Appeal Ref: CF087/2019CA

IN THE COUNTY COURT AT CARDIFF
On appeal from the County Court at Newport (Gwent)
Deputy District Judge Jackson
Claim No. F01NP052

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 12 June 2020

Before:

HIS HONOUR JUDGE KEYSER Q.C.

- -

Between:

PATRICK MCDONAGH **Appellant**
- and -

NEWPORT CITY COUNCIL **Respondent**

- -
- -

Stephen Cottle (instructed by **The Community Law Partnership Ltd**) for the **Appellant**
Adrian Davis (instructed by **Head of Law and Regulation, Newport City Council**) for the **Respondent**

Hearing date: 2 June 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE KEYSER Q.C.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 11.30am on 12 June 2020.

JUDGE KEYSER QC:

Introduction

1. This is an appeal against a possession order made on 6 September 2019 in the County Court at Newport (Gwent) by Deputy District Judge Jackson ("the Judge"). The possession order was made on the application of the respondent, Newport City Council ("the Council"), against Persons Unknown. The appellant, Mr Patrick McDonagh, who is a member of a family of Irish Travellers, was one of those Persons Unknown and filed evidence and made oral submissions in the possession proceedings. He has been joined as a named party to the proceedings for the purposes of the appeal. His case, in short, is that the Judge was wrong to make a possession order but ought instead to have given case management directions for a contested possession claim because, although Mr McDonagh and the Persons Unknown were trespassers on the land to which the proceedings relate, there exists a properly arguable defence on public law grounds to the possession claim. The appeal is brought with permission granted by His Honour Judge Harrison on 16 January 2020.

2. The remainder of this judgment will be structured as follows. First, I shall set out reasonably comprehensively the background to the hearing before the Judge, beginning with the legal framework in which the case arises and, within that framework, summarising the facts that led to the commencement of proceedings and the course of those proceedings. Second, I shall explain what happened at the hearing before the Judge and how he reached his decision. Third, I shall summarise briefly the grounds of the appeal and say something about the legal nature of the appeal. Fourth, I shall address the issues as I see them.

3. I am grateful to Mr Cottle and Mr Davis, counsel who appeared respectively for Mr McDonagh and for the Council, for their helpful skeleton arguments and the oral submissions they made in a Skype hearing that occupied a full day of court time.

The Background

The wider context

4. The Council is the local housing authority for Newport in South Wales. As such, its functions are governed by the Housing (Wales) Act 2014 ("HWA"), which is an Act of the National Assembly for Wales (now the Welsh Parliament). Of particular relevance for this appeal is Part 3 of HWA, sections 101 to 110, headed "Gypsies and Travellers". Sections 101 and 102 came into force on 25 February 2015 and provide as follows:

> "101 *Assessment of accommodation needs*
>
> (1) A local housing authority must, in each review period, carry out an assessment of the accommodation needs of Gypsies and Travellers residing in or resorting to its area.

(2) In carrying out an assessment under subsection (1) a local housing authority must consult such persons as it considers appropriate.

(3) In subsection (1), 'review period' means—

(a) the period of 1 year beginning with the coming into force of this section, and

(b) each subsequent period of 5 years.

(4) The Welsh Ministers may amend subsection (3)(b) by order."

"102 *Report following assessment*

(1) After carrying out an assessment a local housing authority must prepare a report which—

(a) details how the assessment was carried out;

(b) contains a summary of—

(i) the consultation it carried out in connection with the assessment, and

(ii) the responses (if any) it received to that consultation;

(c) details the accommodation needs identified by the assessment.

(2) A local housing authority must submit the report to the Welsh Ministers for approval of the authority's assessment.

(3) The Welsh Ministers may—

(a) approve the assessment as submitted;

(b) approve the assessment with modifications;

(c) reject the assessment.

(4) If the Welsh Ministers reject the assessment, the local housing authority must—

(a) revise and resubmit its assessment for approval by the Welsh Ministers under subsection (3), or

(b) conduct another assessment (in which case section 101(2) and this section apply again, as

> if the assessment were carried out under section 101(1)).
>
> (5) A local housing authority must publish an assessment approved by the Welsh Ministers under this section."

Section 108, the interpretation provision for Part 3 of HWA, provides in part:

> "'accommodation needs' includes, but is not limited to, needs with respect to the provision of sites on which mobile homes may be stationed;
>
> 'Gypsies and Travellers' means—
>
> (a) persons of a nomadic habit of life, whatever their race or origin, including—
>
> (i) persons who, on grounds only of their own or their family's or dependant's educational or health needs or old age, have ceased to travel temporarily or permanently, and
>
> (ii) members of an organised group of travelling show people or circus people (whether or not travelling together as such), and
>
> (b) all other persons with a cultural tradition of nomadism or of living in a mobile home".

Section 106 makes provision in respect of guidance given by the Welsh Ministers:

> "106 *Guidance*
>
> (1) In exercising its functions under this Part, a local housing authority must have regard to any guidance given by the Welsh Ministers.
>
> (2) The Welsh Ministers may—
>
> (a) give guidance either generally or to specified descriptions of authorities;
>
> (b) revise the guidance by giving further guidance under this section;
>
> (c) withdraw the guidance by giving further guidance under this section or by notice.
>
> (3) The Welsh Ministers must publish any guidance or notice under this section."

5. In the exercise of their powers under section 106 of HWA, in May 2015 the Welsh Ministers published guidance entitled *Undertaking Gypsy and Traveller Accommodation Assessments* ("the Assessments Guidance"). I shall make reference to the Assessments Guidance later in this judgment.

6. In compliance with its duty under section 101 of HWA, in or about September 2015 the Council carried out an assessment and produced a report, *Gypsy and Traveller Accommodation Assessment: 2015 – 2020* ("the Assessment"). Paragraph 1.1.4 stated that the Council had taken account of the Assessments Guidance when carrying out the assessment and preparing the report. The Assessment analysed extensive data which it is unnecessary to set out here, but some points may be noted. A table in paragraph 2.3.1 showed that in July 2014 and again in July 2015 there were 27 Gypsy and Traveller caravans on unauthorised sites in Newport. Paragraph 2.4.1 recorded that there were no local authority sites, either residential or transit, in Newport. Paragraph 5.1.5 recorded that more than one-third of the demand for residential pitches in Newport came from long-standing unauthorised encampments: "Between these encampments there is current need for 13 residential pitches." (A pitch can accommodate two caravans.) Table 3 showed that "current residential demand" was for 25 pitches: this comprised as to 13 pitches those on unauthorised encampments, as to 9 pitches those in unauthorised developments, and as to 3 pitches those living in conventional housing but (see paragraph 4.3.3) expressing a desire for a site pitch. Accordingly, the "unmet need" was shown as 25 pitches at the date of the Assessment and 32 pitches as at 2020, allowing for future residential demand of 7 further pitches over a 5-year period.

7. The Welsh Ministers approved the Council's Assessment as submitted.

8. Sections 103 and 104 of HWA came into force on 16 March 2016 and provide as follows:

> "103 *Duty to meet assessed needs*
>
> (1) If a local housing authority's approved assessment identifies needs within the authority's area with respect to the provision of sites on which mobile homes may be stationed the authority must exercise its powers in section 56 of the Mobile Homes (Wales) Act 2013 (power of authorities to provide sites for mobile homes) so far as may be necessary to meet those needs.
>
> (2) But subsection (1) does not require a local housing authority to provide, in or in connection with sites for the stationing of mobile homes, working space and facilities for the carrying on of activities normally carried out by Gypsies and Travellers.
>
> (3) The reference in subsection (1) to an authority's approved assessment is a reference to the authority's most recent assessment of accommodation needs

> approved by the Welsh Ministers under section 102(3)."

> "104 *Failure to comply with duty under section 103*
>
> (1) If the Welsh Ministers are satisfied that a local housing authority has failed to comply with the duty imposed by section 103 they may direct the authority to exercise its powers under section 56 of the Mobile Homes (Wales) Act 2013 so far as may be necessary to meet the needs identified in the authority's approved assessment.
>
> (2) Before giving a direction the Welsh Ministers must consult the local housing authority to which the direction would relate.
>
> (3) A local housing authority must comply with a direction given to it.
>
> (4) A direction given under this section—
>
> (a) must be in writing;
>
> (b) may be varied or revoked by a subsequent direction;
>
> (c) is enforceable by mandatory order on application by, or on behalf of, the Welsh Ministers."

9. It will suffice to set out the terms of subsection (1) of section 56 of the Mobile Homes (Wales) Act 2013:

> "A local authority may within its area provide sites where mobile homes may be brought, whether for holidays or other temporary purposes or for use as permanent residences, and may manage the sites or lease them to another person."

10. Accordingly, after 16 March 2016 the Council was under a duty to exercise its powers under section 56 of the Mobile Homes (Wales) Act 2013 "so far as [might] be necessary to meet [the] needs within [its] area [—as those needs were identified within the Assessment—] with respect to the provision of sites on which mobile homes [might] be stationed".

11. Pursuant to that duty, the Council identified land for a new Gypsy and Travellers site ("the Ellen Ridge site") and began construction works there. It also adopted a Site Allocation Policy, which it amended in May 2018 ("the Site Allocation Policy"). From the time of its amendment, the Site Allocation Policy stipulated that it was a condition of eligibility to be allocated a pitch that an applicant demonstrate that he or she had an "aversion to bricks and mortar accommodation".

Events leading to the proceedings

12. By a decision letter dated 2 July 2019, upon review of its earlier decision, the Council rejected an application by Mr McDonagh for allocation of a pitch on the Ellen Ridge site, on the ground that he had not demonstrated that he had an aversion to bricks and mortar accommodation. The decision was based on the Council's finding that Mr McDonagh had resided in a number of bricks and mortar properties since 2003. (The Council also decided that Mr McDonagh, though homeless for the purposes of Part 2 of HWA, did not have a priority need for accommodation by reason of his medical condition. Although that is an aspect of the case that was mentioned in the evidence and argument before the Judge, it has not been raised as an issue on this appeal and I shall not mention it further.)

13. On 4 July 2019, Mr McDonagh and members of his family forced entry onto the hitherto empty traveller Ellen Ridge site and stationed their caravans there.

The possession proceedings

14. The Council commenced possession proceedings by the issue of an N5 claim form on 29 July 2019. As I have said, the defendants were described as Persons Unknown. The grounds for possession were identified as "trespass". The particulars of claim identified the land of which possession was sought (defined there as "the land") by reference to a marked plan and to the Council's title. The land comprised several contiguous parcels; the Council's title to one parcel was unregistered, and its title to the other five parcels was registered under different title numbers. The totality of the land was more extensive than that set aside for the Ellen Ridge site.

15. Paragraph 5 of the particulars of claim stated:

> "On Thursday 4 July 2019 a group of caravans with members of the travelling community arrived on the land. The land is a new and previously unoccupied gypsy and traveller site in Newport where pitches are allocated in accordance with the Claimant's application procedures. A joint visit with the officers from Heddlu Gwent Police and Enforcement Officers from High Court Enforcement Group ('HCE'), who are acting as the Claimant's agents, was undertaken on Tuesday 9 July 2019. HCE undertook the Initial Encampment assessment and welfare assessment. None of the Defendants currently occupying the land have been allocated pitches on the site. The Defendants are therefore occupying the land without the Claimant's consent. the Claimant seeks possession of the land so that gypsies and travellers, who have been occupied [presumably, allocated] pitches there in accordance with the Claimant's allocation policy for the land can occupy it."

16. The Council filed evidence in support of its claim in the form of a witness statement from Ms Victoria Davies-Short, an Administration Manager employed by HCE. The statement proved the Council's title to the land. It also produced a Welfare Assessment Form that had been completed on site on 9 July 2019 by an enforcement agent, as mentioned in paragraph 5 of the particulars of claim. The form showed that

those who had occupied the land comprised a single extended family of Irish Travellers: there were seven adult males, seven adult females, six children under the age of six years, four children aged between six and ten years, three children aged between 11 and 15 years, and two children aged 16 or 17 years. The family had seven caravans, six vans and a car. The "reason for encampment" was recorded as "No were (sic) to go". The "expected duration of stay" was recorded as "Long as possible". Section 7 of the form recorded that the group did not include any pregnant women and that there was no need to consult health professionals with regard to "moving on". Section 8 recorded that no one within the group required regular medical treatment or examinations. Section 9 recorded that no one in the group had received or was currently in receipt of urgent medical treatment. Section 10 recorded that the group did not contain any disabled or elderly persons who were currently unable to move on. Section 11 recorded that a number of the children in the group attended local schools, though none of them were within four weeks of examinations. It recorded that to the question, "Would you like the Traveller Education Service to visit?", the answer was "No".

17. In accordance with CPR r. 55.5(1), upon issue of the claim form the County Court at Newport listed the case for hearing. The hearing date was 6 August 2019; the time allowed was 30 minutes.

18. On 30 July 2019, solicitors acting for Mr McDonagh sent to the Council a Judicial Review Pre-Action Protocol letter challenging the decision of 2 July 2019 on the ground, inter alia, that the Council was in breach of its duty under section 103 of HWA. By its response dated 1 August 2019, the Council complained that Mr McDonagh was seeking to circumvent due legal process by entering the land as a trespasser, and said that his proper course was to advance his case as a defence in the possession proceedings rather than to commence a claim for judicial review.

19. On 5 August 2019, Mr McDonagh's solicitors wrote to the court, requesting that the hearing be vacated from the list for the following day so that he could file a claim for judicial review. However, the hearing was not vacated.

20. The hearing on 6 August 2019 was before District Judge Porter-Bryant. Rule 55.8 applied to the hearing:

> "(1) At the hearing fixed in accordance with rule 55.5(1) or at any adjournment of that hearing, the court may –
>
> (a) decide the claim; or
>
> (b) give case management directions.
>
> (2) Where the claim is genuinely disputed on grounds which appear to be substantial, case management directions given under paragraph (1)(b) will include the allocation of the claim to a track or directions to enable it to be allocated."

A number of members of the McDonagh family were present and identified themselves as persons occupying the land; these included Mr McDonagh himself, who confirmed that he was speaking on behalf of the family. A representative of

Shelter Cymru was also in attendance and addressed the court on behalf of Mr McDonagh. The order made on that occasion records that the district judge considered a letter dated 5 August 2019 from Community Law Partnership (the solicitors who now act for Mr McDonagh), though he noted that there was no notice of acting on the court file. The district judge adjourned the hearing to 2.40 p.m. on 6 September 2019, with a time estimate of 1 hour. He ordered Mr McDonagh to file a statement setting out the nature of any related proceedings and how they might impact on the claim for possession; the statement might be filed by a solicitor, provided he were on the court file as acting for Mr McDonagh. Permission was given to the Council to file a statement in response.

21. Pursuant to the directions given at the first hearing, Mr McDonagh filed a witness statement by Mr Christopher Johnson, a solicitor at Community Law Partnership. The statement explained that, because legal aid was not available for trespassers, Community Law Partnership was unable to go onto the Court record as acting for Mr McDonagh. Mr Johnson stated that Mr McDonagh's aim was to obtain an authorised pitch for himself and his partner and their young child, but that his application to the Council for such a pitch had been unsuccessful: first, the Council initially decided that he did not have a local connection with the Newport area, although it had subsequently accepted that he did have such a connection; second, the Council then refused to put Mr McDonagh on the waiting list for a pitch, because it considered that he did not have an aversion to bricks and mortar, although when faced with an application for judicial review on the ground that aversion to bricks and mortar was not a relevant criterion under the Council's own Site Allocation Policy at the time the Council had then backed down; third, however, the Council then adopted a new Site Allocation Policy, which provided that an applicant for a site must show a "demonstrable aversion to bricks and mortar accommodation", and it decided that Mr McDonagh did not have such an aversion and was therefore ineligible to be placed on the waiting list for a pitch. Mr Johnson stated that the lawfulness of the new Site Allocation Policy was subject of challenge in judicial review proceedings brought by Mr McDonagh's sister, Miss Caroline McDonagh.

22. The key part of Mr Johnson's witness statement was paragraph 10:

> "Recently, given the fact that he and his family are subject to frequent evictions from unauthorised encampments, out of desperation Mr McDonagh (as well as other members of his extended family) moved onto empty pitches on the new Travellers' Site at Ellen Ridge. This has resulted in this court action. Our central argument in response to this eviction action is that the Claimant has a duty to meet assessed need for Gypsies and Travellers under the Housing (Wales) Act 2014, section 103. We argue that the Claimant has known about Mr McDonagh having to resort to unauthorised encampments in the Newport area for several years. He clearly must be part of the assessed need. Despite this, the Claimant has failed to meet that need with regard to Mr McDonagh. We draw an analogy with the previous case of *West Glamorgan v Rafferty*, which case involved the (now repealed) duty to provide sites under the Caravan Sites Act 1968. As explained above, we are seeking

> either ECF [i.e. Exceptional Cases Funding] to enable Mr McDonagh to defend this action in this court, or else legal aid for judicial review to lodge a separate judicial review challenge in the High Court. We also believe that this challenge, based on the s. 103 duty, has wider public importance for all Gypsies and Travellers, who have to resort to unauthorised encampments in the Newport area (and potentially for all Gypsies and Travellers who have to resort to unauthorised encampments in any local authority area in Wales)."

23. Pursuant to the permission contained in the order dated 6 August 2019, on 30 August 2019 the Council filed a statement in response from its Housing Needs Manager, Mr Simon Rose. Mr Rose stated that the Council agreed that Mr McDonagh had presented as homeless but that it did not accept that he was disabled or in priority need. He stated: "The [Council] also noted that Patrick McDonagh, in common with many other members of his family, had resided and on occasions still do [sic] reside in bricks and mortar accommodation both in Newport and elsewhere in the UK." In respect of Mr Johnson's arguments concerning section 103 of HWA, Mr Rose stated:

> "The [Council] does not accept these arguments. It believes that it has assessed the needs of gypsy and traveller families in its area. It has built a dedicated gypsy and traveller site at Ellen Ridge and developed a process for applying for and allocation of pitches at the site. It is completely wrong and unacceptable for Patrick McDonagh and his family to break into the site and take up occupation at pitches at the site and to remain in occupation there. They are trespassing on the site and the court should make a possession order to evict them so that the site can be occupied by gypsies and travellers who have been allocated pitches at the site through the correct procedures that are in place."

Mr Rose exhibited the decision letter dated 2 July 2019 to his statement.

24. After the evidence in the possession claim was complete but before the adjourned hearing on 6 September 2019, three significant things occurred.

25. First, on 3 September 2019 I heard and dismissed a claim by Mr McDonagh's sister, Miss Caroline McDonagh, for judicial review of the Council's Site Allocation Policy. Like her brother, Miss McDonagh had been refused a pitch on the ground that she had not demonstrated that she had an aversion to bricks and mortar accommodation. Her challenge to that decision included a challenge to the legality of the Site Allocation Policy on the grounds (1) that the policy did not contain a definition of "aversion", (2) that the decision to adopt the policy was made in breach of the duty under section 149 of the Equality Act 2010, and (3) that the policy was irrational in that it used the criterion of aversion to bricks and mortar as a requirement for admission to the waiting list for a pitch instead of incorporating it into a banding system of priorities. I rejected each of those grounds of challenge. The judgment has the neutral citation number [2019] EWHC 3886 (Admin) and I make further reference to it below.

26. Second, on 5 September 2019 Mr McDonagh filed a claim for judicial review of the Council's decision to seek possession of the land, together with an application for urgent consideration and for the grant of interim relief in the form of an order staying the possession proceedings until determination of the judicial review claim.

27. The Statement of Facts and Grounds in the judicial review claim was settled by leading and junior counsel. As it was before the Judge when he made the possession order and was verified by a short confirmatory witness statement by Mr Johnson, its contents are important and I shall summarise the main points so far as they are relevant to this appeal.

    1) Mr McDonagh has been on unauthorised encampments in the Newport area since 2012, having nowhere to station his caravan lawfully, and has been seeking an authorised pitch on a Council-run site for 7 years. (Paragraph 2)

    2) In 2015 the Council's Assessment "assessed there to be a need for the provision of 32 additional permanent pitches in Newport to be provided over the period 2015-2020 and a need for an additional 7 transit pitches." (Paragraph 15) However, in breach of its duty under section 103 of HWA "the [Council] has failed to provide sufficient permanent and/or transit sites to meet that assessed need." (Paragraph 16)

    3) The first ground of challenge was that the decision to bring possession proceedings was irrational, in circumstances where (a) the Council was in breach of its duty under section 103, (b) the Council was well aware that Mr McDonagh had resided in and resorted to the Newport area since 2012, (c) in the absence of sufficient site provision Mr McDonagh and his family had been continually forced to camp on unauthorised sites and to suffer hardship as a consequence, (d) the Council had not offered Mr McDonagh any lawful site on which to camp, whether permanently or temporarily, before bringing possession proceedings, (e) if evicted from the Ellen Ridge site Mr McDonagh and his family would be forced to camp on yet another unauthorised site and would suffer further hardship. Reliance was placed on *West Glamorgan County Council v Rafferty* [1987] 1 WLR 457. (Paragraphs 17 to 24)

    4) "[A]ny eviction from the Ellen Ridge Site would cause [Mr McDonagh] and his family (including now his 3 year old son, whose best interests should be a primary consideration) to suffer yet more hardship." (Paragraph 23)

    5) The second ground of challenge was that, in the circumstances, the Council's decision to seek possession of the land was disproportionate and breached the rights of Mr McDonagh and his family under Article 8 of the European Convention on Human Rights. (Paragraphs 25 and 26)

    6) The third ground of challenge was that, in deciding to bring possession proceedings, the Council had failed to take account of relevant matters: (a) the right of Mr McDonagh and his family to respect for their traditional way of life and its own positive obligation to facilitate that way of life; (b) its breach of its duty under section 103 of HWA; (c) "the [availability of the possibility of making an] offer of the provision of an alternative site for [Mr McDonagh] and his family." (This seems to be the intended sense of (c).] (Paragraph 27)

28. Third, on the morning of 6 September 2019 Upper Tribunal Judge Grubb, sitting as a Judge of the High Court, refused the application for interim relief, on the ground that Mr McDonagh's proper course was to raise the matters he relied on as a public law defence to the possession proceedings.

The Hearing before the Judge, and his Judgment

29. The hearing before the Judge on 6 September 2019 was, again, a hearing to which r. 55.8 applied. The decision for the Judge was therefore whether to decide the possession claim summarily or to give case management directions.

30. At the hearing, the Council was represented by Mr Matthew Paul of counsel, and Mr McDonagh spoke for himself and for the other unnamed defendants, several of whom were also present. The Judge had the witness statements with exhibits, the judicial review claim form and Statement of Facts and Grounds, and the Order of Judge Grubb. The order had been sent to the court with a letter from Community Law Partnership, which asked for an adjournment of the hearing so that an application to the Legal Aid Agency for Exceptional Cases Funding could be determined. It is clear from the transcripts of the hearing and of the Judge's extempore judgment that he had read all of these documents with great care and attention. He did not agree to the request for an adjournment.

31. Before the Judge, the Council's argument was as follows. The defendants were trespassers at common law. The policy under which Mr McDonagh had been refused a pitch had been held to be lawful. Although Mr McDonagh disputed the decision that he had no aversion to bricks and mortar, there was no evidential basis on which the Judge could properly hold that the decision was irrational. Insofar as Mr McDonagh relied on his claim to be a homeless person with priority need of accommodation, that did not avail him: the question of priority need was one for other proceedings, and even if such priority need were established it would not address the failure to satisfy the requirement of demonstrable aversion to bricks and mortar under the site allocations policy. The decision to seek possession was not within the exceptional class of case in which the court could hold that the enforcement of common law proprietary rights was a disproportionate interference with rights under Article 8 of the European Convention on Human Rights. Mr McDonagh had been in possession of the land only since 4 July 2019, less than four weeks before the claim was commenced, and proportionality did not require the Council to permit him to jump the queue for allocation of a pitch.

32. In an exchange recorded at pages 5 to 9 of the hearing transcript, the Judge explored with Mr McDonagh the relevance of the dismissal of Caroline McDonagh's challenge by judicial review to the Site Allocation Policy. The gist of Mr McDonagh's response was that, although he could not as he had hoped rely on a finding that the Site Allocation Policy was unlawful, he maintained that the Council had incorrectly applied the policy to him because it had mistakenly believed that he had lived at properties which in fact he had never lived in. The Judge took Mr McDonagh through the list of properties in the Council's decision letter dated 2 July 2019. Mr McDonagh admitted to having lived in two of the properties—"Just a couple of months, when the weather used to get bad."—but he denied having lived in the others.

33. For the Council, Mr Paul then submitted that, as Miss McDonagh's challenge to the legality of the Site Allocation Policy had failed, the two questions for consideration were (1) whether the Council had lawfully and rationally applied the policy in Mr McDonagh's case and (2) whether the decision to seek possession was proportionate. As to the first question, he submitted that there was no evidence before the court that indicated any real possibility of a finding that the Council's decision was unlawful on public law grounds. As to the second, he noted that it is only in exceptional cases that the vindication of private law rights will be held to be a disproportionate interference with Article 8 rights, and he submitted that, where the defendants had been on the land only since 4 July 2019 and had bypassed the allocations policy, thereby denying others the opportunity to obtain a pitch pursuant to the policy, it could not be disproportionate to seek possession of the land.

34. The Judge then turned to Mr McDonagh and attempted carefully to identify his proposed defence. He began by referring to Miss McDonagh's unsuccessful challenge to the Site Allocation Policy and the Council's decision that Mr McDonagh did not qualify because he had no aversion to bricks and mortar. Then there was the following exchange (transcript, pages 13 and 14):

> "THE JUDGE: The point then being made is that the Council have made a decision that you do not qualify through their policy requirements to get a pitch. If that is the case, that explains why you have not been allocated a pitch by the Council. There is not anything to indicate to me on what I read that the Council was plainly and obviously wrong, that it acted irrationally (to use Mr Paul's word, a legal word), or that it made any obvious mistakes which cause me to believe that there are any grounds for challenging that part of the decision. Right?
>
> MR MCDONAGH: Yes.
>
> THE JUDGE: And, indeed, you have told me today of a couple of properties where you have lived.
>
> MR MCDONAGH: Yeah.
>
> THE JUDGE: And you have confirmed that you do not have an aversion to bricks and mortar because you will go and live somewhere like that when the weather is bad.
>
> MR MCDONAGH: Yeah.
>
> THE JUDGE: So it seems to me pretty hopeless to challenge a decision by the Council that you do not fall within their policy."

35. The Judge then turned (transcript, pages 15ff) to a specific consideration of the relevance of section 103 of HWA. The Council accepted that it owed the duty created by section 103, but it denied that it was in breach of the duty. Mr Paul said (transcript, page 16):

> "Sir, the local housing authority's position is that it is compliant with its statutory duty and that it has established space for up to 32 pitches should a sufficient number of people who are eligible present themselves. There are at present 4 pitches on the site at Ellen Ridge which at present do not have lawful occupiers because they are being occupied unlawfully by these respondents."

After reference to the Assessment, Mr Paul continued:

> "The Council in establishing the land at Ellen Ridge has set aside sufficient land in due course between the 2015 and 2020 period to cater for that need [i.e. the need identified in the Assessment] should it crystallise in exactly those terms. At present, as I understand it—I do not want to give evidence here, because it is not in any evidence before the court—there are a smaller number of applicants for that land."

36. The Judge then referred to the distinction between the statutory assessment and the policy for allocations, and Mr Paul responded (transcript, page 17):

> "So, perfectly agreed, the Council has a statutory duty to accommodate gypsies and travellers. However, those who it says are gypsies and travellers is the subject of this case, rather than …"

There was then the following exchange between the Judge and counsel:

> "THE JUDGE: The point I want to be clear about is that the policy, which may have been incorrect before, has been amended and is, as we now know, lawful.
>
> COUNSEL: Yes.
>
> THE JUDGE: It is an entirely separate matter about the compliance with duty under section 103 in terms of making an assessment and then provision …
>
> COUNSEL: It is a separate matter, yes."

Mr McDonagh then interjected, saying that the Council was the only local housing authority to have introduced the requirement of a demonstrable aversion to bricks and mortar into its allocations policy. The transcript at page 17 records:

> "JUDGE: Mr McDonagh, I will accept that from you today. But, even on that basis, what we do know is that it has been held that the policy, even if it is unique to Newport, is lawful.
>
> MR MCDONAGH: Yes, it's lawful, yeah."

The further exchanges, immediately preceding the giving of judgment, are also relevant (transcript, pages 18 and 19):

> "THE JUDGE: Can you point me to any evidence that there are not enough sites around, apart from saying that you yourself have not been allocated?
>
> MR MCDONAGH: That's the only site in Newport at the moment, is this one that's just been built. And the travellers there that it was built for left and went to Pembroke. And the Henrys, that was allocated, they bought their own land out around Cwmbran, out that way. So there's nobody allocated to the pitches anyway. And we knew this before we went in. We told this to the Council, but it was in one ear and out the other. So basically, if you decide to put us out, we're going to end up camping around the town, the site is going to be empty—it's going to be allocated to nobody.
>
> THE JUDGE: If it is not going to be allocated to anybody and it is going to be empty, that would indicate that there is enough site provision, would it not?
>
> MR MCDONAGH: Yes.
>
> THE JUDGE: So there is room.
>
> MR MCDONAGH: Yes, there is room.
>
> THE JUDGE: Your complaint is simply: 'If I'm not there, no-one's going to be there and it's an empty site.'
>
> MR MCDONAGH: It's an empty site, yet they're moving us about the town, that's what I mean. And if I leave the town I'll have to take my kids out of school. My kids are at school here.
>
> …
>
> THE JUDGE: The problem is not that there are not enough sites. There are enough sites around, but they are just not allocating a pitch to somebody who deserves one.
>
> MR MCDONAGH: Yeah, that's basically it."

37. The Judge gave a clear and detailed extempore judgment. Having set out the background to the matter, he observed (paragraph 6) that the Council's new Site Allocation Policy had been held to be lawful. He noted that Mr McDonagh had failed the threshold requirement under the policy, namely the demonstration of a demonstrable aversion to bricks and mortar; and, while remarking that it was "not for [him] to seek to go behind decisions of the Council", said that the Council's decision on the point was "plainly … made out" (paragraph 11). In paragraph 13 the Judge concluded:

> "There is no evidence that there has been any application of the policy in an irrational way, or obvious clear mistakes made as to it. It is what Mr Paul describes as a 'hard review' point. I

> cannot seek and do not seek to carry out a hard review, and it strikes me that there is no likelihood of any court being able to carry out such a hard review."

38. The Judge then turned to the question whether the decision to bring possession proceedings was disproportionate. He stated his conclusion in paragraph 14:

> "It would be an exceptional case where the court grants permission and permits such a defence to proceed on the basis that, notwithstanding the [Site Allocation] policy and consideration of it, it is disproportionate for the claimant to seek to exercise its powers in the way it seeks to exercise it by bringing possession proceedings. In my view, there is simply no evidence before me, or any suggestion or reason to think, that there will be a serious issue to arise as to justify such a defence that the bringing of this claim for possession is disproportionate."

The Judge specifically considered the contention that the Council was in breach of its duty under section 103 of HWA by failing to provide sufficient sites to meet the assessed need. He dealt with that contention in paragraphs 17, 18 and 21:

> "17. One proceeds on an assumption of regularity in terms of the acts of the local authority. There was no evidence before me to indicate that there is a failure to assess needs and to meet those needs under section 103. I am told that the assessment under section 103 was carried out in 2015, some 4 years ago. In any event, when one looks at the substance of what Mr Johnson says on behalf of Mr McDonagh, it does not appear to carry weight because Mr McDonagh himself tells me that, as far as he knows, there is room and there is provision of adequate sites. His complaint is that if he (and I take it other members of his family) is evicted from the site, it will simply be empty.
>
> 18. That rather cuts its way through alleged breach of section 103 and points back to a complaint as to allocation and as to how to allocate pitches. As I have indicated already, there does not appear to be any basis upon which to challenge the allocation, the judicial review application brought by Caroline McDonagh failed, and there is no reason to think that any application by Mr Patrick McDonagh or others would succeed on different or similar grounds."
>
> "21. The public law points have been raised by Mr Johnson in his letters written on behalf of Mr McDonagh. In my view, having considered that, I do not see merit in the challenge. This is not a case where there has been any unlawful or irrational application of a policy. It is not a case, it seems to me, of an exceptional nature where it can be said that the claimant's action is disproportionate. The central point raised

> under section 103 seems to me not to have merit when one considers what is said today to me about non-compliance with the duty and, second, Mr McDonagh's observations as to how he would say the duty has been discharged. His case, it seems to me, is that it has."

39. It is unnecessary, for the purposes of this appeal, to refer to the remaining parts of the judgment.

The Appeal

40. This appeal is limited to a review of the Judge's decision; it is not a rehearing: CPR r. 52.21 (1). The appeal will be allowed only if I conclude that the Judge's decision was wrong: r. 52.21 (3). (This appeal does not raise questions of serious procedural or other irregularity in the lower court.)

41. The amended grounds of appeal are dated 18 November 2019. In granting permission to appeal on all grounds, Judge Harrison observed that he was considering them "compendiously", since there was "overlap and interrelationship". The amended grounds extend to some three-and-a-half pages. There are nine numbered grounds; ground 1A is divided into eight allegations of error on the part of the Judge, some of them relying on passages in the transcript of the hearing rather than in the judgment itself; the eighth of those allegations is expounded in three numbered particulars. It is open to doubt whether this is a helpful way in which to present grounds of appeal. I shall not set out, or even seek to paraphrase, the grounds individually; nor shall I address each and every point they raise. The essential complaints, as they were developed in written and oral submissions, seem to me to be the following:

    1) The Judge was wrong to conclude that there was no realistic public law defence, because it was realistically arguable that the Council's decision to seek possession was unlawful because it was in breach of a section 103 duty owed to Mr McDonagh.

    2) Further, it was realistically arguable that the Council's decision to seek possession was unlawful because it had failed to consider alternatives to eviction, including tolerating the defendants as trespassers on parts of the land other than the relatively small area where the four existing pitches had been created.

    3) Further, it was realistically arguable that the Council's decision to seek possession was unlawful because the Council had failed to carry out a lawful assessment of the relevant children's principal needs, to identify the outcome that was in the children's best interests given those needs, and to attach substantial weight to achieving that outcome, as required by Article 3 of the United Nations Charter on the Rights of the Child and section 28(2) of the Children's Act 2004.

Discussion

42. With some diffidence, I have come to the view that, although the Judge's reasoning and analysis were largely correct, he was wrong to make a possession order and ought

instead to have given case management directions for a defended claim. Accordingly the appeal will be allowed, subject to qualifications to be included in the case management directions. I express diffidence, because I am reluctant to imply any criticism of the way in which the Judge dealt with the matter. He had prepared thoroughly for the hearing; he was painstaking in his efforts to identify the issues and to ensure that he understood the case being advanced by Mr McDonagh; he explained his conclusions clearly, succinctly and with considerable logical force; and he lacked the advantage of full argument, and had to deal with the matter within the constraints of a relatively short hearing. It is only after a full day of oral submissions, with the benefit of substantial skeleton arguments and time to consider the matter and give a reserved judgment, that I have come to a different conclusion from that of the Judge, although I respectfully agree with much of his reasoning

43. My conclusions, which I explain below, are in short as follows:

1) The Judge was right to reject the proposed defence based on the Council's alleged breach of the duty under section 103 of HWA. If there was any such breach, it gave to Mr McDonagh no proper ground of complaint. The Judge was right to consider that Mr McDonagh's primary issue lay with the Council's refusal to allocate to him a pitch.

2) The Judge was also right to conclude that the Council's refusal to allocate Mr McDonagh a pitch did not give him a defence in the proceedings. It was not contended that the Site Allocation Policy was unlawful. And the Judge was entitled to conclude that there was no basis for permitting Mr McDonagh to defend the claim on the ground that the policy had been unlawfully applied in his case.

3) However, the circumstances of the case justified permitting Mr McDonagh to defend the claim on the basis that the Council's decision to seek possession was arguably unreasonable and therefore unlawful, because it had apparently failed to consider, and had certainly failed to adopt, alternatives to eviction, such as tolerating a trespass, either on the four allocated pitches or on the undeveloped parts of the land, for a longer or shorter period. The Judge did not deal with that aspect of the matter in his judgment. That is understandable, because it was not discussed at the hearing; however, it was raised in the written materials before the Judge.

4) Further, the ground of defence based on the best interests of the children ought to be considered upon evidence at trial, whether it be considered a free-standing ground of defence or simply an aspect of the general *Wednesbury* unreasonableness defence.

Section 103, HWA

44. In my judgment, the argument advanced by Mr Cottle, on behalf of Mr McDonagh, on the basis of section 103 is plainly wrong. Its error lies in the conjunction of two connected mistakes: the mistaken contention that the section 103 duty is owed to particular individuals, and the failure to understand the way that "needs" operate at different stages of the Council's functions. I explain this below.

45. It is convenient to begin with the question: To whom is the section 103 duty owed? Although it was not necessarily essential to his case, Mr Cottle put the matter on the basis that the duty was owed to Mr McDonagh personally, as well as to others. The logic of the argument on this point was as follows. First, Mr McDonagh is a Traveller within the definition in section 108 of HWA. Second, Mr McDonagh was one of the persons whose views were canvassed and recorded in the Assessment for the purpose of assessing need, either as being at the time resident in a caravan or as being resident in conventional housing but expressing a desire for a pitch: see paragraph 6 above. Third, as Mr McDonagh's needs were identified by the Council and included in the assessed needs in the Assessment, the duty under section 103 is owed, *inter alios*, to him personally.

46. That argument is clearly wrong. The first premiss is very probably correct: the Council did not question it on this appeal or before the Judge, and to do so would only with the greatest difficulty sit alongside the concession made in *R (Caroline McDonagh) v Newport City Council* that Miss McDonagh was a Traveller within the statutory definition. I note also that in the decision letter dated 2 July 2019 the Council accepted that Mr McDonagh was an Irish Traveller. The second premiss is a matter for trial: it may or may not be the case that Mr McDonagh is one of the persons identified, though not named, in the Assessment, but the court cannot adjudicate on that issue without hearing evidence. Thus for present purposes the second premiss may be accepted. However, the conclusion follows neither from the premises nor from the wording of HWA.

47. Section 103 does not impose a duty to provide a site to each person identified as having a relevant need; it does not even impose a duty to identify particular persons with relevant needs; and it does not establish any procedure for challenge by, or review at the behest of, those claiming to have such needs. (This may be contrasted with Part 2 of HWA, which deals with homelessness and makes provision for the determination of the case of each particular applicant.) Rather, section 103 creates what might be termed a strategic duty to make available sufficient sites to meet the general (not person-specific) need identified in the statutory assessment. It is for this reason that the statutory recourse is given to the Welsh Ministers, who may decline to approve an assessment under section 102 and may enforce compliance with an approved assessment under section 104.

48. This analysis is correctly reflected in the Welsh Ministers' Assessment Guidance:

> "162. Before starting this [assessment] process, it is important to note an estimate of needs does not replace or contradict Local Authority duties under Homelessness or other Housing legislation. Estimates of need will not relate directly to specific households who are consulted and should simply represent an overall picture of likely needs which must be planned for. Once needs have been established, Local Authorities can use their existing Homelessness and Housing Allocation policies to make detailed assessments of who would be eligible for assistance and allocated pitches.
>
> 163. It is a fundamental this is communicated to Gypsy and Traveller participants to ensure they are not under the

> impression their aspirations will be met directly through this process."

Essentially the same point is made in paragraphs 105 and 106, which I do not need to set out here.

49. Accordingly, I agree with the submissions of Mr Davis for the Council that the duty under section 103 was not owed personally to Mr McDonagh. It follows from this conclusion that, regardless of whether or not Mr McDonagh was one of those whose representations were taken into account in the Assessment, the contents of the Assessment do not themselves give Mr McDonagh an enforceable right to receive a pitch.

50. However, the argument for Mr McDonagh, as it appears in the papers before the Judge and was expounded in submissions to me by Mr Cottle, purports to operate also at a more indirect level, as follows. First, as Mr McDonagh is a Traveller within the statutory definition, he is within the class of those persons whose needs are required to be identified in the statutory assessment and thereafter met under section 103: this follows from the absence of any qualification, such as a need for an aversion to bricks and mortar, in the statutory provisions, and it is reflected in the Council's own Assessment, which included in its calculations a number of persons who were then residing in bricks and mortar but who wished for a pitch: see paragraph 6 above. Second, the Council has failed to make the required provision for the assessed needs, in two respects: (a) it has provided only 4 pitches, not the required 32 pitches; (b) it has not provided any pitches for at least some of the assessed needs, because the only pitches it has provided are subject to the Site Allocation Policy, which has the effect of excluding at the threshold some persons falling within the assessed needs, namely persons who cannot demonstrate an aversion to bricks and mortar. Third, the consequence is that persons such as Mr McDonagh, who would have access to pitches if the Council complied with its statutory duty, do not do so. Fourth, accordingly, it is unreasonable and therefore unlawful for the Council to decide to seek Mr McDonagh's eviction from the land.

51. In my judgment, this argument too is plainly incorrect.

52. The starting point, which needs always to be borne in mind, is the point established above: regardless of whether or not Mr McDonagh was one of those whose representations were taken into account when the Council produced the Assessment, the Assessment does not have the effect of establishing, for the purpose of the exercise of the Council's functions with respect to meeting the accommodation needs of any particular person, either (a) that that person has any accommodation need or (b) what is the specific nature of that person's accommodation need.

53. The argument for Mr McDonagh must therefore operate by reference to the statutory provisions. It is here that it is fallacious. The fact that a person may be a Traveller even if he does not have an aversion to bricks and mortar (section 108) does not establish either (a) what if any "accommodation needs" he has (section 101(1); cf. also the definition of that expression in section 108) or (b) that he has a "need" for a site on which a mobile home may be stationed (section 103(1)). The apparent assumption that, because "aversion" is not relevant to the identification of a Traveller,

it is not relevant to the identification of an accommodation need is obviously incorrect.

54. The Welsh Ministers' Assessments Guidance reflects the correct understanding both of the concept of "accommodation needs" and of its relationship with the definition of "Gypsies and Travellers". After setting out and explaining the definition of "Gypsies and Travellers", the Assessments Guidance continues in paragraph 12:

> "A broad definition is necessary to achieve a full understanding of the accommodation needs of these communities. Gypsies and Travellers, and their children and other relatives, in bricks and mortar housing may form part of the source from which future site need and aspiration may arise, and it will be essential to understand this. Assessing the needs of housed Gypsies and Travellers will also help identify the ways in which housing may be made to work better for them, and made more attractive to Gypsies and Travellers in general. The intention should not be to encourage these communities to integrate into conventional housing. However, adapted or improved housing could reduce the numbers who leave or wish to leave conventional housing for sites. Some of those currently on unauthorised sites may also wish to move into, or back into, housing if it can better suit their circumstances."

55. The fact that the strategic identification of needs (that is, under section 101 of HWA) is not a matter of applying a definition of Gypsy or Traveller is reflected in a further passage of the Assessments Guidance, which also brings out the different nature of the housing authority's functions when meeting individual need and provides examples of the sort of cases that might arise:

> "31. The inclusion of someone in the survey as a Gypsy or Traveller within the definition … does not, in itself, imply a person should live on a site. However, the Housing (Wales) Act 2014 has consolidated the definition of 'Gypsies and Travellers' with the Mobile Homes (Wales) Act 2013, which means all such individuals should be considered as having 'Gypsy Status' in planning terms.
>
> 32. If identified need for Gypsy and Traveller pitches has been established, Local Housing Authorities will continue to be responsible for the allocation of pitches on sites. Local Housing Authorities may consider a variety of ways in which pitch needs could be met, including …
>
> 33. If a need for Gypsy and Traveller pitches is identified, the Local Authority will need to consider how to make the necessary provision (as outlined in Chapter five).
>
> 34. The following groups may be particularly likely to give rise to pitch need:

> Mobile Home dwelling households:
>
> - who have no authorised site anywhere on which to reside;
>
> - whose existing site accommodation is overcrowded or unsuitable and are unable to obtain larger or more suitable accommodation;
>
> - who contain households who are unable to set up separate family units and who are unable to access a place on an authorised site or develop their own site.
>
> 'Bricks and mortar' dwelling households:
>
> - whose existing accommodation is overcrowded or unsuitable ('unsuitable' in this context includes unsuitability by virtue of psychological aversion to bricks and mortar accommodation);
>
> - which contain concealed households who are unable to set up separate family units and who are unable to access suitable or appropriate accommodation."

56. Chapter 3 of the Assessments Guidance deals with "Assessing Accommodation Needs". At paragraphs 164ff the guidance draws out the distinction between needs and preferences. Paragraph 170 reads:

> "The consideration of needs versus preferences is likely to be focused around three major themes:
>
> a. community members in conventional housing who claim a need for mobile home pitches due to a cultural aversion;
>
> b. community members who claim a need for mobile home pitches in a different Local Authority area than the one undertaking the assessment; and
>
> c. Those on unauthorised sites who claim a need for mobile home pitches in the specific Local Authority undertaking the assessment."

Again, it is important to bear in mind that this discussion is concerned with the strategic assessment of need (that is, under section 101) and not with the identification of need in particular applicants for the provision of accommodation. The "theme" identified as "(a)" acknowledges that "cultural aversion" is relevant to need. For the purpose of the statutory assessment, those living in conventional accommodation are regarded as having a relevant need only if they demonstrate their cultural aversion to bricks and mortar, but those who are living in caravans are not so required; paragraph 180 of the Guidance provides:

> "180. Local Authorities should not require individuals who are currently resident in mobile home accommodation to demonstrate they have a cultural aversion to conventional housing for the purposes of the GTAA."

This, however, relates to the purposes of the strategic assessment under section 101 of HWA, not to the discharge of the local housing authority's responsibility to meet the needs of particular persons under its functions with respect to homelessness and pitch allocation. That those resident in mobile homes are not required to demonstrate for the purposes of the statutory assessment that they have a cultural aversion to conventional accommodation simply reflects, first, the fact that the "need" for a pitch is obviously likely to be more open to question in the case of persons who do not even live in caravans and, second, the concern of the Assessments Guidance, evident throughout that document, to avoid the perception of insensitivity that might exacerbate cultural suspicions and tensions. Neither as a matter of statutory provision nor as a matter of logic can it mean that cultural aversion is in principle irrelevant to the existence of a need for pitches among those who are living in caravans though it is relevant to the existence of such a need among those who are living in conventional accommodation.

57. The question of cultural aversion is addressed in greater detail in paragraphs 171 to 177 of the Assessments Guidance:

> "171. For many Gypsies and Travellers, living in mobile homes is a key aspect of their cultural identity. However, the Census 2011 suggested only 24% of Gypsy and Traveller communities in England and Wales live in caravans or other temporary structures. The Census also suggested almost 76% of these communities currently live in houses, flats or bungalows in England and Wales.
>
> 172. Many of those living in houses, flats or bungalows do so by choice and for a variety of reasons. However, it is also believed a significant minority of this population have moved into conventional housing due to a lack of lawful mobile home pitch alternatives.
>
> 173. Amongst the community members living in conventional housing, it is likely some experience what is known as a 'cultural aversion' to this type of accommodation. That is, community members who have a tradition of living in a mobile home or on sites and who struggle to adapt to living in conventional bricks and mortar accommodation.
>
> 174. Cultural aversion could be created by the failure to adapt to a new type of accommodation or more sedentary lifestyle or isolation from community and family members whilst living in conventional housing.
>
> 175. Local Housing Authorities will need to carefully consider whether those interviewed who have a stated preference for

> living on mobile home sites could also be said to have a cultural aversion to maintaining their accommodation in conventional housing. This consideration should have reference to:
>
> a. the cultural tradition of the household for living in mobile homes;
>
> b. the reason for moving into conventional housing;
>
> c. the likelihood of harm to the individual if they remain in conventional housing; and,
>
> d. the developing case-law around the issue of cultural aversion.
>
> 176. During the accommodation assessment, it would not be appropriate for Local Authorities to require interviewees to demonstrate their aversion through any kind of medical or psychiatric assessment. The assessment process aims to develop a broad estimate of likely overall Gypsy and Traveller pitch needs in the area, rather than the needs of any specific individuals.
>
> 177. Any in-depth assessments of an individual's cultural aversion should be made as part of the Local Housing Authority's homelessness or pitch allocation policies, rather than through the accommodation assessment."

Here, again, the Assessments Guidance proceeds on the correct basis that, when the local housing authority is concerned to identify the housing needs of particular persons with a view to meeting those needs in accordance with its policies, it will properly consider those persons' "cultural aversion" on the facts of the particular case. The statutory assessment under Part 3 of HWA, by contrast, is concerned with making a strategic assessment of overall need with respect to the relevant review period.

58. In the present case, the specific allegations of failure by the Council to comply with its section 103 duty were twofold: first, that only four out of 32 of the pitches assessed to be necessary had been provided; second, that none of the pitches, whether four or 32, were provided to persons, such as Mr McDonagh, who were within the scope of the assessed need but were refused allocation because of their failure to demonstrate an aversion to bricks and mortar. Neither of these allegations of breach of statutory duty has any force in Mr McDonagh's case, and the second has no force at all as an allegation of breach of statutory duty. As for the first allegation, on Mr McDonagh's own case it makes no difference whether there are four or 32 pitches, because he maintains that there is no other demand for any of them and that, however many there be, he is excluded from them by the Council's Site Allocation Policy.

59. As for the second allegation of breach of statutory duty, the Judge was right to say that it amounts to a complaint regarding not the provision of sites but rather the decision not to allocate a pitch to Mr McDonagh. As the Assessments Guidance

correctly explains, this is a matter for the local housing authority's allocation policy. Mr McDonagh's complaint must therefore be either that the Site Allocation Policy is unlawful or that it has been wrongly applied in his case. Again, the Judge correctly identified this as the principal issue raised.

The Site Allocation Policy and Mr McDonagh

60. It was not argued before the Judge or on appeal before me that the Site Allocation Policy was unlawful. Therefore this point does not strictly arise for consideration. However, in the light of the foregoing discussion concerning the section 103 duty, it is convenient to explain here why an attack on the legality of the policy would have been misguided.

61. In view of the way in which Mr McDonagh's case has been advanced in these proceedings, it is reasonable to suppose that the decision not to challenge the Site Allocation Policy resulted from my judgment of 3 September 2019 in the case *R (Caroline McDonagh) v Newport City Council* (see paragraph 25 above). In that case, the Council accepted that Miss McDonagh was within the definition of Gypsies and Travellers in section 108 of HWA, and the issue was whether she was properly excluded from allocation of a pitch because she did not demonstrate an aversion to bricks and mortar as required by the Site Allocation Policy. In her challenge to the lawfulness of that policy, Miss McDonagh did not rely on the duty under section 103 of HWA. (Section 103 was not even mentioned. The only provision in Part 3 of HWA referred to in counsel's submissions was section 108. The only other provisions of HWA referred to were in Part 2, relating to homelessness.) Rather, she advanced three grounds of challenge. First, she complained that the criterion of "aversion" was imprecise and undefined. I rejected that complaint, construed the policy and made a declaration accordingly. Second, she complained the Site Allocation Policy had been adopted without compliance with the duty under section 149 of the Equality Act 2010 ("the public sector equality duty"). I rejected that complaint also. Third, she alleged that, in the light of the public sector equality duty, the Site Allocation Policy was unreasonable in the *Wednesbury* sense. I identified the point at paragraph 62 and addressed it at paragraphs 65 and 66:

> "62. [Counsel for Miss McDonagh] made a point that, if it did not originate with me, nevertheless was latched on to by me when I gave permission to apply, when I said:
>
> > 'As redrawn, the policy purports to be a policy that respects the culture of gypsies and travellers because it is applicable to them. However, the inclusion of the requirement of demonstrable aversion arguably has the contrary effect. Instead of having due regard to the opportunity to live in accordance with one's own cultural heritage, it substitutes a criterion of practical albeit not clinical harm that has only a contingent relationship to culture. To put it another way, it is not at all clear to me that the policy respects the importance of allowing people to live in accordance with their cultural heritage as a good in itself.'"

> "65. [As regards that matter], the critical point is that the valuing of a traveller's culture is actually achieved by the policy itself. The 'demonstrable aversion' requirement is not directed to the question whether the culture is one that is valued or ought to be given respect: that question receives its answer from the policy itself. Rather, the requirement is directed to the scarcity of resources and the need to follow some course in order to allocate scarce resources to those in greatest need. Thus it is not a valid objection to the requirement to say that it fails to afford inherent value to the cultural practice.
>
> 66. If and in so far as the submission is that, by dealing with scarcity of resources by creating an exclusionary factor rather than by introducing banding so as to create priorities, the policy is irrational, the submission goes far too far. To say that people without an aversion should be necessarily put on a waiting list is untenable. Of course, ideally they might be put on a waiting list. Indeed, ideally they might be given pitches. However, where resources are very limited (as is indicated by the evidence regarding the adoption of the policy), there may very well be strong grounds for saying that persons who do not have an aversion but merely a strong preference driven by culture, should not be put onto the waiting list at all. For example, an applicant without any aversion to bricks and mortar might be on the waiting list and then given a pitch in circumstances where, despite general pressures on pitches, a vacancy has arisen and the applicant is next in line. If there is not and is unlikely to be an available bank of pitches to accommodate changing circumstances, such an outcome may very well serve only to undermine the policy of allocation to those with greatest need. A pitch that might be needed for those in greatest need next week will have been taken by someone without such need. The short point is that there is no basis for supposing that the failure to use a banding system is irrational."

62. Thus, subject to issues of construction, Miss McDonagh's substantive challenge to the Site Allocation Policy rested on the complaint that the "aversion to bricks and mortar" criterion unreasonably failed to reflect respect for the cultural way of life of Gypsies and Travellers because it was used as a threshold criterion rather than as a factor in prioritising applicants for scarce resources.

63. For reasons that will be apparent from paragraphs 44 to 57 of the present judgment, section 103 of HWA makes no difference to the conclusion that the Site Allocation Policy is not unlawful. (That may be why Miss McDonagh's representatives did not refer to section 103.) Part 3 of HWA does not relate to the identification of the accommodation needs of any particular person. Those needs fall to be identified, on the basis of the evidence pertaining to the particular person, in the context of the exercise by the local housing authority of its functions in respect of homelessness and site allocation as the case may be. A person's preferences are not necessarily the same as his or her needs, and in assessing whether the preference of a Gypsy or

Traveller for a pitch is a matter of need or of preference there is no reason why the local authority should not have regard to the presence or absence of an aversion to conventional housing. It is easy to see that a person who is actually residing in a caravan might be doing so because he or she has an aversion to bricks and mortar; however, it is not axiomatic that that is the case, and the local housing authority must form its judgement on the facts and evidence before it in the particular case. Sections 101 to 103 of HWA have nothing to do with the identification of the accommodation needs of particular persons in respect of the allocation to them of any form of accommodation.

64. In the absence of a challenge to the Site Allocation Policy, Mr McDonagh's complaint regarding pitch allocation can only be, as the Judge rightly said, that the policy has been misapplied in his case. On this appeal there are two sufficient answers to such a complaint. First, it is not raised in the Amended Grounds of Appeal and was not pursued in argument. Second, as the Judge observed, neither the evidence nor the answers given by Mr McDonagh in the hearing provided any reason to suppose that the complaint had any substance; indeed, the Judge thought that it clearly had none, and I do not disagree.

Alternatives to Eviction

65. The foregoing conclusions do not, however, establish that the Council's decision to bring possession proceedings was reasonable, in the public law sense, and thus lawful. The question arises whether it was reasonable for the Council to take possession proceedings rather than taking some lesser course such as tolerating the presence of the defendants as trespassers on some part of the land. That question was not the focus of the submissions before the Judge, when of course Mr McDonagh was unrepresented and advanced his case largely in responses to questions put to him by the Judge. However, it was, as it seems to me, something that properly arose for consideration on the basis of paragraphs 17 to 24 and 27(c) of the Statement of Facts and Grounds in the judicial review claim, which was before the Judge and had been read by him. It also seems to me to be a point that, in the circumstances of this case and in the light of the arguments advanced before me, ought properly to be permitted to be raised on appeal even if it had not been raised below.

66. Both the Statement of Facts and Grounds and Mr Cottle's submissions on this appeal sought to draw support for Mr McDonagh from the decision of the Court of Appeal in *West Glamorgan County Council v Rafferty* [1987] 1 WLR 457. In that case the local authority brought possession proceedings to evict gypsies from land that they had occupied as trespassers. In the possession proceedings, on a first appeal against the initial possession order, the High Court gave the gypsies leave to defend on the ground that they had an arguable case that the decision to seek to evict them was unreasonable and therefore unlawful. In judicial review proceedings, the High Court held that the decision to seek to evict the gypsies was indeed unreasonable and therefore unlawful. The Court of Appeal dismissed appeals against both decisions; the dismissal of the appeal in the judicial review proceedings meant that the possession proceedings were aborted. In connection with the possession proceedings, having cited some authorities, Ralph Gibson LJ said at 470:

> "The dicta in these cases, to the effect that invalidity of the decision to serve the notice to quit can be raised as a defence

> against the claim for possession without prior application to the High Court to quash the council's decision, are unaffected by the principles stated by the House of Lords in *O'Reilly v. Mackman* [1983] 2 AC 237. That was made clear by the further decision of the House of Lords in *Wandsworth London Borough Council v. Winder* [1985] AC 461.
>
> In this case the decision of the plaintiffs to start proceedings to evict the gipsies was taken with reference to land vested in the plaintiffs as freehold owners. It was not suggested for the gipsies that in making that decision the plaintiffs were acting pursuant to any particular statutory power … as was the case in *Cannock Chase District Council v. Kelly* [1978] 1 WLR 1, namely powers under the Housing Act 1957; nor was it suggested for the plaintiffs that the principles stated in that case were not applicable to the decision by the plaintiffs in the circumstances of this case if unreasonableness in the *Wednesbury* sense [1948] 1 KB 223 could be made out on the facts.
>
> It follows, in my judgment, that that which was common ground between the parties on this appeal was rightly not disputed by either side: if the decision on 16 September 1985 to evict the gipsies was void for unreasonableness, the plaintiffs' claim for possession must fail. ... Further, if the decision to evict was not void, the defendant gipsies have no defence and the original order for possession would have to be restored."

67. I shall not refer to the detailed facts of the *Rafferty* case, which in many respects were quite different from those of the present case. As Mr Davis pointed out in his submissions to me, one very material distinction between the cases is that in the *Rafferty* case it was common ground that the plaintiff council was in continuing breach of its duty (since repealed, and substantially different from the duty under section 103 of HWA) under section 6 of the Caravan Sites Act 1968 to "to exercise their powers under section 24 of [the Caravan Sites and Control of Development Act 1960] … so far as may be necessary to provide adequate accommodation for gipsies residing in or resorting to their area." Although this is indeed a distinction, and an important one, it should be noted that at 475, with reference to the judicial review proceedings, Ralph Gibson LJ observed:

> "It is necessary to emphasise that Kennedy J did not rule that the decision to evict was unreasonable because the plaintiffs were in breach of statutory duty. He held that, having regard to all the circumstances, it was unreasonable to resolve to evict the gipsies from the site without making any arrangements whatever for provision of alternative accommodation for any of them."

The relevance of breach of statutory duty in the *Rafferty* case was explained in context by Ralph Gibson LJ in a helpful passage at 476 – 477:

> "The question is whether within the principles of law stated above, the decision of the plaintiffs must be described as perverse or as revealing 'unreasonableness verging on an absurdity': see *Reg. v. Hillingdon London Borough Council, Ex parte Puhlhofer* [1986] AC 484, 518D. I have found the decision difficult but, in the end, I am driven to the same conclusion as that reached by Kennedy J for the following reasons. The court is not, as I understand the law, precluded from finding a decision to be void for unreasonableness merely because there are admissible factors on both sides of the question. If the weight of the factors against eviction must be recognised by a reasonable council, properly aware of its duties and its powers, to be overwhelming, then a decision the other way cannot, be upheld if challenged. The decision on eviction was a decision which required the weighing of the factors according to the personal judgment of the councillors but the law does not permit complete freedom of choice or assessment because legal duty must be given proper weight.
>
> The continuing breach of duty by the plaintiffs under section 6 of the Act of 1968 to 'gipsies residing in or resorting to' the area of West Glamorgan does not in law preclude the right of the plaintiffs to recover possession of any land occupied by the trespassing gipsies, but that does not remove that continuing breach of duty from the balance or reduce its weight as a factor. The reasonable council in the view of the law is required to recognise its own breach of legal duty for what it is and to recognise the consequences of that breach of legal duty for what they are."

68. In the *Rafferty* case the council's breach of statutory duty was a relevant and weighty factor in determining whether its decision to seek possession was reasonable. No such factor operates in the present case, because the statutory duty is materially different and because, even if (which it does not accept) the Council is indeed in breach of the section 103 duty, that breach has no bearing on Mr McDonagh's position, for reasons already explained. However, the question remains whether on the particular facts of the present case it is arguable that the Council's decision to seek possession was unreasonable in the public law sense of that word.

69. One matter relevant to consideration of that question is the Welsh Government's *Guidance on Managing Unauthorised Camping* (2013) ("the Management Guidance"), which is directed to local authorities among others and aims to set out, among other things, "recommended courses of action, i.e. a step-by-step guide of what to do if you are dealing with an unauthorised encampment" (paragraph 23). A summary of the guidance to local authorities is found in paragraphs 41 to 51 of the Management Guidance, under the heading "Approaches to Resolving Unauthorised Encampments". I need only set out paragraphs 41 and 42:

> "41. Effectively, if an unauthorised encampment arises and there are no alternative authorised pitches in the area, local authorities have three clear paths relating to how they can

> resolve the encampment. Each option should be carefully considered:
>
> - Path 1 – To seek and obtain possession of the occupied site (eviction proceedings).
>
> - Path 2 – To 'tolerate' the Gypsy or Traveller occupiers, if only for a short time, until an alternative site can be found or the occupiers move on voluntarily.
>
> - Path 3 – To find an alternative site, if only on a temporary basis, and offer the Gypsy or Traveller occupiers the chance to move onto it.
>
> 42. Deciding which path to take is about finding a critical balance between considering the welfare and human rights of Gypsies and Travellers, whilst safeguarding the human rights of landowners, occupiers and the public, and protecting them from health and safety hazards or public nuisance. Each encampment should be dealt with on a case-by-case basis."

Section 5 of the Management Guidance provides a step-by-step guide to assist local authorities in their approach to unauthorised encampments. Four steps are identified. Step 1 is identifying the encampment. Step 2 is an Initial Encampment Visit. Step 3 is a Welfare Assessment. Step 4 is the "cost-benefit analysis and resolving the issue". All of section 5 is relevant, but I shall set out only some parts relating to Step 4:

> "119. Unauthorised encampments are, by definition, unlawful. However it is recognised by the Welsh Government that until the issue of site provision is properly addressed unauthorised encampments will continue to occur.
>
> 120. Each encampment location must be considered on its merits against criteria such as health and safety considerations for the unauthorised campers, traffic hazard, public health risks, serious environmental damage, genuine nuisance to neighbours and proximity to other sensitive land-uses.
>
> 121. When assessing the campers' circumstances it is particularly important that local authorities consider how the encampment impacts on children and how eviction actions will also impact on those children. This process should help local authorities to assess what action would be in the best interests of child occupants, which should be a key factor in deciding how to proceed.
>
> 122. Local authorities may consider that some encampments will be allowed to remain either on a long-term or short-term basis.
>
> 123. This decision will be determined by factors including:

> - The Initial Encampment Visit Assessment.
> - The Welfare Assessment.
> - Local circumstances.
> - General considerations such as health and safety hazards, traffic issues, public health risks and other land users.
>
> …
>
> 126. The local authority and relevant partner agencies will need to decide whether the individual circumstances of the encampment, for example the risks to public safety or the impact on the local community, outweigh other factors such as the welfare and human rights considerations of the encampment occupiers.
>
> …
>
> 137. In most circumstances, local authorities will have three paths from which to choose when resolving the issue of an unauthorised encampment and it is important that they carefully consider **each** option (see *R(Casey) v Crawley BC*):
>
> - **Path 1** – To seek and obtain possession of the occupied site (eviction proceedings).
> - **Path 2** – To tolerate the Gypsy or Traveller occupiers, if only for a short time, until an alternative site can be found.
> - **Path 3** – To find an alternative site, if only on a temporary basis, and offer the Gypsy or Traveller occupiers the chance to move onto it."

70. In the present case, it appears that the Council carried out a welfare assessment in respect of the encampment on the land. It does not appear what consideration if any was given to alternatives to seeking possession; there is no evidence as to the decision-making process.

71. There are several obvious factors militating in favour of a decision to seek possession, among which are the following: the land—or, at least, part of it—was specifically identified for provision of pitches to such persons as were assessed as having need of them; Mr McDonagh occupied the land after, and apparently in consequence of, his failure to establish either a need for a pitch or a priority need for accommodation under the homelessness legislation; the Council's welfare assessment arguably did not show any pressing or urgent needs; and, significantly, the unauthorised encampment cannot be laid at the door of the Council's failure to comply with its duty under section 103 of HWA, for reasons already explained at length.

72. However, there are factors pointing the other way; on the basis of the information available at present, indeed, it is arguable that the Council has managed to bring about a perverse outcome. Even allowing that Mr McDonagh does not have an "aversion" to bricks and mortar within the terms of the Site Allocations Policy, he is a Traveller with what appears to be a marked and enduring preference for living in a caravan in accordance with the traditions of his cultural heritage. The Statement of Facts and Grounds, verified by Mr Johnson, stated that Mr McDonagh had been "residing in and resorting to the Newport area on unauthorised encampments since 2012 in his caravan" and that he and his family had "been continually forced to camp on unauthorised sites"; and, whether or not such encampments had been interrupted by periods spent in conventional housing, there seems no reason to dismiss those statements summarily. It also appears to be likely that, if Mr McDonagh is evicted from the land to which the possession order relates, he will proceed to another location in the Newport area and set up another unauthorised encampment there. The obvious public benefit in avoiding unauthorised encampments is identified on several occasions in the Management Guidance; see, for example, paragraph 31. Also of significance is the presence of several children on the land and at any subsequent unauthorised encampment; see, for example, paragraph 121 of the Management Guidance. Further, the Council has accepted that Mr McDonagh is homeless for the purposes of Part 2 of HWA, though it has decided that he does not have priority need for accommodation.

73. The Council has been under a duty since 2016 to make land available for 32 pitches for mobile homes pursuant to the Assessment. Whether or not 32 actual pitches have been provided, the Council has the land for them on the site to which these proceedings relate. On 4 July 2019, when Mr McDonagh and his family went onto the land, not one of the 32 pitches was occupied. There is an issue as to whether Mr McDonagh's entry onto the land prevented others from taking up four pitches that had been allocated to them; the Council's evidence that it did is hardly impressive. Even if four pitches had been allocated, however, that appears to be as far as it goes. I refer again to what Mr Paul, on instructions, told the Judge:

> "[T]he local housing authority's position is that it is compliant with its statutory duty and that it has established space for up to 32 pitches should a sufficient number of people who are eligible present themselves. There are at present four pitches on the site at Ellen Ridge which at present do not have lawful occupiers because they are being occupied unlawfully by these respondents."

In the case of *R (Caroline McDonagh) v Newport City Council*, one of the points advanced by the Council in explanation of the Site Allocation Policy was the need to decide how to use scarce resources in the face of the pressure of demand. However, the evidence in this case does not suggest that there is any pressure of demand for pitches on the Ellen Ridge site, at least among those who satisfy the requirements of the policy. To the contrary, the Council's position appears to be that it has not got around to developing the remaining 28 pitches indicated by the Assessment because it has not received any applications for them from persons who are eligible for them. (I note here that I was informed that after the possession order was made Mr McDonagh and the other defendants moved from the pitches to a different area of the land that is

subject of the possession order. That, however, was not in evidence before me or the Judge.)

74. The burden of showing that the Council's decision to seek possession was unlawful is a heavy one, as is made clear by the remarks of Ralph Gibson LJ in the *Rafferty* case at 476 (see paragraph 67 above). However, on the facts of the present case, the defence appears to be sufficiently arguable to be allowed to proceed and to be determined after full consideration of the evidence.

75. On the other hand, it would not be a defence to the possession claim merely to show that the Council failed to consider alternatives to seeking possession, if the proper conclusion were that such consideration would have made no difference to the decision. This must follow from parity of reasoning with section 31 (2A) of the Senior Courts Act 1981, which so far as relevant to this case provides:

> "The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, …
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

Best Interests of the Children

76. In the light of my discussion of *Wednesbury* unreasonableness and the alternatives to eviction, I do not need to consider this further point in detail. Reliance is placed on the Council's obligation to attach substantial weight to achieving the outcome that was in the best interests of the several children on the unauthorised encampment and, in particular, of Mr McDonagh's three-year-old son. In the Statement of Facts and Grounds in the judicial review proceedings, the point appears to be an aspect of the general *Wednesbury* unreasonableness defence. Mr Cottle tended to present it as a distinct ground of defence. How it is to be categorised is, for present purposes, not of primary importance. As the possession claim is to proceed to trial, I consider it proper to permit the argument based on the best interests of the children to be raised in the Defence and in evidence.

77. It might be helpful to add that, as the possession order will be set aside and the matter will proceed to trial, I do not think it appropriate to seek to define the precise ambit of the arguments that can be raised, subject to the conclusions expressed above. Thus, as Mr McDonagh is to be allowed to advance the public law unreasonableness defence, I should not think it right at this stage to decide that he could not also seek to rely on Article 8 rights, which might conveniently be considered at the same time. I observe, however, that at present the grounds for establishing disproportionate interference with Article 8 rights appear to be tenuous. The Judge noted in paragraph 14 of his judgment (paragraph 38 above) that there was no evidence to justify an allegation that the proceedings were disproportionate, though it might in fairness to Mr McDonagh be noted that paragraph 2 of District Judge Porter-Bryant's order of 6 August 2019 defined the evidence required of Mr McDonagh in narrow terms.

Conclusion

78. The appeal is allowed. The possession order dated 6 September 2019 will be set aside. Case management directions will be given with a view to a prompt trial of the claim.

79. However, Mr McDonagh will not be permitted to advance the proposed defence based on breach of section 103 of HWA. For the reasons set out in paragraphs 44 to 64 above, there is no merit in that defence.

80. The permissible grounds of defence identified on this appeal are (1) that the decision to bring possession proceedings rather than take an alternative course was *Wednesbury* unreasonable and thus unlawful, and (2) that the decision to bring possession proceedings was unlawful because it failed to attach substantial weight to achieving an outcome that was in the best interests of the children on the land.

81. In the light of communications from counsel since this judgment was circulated in draft, I think it convenient to spell out what paragraphs 79 and 80 above do and do not mean. First, any attempt by Mr McDonagh to revive the section 103 defence, which I have considered at length in this judgment and firmly rejected, will be an abuse of process. Paragraph 79 ought to be clear enough on this point. If Mr McDonagh were to include the defence in a statement of case, it would fall to be struck out. Second, the position of the other, unnamed defendants is slightly, though not greatly, different. They have not advanced any grounds of defence, other than through Mr McDonagh. They will not be permitted to raise any defence based on the contention that they were owed personally a duty under section 103 of HWA; the order that I make will make this clear. Subject to this, I do not think it appropriate to seek at this juncture to define how they may or may not put their cases with regard to their personal circumstances. This judgment will give a clear indication as to the likely parameters of permissible defences; however, any statement of case will have to be considered on its own terms. Third, paragraph 80 simply identifies the permissible grounds of defence that have been raised on this appeal and that therefore justify the grant of permission to defend the claim. It does not amount to a decision precluding the inclusion in any subsequent Defence of any other basis for resisting the claim. If some other ground of defence were raised, it would have to be considered on its own merits, whether at trial or at a prior application to strike it out as disclosing no reasonable ground of defence. Fourth, paragraph 80 is intended to identify the permissible grounds of defence that have been identified on this appeal. It is not intended to define the way in which those grounds may be formulated or the arguments that may be raised in support of them, save for what I have said about the section 103 defence. Fifth, it should go without saying that nothing I have said about permissible grounds of defence in any way constrains the decision of the judge who hears the possession claim.