposed reforms. At present we will restrict our observations to two themes, namely the accommodation needs of Irish Travellers and proposed reforms to the appeals system. The Commission can respond to specific requests for advice from the Department on other aspects of the reforms.

Planning reform and Travellers

3. The Commission has identified the accommodation needs of members of the Traveller community as a priority issue in relation to human rights compliance. The accommodation

¹ Northern Ireland Act 1998, s.69(1).

² *Ibid*, s.69(4).

³ *Ibid*, s.69(7).

situation for Travellers in Northern Ireland has been highlighted by United Nations and Council of Europe experts in the monitoring of compliance by the United Kingdom with its international treaty obligations.

4. The Commission participated in April 2009 in the UK's examination by the UN body overseeing its compliance with obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR). Among the key issues raised by the UN in its subsequent Concluding Observations were the shortage of adequate sites for Travellers and the discriminatory effect of the Unauthorised Encampments (Northern Ireland) Order 2005. The UN recommended that the UK ensure the provision of sufficient, adequate and secure sites, that it review the Order and that it provide for suitable accommodation arrangements for Travellers.⁴
5. At the regional level the Council of Europe, in relation to compliance with the UK's obligations under the Framework Convention for the Protection of National Minorities (FCNM), has also singled out the accommodation situation of Irish Travellers. In response to observations on the subject by the FCNM treaty monitoring body the UK stated that in Northern Ireland there was adequate funding for accommodation for Travellers but conceded that there were 'constraints' in obtaining the suitable sites needed, indicating this was a problem being actively addressed by the Department for Social Development (DSD) and the Housing Executive.⁵ Subsequently the Council of Europe's Committee of Ministers adopted a resolution in relation to the UK's compliance with the FCNM which included among its issues of concern:

Hostility among some people within the local population and the resistance of certain local authorities to improving the availability of authorised sites have contributed to the fact that a number of Gypsies and Travellers continue to live on unauthorised sites and may face eviction orders.⁶

⁴ Committee on Economic, Social and Cultural Rights (22 May 2009), *Concluding Observations on the United Kingdom*, UN Document number: E/C.12/GBR/CO/5, paragraph 36.

⁵ *Comments of the Government of the United Kingdom on the Opinion of the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities* (26 October 2007), Council of Europe document GVT/COM/II(2007)003, page 14.

⁶ Council of Europe Resolution CM/ResCMN(2008)7 (Adopted by the Committee of Ministers on 9 July 2008), page 2.

6. UN and Council of Europe treaty bodies have therefore placed emphasis on the need to ensure adequate accommodation arrangements for Travellers, a matter in which planning policy can play a significant role. The Commission concurs with the research evidence provided by the Department's draft Equality Impact Assessment on the policy which acknowledges the causal relationship between planning decisions and unsuitable accommodation as follows:

Travellers in particular suffer multifaceted deprivation as a direct consequence of planning decisions that result in many families living on unauthorised sites, with poor access to services and with negative consequences for health and access to other services such as education.⁷

7. Whilst, unlike most provisions of the European Convention on Human Rights (ECHR),⁸ the Covenant and FCNM are not directly justiciable in the domestic courts, they are nevertheless binding in international law on the UK, including its devolved bodies. The Department therefore has to ensure that its policies are in compliance with the standards which the UK has ratified in human rights instruments. The policy development process should ensure there is a high priority given to progressing the recommendations of treaty bodies, and that reforms do not risk 'regressive steps' (i.e. the situation deteriorating rather than improving) in relation to the human rights issue in question.
8. Another core concept in human rights is that when an entitlement or obligation is created, there must be legal certainty ('prescribed by law') as to how to access or comply with it. This concept applies to planning legislation in relation to provision for Travellers sites, so that once legitimate clear criteria have been established, there must be a clear and certain process for obtaining the entitlement.

Planning Policy Statements

9. Present Departmental policy in relation to Traveller accommodation is contained in policy number HC3 in Planning Policy Statement (PPS) 12. This sets out the criteria for provision in relation to grouped housing schemes, serviced sites and transit sites.

⁷ Department of Environment (July 2009) *Reform of the Northern Ireland Planning System: Draft Equality Impact Assessment at a Strategic Level*, page 22.

⁸ Through being given further effect by the Human Rights Act 1998.

10. The Commission recently corresponded with the Department in relation to Traveller accommodation and draft PPS21, a Planning Policy Statement that relates to development in the countryside. Policy Planning Statements set out high-level planning rules and are therefore of key importance in setting out and providing legal clarity in relation to entitlements to provision. The Commission had queried potential ambiguities in the wording and meaning of a number of parts of the draft document. The Commission was grateful for the response of the Department which indicated that wording would be changed in order to remove any potential ambiguity in the policy provision in question (CTY1 of PPS21). The Department confirmed that this policy referred to the full range of Traveller accommodation set out in PPS12, and that policy in relation to social and affordable housing outside of settlements (CTY 5 of PPS21) did include group schemes for Travellers.⁹

11. The Department's draft Equality Impact Assessment concludes that there is a potential differential impact between persons of different racial groups by the range of ways decisions are made in planning. Within the assessment of procedural impacts the following conclusion is listed:

It has also been found that the planning system can be used as an outlet for discriminatory behaviour against some racial groups, particularly Travellers, through objections to planning applications, not made on the basis of the land use characteristics of the proposed development, but the ethnicity of the proposed occupants.¹⁰

12. The Commission concurs that there is risk of objections being made on the basis of racism rather than legitimate criteria. Objections motivated by racism but which are disguised as legitimate objections may be difficult to identify, meaning that a robust evidence-based process needs to be established to weed out illegitimate objections and not permit them to hold up applications. In addition to individual objections thwarting an application from Travellers, the same effect can occur on the basis of planning criteria which inadequately provide for Traveller sites; criteria which are unduly difficult to meet, or are ambiguous; or processes whereby there is no clarity in

⁹ Correspondence from Permanent Secretary to Commission, 6 August 2009, Department of Environment reference number SQ 593/2009.

¹⁰ EQIA, as above, page 27.

entitlements. The importance of legal certainty throughout the process again needs to be stressed.

13. One of the key proposals in the reforms is for the status of PPSs to be downgraded from the present position of providing operational guidance and advice to a position of providing strategic direction and regional policy advice which would then be interpreted by local councils into development plans. The Department notes that, unlike Northern Ireland at present, elsewhere in the UK and Ireland overarching policy guidance is strategic and is then translated into local development plans where detailed operational policy is often found. The Department identifies a number of problems with the present system in Northern Ireland prescribing universal policy on land use topics which differ in circumstance across the jurisdiction, and in that the present system can result in local policy issues not being adequately addressed.¹¹
14. The Commission has no view on the administrative arrangements for planning policy development nor do we in principle have any objection to areas of general planning policy being devolved to a local level. However in matters that engage national compliance with human rights obligations the Commission is concerned that the state, in this case at sub-national (Northern Ireland) level, must maintain a binding framework. This is particularly relevant to Traveller sites where any reform which makes the provision of Traveller sites discretionary could facilitate discriminatory practices.
15. The Commission would therefore urge that explicit safeguards be provided within the new policy framework to ensure legal certainty over the provision of Traveller sites. The Commission notes the Department's assurance that the reform of PPSs would be subject to "appropriate checks and balances" and "subject to the proviso that any detailed local policies should be aligned with central government plans, policy and guidance", and would draw particular attention to this area of provision being included in such arrangements.¹²
16. Other areas or initiatives that engage compliance with human rights obligations in relation to the fulfilment of the right to

¹¹ Reform of the Planning System in Northern Ireland: Your chance to influence change, Consultation Paper, July 2009, Department of Environment paragraphs 2.5 and 2.8

¹² As above, paragraph 2.9

adequate housing could also be protected.¹³ For example measures such as obligations on developers to include provision for social housing or infrastructure (roads, sewerage etc) in developments are one way duties relating to the provision of affordable housing can be progressed.

Appeals and third-party appeals

17. The Commission notes the proposals in chapter five of the consultation document in relation to appeals. The Commission has not scrutinised every aspect of these proposals but would like to make the following observations on particular aspects of the reforms.

Time limits for appeals

18. The Commission concurs with the Department in that the six-month time limit on applicant appeals to the Planning Appeals Commission (PAC) is unnecessarily long for all the reasons set out in the consultation document, and because, in the context of Article 6 ECHR, decisions affecting the civil rights of all parties, including the applicant and objectors, require to be determined within a reasonable time.

Determining the appeal method

19. The fair hearing provisions of the ECHR do not necessarily require an oral hearing nor is there an automatic human right to cross-examination in proceedings of this nature. The cost of oral hearings in all cases as a matter simply of choice must be balanced against the desirability of efficiency and cost effectiveness. Each case must be examined on its own merits, however, and the Commission supports the proposal that the PAC be given the power to decide, applying published criteria and taking into consideration the applicant's preferred method, the most appropriate method for processing the appeal.

Third-party planning appeals

20. The planning legislation and the principles derived from it give third parties rights to make representations before a planning application is determined, and the planning authority is legally obliged to take into account all relevant representations

¹³ For interpretation of the right to adequate housing under Article 11(1) of the International Covenant on Economic, Social and Cultural Rights see General Comments 4 and 7: <http://www2.ohchr.org/english/bodies/cescr/comments.htm>

received. In the pre-determination stage, it is hard to see that, in theory, there is an inequality of arms between third parties and the applicant.

21. However, third-party rights to challenge the determination are severely limited and this raises the scope of Article 6 ECHR. Within the planning system, there is an unbalanced playing field in favour of the applicant. Objectors have no right of appeal and the cost of legal proceedings, especially for judicial review cases, is prohibitively expensive especially with the threat of having to pay another party's legal costs if the objector loses. Even success in judicial review proceedings will only address the procedural unfairness and not the substantive issues in the case or merits of a decision.
22. The Commission encourages the Department to consider providing for third party appeals. Although it is important that people have the right to object to decisions, we must avoid a situation whereby vexatious third-party appeals interfere with the efficiency of the system and the Commission recommends therefore the appeal should not be an unlimited right. Criteria for appeal ought to be developed which include the need for the appeal to be grounded on issues of primary fact; for example it would not be appropriate if the objector wishes to appeal on grounds relating to matters of policy. The Commission is mindful of the need for the planning process to be efficient and time delays can amount to a breach of the rights of all parties concerned. The Commission notes the Department's concerns in respect of the implications of third party appeals but considers that, properly drafted criteria and efficient processing together with consideration of the nature and form of appeal, leaves the balance of advantage on the side of a third party appeal system.

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