

Local development plan evidence report - defining Gypsies and Travellers: consultation

15 February 2023

The Scottish Human Rights Commission was established by the Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the National Human Rights Institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

www.scottishhumanrights.com

The Scottish Human Rights Commission (The Commission) is pleased to offer this short note in support of a human rights based approach to local and national planning frameworks that upholds the rights of Gypsy / Traveller communities throughout Scotland. This note is not a full human rights analysis of all relevant standards applicable to the accommodation rights of Gypsies and Travellers,¹ but is intended to provide the Scottish Government with an overview of some of the relevant international and regional human rights standards to be considered as part of a human-rights based approach to defining Gypsy and Traveller communities in Scotland

The Scottish Government is currently consulting on the definition of 'Gypsies and Travellers' for the purpose of section 16B of the Town and Country Planning (Scotland) Act 1997. Section 16B requires planning authorities to prepare an evidence report covering a range of matters including actions taken and impacts of action to meet the accommodation needs of Gypsies and Travellers in the authority's area.

The Commission understands that Gypsy and Traveller communities in Scotland are not a monolithic identity. There has been global recognition that "Roma populations" have "engaged in a visible struggle" to preserve their identities² and international and regional frameworks may not have the precision of local laws and policies. International standards protecting minorities have to be applied in a local context.

1 Acknowledging the context of this note, this document uses the language of the consultation paper and relevant legislation in referring to 'Gypsies and Travellers' or Gypsy and Traveller communities. We use other terms including "national minorities" or "Roma" to reflect the original language of the source materials. The Commission recognises the array of terminology used in this note may itself be contested or not applicable to all relevant communities in Scotland although the relevant standards should be upheld.

2 Thematic Discussion on The Question of Discrimination Against Roma. CERD/C/SR.1423 See: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CERD/C/SR.1423&Lang=en

In order to support human rights in policy process, a PANEL approach can be a useful framework to consider how rights can be put at the centre of decision-making:

- **P**articipation
- **A**ccountability
- **N**on-discrimination and Equality
- **E**mpowerment
- **L**egality

It is vital that all decisions relating to the definition of the group are centred in and are led by the members of that community or communities, and that opportunities to challenge harmful stereotypes, omissions and outdated language are available. It is unclear from the consultation document the extent of opportunities for people from Gypsy and Traveller communities to participate meaningfully, beyond response to written feedback on the draft definition provided. The Commission strongly recommends that other forms of engagement are provided, but most critically that it is Gypsy and Traveller communities that lead this process.

At its last review of the UK, the United Nations Committee on the Elimination of Racial Discrimination set out in its concluding observations that the UK should:

“Ensure that any changes in the definition of a Gypsy or Traveller, including for planning purposes, are made **with effective consultation with the Gypsy and Traveller communities and that their views are duly taken into account**, and that such changes do not adversely affect their rights, including the rights of people who have stopped travelling permanently [our emphasis].”³

3 UN Committee on the Elimination of Racial Discrimination (CERD), Concluding observations on the combined twenty-first to twenty-third periodic reports of the United Kingdom of Great Britain and Northern Ireland, 3 October 2016, CERD/C/GBR/CO/21-23, available at: <https://www.refworld.org/docid/597b19ad4.html> [accessed 14 February 2023]

International and regional human rights law recognises human rights to self-determination, participation and substantive equality that the Commission believes should underpin the Scottish Government's approach to defining Gypsy and Traveller communities and other minority groups. Embedding principles of participation and empowerment into relevant decision-making should require the Scottish Government to create an enabling environment for members of Gypsy and Traveller communities to go beyond reactively commenting on a draft definition.

Accordingly, the Commission would appreciate further information on proactive steps taken to facilitate the effective participation of members of Gypsy and Traveller communities in Scotland in the draft definition and avenues for further feedback from the relevant communities, giving effect to the recommendation of the Committee on the Elimination of Racial Discrimination.

Relevant International Frameworks

In the remainder of this document, the Commission sets out some of the relevant international and regional human rights standards to be considered as part of a human-rights based approach to defining Gypsy and Traveller communities in Scotland. These standards include standards binding under international law and in the case of the Human Rights Act domestic law, as well as some relevant "soft law" normative frameworks relevant to race and minority community rights.

The 'International Bill of Rights' – [International Covenant on Civil and Political Rights \(ICCPR\)](#) and the [International Covenant on Economic, Social and Cultural Rights \(ICESCR\)](#)

ICCPR and ICESCR each provide the same right at Article 1: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." This principle is also widely considered to be found in customary international law. There is much academic dispute as to the scope and application of self-determination, however state practice has affirmed that the right applies where the 'peoples'

concerned are part of the inhabitants of the state.⁴ It is increasingly supported that self-determination can be “externally” or “internally” exercised, the later understood as including “a self-determining collective's procedural right 'to be heard.'”⁵ While there is no clear consensus on the precise scope of internal self-determination, there is a clear political dimension involving participation in public affairs, especially where directly effecting the relevant community or communities.⁶

Additionally Article 27 of the ICCPR concerns the rights of persons belonging to ethnic, religious and linguistic minorities who “shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” The Human Rights Committee (the committee of independent experts who monitor implementation of the Covenant) has determined that “the terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language”. The Committee has also explicitly rejected the possibility of arbitrary exclusions from the protection of Article 27, stating, “the existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.”

Beyond the primary issue of defining minority communities, the substantive content of the two Covenants is relevant to the question of housing and accommodation for Gypsy / Traveller communities.⁷

4 Robert Mccorquodale ‘Self-Determination: A Human Rights Approach’ *International and Comparative Law Quarterly* 43 (1994) 857

5 Limor Yehuda ‘Collective Equality: Theoretical Foundations for the Law of Peace’ (2022) *OJLS* 2022 42 (703)

6 Matthew Saul ‘The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?’ (2011) *Human Rights Law Review* (2011) 11(4): 609–644

7 For example: The right to an adequate standard of living including adequate food, adequate housing, and the fundamental right to be free from hunger (article 11, ICESCR); The right to adequate

UN Convention on the Elimination of all forms of Racial Discrimination

- Article 1 of the convention extends a broad definition of “racial discrimination” for the purposes of the convention as meaning “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”
- Under Article 2.1 (c) there is an obligation to “take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”
- Additionally for the present purposes we highlight housing as one of the key rights that “States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law” (Article 5).

The UN Committee on Racial Discrimination has considered the application of the treaty to Roma communities in General Recommendation⁸ XXVII on Discrimination Against Roma⁹ which recommends that states (among other activities):

housing including: legal security of tenure; availability of services; affordable, accessible, and habitable housing that is located within access to employment and is culturally adequate (article 11, ICESCR); The right to non-discrimination in the realisation of rights, including on the basis of rural living (article 2(2) ICESCR); The right to work (article 6, ICESCR); Rights at work including fair and equal pay for work of equal value, a decent living, safe and healthy conditions of work, equal opportunities (article 7, ICESCR)

⁸ General Comments/Recommendations are highly authoritative but not legally binding interpretations of the law generated by the Committee established by a relevant UN treaty.

⁹ CERD General recommendation XXVII on discrimination against Roma (refworld.org)

- “respect the wishes of Roma as to the designation they want to be given and the group to which they want to belong”
- “develop modalities and structures of consultation with Roma political parties, associations and representatives, both at central and local levels, when considering issues and adopting decisions on matters of concern to Roma communities.”

In the Committee’s General Recommendation 21,¹⁰ the Committee considers the principle of self-determination within the scope of the convention and minority rights, noting “Governments should be sensitive towards the rights of persons belonging to ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the Government of the country of which they are citizens.” The Recommendation identifies a clear link between the internal aspect of self-determination and political rights protected by Article 5 of the CERD Convention.

In its 2016 review of the UK, the CERD Committee noted:

“the change in the definition of Gypsy or Traveller in the Planning Policy for Traveller Sites in England adopted in August 2015 may adversely impact the enjoyment of rights by those who have stopped travelling permanently due to factors such as illness or old age, and may further restrict the ability of Gypsy and Traveller communities to access culturally appropriate accommodation and stopping sites (arts. 2 and 5).”

Relevant recommendations included:

- 25(a) Develop a comprehensive strategy, in consultation with members of Gypsy, Traveller and Roma communities, to ensure a systematic and coherent approach in addressing the challenges that they continue to face in the fields of health, education, housing

¹⁰ General Recommendation No21-self-determination.pdf (uio.no)

and employment, and ensure its effective implementation by adopting specific action plans and effective oversight and monitoring mechanisms to track progress, with adequate human and financial resources;

- 25(d) Ensure that any changes in the definition of a Gypsy or Traveller, including for planning purposes, are made with effective consultation with the Gypsy and Traveller communities and that their views are duly taken into account, and that such changes do not adversely affect their rights, including the rights of people who have stopped travelling permanently.

Other relevant sources from international human rights law (non-exhaustive)

- The United Nations General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, at Article 2(2): Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.¹¹
- The Declaration and Programme of Action Following the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (The Durban Declaration and Programme of Action) refers to the CERD General Recommendation 27 and “encourages States to adopt appropriate and concrete policies and measures, to develop implementation mechanisms, where these do not already exist, and to exchange experiences, in cooperation with representatives of the Roma/Gypsies/Sinti/Travellers, in order to eradicate discrimination against them, enable them to achieve equality and ensure their full enjoyment of all their human rights.”¹²
- In 2013, the UN Special Rapporteur on Housing recommended that the UK “Strengthen efforts to address stigma and

11 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities | OHCHR

12 Durban_text_en.pdf (ohchr.org)

discrimination for the Gypsy and Traveller communities in relation to the wider spectrum of rights, starting with the recognition that cultural adequacy in housing is a pillar for inclusion, and that legislation and policy are not enough to overcome local obstacles.”¹³

European Convention on Human Rights

Recognising the historic marginalisation and oppression of Gypsy and Traveller communities across Europe, the European Court of Human Rights has recognised Roma as requiring special protection that accounts for specific disadvantage and vulnerability.¹⁴ In the context of the UK the Court has recognised a positive obligation under Article 8 to facilitate the Gypsy and Traveller ways of life.¹⁵

A number of the substantive provisions of the Convention are relevant to Gypsy and Traveller identities and ways of life¹⁶:

- Article 8 protects the right to private life, family life and home
- Article 14 prohibits discrimination in the enjoyment of ‘the rights and freedoms set forth in [the] Convention’
- Article 5 protects freedom of liberty and security
- Articles 2 and 3, the right to life and prohibition of inhuman or degrading treatment
- Article 10 freedom of expression
- Article 11, Freedom of assembly and association
- Article 1 of Protocol No. 1, the protection of property, (including protection from forced evictions)
- Article 2 of Protocol No. 1, the right to education

13 Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik A/HRC/25/54/Add.2

14 D.H. and Others v. the Czech Republic, application n° 57325/00, Grand Chamber

15 Connors v. the UK, application 66746/01, judgment of 27 May 2004, paragraph 84.

16 A summary of key cases concerning Gypsy, Roma and Traveller rights across Europe is available at: FS_Roma_ENG (coe.int)

- Article 3 of Protocol No. 1, right to free elections

Council of Europe Framework Convention for the Protection of National Minorities 1995.

- Article 1 provides that “Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice.”
- Article 5(2) protects national minorities from being subjected to policies and practices aimed at assimilation against their will.
- Article 15 sets out a duty to create the necessary conditions for effective participation cultural, social and economic life and in public affairs, “in particular those affecting them.”

Other relevant regional frameworks

- In her visit to the UK in 2022, the Council of Europe Commissioner For Human Rights, Dunja Mijatović, called on all authorities to facilitate the recognised right of Gypsy, Roma and Traveller communities to lead a nomadic lifestyle, and to promptly implement long-standing recommendations in this area.¹⁷
- The Office for Security and Co-operation in Europe (OSCE) Charter of Paris “affirms that the ethnic, cultural, linguistic and religious identity of national minorities will be protected and that persons belonging to national minorities have the right freely to express, preserve and develop that identity without any discrimination and in full equality before the law.”¹⁸

17 Report on the United Kingdom following a visit from 27 June to 1 July, by Dunja Mijatovic, Commissioner for Human Rights of the Council of Europe (coe.int)

18 CHARTER OF PARIS (osce.org)