UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2020] UKUT 306 (LC)
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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

PARK HOMES – JURISDICTION – ***whether caravan site can become a "protected site" where planning permission granted after date of occupation agreement – s.1(1) Mobile Homes Act 1983 – whether*** **Murphy v Wyatt [2011] EWCA Civ 408** ***correctly decided*** **--** ***whether Act so interpreted unlawfully discriminates against Convention rights of non-gypsy occupiers of protected sites.***

IN THE MATTER OF AN APPLICATION TO DETERMINE A QUESTION ARISING UNDER THE MOBILE HOMES ACT 1983

BETWEEN:

(1) MS SOPHIE DEAN
(2) MS EMILY HAGGART
(3) MRS ANNABEL HARDING

Applicants

- and -

SIMON MITCHELL

Respondent

Re: Sunny Glade,
Haycrafts Lane,
Swanage,
Dorset,
BH19 3EB

Mr Justice Fancourt, Chamber President
26 October 2020
Rolls Building

Mr John Clement, solicitor advocate, IBB Law, for the applicants
The respondent, Simon Mitchell, in person

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The following cases are referred to in this decision:

Balthasar v Mullane (1985) 17 HLR 561

Connors v The United Kingdom (2004) ECHR 66746/01; 40 EHRR 9

Kay v London Borough of Lambeth [2006] UKHL 10; [2006] 2 A.C. 465

Murphy v Wyatt [2011] EWCA Civ 408; [2011] 1 WLR 2129

R (Aguilar Quila) v Secretary of State for the Home Department [2012] 1 A.C. 621

R (Steinfeld) v Secretary of State for International Development [2018] UKSC 32; [2020] A.C. 1

Introduction

1. On 18 July 2019, the three Applicants applied to the First-tier Tribunal (Property Chamber) in connection with a caravan site at Sunny Glade, Haycrafts Lane, Harmans Cross, Swanage, Dorset, BH19 3EB ("the Site") seeking a determination as to whether an agreement between them and the Respondent, Mr Mitchell, is one to which the Mobile Homes Act 1983 (as amended) ("the 1983 Act") applies.

2. The application was made to the First-tier Tribunal pursuant to sections 4(1) and 5(1) of the 1983 Act, which confers on it jurisdiction to determine any question arising under the Act or any agreement to which it applies, subject to the exceptions mentioned in section 4(3). These exceptions are concerned with termination of such an agreement by the owner, where the County Court has jurisdiction instead of the First-tier Tribunal. Since the application made by the Applicants was for determination of whether the 1983 Act applies to Mr Mitchell's agreement in relation to the Site, it was properly made to the First-tier Tribunal.

3. The First-tier Tribunal (Property Chamber) considered that the issues raised by the application involved an important principle and were likely to be appealed further, such that the claim was more appropriately heard in the Upper Tribunal (Lands Chamber). With my agreement, the application was transferred to be determined in the Upper Tribunal pursuant to rule 25 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

4. The issue of importance raised is whether the 1983 Act can apply to an agreement when the land on which a mobile home is stationed was not a protected site (within the meaning of section 1(2) of the Caravan Sites Act 1968) when the agreement for occupation was made but became a protected site during the period in which the agreement continued. In 2011, the Court of Appeal decided that the 1983 Act can only apply where the land was a protected site at the start of the agreement and remains so. The 1983 Act was amended shortly after judgment in that case was handed down. The Respondent argues that the same conclusion cannot now be reached without unlawfully discriminating against someone in his position, and that accordingly the true construction of the 1983 Act, as amended, is that it can apply where the agreement relates to land which is a protected site for the time being.

5. A further issue is raised by the application. The 1983 Act can only apply to an agreement under which a person is entitled to occupy a mobile home as his only or main residence. The Applicants contend that their agreement with the Respondent did not confer on him the right to occupy anything at the Site as an only or main residence, but only a right to occupy a caravan for seasonal use. That gives rise to a purely factual dispute about the circumstances and the terms in which the agreement between the Applicants and Mr Mitchell was made.

6. The parties have agreed certain basic facts, as follows:

a. Between 1980 and January 2004 Mrs Rosemary Angela Margaret Dean was the freehold owner of land known as "Sunny Glade", Haycrafts Farm, Harmans Cross, Swanage BH19 3EH, registered at HM Land Registry under Title No. DT333845.

b. Prior to her death, Mrs Dean used the land as a Caravan Club site for touring caravans. There was no planning permission for use of the land as a caravan site.

c. In or around 2000, Alastair Bowerman introduced Una Costain to Mrs Dean. Mrs Dean then agreed to permit Simon Mitchell and Ms Costain to station and occupy their Mercedes van on a piece of land at Sunny Glade. In 2001 they moved to a different place on the field in question.

d. By 2003 Ms Costain and the Respondent had brought a modified coach and a touring caravan onto the land.

e. The Respondent initially paid Mrs Dean (and subsequently the Applicants) a sum of £10 per week (which increased to £30 per week by 2006) for use and occupation of the land.

f. Mrs Dean died in January 2004 and the Applicants (her daughters) are now registered as the freehold owners of the land. The Applicants continued to permit the Respondent to occupy the coach and touring caravan on the land on the same basis as before.

g. On 7 August 2015 Symonds and Sampson LLP (planning consultants on behalf of the Applicants) submitted an application to Purbeck District Council for a certificate of lawful use in respect of the stationing and occupation of the coach on the land.

h. On 13 October 2015 the Council issued a certificate of lawful use in respect of the coach and touring caravan. The next day the Applicants' solicitors served a notice on Mr Mitchell purporting to terminate his agreement.

i. In 2015 Una Costain left the land.

j. No written agreement was ever entered into between Mrs Dean/the Applicants and the Respondent/Ms Costain in respect of the use and occupation of the land.

7. No one suggests that the original agreement made in 2000 with Mrs Rosemary Dean created a tenancy rather than a licence. The original licence must, on the basis of these agreed facts, have been varied before Mrs Dean's death in 2004 in order to apply to the new location on Sunny Glade (the Site) and to include the coach and touring caravan. The licence, whatever its terms, must in law have terminated on Mrs Dean's death, but it is common ground that the licence was implicitly renewed on the same terms as between the Applicants and Mr Mitchell.

8. The central factual issue is accordingly whether under the original agreement Ms Costain and Mr Mitchell were entitled to occupy a mobile home as their only or main residence, and whether any such term of the agreement changed when they moved to the Site and by agreement brought the coach and touring caravan onto the Site.

9. The parties exchanged numerous witness statements, many of which only went to peripheral and irrelevant matters. I heard evidence at the trial from Ms Sophie Dean, the First Applicant, Alastair Bowerman, who knew Mrs Rosemary Dean in 2000 and had been to school with Una Costain, and Mr Mitchell. When the trial started, Mr Clement said that he did not wish to cross-examine Una Costain or Rosalind Sunley, who had provided witness statements in support of Mr Mitchell's case. No other witness who provided a statement was able to give evidence about the arrangements made between Mrs Dean and Mr Mitchell in the period 2000 to 2003.

10. Ms Sophie Dean accepted that she was not present when her mother and Mr Mitchell and Ms Costain agreed terms relating to the occupation of Sunny Glade. She said that she understood that the arrangement started off with permission for Una Costain to camp on Sunny Glade and that Mr Bowerman had introduced Ms Costain to her mother. She thought the initial arrangement was made in 2001. She could not explain why a letter before action written by the Applicants' solicitors in 2015 said that their instructions were that Ms Costain and Mr Mitchell moved on to Sunny Glade to live in a caravan and single decker bus with Mrs Dean's permission in 2000. She said she did not believe that her mother would have permitted Mr Mitchell or Ms Costain to occupy the Site as their only or main residence, and that if she had done so she would have mentioned it to her daughters before her death.

11. She said that no written agreements were provided by Mrs Dean because it was understood that the occupiers of Sunny Glade would only be entitled to use it on a seasonal basis. When shown a letter signed by her sister, Annabel, in 2013, verifying that Mr Mitchell had lived at Sunny Glade and paid rent since June 2000, Ms Dean said that the letter does not say that he lived there as his main residence, and she asserted that he had only paid rent sporadically.

12. Mr Bowerman originally introduced Ms Costain to Mrs Rosemary Dean. He said he was approached by her in around 2001; that she said she was visiting a friend in the area; and that she asked whether he knew anywhere that she might be able to camp for the summer. He then personally introduced Ms Costain to Mrs Dean. He was present at that initial meeting, at the house at Quarr Farm. He insisted that Mr Mitchell was not present at that meeting. He said that Mrs Dean told Ms Costain that she was happy to allow her to camp on Sunny Glade for a period of around three weeks that summer. There was no mention then of Mr Mitchell. When Ms Costain first occupied the land in 2001, she was there with a tent; he subsequently became aware that Mr Mitchell brought a modified bus and touring caravan onto the land in around 2003, which replaced the tent. He considered Mrs Dean to be astute and intelligent and that she would not have granted anyone permission to stay on her property for any length of time without a firm understanding and financial arrangement.

13. Mr Mitchell accepted that Mr Bowerman had been the source of the initial introduction to Mrs Dean, but said that he and Ms Costain met Mrs Dean together, when they arrived in their Mercedes van. Mr Bowerman was not there. Mrs Dean had said that she would like to meet them and see what vehicle they had, so they arrived with the van in June 2000 and parked it in the lower car park at Quarr Farm. Mrs Dean was satisfied that it was not too large and showed them where they could park the van on Sunny Glade. Mr Mitchell said that his reaction to this was that it was wonderful because he and Ms Costain had been travelling in the van and now had somewhere to live permanently. He said that he asked Mrs Dean how long they could stay and that she said they could stay as long as they liked, and that they should come to Quarr Farm to pay the rent.

14. He said that the move from the initial position to the Site, with the van and caravan, was effected in November 2001 and the coach was moved onto the Site in 2003, with Mrs Dean's agreement and an increase of rent to £20 per week. After Mrs Dean's death, Mr Mitchell paid the rent to Emily Haggart, the Second Applicant, and then after a time to Sophie Dean. The rent was increased to £30 per week in 2006.

15. In cross-examination, Mr Mitchell was asked whether, if Mrs Dean had asked him to leave, he would have respected her wishes. He accepted that Mrs Dean had the right to ask him to leave at any time. He said he would have sought to negotiate some extra time but would have agreed to leave. He did not accept that the Applicants, as Mrs Dean's successors in title, had the same rights, as he had no such agreement with them. Asked about events in 2015, Mr Mitchell said that the Applicants' land agent's email dated 29 October 2015 was wrong, and he did not confirm that he would remove from the Site in accordance with the terms of the letter before action that he had recently received. He also said that Una Costain left the Site in June or July 2015, before the meeting in October 2015 with the land agent, though he accepted that she happened to be present at the Site during that meeting. In fact, paras 12 and 13 of Ms Costain's witness statement are quite clear that she left after the letter before action and after the land agent's visit.

16. Ms Costain's witness statement, which was not challenged by the Applicants, confirms Mr Mitchell's account of the initial meeting with Mrs Dean. She says that Mrs Dean said that they could stay as long as they liked and to bring £10 per week over to the farmhouse. She says that after 2½ years of living in the van she and Mr Mitchell felt settled enough to look for a bigger home to put on the Site, so they asked Mrs Dean if they could get a bigger vehicle to live in. She agreed and they purchased a Bedford coach, which they brought to the Site in 2003.

17. I do not accept the totality of Mr Mitchell's evidence. I consider that he is wrong about the events of 2015, in particular when Ms Costain left the Site and what was said to the Applicants' land agent. However, he struck me as an essentially truthful witness. He conceded readily that Mrs Dean was entitled to require him to remove, if she so wished, which concession was potentially contrary to his own interests in the trial. The events of 2000, when as I find the initial meeting between Ms Costain, Mr Mitchell and Mrs Dean took place, are a long time ago. Mr Mitchell and Ms Costain are more likely to remember what happened than Ms Sophie Dean, who was not present, or Mr Bowerman, who only had a peripheral role.

18. Mr Bowerman may well be right that he initially introduced Mrs Dean to Ms Costain, but I accept Mr Mitchell's evidence that he and Ms Costain came to see Mrs Dean with their Mercedes van and that Mrs Dean showed them where they could station it on Sunny Glade. I do not accept Mr Bowerman's evidence that what was agreed related to pitching a tent for a few weeks and that somehow, subsequently, a modified coach and touring caravan had appeared on the land. This could not have happened without Mrs Dean's agreement. Mr Mitchell's account is inherently more likely to be true. It is also supported by Ms Costain, whose evidence was not challenged by the applicants, and the agreed facts.

19. Whatever subjectively Mrs Dean may have thought about how long, or during what periods, Mr Mitchell and Ms Costain might stay on Sunny Glade, the relevant question is whether under the agreement that was reached they were entitled to occupy the van (initially) and then the coach and caravan as their only or main residence. I find that, in all probability, nothing to the contrary was said. It must have been reasonably clear to Mrs Dean, by the time that a touring caravan and coach were brought onto the Site with her agreement, that Mr Mitchell and Ms Costain were intending to live there. I consider that it would also have been reasonably clear that they had no other home. Since, as I find, no time or seasonal limit was imposed under the oral agreement between Mrs Dean and Mr Mitchell and Ms Costain, the latter were entitled to occupy the van and then the coach and caravan as their only or main residence under the terms of the agreement.

20. As it is common ground that the terms agreed with Mrs Dean were replicated with her successors in title, it follows that from 2004, under the agreement between the Applicants and Mr Mitchell and Ms Costain, the latter were entitled after 2004 to occupy the caravan and coach on the Site as their only or main residence.

21. Whether, under para 5 of Chapter 2 in Part I of Schedule 1 to the 1983 Act, the Applicants are entitled to terminate the agreement on the basis that Mr Mitchell is no longer occupying the coach and caravan as his only or main residence, is a matter that - if necessary - the County Court will have to determine. That is not a question within the jurisdiction of this Tribunal or the First-tier Tribunal.

22. I turn then to the main legal issue of whether the 1983 Act applies to the agreement between the Applicants and Mr Mitchell.

23. The Statement of Agreed Facts records that there was no planning permission for use of Sunny Glade (which includes the Site) as a caravan site prior to the issue on 13 October 2015 of a certificate of lawful use in relation to the Site itself.

24. In Balthasar v Mullane (1985) 17 HLR 561, the Court of Appeal held that where a site licence for a caravan site is required under s. 1(1) of the Caravan Sites and Control of Development Act 1960 ("the 1960 Act"), a "protected site" within the meaning of s. 1 of the Caravan Sites Act 1968 ("the 1968 Act") and s. 1 of the 1983 Act means a site in respect of which planning permission has been granted. If a site licence is required but planning permission has not been granted, the site in question is not a protected site for the purposes of the 1983 Act and so that Act cannot apply to the agreement in question.

25. In Murphy v Wyatt [2011] EWCA Civ 408; [2011] 1 WLR 2129, the Court of Appeal decided that the 1983 Act could not apply to an agreement unless the land on which the mobile home was stationed was a protected site from the start of the agreement. This conclusion was reached as a matter of construction of the 1983 Act, by reference to the relevant provisions of the 1968 Act and the 1960 Act.

26. In Murphy, the land in question was not a protected site because, in 1975 when the agreement was made, the land did not have planning permission for use as a caravan site, though as a result of a grant of a certificate of lawful use with effect from 2001 it subsequently became a protected site. Lord Neuberger of Abbotsbury MR and Arden LJ both gave judgments explaining that it was clear from the structure of the 1983 Act that it was not intended that an agreement could first come within the 1983 Act at a time after it was made, although it could cease to be a protected site subsequently, e.g. if planning permission expired (1983 Act, Sched. 1, Part I, Chap. 2, para 2(2)). Longmore LJ agreed with both judgments.

27. The Applicants naturally contend that the facts of the instant case are materially indistinguishable from the facts of Murphy v Wyatt, which is binding on this Tribunal, and that accordingly the 1983 Act does not apply to Mr Mitchell's agreement with the Applicants.

28. The terms of the 1983 Act (as amended by the Housing Act 2004) as considered by the Court of Appeal in Murphy were the following.

29. S. 1(1) provided:

> "This Act applies to any agreement under which a person ("the occupier") is entitled –
>
> (a) to station a mobile home on land forming part of a protected site; and
>
> (b) to occupy the mobile home as his only or main residence."

30. S. 5(1), so far as material, provided:

> "In this Act, unless the context otherwise requires –
>
> ……
>
> "protected site" *does not include any land occupied by a local authority as a caravan site providing accommodation for gypsies or, in Scotland, for persons to whom section 24(8A) of the Caravan Sites and Control of Development Act 1960 applies but, subject to that*, has the same meaning as in Part I of the Caravan Sites Act 1968….." (italicised words later removed by amendment)

31. Both Lord Neuberger and Arden LJ based their decision principally on the wording of ss. 1 and 2 of and Schedule 1 to the 1983 Act. Nothing in their judgments turned on exclusion from the definition of "protected site" (by the words italicised in the quotation above) of local authority caravan sites providing accommodation for gypsies. No argument before them relied on anything concerned with that exclusion.

32. On 27 May 2004, the European Court of Human Rights unanimously held (in Connors v The United Kingdom (2004) ECHR 66746/01; (2004) 40 EHRR 189) that the UK was in violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by providing a statutory scheme that permitted the summary eviction of gypsies who had established caravans on local authority sites, in comparison with the statutory scheme in the 1983 Act conferring some security of tenure on occupiers of protected sites.

33. In consequence of that decision, Parliament belatedly enacted s. 318 of the Housing and Regeneration Act 2008, which omitted from the definition of "protected site" in s. 5(1) of the 1983 Act all the italicised words (in para 30 above), leaving the definition as "… has the same meaning as in Part I of the Caravan Sites Act 1968". The effect of that amendment was to take away the automatic exclusion from the meaning of "protected site" of local authority occupied caravan sites providing accommodation for gypsies and travellers. The amendment itself did not bring such caravan sites automatically within the meaning of "protected site"; it merely caused local authority caravan sites providing accommodation for gypsies and travellers to be treated in the same way as any private land used as a caravan site. Whether, in either case, the site was a "protected site" would depend on other requirements of the 1960 and 1968 Acts.

34. S. 318 of the 2008 Act did not come into force until 30 April 2011: The Housing and Regeneration Act 2008 (Commencement No. 8 and Transitional, Transitory and Saving Provisions) Order 2011 (S.I. 2011 No. 1002), arts. 1(2), 2(1). Art. 4 of the 2011 Order provides:

> "Subject to article 5, the 1983 Act applies to an existing agreement as it would apply to a local authority agreement made after the coming into force of the provisions brought into force by article 2 and the Mobile Homes Act 1983 (Amendment of Schedule One and Consequential Amendments) (England) Order 2011."

A "local authority agreement" is defined in art. 1(2) as meaning an agreement under which a person is entitled to station a mobile home on a local authority gypsy and traveller site in England. An "existing agreement" is defined in that article as meaning a local authority agreement which is made before 30 April 2011. Art. 5 of the 2011 Order disapplies to an "existing agreement" various provisions of the 1983 Act, and The Mobile Homes Act 1983 (Amendment of Schedule One and Consequential Amendments) (England) Order 2011 made different provision for "existing agreements" in that regard.

35. The effect of the 2011 Order was therefore to allow any such existing agreements, as defined, to be capable of being protected by the 1983 Act, even though it would otherwise

not have applied to them because the agreements when first made were not in relation to "protected sites". The 2011 Order does not say that the 1983 Act will apply to "existing agreements": it says that the 1983 Act applies to an existing agreement as it would apply to a local authority agreement made on or after 30 April 2011. If there were some other reason why the 1983 Act could not apply to a given local authority agreement, e.g. if the agreement was for seasonal occupation only, the 1983 Act would not apply to an existing agreement any more than it would apply to a local authority agreement made on or after that date.

36. It can therefore be seen that the 2011 Order performs a very limited function. It prevents gypsies and travellers who entered into an agreement before 30 April 2011 from being treated differently from gypsies and travellers who entered into an agreement on or after that date. The purpose of that provision is, clearly, to ensure that full effect is given to the change in the law required as a result of the Connors decision in the European Court of Human Rights. Without the transitional provision, any gypsies or travellers with existing agreements would still be denied the protection of the 1983 Act.

37. The terms of s. 318 of the 2008 Act and the 2011 Order were not referred to the Court of Appeal in the Murphy case. That is unsurprising: those statutory provisions had not yet come into force. In any event, no obvious argument based on them would have been seen as likely to assist the appellant in that case, who was not a gypsy or a traveller. Had the imminent amendment to the 1983 Act and the 2011 Order been referred to the Court of Appeal in that case, however, the Court would in my judgment have been very likely to find further support for its conclusion. The transitional provision in the 2011 Order is necessary because the 1983 Act only applies to an agreement where the site is a protected site at the date of the agreement. Further, the amendment to s. 5(1) of the 1983 Act itself would have made no difference to the reasoning of Lord Neuberger MR and Arden LJ based on the language of s. 1 and other sections of that Act.

38. Mr Mitchell contends for a different interpretation of the 1983 Act (as amended by the 2008 Act). His argument, which was prepared for him by Mr Chris Johnson of The Community Law Partnership when that firm acted for him, is in essence as follows:

    a. This Tribunal, as a public body, is obliged to give effect to the Human Rights Act 1998 and act in accordance with Mr Mitchell's Convention rights.

    b. The 1983 Act, as interpreted in the Murphy decision, discriminates against him unlawfully when compared with the position of gypsies and travellers, contrary to article 14 of the Convention in conjunction with article 8. That is because the Act appears to deny him security of tenure because the Site was not a protected site when his agreement was made, even though the Site is now a protected site; whereas gypsies and travellers whose agreements were made before 30 April 2011 and so were not then protected by the 1983 Act became entitled to its protection after that date.

c. It is therefore permissible and appropriate for this Tribunal to read down the provisions of the 1983 Act that would otherwise deprive Mr Mitchell of security of tenure, pursuant to s. 3 of the Human Rights Act 1998.

d. The appropriate result is achieved by reading section 1(1) of the 1983 Act as if it provided: "This Act applies to any agreement under which *for the time being* a person…is entitled….", with the italicised words being read in. That would have the effect that an agreement would attract the protection of the 1983 Act if at any time during its subsistence the occupier was entitled to station a mobile home on a protected site and to occupy it as their only or main residence.

e. If s. 1(1) of the 1983 Act cannot be read down in that way, this Tribunal should make a declaration of incompatibility under s. 4 of the Human Rights Act 1998, using power conferred by s. 25 of the Tribunals, Courts and Enforcement Act 2007. Alternatively, this Tribunal should declare that the 1983 Act unlawfully discriminates against Mr Mitchell in the enjoyment of his article 8 rights.

39. The statutory provisions engaged by this argument are the following.

40. S. 3 of the Human Rights Act 1998 provides:

> "(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2) This section --
>
> (a) applies to primary legislation and subordinate legislation whenever enacted;
>
> (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
>
> (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility."

41. S. 4 of that Act provides (so far as directly material):

> "(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
>
> (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

…..

(5) In this section "court" means --

(a) the Supreme Court;

(b) the Judicial Committee of the Privy Council;

(c) the Courts-Martial Appeal Court;

(d) In Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session;

(e) In England and Wales or Northern Ireland, the High Court or the Court of Appeal;

(f) the Court of Protection…"

(6) A declaration under this section ("a declaration of incompatibility") --

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made."

42. Article 8 of the Convention provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

43. Article 14 of the Convention provides:

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

44. S. 25 of the Tribunals, Courts and Enforcement Act 2007, whose side note reads "Supplementary Powers of Upper Tribunal", provides, so far as material:

> "(1) In relation to the matters mentioned in subsection (2), the Upper Tribunal --
>
> > (a) has, in England and Wales or in Northern Ireland, the same powers, rights, privileges and authority as the High Court, …
>
> (2) The matters are --
>
> > (a) the attendance and examination of witnesses,
> >
> > (b) the production and inspection of documents, and
> >
> > (c) all other matters incidental to the Upper Tribunal's functions."

45. The argument of Mr Mitchell was developed in writing by Mr Johnson as follows (Mr Mitchell did not add to it in oral submissions).

46. Mr Mitchell and others in his position on the one hand and gypsies and travellers who have ceased travelling on the other hand are caravan dwellers, dependent on living on a protected site for security of tenure, and are affected by the 1983 Act as amended by s. 318 of the 2008 Act. Article 8 is clearly engaged in each case. They are therefore in an analogous position, but unless the 1983 Act is given a different meaning from what it has been held to mean one group cannot have protection - because the site was not a protected site at the start of their agreements - but the other group can. Article 14 prohibits discrimination in the enjoyment of protected rights and freedoms on various grounds, none of which apply in Mr Mitchell's case, but also on the ground of "other status". Mr Mitchell's status as a non-gypsy non-traveller caravan dweller is such an "other status" within Article 14.

47. Finally, the interference with Mr Mitchell's Article 8 qualified Convention right is not justified. Such justification requires that the legislative objective (legitimate aim) is sufficiently important to justify limiting a fundamental right; that the measures that are designed to meet the objective must be rationally connected to it and no more than is necessary to accomplish it; and that they must strike a fair balance between the interests of the community and the rights of the individual: per Lord Kerr of Tonaghmore JSC in R (Steinfeld) v Secretary of State for International Development [2018] UKSC 32; [2020] A.C. 1 at [41], citing R (Aguilar Quila) v Secretary of State for the Home Department [2012] 1 A.C. 621 at [45], per Lord Wilson JSC. That justificatory test is not satisfied (though Mr Johnson does not explain exactly why not).

48. The first step in considering this argument must be to consider whether the decision in Murphy is binding on me. If it is, I must follow it even if I consider that it is wrong or inconsistent with the Convention or Strasbourg jurisprudence: Kay v London Borough of Lambeth [2006] UKHL 10; [2006] 2 A.C. 465, per Lord Bingham of Cornhill at [43]. The

appropriate course would be for this Tribunal to make a declaration in favour of the Applicants but grant permission to appeal.

49. The statutory provisions that I have to construe are not the same provisions as were considered by the Court of Appeal in Murphy. The definition of "protected site" has changed. That change would not itself have made any difference to the analysis and decision of the Court of Appeal, had the case been argued before it on or after 30 April 2011. It is the terms of the 2011 Order that arguably make a difference.

50. Nevertheless it is the combination of the amendment to the 1983 Act and the transitional provisions in the 2011 Order that give rise to Mr Mitchell's argument that the 1983 Act should be construed differently in order to comply with the Human Rights Act 1998. In those circumstances, it seems to me that I should not ask whether the decision strictly binds me or was decided *per incuriam* (which it clearly was not) but take it as a persuasive authority and consider whether, in view of the amendment and the 2011 Order, a different construction is now required. To hold that the decision in Murphy binds me would prevent Mr Mitchell's argument based on statutory amendments made subsequently to that decision being heard.

51. In my judgment, however, Mr Mitchell's argument does not require me to reach a different conclusion about the meaning of the 1983 Act or to declare its incompatibility with the qualified right to respect for private and family life, home and correspondence.

52. Even assuming (which I seriously doubt) that Mr Mitchell has an "other status" as a non-gypsy non-traveller permanent caravan dweller, within the meaning of Article 14 of the Convention, the 1983 Act itself no longer distinguishes between gypsies and travellers who permanently live in caravans on caravan sites and others who do so. Any agreement made on or after 30 April 2011 that confers a right to station a mobile home on a protected site and to occupy it as an only or main residence treats those two classes of persons exactly alike. The only relevant difference is that a site licence is not required for a local authority occupied caravan site to be a protected site, whereas it is required for privately owned caravan sites. That, however, is a function of the 1960 and 1968 Acts, under which a local authority is a licensor of caravan sites, not a licensee; it is not a difference created by the 1983 Act.

53. The 2011 Order means that the 1983 Act can apply in favour of gypsies and travellers even though, in the case of an occupation agreement made before 30 April 2011, their caravan sites could not have been protected sites when the agreement was made. But the reason why they could not have been protected was that such sites were expressly excluded from the definition of protected site. The 2011 Order only removes the effect of that provision in relation to agreements made before 30 April 2011. It does not otherwise confer on occupiers of local authority sites greater protection than on occupiers of private sites.

54. The purpose of the 2011 Order is clear. It is to ensure that equivalent protection to be conferred on gypsies and travellers as a result of the Connors decision was given full effect and thereby to end the unlawful discrimination against them. But for art. 5 of the 2011 Order, the amendment to the 1983 Act would have had no effect in favour of those gypsies

and travellers with existing licences to occupy caravan sites. The 2011 Order is removing the effect of previous unlawful discrimination against gypsies and travellers. It is not distinguishing between all gypsies and travellers on the one hand and all other caravan dwellers on the other.

55. The position of gypsies and travellers was different from caravan dwellers who were not occupying local authority sites because the 1983 Act had never previously been capable of applying to the former. The position on 30 April 2011 of gypsies and travellers on the one hand and Mr Mitchell on the other are therefore not analogous in relation to their article 8 rights: Mr Mitchell was never excluded from the 1983 Act and did not need statutory provision in order to remedy his exclusion. Non-gypsies and non-travellers had not been discriminated against in the same way. Mr Mitchell, like others in a similar position, was always entitled to protection under the 1983 Act provided that the terms of his agreement and the Site fell within the requirements of the Act. There was therefore, in my judgment, no unlawful discrimination against Mr Mitchell by the terms of the 2011 Order.

56. Further, if there was discrimination between persons in an analogous position as to their article 8 rights, the different treatment of gypsies and travellers is clearly justified. There was a legitimate aim in ending historic discrimination against gypsies and travellers with immediate effect, which was very important in view of the unlawfulness found by the European Court in Connors. The transitional provision was effective and necessary fully to achieve that objective and was no more than was required to do so. The protection so conferred on gypsies and travellers alone struck a fair balance because it conferred on them the same conditional rights that others already enjoyed. The reason why Mr Mitchell did not enjoy the same rights was because his agreement did not satisfy the conditions of the 1983 Act, which had always been capable of applying to him.

57. In any event, the argument that the 1983 Act should be construed compatibly with the alleged Convention rights in the way contended for is hopeless. To read in the words "*for the time being*", so that the Act applies to any agreement under which for the time being the occupier has the specified rights, would not just remedy the alleged unlawful discrimination. It would fundamentally change the structure of the Act and the way that it operates, for all the reasons given by Lord Neuberger MR and Arden LJ in the Murphy case in rejecting the argument that there was no need for an agreement to be within the Act from its inception.

58. It is unnecessary to decide the point, but I also consider that the Upper Tribunal is not empowered to make a declaration of incompatibility under s. 4 of the Human Rights Act 1998. That power is expressly conferred by that Act on the higher courts only. Although the Tribunals, Courts and Enforcement Act 2007 created the Upper Tribunal, as part of the unified tribunals system, as a "superior court of record" (s. 3(5) of the 2007 Act), with broadly equivalent status to the High Court, it does not have all the same powers as the High Court. S. 25 of the 2007 Act recognises that, by conferring on the Upper Tribunal the same powers in relation to certain matters only. Making a declaration of incompatibility under s.4 of the Human Rights Act cannot fairly be said to be incidental to its functions, as it amounts to substantive relief in its own right. The judicial review jurisdiction conferred on the Upper Tribunal does not expressly extend to making declarations of incompatibility: see ss. 15(1) and 18(1) to (3) of the 2007 Act and ss. 31(1)

and 31A(2) and (4) of the Senior Courts Act 1981. I consider that if Parliament had intended to confer on the Upper Tribunal jurisdiction to make a declaration of incompatibility it would have done so expressly in the 2007 Act and in clear terms.

59. I turn then to construing the 1983 Act as amended. I can deal with that quite shortly. The amendment of s. 5(1) of the Act makes no difference to the arguments that the Court of Appeal considered in Murphy. No part of the Court's reasoning is affected by the amendment and indeed, as I have already said, the transitional provision for the amendment is consistent with the Court's decision. Having rejected the argument based on unlawful discrimination and noted that the amendment to the definition of "protected site" does not make a difference, the decision in Murphy is as close as may be to a binding decision. It is in any event highly persuasive, given the strength of the constitution of the Court that decided it. I respectfully consider that the decision is correct for the reasons given by Lord Neuberger and Arden LJ and I propose to follow it, even if I am not bound to do so. The machinery of the 1983 Act simply does not work as it was designed to work if an agreement can lie outside it for a period and then come within it months or years later.

60. For these reasons, I will make the declaration sought by the Applicants, namely that the agreement between them and Mr Mitchell relating to the occupation of the Site is not one to which the 1983 Act applies.

Mr Justice Fancourt

Chamber President

Dated: 20 November 2020