30 November 2023

Briefing

Persons Unknown Injunctions – Supreme Court Appeal

Key Points

- For the first time, the Supreme Court has ruled on "persons unknown" injunctions (injunctions taken out against unknown and unidentifiable individuals), and the limits to which these controversial orders can be used by private companies and public authorities when fundamental human rights are engaged, such as the right to a private and family life, and the right to protest.
- In *Wolverhampton City Council v London Gypsies and Travellers & Others*[1], the Supreme Court has rejected the appeal brought by 3 Gypsy, Roma and Traveller charities, the judgment imposes significant restrictions on how these injunctions can be used in relation to Gypsies and Travellers. That is a very welcome development.
- In recent years, there has been a massive increase in the use of these injunctions, which have targeted environmental protestors, and also Gypsy and Traveller communities. Meanwhile, there continues to be a serious lack of provision of allocated sites for the latter to use. In a positive development, the Supreme Court has emphasised that these injunctions must be an "exceptional remedy", and that failure by local authorities to allocate sufficient sites may mean that an injunction of this kind cannot be justified.
- There are, however, some potentially unhelpful aspects to the judgment in relation to protest rights, and far less guidance is given on these injunctions in this context.
- In total, there were 17 parties to this appeal. The appellants were: London Gypsies and Travellers; Friends Families and Travellers; and Derbyshire Gypsy Liaison Group. Friends of the Earth and Liberty supported the appeal.[2]

What was the appeal about?

The appeal concerned the use of so-called 'persons unknown' injunctions targeting Gypsy and Traveller communities, as well as environmental protestors.

Injunctions are orders granted by a court, that prohibit specific behaviour in a defined geographical area. Normally, they (like any other type of court order) have to be sought against identified individuals. That is important, as it ensures that the defendant has knowledge of the proceedings, and gives them the chance to defend themselves against them. However, a persons unknown injunction is granted against *unnamed* defendants, who are defined according to the actions prohibited by the injunction (for example, entering a specified area of land without permission, or obstructing access to or from a site). They are often granted in secret (at a hearing on a without notice basis), without anyone opposing them.

Since 2015, a large number of local authorities have obtained 'borough-wide' injunctions prohibiting people from stopping on their land. These orders, taken out against unknown and unidentifiable people (known as "persons unknown" or "newcomers"), disproportionately impact nomadic Gypsies and Travellers, and compounding the long-standing shortage of sites and stopping places.

Persons unknown injunctions have in recent years also been increasingly used against environmental protestors, including by fossil fuel companies against a number of community-based campaigns opposing potential sites for fracking and other fossil fuel extraction. They have in addition been secured over a range of sites subject to other types of environmental protest, including the entirety of the HS2 route and a controversial landfill site in Newcastle-under-Lyme, that has been subject to protests by local residents deeply concerned by the fumes from the site.

Friends of the Earth concerns about injunctions against protesters

They can have a chilling effect on peaceful, lawful protest. They can and have been granted on broad and sometimes ambiguous terms. When that happens, it can be unclear what is and what is not prohibited by the order. This can mean that people who wish to engage in lawful protest are deterred from doing so, because they are worried about the consequences of being found in breach of an injunction.

In our view, they are a misuse of a civil law mechanism, which is ill-equipped to deal with complex human rights issues. In taking out these injunctions, private entities and public authorities are creating a confusing parallel system of law enforcement to that in the criminal justice system, but one which lacks the safeguards of the latter and has not been legislated for by Parliament. These injunctions allow private entities to utilise the civil courts to regulate protest and public order without adequate safeguards, and limited accountability.

The penalties for breaching an injunction can be very serious. Breaching an injunction can amount to a contempt of court, which can result in imprisonment of up to 2 years and/or an unlimited fine. It is notable that these penalties under the civil law are sometimes *more* severe than the comparable offence under the criminal law.

It is very difficult to challenge these injunctions, because courts have previously held that cost protection is not available in civil law proceedings. This means that ordinary citizens can be priced out of court, and unable to get an injunction removed, or reduced in size. That is what happened to Friends of the Earth when we sought to get Cuadrilla's injunction reduced; we had to withdraw from the case because Cuadrilla threatened us with an £85k cost bill.

Why was Friends of the Earth involved in this appeal?

This was an appeal of a judgment of the Court of Appeal handed down in January 2022[3]. As a social and environmental justice organisation, Friends of the Earth participated in the appeal as we support the right of Gypsies and Travellers to maintain their way of life. This right is protected under Article 8 (the right to respect for private and family life) of the European Convention of Human Rights (the "ECHR"). We recognised that the numerous, wide-ranging injunctions taken out by the Respondents threaten the centuries-old culture of an already

marginalised community. The injunctions also do not address the fundamental issue, which is that there are insufficient allocated sites for these communities to stop in, and it is the State's responsibility to ensure that there are.

In addition, Friends of the Earth participated in the appeal given our experience of defending protest rights and to provide evidence as to the impact that these orders can have on peaceful, lawful protest (protected under Articles 10 and 11 of the ECHR and the common law). We also made submissions on how they impact on the fairness of the procedure and access to justice. Back in 2017, Friends of the Earth became increasingly concerned at a trend by the oil and gas industry to take out persons unknown injunctions in relation to protest activities. In particular, firms engaged with fracking and other unconventional extraction techniques, such as Ineos, UKOG, Igas, or Angus Energy[1] all took out similar wide-ranging injunctions in a short space of time. These injunctions were broadly and ambiguously drafted, so it was unclear which activities were prohibited and which were not.

These injunctions included bans on protest activities such as slow walking in the road, which can be legal. The overall effect was to deter protest from happening, whether lawful or not. The fear and uncertainty that these injunctions created had a noticeable chilling effect on peaceful protest directed at fracking sites, including protest activity that was normally lawful, such as that undertaken by Friends of the Earth local groups and supporters.

Friends of the Earth has worked with community groups and concerned citizens to push back against these injunctions, and helped to secure significant reductions in their scope. For example, we intervened to support the appeal taken by Joe Corré and Joe Boyd against Ineos' injunction, which succeeded and resulted in a significant reduction in the scope of that injunction.

Last year, there was a surge of injunctions taken out in relation to various protest activities. These included a route-wide injunction obtained by HS2, which has been strongly criticised by the Wildlife Trusts given the potential implications for protest rights and also nature reserve visitors, and an injunction obtained by Walleys Quarry Ltd in connection with its controversial land fill site[1] near Newcastle-under-Lyme. Local residents have complained about the noxious emissions from the site. Significant parts of the road network have also been subject to high profile, sweeping persons unknown injunctions.

The Judgment

On 29 November 2023, the Supreme Court handed down its judgment in this appeal. While the Court rejected the appeal, the judgment is a welcome development which will limit the use of these injunctions in the Gypsy and Traveller context. That is because while the Supreme Court has concluded that it is technically possible for the court to grant what it has called "newcomer injunctions" (granted against unknown and unidentifiable defendants) they have imposed **significant** restrictions on their use in the future. In the light of these this, it is difficult to see how injunctions of the kind and scale obtained by the Respondents will be possible.

The Supreme Court has specifically recognised the shortage of stoppage sites for Gypsy and Traveller communities who wish to maintain their unique, nomadic way of life [para. 76]. The judgment refers to the responsibilities of local authorities to provide sites, such as those under s.8 of the Housing Act 1985 and in planning policy [paras. 196 and 201].

The conditions to obtaining newcomer injunctions targeting Gypsy and Traveller communities [para. 167] are, in Friends of the Earth's view, onerous:

- There must be a “compelling need”, which cannot be met by any other measures, and there must be “full and detailed evidence” to back this up.
- There must be procedural protections in place. The judgment emphasises the need for dialogue between local authorities and Gypsy and Traveller communities, including so that notice of applications can be given to the communities and to interested bodies such as the appellants.
- There must be “stringent disclosure” by local authorities when they seek these injunctions.
- There must be limitations in terms of the size of the area of land covered by the injunction, and its duration.
- The Supreme Court has expressed “considerable doubt” that a newcomer traveller injunction could extend <u>over the whole of a borough, or for significantly more than a year</u>, given that newcomer injunctions are an “exceptional remedy” [para. 225]
- The injunction must be just and convenient on the facts of the case. They conclude that if a Local Authority has failed to provide sufficient authorised sites or advertised where its authorised sites are, that might be sufficient reason for refusing a newcomer injunction in and of itself [paras. 189 and 202].
- They also state that any injunction must be granted in “everyday terms”, so that there is no need to consult legal advisors to understand the order [paras. 222 and 224].

Overall, the use of such injunctions should now become a true exception rather than the norm or default that they were prior to this judgment. As the Court emphasised, these injunctions are “an exceptional remedy” and must be “a proportionate response” to the unlawful activity to which they are directed. [para 225]

There are, however, some disappointing aspects to the judgment, in Friends of the Earth’s view:

- While newcomer injunctions targeting protestors were not the main subject of the appeal, the judgment states that the protections imposed by the court in relation to Gypsy and Traveller communities are not necessarily to be read across to the protest context [para 235].
- There had been conflicting judgments[4] from the Court of Appeal as to whether newcomer injunctions could only be granted on an interim basis or on a final basis as well. The Supreme Court has found that there is no essential difference between an interim and final injunction in the context of newcomer injunctions, given its conclusion that they are a unique species of injunction [para 144].
- While the Supreme Court acknowledges Friends of the Earth’s submissions on the cost implications of challenging these injunctions, and expresses “*considerable concern*” that litigation of this kind is beyond the reach of Gypsies and Travellers and many interveners, they do not make an express finding that protective cost orders can be granted in these cases, although the benefit of doing so was acknowledged [para 233]. Given that the potential cost consequences are a key reason why challenging these injunctions is so difficult, it is disappointing that this issue of principle was left to be decided on another occasion. That said, we understand from the appellants that they successfully applied for a PCO from the Supreme Court in this appeal, and that this was opposed by the respondents.
- While the Supreme Court states that it does not doubt the correctness of the Court of Appeal’s decision in the *Canada Goose* case (concerning a newcomer injunction in relation to protesting against the sale of fur at Canada Goose’s store in Regent Street)

they did not uphold that court's finding that injunctions of this kind were fundamentally unsuitable for dealing with public order issues [para. 138].

Wider Significance and Implications

When the various Respondents' injunctions come up for review, they will have to justify their continued existence on the basis of very stringent criteria set out in the Supreme Court's judgment. That will be a very tall order indeed. Other local authorities who may be considering applying for a newcomer injunction in this area will similarly have to justify their application against these onerous conditions.

The frequency in which local authorities were obtaining these injunctions was once described as a "*something of a feeding frenzy*" by the Court of Appeal [1]. Friends of the Earth believes that this judgment from the Supreme Court will help to bring such a phenomenon to an end. It is hoped that instead, energies will be focussed on providing sufficient, adequate sites and stopping places for Gypsy and Traveller communities to use. As an organisation committed to social justice, Friends of the Earth is very proud to have supported this appeal.

There is more limited specific guidance in the judgment regarding the protest context, although the Court did similarly emphasise that there "*the judge must be satisfied there is a compelling need for the order".* [para. 236] The significant variation in the facts of such cases means that submissions will have to be made challenging the imposition and scope of such injunctions on a case-by-case basis. The protections the Supreme Court has identified in relation to Gypsies and Travellers as a matter of generality have not been expressly extended to the protest context. Although they can be argued as necessary by analogy in any given protest case, this in our view, does not address the lack of certainty, the due process deficits, and the practical difficulties Friends of the Earth identified in seeking to challenge the use of such injunctions. That is of concern, given the increasing trend for private companies to obtain wide-ranging draconian injunctions, and the chilling effect they can have upon peaceful protest.

Further Information and Next Steps

Friends of the Earth is considering the judgment carefully, in order to inform our next steps on defending protest rights.

The Appellants were represented by Richard Drabble KC of Landmark Chambers, Marc Willers KC, Tessa Buchanan and Owen Greenhall all of Garden Court Chambers, and by the Community Law Partnership. Friends of the Earth was represented by Stephanie Harrison KC, Stephen Clark and Fatima Jichi all of Garden Court Chambers, the law firm Hodge Jones and Allen, and its own in-house legal specialists.

For further information, please contact the Friends of the Earth Media team on 020 7566 1649 or email: media@foe.co.uk

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[1] [2023] UKSC 47

[2] The appeal was opposed by 10 local authorities, HS2 and the Secretary of State for Transport, Rt Hon Mark Harper MP.

[3] *London Borough of Barking and Dagenham & others v Persons Unknown and others* [2021] EWHC 1201

[4] *London Borough of Barking and Dagenham & others v Persons Unknown and others* [2021] EWHC 1201

(QB) and *Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303. Canada Goose announced in

June 2021 that it would stop using fur by the end of 2022
https://www.theguardian.com/world/2021/jun/24/canada-goose-fashion-brand-to-stop-using-fur-by-end-of-2022