Case No: F01NP052

IN THE COUNTY COURT AT CARDIFF

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

Date: 3 June 2021

Before:

HIS HONOUR JUDGE KEYSER QC

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Between:

NEWPORT CITY COUNCIL	**Claimant**
- and -	
(1) PATRICK MCDONAGH	
(2) EDWARD MCDONAGH	
(3) KATHLEEN MCDONAGH	
(4) SHANNON WARD	
(5) PERSONS UNKNOWN	**Defendants**

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Adrian Davis (instructed by **Head of Law and Regulation, Newport City Council**) for the **Claimant**
Stephen Cottle (instructed by **The Community Law Partnership Ltd**) for the **Second, Third and Fourth Defendants**
The First Defendant appeared **in person.**
The Fifth Defendants did not appear and were not represented.

Hearing dates: 27, 28, 29 April 2021

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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 QC

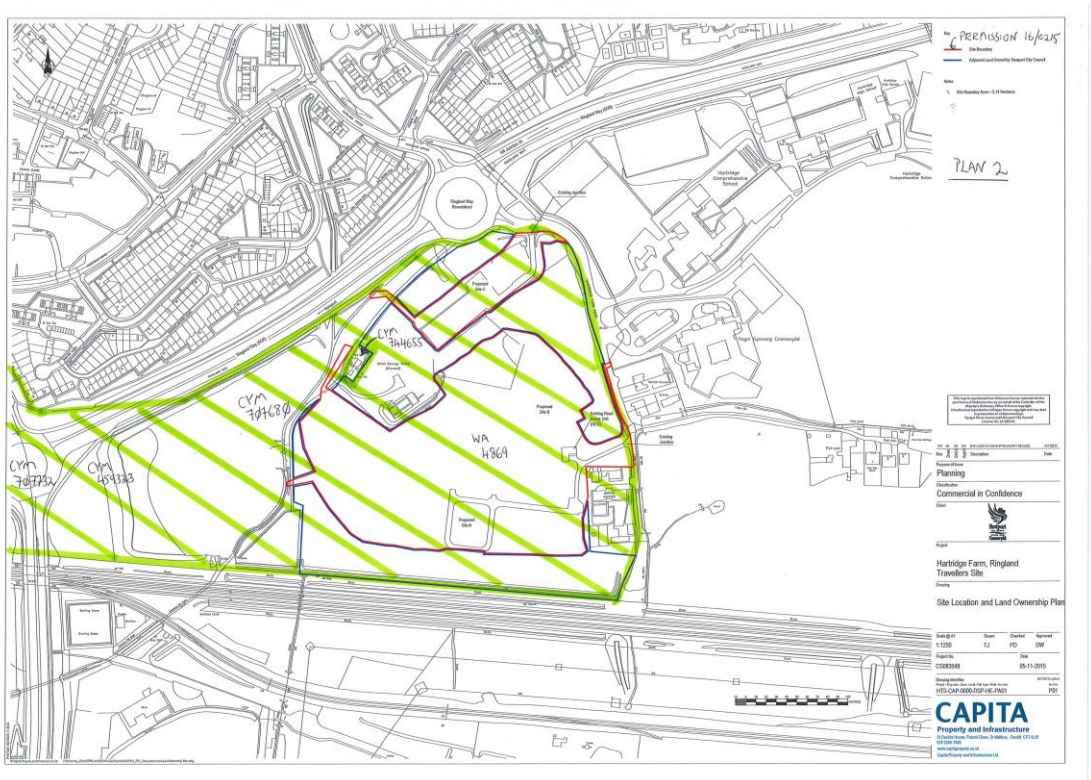
Covid-19 Protocol: This judgment was handed down remotely by circulation to the representatives of the Claimant and of the Second, Third and Fourth Defendants by email and by release to BAILII. The date and time for hand-down is deemed to be 10.30 a.m. on Thursday 3 July 2021.

JUDGE KEYSER QC:

Introduction

1. This is my judgment upon a claim by Newport City Council ("the Council") for possession of land in its ownership in Newport ("the Land"). The first defendant, Mr Patrick McDonagh, and members of his family, who are Irish Travellers, entered onto the Land on 4 July 2019 and, with some comings and goings by individuals, have been there ever since. All of the defendants admit that they are trespassers on the Land. The issue in the case is whether, although the defendants have no right to be present on the Land, they are able to defeat the claim for possession by means of a defence on public law grounds.

2. The Land comprises five parcels of land to which title is registered (title nos. WA4869, CYM707680, CYM456542, CYM707732 and CYM459323) and one parcel of unregistered land. The Land extends over about 20 acres. Rather more than half of the Land, comprising much of the southern and eastern parts of the Land and a section of the northern end of the Land, has been allocated by the Council for social provision of a site for Gypsies and Travellers and has planning permission for use as such. This part of the Land is known as the Ellen Ridge Site. I shall say a little more about the layout of the Land later. For the present, the most useful plan is perhaps the following (slightly, but not importantly, cropped on its left in this reproduction):



The Land is shown by hatching within a thick border. The Ellen Ridge Site comprises two areas within the Land, each of which is marked by a thin boundary line. The larger of these areas is the central part of the Land and is accessed by an entrance from the public highway on the east (right). The smaller area is an irregular rectangular area of land towards the far north of the Land, oriented from the north-east to the south-west;

access to this is gained by a separate entrance a little to the east of the Ringland Way Roundabout. The large area comprises what are known as Site A and Site B on the Ellen Ridge Site, and the smaller area comprises what is known as Site C. Site A and Site B are partially developed, with infrastructure. Site C is entirely undeveloped; it is no more than a piece of rough land. The remainder of the Land is not part of the Ellen Ridge Site.

3. Part of the defendants' case is that the Council could and should relocate them from the part of the Ellen Ridge Site where they currently are (Site A and Site B) either to Site C or to other parts of the Land and tolerate them as trespassers there, instead of seeking to evict them from the entirety of the Land and thereby giving occasion for a never-ending sequence of unlawful roadside encampments.

4. This is the third judgment that I have given concerning the Ellen Ridge Site and the second in these proceedings.

- On 3 September 2019, in proceedings for judicial review, I heard and dismissed a challenge by Mr Patrick McDonagh's sister, Miss Caroline McDonagh, to the legality of the Council's Site Allocation Policy ("the Site Allocation Policy"); the judgment ("the Policy Judgment") has the neutral citation number [2019] EWHC 3886 (Admin).

- On 12 June 2020, in these proceedings, I allowed, on limited grounds, an appeal by the first defendant, Mr Patrick McDonagh, against a summary possession order made by Deputy District Judge Jackson in the County Court at Newport (Gwent) on 6 September 2019; that judgment ("the Appeal Judgment") can be found on BAILII with the reference [2020] EW Misc 5 (CC).

These two judgments contain a fairly comprehensive summary of the background to this matter and I shall refer to them for more detail on some of the matters mentioned below.

5. Some remarks are in order at this point concerning the course that these proceedings have taken. When the original possession order was made, the defendants were "Persons Unknown". Mr Patrick McDonagh was present at the hearing on 6 September 2019 and spoke on behalf of himself and the McDonagh family, several members of which were also present. (Mr Patrick McDonagh repudiated the appellation "head of the family", but it is clear that that is what he is for practical purposes.) He alone appealed against the possession order, contending that a number of public law defences ought to have been permitted to proceed to trial. He was represented on the appeal by Mr Cottle and by the Community Law Partnership.

6. In the Appeal Judgment, I expressed agreement with nearly all of the deputy district judge's reasoning and conclusions; in particular, I rejected Mr Patrick McDonagh's argument that there was an arguable defence on the basis that the Council was in breach of a duty owed to the defendants under section 103 of the Housing (Wales) Act 2014 ("HWA"). However, for good or ill, I came to the conclusion that the defendants ought to be permitted to raise, on what seemed to be other arguable grounds, a defence that the decision to bring possession proceedings was unlawful. Upon allowing the appeal, I gave detailed case management directions, which included the following: Mr Patrick McDonagh was named as first defendant; the second defendant was to be "Persons

Unknown", subject to any subsequent application to identify further named defendants; defendants were required to file and serve their defences, if any, by 3 July 2020; and they were "not permitted to include in their defences a ground of defence alleging that the claimant owed to them or any of them a duty under section 103 of the Housing (Wales) Act 2014."

7. Mr Patrick McDonagh filed an appellant's notice at the Court of Appeal, seeking permission to appeal against my order on the grounds that I was wrong to have ruled out the proposed defence under section 103 of HWA. The application to the Court of Appeal has not been pursued with any vigour and has now been stayed pending the outcome of the possession proceedings. I am told that it was filed in order to preserve Mr Patrick McDonagh's position on the section 103 defence lest it be thought necessary to revive it.

8. Despite his application to the Court of Appeal, Mr Patrick McDonagh did not file a defence in these proceedings. However, defences were filed by three other members of the family: Mr Edward McDonagh, Ms Kathleen McDonagh and Miss Shannon Ward. At a hearing on 18 January 2021 HHJ Harrison ordered that they be named as the second, third and fourth defendants respectively. The defences, in largely identical terms, were filed by the Community Law Partnership, which has continued to represent those defendants throughout the proceedings, as has Mr Cottle. A witness statement, prepared by the same firm of solicitors, was made by Mr Patrick McDonagh, who was called to give evidence at the trial by Mr Cottle. Cross-examination of the Council's witnesses on matters pertaining to Mr Patrick McDonagh was conducted by Mr Cottle, who also made oral submissions concerning Mr Patrick McDonagh's position.

9. The surprising explanation for Mr McDonagh's failure to file a defence is said to be that, because he received Legal Aid for the application to the Court of Appeal for permission to appeal, he cannot now obtain Legal Aid to defend these proceedings. Even if that explanation be true, it is no excuse for the failure to file a defence. The unavailability of Legal Aid does not excuse litigants from compliance with the requirements of the Civil Procedure Rules 1998 or court orders. Mr McDonagh could have filed a basic defence; no evidence has been adduced to suggest he could not have done so, and the level of professional assistance that he has received up to and including trial gives additional reason for supposing that he could.

10. As I explained in the course of argument, the resulting position is as follows. Insofar as the defences of the other defendants raise generic defences to the possession claim, Mr Patrick McDonagh will be able to ride on their coat-tails and take the advantage of the grounds that have been advanced. He will not, however, be permitted to rely on any ground of defence that relies on circumstances particular to himself; if he wanted to do so, he ought to have complied with the Rules and with the orders of the court.

11. By application notice dated 5 February 2021 the second, third and fourth defendants applied for the joinder of the Welsh Ministers as Part 20 Defendant to these proceedings. That application was opposed by the Welsh Ministers and was refused by HHJ Jarman QC on 11 March 2021.

12. Finally, it is now apparent that the third defendant, Ms Kathleen McDonagh, has left the Land to go to reside with her mother, though there is evidence that her caravan remains on the Land. She did not appear at the trial and Mr Cottle did not advance

submissions on her behalf, though he and the Community Law Partnership continue to represent her.

13. The remainder of this judgment will be structured as follows. First, I shall set out a basic narrative. Second, I shall mention the relevant legal framework regarding the Site; this part of the judgment will consist mainly of references to what I have said before on the matter, which I shall not repeat at length. Third, I shall say something about the use of public law defences in possession proceedings. Fourth, I shall address the generic arguments advanced on behalf of the second and fourth defendants. Fifth, I shall consider the arguments advanced on behalf of the second and fourth defendants respectively with regard to their personal circumstances.

14. I am grateful to Mr Davis and Mr Cottle for their oral and written submissions.

Narrative

15. On 25 February 2015, section 101 of HWA came into force. It requires local housing authorities in Wales to carry out and prepare an initial assessment of the accommodation needs of Gypsies and Travellers residing in their areas.

16. In compliance with its duty under section 101 of HWA, the Council carried out an assessment and in September 2015 produced a report, *Gypsy and Traveller Accommodation Assessment: 2015-2020* ("the Assessment"). The "unmet need" was shown as 25 pitches (a pitch can accommodate two caravans) as at the date of the Assessment, rising to 32 pitches in 2020 on account of future residential demand. In November 2016 the Welsh Ministers, in the exercise of their powers under section 102 of HWA, approved the Assessment as submitted. At the time of the Assessment, the Council owned no residential caravan pitches. At the date of this judgment, the Ellen Ridge Site is the only location for residential caravan pitches owned by the Council.

17. As a result of the Assessment, and prior to its approval by the Welsh Ministers, in March 2016 the Council applied for planning permission for the provision of 35 caravan pitches for permanent occupation by Gypsies and Travellers on an area comprising slightly under 12 acres of the Land. The officer report in respect of the application recorded that the proposal included ancillary infrastructure consisting of roads, drainage, footways, lighting, visitor parking spaces, truck parking spaces, bin storage, CCTV equipment and landscaping. An existing building was to be retained as a site office and community facility. The report explained that it was proposed to deliver the pitches in three phases, beginning with 9 pitches to accommodate two families, and that on completion it would consist of three distinct and separate areas: Site A containing 18 pitches; Site B containing 13 pitches; and Site C containing 4 pitches. Entry to Site A and Site B would be by a single point of access on Hartridge Farm Road at the east of the Land; Site A would be at the southern end; Site B would be to the north of Site A. Site C would be accessed by a separate access point from the public highway at the far north of the Land, near to the Ringland Way roundabout.

18. Planning permission was granted on 11 August 2016. Construction works were delayed, first by the need to obtain funding from the Welsh Government and thereafter

by archaeological and ecological surveys that were required to be carried out on the Land. In the event, the first pitches were not ready for occupation before mid-2019.

19. Meanwhile, the Council had adopted a policy for the allocation of pitches on the Site. In May 2018 that policy was replaced by a revised version, the Site Allocation Policy, which remains in force; see paragraphs 22ff of the Policy Judgment. The Site Allocation Policy stated in paragraph 1.3 that its aim was "to ensure that the allocation of pitches on sites is made in a fair and transparent way and that those in the greatest need are given priority assistance". Applicants entitled to be placed on a waiting list for a pitch were banded in Bands A to D. A precondition to inclusion on a waiting list was set out in the opening words of the definition of each band: "Applicants who have a demonstrable aversion to bricks and mortar accommodation and …"

20. The Council proceeded to assess applications from Gypsies and Travellers for pitches on the Site in accordance with the Site Allocation Policy. Mr Patrick McDonagh and other members of his family applied unsuccessfully for pitches; however, Ms Kathleen McDonagh and Miss Shannon Ward did not apply. The Council identified an immediate need for three pitches, one of them a double pitch, for families who satisfied the criteria in the Policy. These three pitches were completed by about June 2019 but they were never occupied by the successful applicants, all of whom informed the Council in March or April 2019 that they no longer wished to take up the offer of the pitches.

21. Evidence as to events in the period when the Ellen Ridge Site was under construction was given by Michelle Aspey, who is employed by the Council as a Housing Manager – Strategy. The evidence, which was not challenged, was as follows. Members of the McDonagh family, including those who first occupied the Ellen Ridge Site on 4 July 2019 (among whom was Mr Patrick McDonagh), took to periodically setting up unauthorised encampments on a variety of sites in Newport, from which on nearly all occasions they refused to move until the Council took enforcement action to evict them. This took place mainly during the spring and summer of 2017, 2018 and 2019. (I ought to record that there is evidence that some members of the McDonagh family had from time to time been on unlawful encampments for several years before 2017.) Most of the sites were owned by the Council; they included sports grounds, public parks and an educational establishment, which were within categories that had been identified as places where unauthorised camping would not be tolerated in the *Gwent Regional Protocol for Managing Unauthorised Encampments*, which was a memorandum of understanding between Gwent Police and the major local authorities in Gwent. Ms Aspey formed the opinion that the encampments were a protest by the family members at the Council's refusal to allocate to them pitches on the Ellen Ridge Site. She was confirmed in that opinion by Mr Patrick McDonagh's remarks to Council officers who attended at one such encampment in August 2017, when he told them that, if the family were evicted, they would move into either the bus station or the civic centre in Newport city centre.

22. By a decision letter dated 2 July 2019, upon review of its earlier decision, the Council rejected an application by Mr Patrick 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 Patrick McDonagh had resided in a number of bricks and mortar properties since 2003. (The Council also decided that Mr Patrick 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.) The other applicants from the extended McDonagh family were similarly unsuccessful because they failed to satisfy the Council that they had an aversion to bricks and mortar accommodation.

23. On 4 July 2019 Mr Patrick McDonagh and members of his family forced entry onto the hitherto empty Ellen Ridge Site and stationed their caravans there.

24. On 9 July 2019 officers from High Court Enforcement Group Limited ("HCEG"), as agents of the Council, attended at the Ellen Ridge Site to carry out a Welfare Assessment. The information on the Welfare Assessment included the following. The encampment consisted of one family group, comprising seven adult males, seven adult females, and fifteen children (six under the age of 6 years, four aged between 6 and 10 years, three aged between 11 and 15 years, and two aged over 15 years). There were seven tourer caravans, six vans and a car. Against "Reason for Encampment" was written, "No were [scil. Nowhere] to go". Against "Expected duration of stay?" was written, "Long as possible". It was recorded that there were no pregnant women in the group, that there were no disabled or elderly persons who were unable to move on, and that no one in the group required regular medical treatment or examinations or urgent medical treatment.

25. Having considered the Welfare Assessment, the Council concluded that the most appropriate course of action was to commence possession proceedings. Accordingly, a claim form for possession was issued on 29 July 2019. The first hearing of the claim was on 6 August 2019, when it was adjourned to a further hearing on 6 September 2019. The course of the proceedings is summarised in paragraphs 14ff of the Appeal Judgment.

26. A few days before the date fixed for the hearing of the possession claim, I heard and dismissed a claim by Miss Caroline McDonagh, for judicial review of the Council's decision that, because she had not demonstrated that she had an aversion to bricks and mortar accommodation, she was ineligible for a pitch. Her claim for review of 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. In the Policy Judgment, I rejected each of those grounds of challenge.

27. I record at this point that in these proceedings no defendant has sought to argue (a) that the Site Allocation Policy is unlawful, (b) that he or she meets the allocation criteria in the Site Allocation Policy or (c) that he or she is lawfully entitled to be allocated a pitch on the Ellen Ridge Site.

28. On 5 September 2019, the Community Law Partnership on behalf of Mr Patrick 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. The Statement of Facts and Grounds was settled by leading and junior counsel. Its main points were as follows:

1) Mr Patrick 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 Patrick McDonagh had resided in and resorted to the Newport area since 2012, (c) in the absence of sufficient site provision Mr Patrick 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 Patrick 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 Patrick 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 Patrick 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 Patrick 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 Patrick 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 Patrick McDonagh] and his family." (This seems to be the intended sense of (c).] (Paragraph 27)

29. On the morning of 6 September 2019, Upper Tribunal Judge Grubb, sitting as a Judge of the High Court, refused Mr Patrick McDonagh's application for a stay of the possession proceedings, on the grounds that he could raise the matters he relied on as a public law defence to the claim for possession.

30. Accordingly, the possession claim was heard by the deputy district judge on 6 September 2019, when he made a possession order.

31. On 18 September 2019 counsel for Mr Patrick McDonagh renewed the application for interim relief in the judicial review proceedings at a hearing before HHJ Jarman QC, sitting as a Judge of the High Court. He gave directions for an oral permission hearing on the first open date after 1 October 2019 and granted an injunction restraining the Council from enforcing the possession order in the meantime. The Council filed an acknowledgment of service and Summary Grounds of Resistance settled by Mr Davis. One of the grounds of resistance (paragraph 16) was that

> "[A] County Court appeal against the possession order is an adequate alternative remedy to bringing this claim for judicial review. Essentially, the Claimant wants to remain on the Site. To try to achieve that aim, the proper course of action is for the Claimant to appeal the possession order in the possession proceedings, rather than bring this claim for judicial review. The Claimant will [be] able to put forward his public law arguments in any appeal in the possession proceedings, as he was able to as a defence to them: *Wandsworth LBC v Winder* [1985] 1 AC 461; *Manchester City Council v Pinnock* [2011] HLR 7. As there is an alternative remedy available to the Claimant, he ought to be refused permission to bring this judicial review claim."

That was the basis on which, after HHJ Jarman QC had granted interim relief, the judicial review proceedings became dormant, and it was the basis on which I proceeded when hearing the appeal against the possession order.

32. On 12 June 2020 I allowed an appeal against the possession order. Although I expressed substantial agreement with the reasoning of the deputy district judge, I concluded that the questions whether it was unreasonable of the Council to address the situation at the Ellen Ridge Site by possession proceedings and whether the Council had attached substantial weight to achieving an outcome that was in the best interests of the children on the Land ought to be considered at trial. See paragraphs 65 to 81 of the Appeal Judgment.

33. After the possession order had been set aside, the parties filed a signed draft consent order in the judicial review proceedings. On 6 October 2020 HHJ Lambert, sitting as a Judge of the High Court, made an order dismissing the claim for judicial review and giving directions for the determination of the costs of the proceedings. On 16 November 2020 HHJ Jarman QC ordered that the Council pay 50% of Mr Patrick McDonagh's costs of the judicial review proceedings.

34. As a result of my appeal decision, managers at the Council carried out a review of their decision to continue to seek possession. The available information, the factors considered and the conclusions reached were set out in a document, "Unauthorised Encampment—Decision Recording Process", prepared by Ms Aspey in September 2020. Her witness statement contained the following evidence concerning the review:

> "67. The enquiries that my colleagues and I made included information on the members of the McDonagh family that have been named in Welfare Assessments … as well as those who have been named as parties and those who have filed defences to these proceedings.

> 68. I weighed up all the facts known to the Council. This included the personal circumstances of the Defendants. I took into account that they had entered and remained on the Ellen Ridge Site illegally. I considered that Patrick, Kathleen, Edward McDonagh and Ms Shannon Ward had lived in bricks and mortar accommodation at various times and did not meet the criteria of demonstrating an aversion to bricks and mortar accommodation in the Site Allocation Policy to be allocated a pitch at the Ellen Ridge Site, for the reasons I have set out in the statement, and that they could be housed in bricks and mortar accommodation. … I took into account the medical circumstances of each of them. I also considered that if they were evicted from the Ellen Ridge Site, it is likely that at least some of them may set up another unauthorised encampment in another part of Newport.
>
> 69. I took into account the assessments of the children's needs by Children and Families Services and the recommendation that it would be in the best interests of the children to be allowed to remain on the Ellen Ridge Site but if this was not possible an alternative permanent residence should be identified. The Social Workers did not feel that eviction would pose any immediate child protection risks. I gave the information contained in these children assessments substantial weight when considering all the factors and circumstances. On the other hand, I considered the needs of the children of families who met the Council's Site Allocation Policy for a pitch on the Ellen Ridge Site and were not able to take up occupation due to the Defendants' illegal encampment at the site.
>
> 70. 1 took into account the fact that the Ellen Ridge Site is the only socially rented Gypsy and Traveller site that the Council has in its local authority area. I also considered that the Council had a waiting list of 18 families who met the criteria for pitches at the Ellen Ridge Site ...
>
> 71. I also took into account the problems encountered at the Ellen Ridge Site with the Defendants in terms of the evidence of criminal damage and allegations of noise nuisance and anti-social behaviour with complaints to the Council and Police by local residents.
>
> 72. I concluded that the Defendants could not be allowed to remain on the Ellen Ridge Site and that, after considering the alternatives, eviction was a reasonable, fair and proportionate course of action and therefore it was appropriate to continue with possession proceedings."

35. The Conclusions and Recommendations section of the "Unauthorised Encampment—Decision Recording Process" read as follows:

> "• The encampment should not be tolerated in its current location.
>
> • There is currently no evidence that the McDonagh family have housing needs that could not be met in bricks and mortar accommodation so there is no necessity [to] source an alternative site for them.
>
> • Possession action in this case is reasonable and justified."

36. These conclusions and recommendations were considered and approved by Mr Ben Hanks, the Housing and Assets Manager, by Mr Gareth Price, Head of Law and Regulation, and by Ms Tracey Brooks, Head of Regulation Investment and Housing.

37. The subsequent course of the possession proceedings has been summarised above. The extended McDonagh family have remained on the Ellen Ridge Site, although the precise composition of the encampment has undergone change from time to time. Mr Patrick McDonagh's presence has been constant throughout. Further Welfare Assessments have been carried out on several occasions.

38. The occupation of the Land has not been without incident. I refused an application by the Council at trial for permission to adduce supplemental evidence on what it says are recent events. The evidence that is before me includes the following records from the Council or Gwent Police.

- On Sunday 12 April 2020 the police received a report of a party at the Site; officers attended and "dealt with" it.

- On 26 April 2020 the police received two anonymous reports: first, of "more caravans arriving at the site despite Covid regulations"; second, of "a large party at the site despite Covid regulations".

- On Saturday 9 May 2020 the Council received a complaint at 4.20 a.m. of anti-social behaviour in the form of an "all night karaoke party" at the Site; a complaint was also made to the police.

- On Thursday 14 May 2020 the police received a complaint of a noisy party at the Site; officers attended and "inform[ed] them to turn it down".

- On 15 May 2020 the Council received a complaint from a local resident: "the past few weeks have been really difficult as the noise coming from the site has been so loud it has left me unable to sleep. This has been a mix of noise from fighting late at night into early hours of the morning and loud music." As a result of that complaint, the Pollution Control Officer wrote to The Occupiers, asking them to keep the noise to a reasonable level and not to hold unauthorised gatherings.

- On Saturday 30 May 2020 complaints were received by the Council and the police in respect of a party the previous evening, involving loud music.

- On Monday 15 June 2020 the Council received a complaint from a resident about the events of the previous night: "another night of music, shouting, fighting, car horn beeping". The police also received a complaint.

- On Saturday 4 July 2020 (as it was reported to the Council) there was a party at the Site, with a large marquee and music from a sound system playing until the early hours.

- HCEG reported to the Council that at lunchtime on Thursday 5 November 2020 its agents attended at the Site for the purpose of completing a Welfare Assessment form and observed that the CCTV building had been broken into. They recorded that they "found the room within smashed up with holes in the walls and general vandalism within. The main doors had also been broken into with around 5 puppies being kept within[;] the conditions were quite squalor [sic]." The agents also recorded that the bottom end of the Site was "cleaner and better maintained" and that the occupants of the Site were "polite and cooperative".

- On 11 December 2020 the Council, in the exercise of powers under section 34B of the Environmental Protection Act 1990, seized two vehicles at the Site on the grounds that it reasonably believed that the vehicles had been used to carry out fly-tipping at various sites in Newport. One of those vehicles had been recorded as being on the Site on 5 November 2020.

39. The Council has produced a schedule setting out the waiting list for pitches at the Ellen Ridge Site as at 31 March 2021. It shows that sixteen applications have satisfied the criteria of the Site Allocation Policy. Of those applications, seven relate to single persons and nine relate to households; each of those households contains at least one child or dependant.

Gypsies and Travellers: the legal framework

40. The statutory context in Wales is mentioned briefly above and is set out in more detail in paragraphs 4 to 11 of the Appeal Judgment.

41. The way in which sections 101 and 103 of HWA work is discussed in paragraphs 44 to 59 of the Appeal Judgment.

42. (I ought perhaps to record that I did not fully understand Mr Cottle's position regarding section 103 at the trial. He argued that the second, third and fourth defendants were not bound in these proceedings by the rulings in the Appeal Judgment, because they had not been privy to the appeal against the possession order; though, on the case they advance, they had been among the "Persons Unknown" who were then the Second Defendants and had been bound by the possession order. He also argued that I was entitled to revisit my rulings on section 103 in the Appeal Judgment. I was rather inclined to agree with Mr Davis's submission that this was an attempt to use litigation as a tactical game. At all events, the second, third and fourth defendants have not sought to appeal against or to vary the order I made when giving the Appeal Judgment, which ruled out reliance on any defence that alleged that a defendant was owed a duty under

section 103. And the defendants have not sought to advance any such defence. As I made clear to Mr Cottle in the course of argument, I will not revisit the issues I decided in the Appeal Judgment.)

43. The Site Allocation Policy is considered, within the context of the issues then arising, at paragraphs 22 to 25, paragraphs 34 to 38 and (most importantly, for present purposes) paragraphs 56 to 67 of the Policy Judgment and at paragraphs 60 to 64 of the Appeal Judgment. I repeat that in these proceedings the defendants have not challenged the lawfulness of the Site Allocation Policy.

A Digression: public law defences in possession proceedings

44. The orders of Judge Grubb and HHJ Lambert in the judicial review proceedings (the latter made by consent), and the Council's Summary Grounds of Resistance in those proceedings, proceeded on the basis that the public law challenges that Mr Patrick McDonagh wanted to make to the possession claim could be raised as defences in the possession proceedings. That was also the basis of the argument before me on the appeal against the possession order and the basis on which I proceeded.

45. However, at the trial Mr Davis submitted that a public law challenge to a decision to bring possession proceedings could only give rise to a defence to such proceedings if it established a private law defence; otherwise, the correct route of challenge was by way of an application for judicial review. If I had thought that submission to be correct, nevertheless I would have refused to permit the Council to rely on the point in circumstances where, largely because of the Council's own stance before trial, these proceedings have been conducted and the judicial review proceedings have been compromised on a contrary basis. However, I consider the submission to be incorrect and I think that Mr Davis's citation of authorities on the point was partial. In the circumstances, I shall take a little time to survey the way in which the law in this area has developed. The substance of my consideration of the present case resumes in the next section of this judgment (paragraphs 60ff).

46. In *Cannock Chase District Council v Kelly* [1978] 1 WLR 1, the plaintiff council sought possession against one of its tenants on the sole ground that the tenancy had been terminated by service of a notice to quit; no breaches of the tenancy were alleged to have occurred, and the judgments at first instance and on appeal proceeded on the basis that the defendant was "a good tenant". The tenant defended the action on the grounds that, in seeking possession, the council had not acted in good faith and had failed to take all relevant considerations into account. The Court of Appeal recognised that a council tenant could, by way of defence, challenge on the grounds stated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 the council's decision to bring possession proceedings; on the facts of the case, the defence was rejected. Megaw LJ said at 6-7:

> "[E]ven though there has been no bad faith, a public authority's exercise of its statutory powers may properly be challenged before the court if it can be shown, the burden being on the challenger, that the authority has, as a material factor in reaching its decision, taken into account a factor which as a matter of law

> should not have been taken into account or has failed to take into account a factor which should have been taken into account. To that extent a local authority, as landlord, is under a stricter obligation than a private landlord, in a case where the tenancy is not subject to the Rent Acts. But, if such a challenge be made, it is for the tenant to particularise the relevant consideration or considerations alleged to have been taken into account or omitted, as the case may be, and to prove that erroneous taking into account or that erroneous omission, which constitutes the so-called 'abuse of the powers.'
>
> In the present case, no such consideration was specified. It is said that it ought to be inferred. Such an inference may be justified, even though the precise consideration, erroneously taken into account or omitted, cannot be identified or proved. How that may arise is shown, again, in Lord Greene MR's judgment in the *Wednesbury* case, at p. 230: 'It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right: but to prove a case of that kind would require something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind.'"

To similar effect was the reasoning of Lawton LJ at 9-10:

> "As the question whether the abuse, or excessive use, of statutory powers could be a defence to a claim for possession of a dwelling-house had never been argued in the *Bristol* case [*Bristol District Council v. Clark* [1975] 1 WLR 1443], it was open to Mr. Hidden to argue, as indeed he did, that such abuse or use could not be a defence to a claim for possession. He had to concede in argument that the validity of a notice to quit might be put in question by evidence of corruption, as, for example, if it was proved that a housing manager had been bribed to get rid of a sitting tenant in favour of an applicant for a council house. He submitted that when a tenant in a possession case raised such an issue, the trial judge should adjourn the proceedings to enable the tenant either to apply for a prerogative order or bring an action for a declaration. I find difficulty in envisaging the form of a prerogative order in such circumstances. The only order which would make sense would be one of prohibition against continuing with the claim. Why the tenant should have to go to the trouble of getting the Divisional Court to stop the proceedings, I do not understand. If on proof of certain facts the claim for possession should fail, the court of trial is the proper tribunal to say so. If corruption, which would be a form of abuse of statutory powers, could affect the validity of a notice to quit, I can see no reason why, by way of defence to a claim for possession, the tenant cannot plead that the notice served on him

> was not a valid one. In my judgment the abuse or excessive use of statutory powers by a local authority acting as a housing authority can provide a defence for a council tenant against a claim for possession."

47. At first blush, the reasoning in *Cannock Chase* supported the contention that any challenge to the decision to seek possession that could be brought by an application for judicial review might equally well be brought by way of defence to the possession proceedings. However, Lawton LJ's reference to the grounds of defence ("that the notice [to quit] served on him was not a valid one") indicated the possibility of a narrower reading: that the public law argument (viz. that the notice to quit was served unlawfully) provided a private law defence (viz. that the tenancy had not ended).

48. In *Wandsworth LBC v. Winder* [1985] AC 461 the House of Lords considered the availability of public law defences in private law proceedings for the first time since its own decision in *O'Reilly v. Mackman* [1983] 2 AC 237. The council, purportedly acting under its statutory powers, served two notices to increase the rent of its tenant, the defendant. The defendant considered the increases to be excessive and unlawful and did not pay the increased rent. When the council brought an action for possession on the grounds of rent arrears, the tenant pleaded in his defence that the notices were *ultra vires* and invalid. The council's application to strike out the defence, on the grounds that the invalidity of the notices could only be raised in proceedings for judicial review, was rejected by a majority in the Court of Appeal and by the House of Lords.

49. Dissenting in the Court of Appeal, Ackner LJ at 467-468 had expressly rejected the tenant's contention that he was merely setting up private law rights; at 468 he said, "The defendant is accordingly not setting up any private law right. … The defendant is thus clearly challenging a decision made by a public body, performing its public functions in a field of public law. That is the limit of his challenge." In the House of Lords, Lord Fraser of Tullybelton, with whose speech the other members of the panel agreed, recognised at 508 that the public law challenge raised by the tenant's defence was not merely collateral to his assertion of "infringement of his right arising under private law to continue to occupy the flat" but was "the whole basis of the respondent's defence". However, he noted that the case was distinguishable from the House's own decision in *Cocks v Thanet District Council* [1983] 2 AC 286 (where an attempt to make a public law challenge a council's decision by a claim for a declaration in the county court was held to be an abuse of process) both because in *Winder* the challenge to the public body's decision was made by way of defence and because in *Cocks* "the impugned decision of the local authority did not deprive the plaintiff of a pre-existing private law right; it prevented him from establishing a new private law right" (see at 508). At 509-510 Lord Fraser said:

> "[T]he arguments for protecting public authorities against unmeritorious or dilatory challenges to their decisions have to be set against the arguments for preserving the ordinary rights of private citizens to defend themselves against unfounded claims.
>
> It would in my opinion be a very strange use of language to describe the respondent's behaviour in relation to this litigation as an abuse or misuse by him of the process of the court. He did not select the procedure to be adopted. He is merely seeking to

> defend proceedings brought against him by the appellants. In so doing he is seeking only to exercise the ordinary right of any individual to defend an action against him on the ground that he is not liable for the whole sum claimed by the plaintiff. Moreover he puts forward his defence as a matter of right, whereas in an application for judicial review, success would require an exercise of the court's discretion in his favour. Apart from the provisions of Order 53 and section 31 of the Supreme Court Act 1981 , he would certainly be entitled to defend the action on the ground that the plaintiff's claim arises from a resolution which (on his view) is invalid: see for example *Cannock Chase District Council v. Kelly* [1978] 1 WLR 1 , which was decided in July 1977, a few months before Order 53 came into force (as it did in December 1977). I find it impossible to accept that the right to challenge the decision of a local authority in course of defending an action for non-payment can have been swept away by Order 53, which was directed to introducing a procedural reform. As my noble and learned friend Lord Scarman said in *Reg. v. Inland Revenue Commissioners, Ex parte Federation of Self Employed and Small Businesses Ltd.* [1982] AC 617 , 647G, 'The new R.S.C., Ord. 53 is a procedural reform of great importance in the field of public law, but it does not - indeed, cannot - either extend or diminish the substantive law. Its function is limited to ensuring "*ubi jus, ibi remedium*."' Lord Wilberforce spoke to the same effect at p. 631A. Nor, in my opinion, did section 31 of the Supreme Court Act 1981 which refers only to 'an application' for judicial review have the effect of limiting the rights of a defendant *sub silentio*. I would adopt the words of Viscount Simonds in *Pyx Granite Co. Ltd v. Ministry of Housing and Local Government* [1960] AC 260, 286, as follows:
>
> 'It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words.'
>
> The argument of the appellants in the present case would be directly in conflict with that observation.
>
> If the public interest requires that persons should not be entitled to defend actions brought against them by public authorities, where the defence rests on a challenge to a decision by the public authority, then it is for Parliament to change the law."

50. From these passages, it would appear that a defendant might properly challenge a decision of a public body by way of defence to a claim, if the purpose of such a challenge were to vindicate the full extent of an existing private right. What was not permitted was the use of such a challenge to seek to establish a new right.

51. In *West Glamorgan County Council v Rafferty* [1987] 1 WLR 457, the principles enunciated in earlier decisions were applied in the context of gypsies who were

trespassing on the local authority's land. The trespassers were held to have a defence to the local authority's claim for possession on the grounds that the decision to bring possession proceedings was one that no reasonable authority could have made, because the local authority had failed since 1974 to carry out their statutory duty under section 6 of the Caravan Sites Act 1968 for the provision of adequate accommodation in their area for gipsies; *per* Ralph Gibson LJ at 460-461. As the decision to bring possession proceedings was a decision made by an elected body under lawful procedure, it commanded "the careful respect which such a decision always receives in a court of law"; further, the decision was one "in which factors of social policy, some for and some against the eviction of the gipsies, had to be considered". Therefore a finding that the decision to bring possession proceedings was unlawful, in the sense that no reasonable council could have made it, would be justified only if the facts of the case were "both exceptional and extreme": *per* Ralph Gibson LJ at 461-462. Nevertheless, the Court of Appeal found that, in the case before it, the decision was unlawful because "it [was] necessary to describe the conduct and attitude of the plaintiffs as long continued breach of duty and an apparent inattention both to that breach of duty and to the powers of the plaintiffs by which it might be remedied": *per* Ralph Gibson LJ at 462. The Court of Appeal was clear that breach of the duty under section 6 of the 1968 Act did not of itself constitute a defence to the possession claim. However, the crux of the Court's reasoning is in the judgment of Ralph Gibson LJ at 477 (my emphasis):

> "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. The reasonable council, accordingly, was not in my judgment free to treat the interference with the intended reclamation and redevelopment of this site, for such period of time as would have resulted from the holding up of complete eviction from the entire site while temporary accommodation was provided elsewhere, as outweighing the effects of eviction on the gipsies then present and on those to whom the impact of trespassing by gipsies would necessarily be transferred. *The decision is only explicable to me as one made by a council which was either not thinking of its powers and duties under law or was by some error mistaken as to the nature and extent of those powers and duties.*"

52. The procedural history in *Rafferty* was important. In the possession proceedings, a summary possession order had been set aside by Peter Pain J, on the ground that the council's breach of statutory duty made it inappropriate to make a summary possession order. Thereafter the gypsies applied for judicial review of the decision to commence possession proceedings, relying on the same ground, and Kennedy J quashed the decision. The Court of Appeal was hearing appeals against both decisions. Ralph Gibson LJ said at 461:

> "It has been common ground that if in the second appeal the order of Kennedy J is upheld by this court then the proceedings for possession are aborted and no separate issues arise in the first appeal save as to costs. It is also common ground that if the order of Kennedy J is set aside then the first appeal must be allowed and the original order for possession restored."

53. The authority relied on by Mr Davis was *Avon County Council v Buscott* [1988] 1 QB 656. The council brought possession proceedings against trespassers, who were gypsies. The trespassers sought to defend the proceedings on the same ground as that advanced in *Rafferty*, namely that the council was in breach of its duty under section 6 of the Caravan Sites Act 1968. The question was whether the decision to commence proceedings could be challenged by way of defence in those proceedings, or whether it could only be challenged in proceedings for judicial review. The Court of Appeal held that the latter was the case. Lord Donaldson of Lymington MR, with whose judgment Parker and Taylor LJJ agreed, stated his conclusion at 661:

> "The decision of this court in *West Glamorgan County Council v Rafferty* [1987] 1 WLR 457 binds us to hold that (a) a decision by a local authority to seek to evict squatters can be quashed in judicial review proceedings on the grounds that it is *Wednesbury* unreasonable to apply for a possession order when the council is in continuing breach of its obligation to provide caravan sites for gipsies, (b) if the decision is quashed in such proceedings, any eviction proceedings based on the decision would be abortive, and (c) no pre-conditions for the validity of a new decision to seek an eviction order could be laid down. What the *West Glamorgan* case does not decide is whether the decision of the local authority can be attacked on the eviction proceedings themselves, as contrasted with separate judicial review proceedings. That issue was decided by Scott J in *Waverley Borough Council v Hilden* [1988] 1 WLR 246 on a consideration of the *West Glamorgan* case [1987] 1 WLR 457 and *Wandsworth London Borough Council v Winder* [1985] AC 461. His conclusion was that the decision falls to be challenged by judicial review and not otherwise. I agree with that conclusion, but as his decision is not binding on this court, I should now give my reasons."

54. It is unnecessary to recite at length Lord Donaldson's analysis of the authorities. One passage from his judgment at 663 makes the point sufficiently:

> "[T]here is a fundamental difference between this case and *Winder's* case. Mr Winder was seeking to raise a true defence. He was saying that he had a valid tenancy, that he did not owe any rent and accordingly was not liable to eviction. It was a defence on the merits. In the present case the defendants do not allege any right to occupy the land and accordingly do not deny that they are liable to be evicted. They do not suggest that they have any defence on the merits. What they say is quite different, namely, that the council is not entitled to enforce its rights. It is

> not entitled to come to the court to seek an eviction order. If one can imagine a private company whose memorandum and articles limited its powers to acting in a way which was *Wednesbury* reasonable and which sought to evict the defendants from its land in similar circumstances, the defendants would be seeking to strike out the action for want of authority on the part of the plaintiff to bring the action. When a defendant is seeking, in effect, to strike out an action on the basis of a public law right, he should, in my judgment, proceed by way of an application for judicial review, thus ensuring that the matter is dealt with speedily as a preliminary point and in a manner which gives the public authority and the public which it serves the protections enshrined in the judicial review procedure."

55. The resulting position was that public law challenges to a council's decision to bring possession proceedings were capable of being raised by way of defence only insofar as the challenges sought to establish that the defendants had a right to remain in possession. This would rule out the main grounds of challenge raised by the defendants in the present case: they are *Rafferty*-style challenges, not *Winder*-style challenges, as is shown by the defendants' express acceptance that they are trespassers. In the words of Lord Donaldson in the passage set out above from *Buscott*: "In the present case the defendants do not allege any right to occupy the land and accordingly do not deny that they are liable to be evicted. They do not suggest that they have any defence on the merits. What they say is quite different, namely, that the council is not entitled to enforce its rights. It is not entitled to come to the court to seek an eviction order."

56. However, in the Court of Appeal's judgment in *Doherty v Birmingham City Council* [2006] EWCA Civ 1739, [2007] HLR 32, the Court referred at [33] to the "long-running controversy over the use of public law principles to defeat or delay local authority possession actions in the county court" and continued:

> "34. Since at least the early 1970s, and well before the development of the modern judicial review procedure, battle had been drawn on this issue between public authorities, and those championing the rights of the disadvantaged, such as gipsies and the homeless. The fortunes of the two sides have fluctuated. The introduction of judicial review opened the way for a new line of argument. Authorities contended that it was an abuse of process to use any other procedure than judicial review to challenge local authority decisions. This argument was rejected in 1985 by the House in *Wandsworth*. This decision appeared to establish the right of defendants in the county court to use any available legal weapons, public or private.
>
> 35. In 1988 the pendulum began to swing the other way, with the impetus of two cases: *Waverley Borough Council v Hilden* [1988] 1 WLR 246 (Scott J), and *Avon County Council v Buscott* [1988] QB 656 CA. Both concerned local authority proceedings against gipsies: the former to enforce planning restrictions against gipsies developing their own land; the latter to seek possession against squatters on the local authority's land. In both

cases, *Wandsworth* was held not to apply to a challenge to the authority's decision to commence proceedings. In *Avon* Lord Donaldson MR explained the distinction:

> 'There is a fundamental difference between this case and *Winder's* case. Mr Winder was seeking to raise a true defence. He was saying that he had a valid tenancy, that he did not owe any rent and accordingly was not liable to eviction. It was a defence on the merits. In the present case the defendants do not allege any right to occupy the land and accordingly do not deny that they are liable to be evicted. They do not suggest that they have any defence on the merits. What they say is quite different, namely, that the council is not entitled to enforce its rights. It is not entitled to come to the court to enforce an eviction order.' (p 663)

The distinction was not without its critics. *Wade & Forsyth Administrative Law* (9th Ed) commented that 'it seems impossible to draw any logical line' between *Avon* and *Wandsworth* (p 671). It has not always been consistently applied (see, for example, *Rhondda Cynnon Taff County Borough Council v Watkins* [2003] EWCA Civ 129; [2003] 1 WLR 1864).

36. That whole area of controversy has now apparently been swept aside by the House without further ado. All seem to have accepted it as settled law under *Wandsworth* that 'conventional' judicial review grounds can be raised by way of defence to possession proceedings in the county court. Lord Hope said simply:

> 'A defendant has the right to contend in his defence that the decision of a public authority to recover possession was one which no reasonable person could consider justifiable, as Lord Fraser of Tullybelton explained in *Wandsworth* …' (para 86)

Mr Underwood realistically did not suggest otherwise. Indeed, from an authority's point of view, once it is accepted that its decision is in principle open to challenge on judicial review grounds, there seems every advantage in those grounds being considered in the county court. As Lord Hope said in the same paragraph:

> 'It is preferable, wherever possible, that the matter should be dealt with in the county court, rather than by adjourning the proceedings to enable the defendant to apply in the High Court for permission for judicial review of the decision to apply for the possession order.'

> Furthermore, in contrast to the position in 1988, and at least since the Housing Act 1996, the legal issues are no different in kind from those regularly dealt with by county court judges under its housing jurisdiction."

57. When *Doherty* was considered in the House of Lords, [2008] UKHL 57, [2009] 1 AC 367, Lord Hope of Craighead said:

> "8. In *Kay and others v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465 (which I shall refer to from now on as *Kay*) it was held by the majority, affirming *Qazi*, that the county courts, when faced with a defence to a claim to possession by a public authority landlord which is based on article 8, should proceed on the assumption that domestic law strikes a fair balance and is compatible with the occupier's Convention rights. But it was recognised that there might be cases of a special and unusual kind, of which *Connors* was an example, where it would be incompatible with article 8 for the occupier not to be permitted to challenge the factual allegations that were made against him which were the basis for the claim for a possession order. If the legal framework denied him that opportunity it would fall to be regarded as incompatible with the Convention right: see paras 108, 168 and 184-185.
>
> 9. In *Kay*, para 110, I said that where domestic law provides for personal circumstances to be taken into account, as in a case where the statutory test is whether it would be reasonable to make a possession order, then a fair opportunity must be given for the arguments in favour of the occupier to be presented. But if the requirements of the law have been established and the right to recover possession of the public authority landlord is unqualified, the only situations in which it would be open to the court to refrain from proceeding to summary judgment and making the possession order are these:
>
> > '(a) if a seriously arguable point is raised that the law which enables the court to make the possession order is incompatible with article 8, the county court in the exercise of its jurisdiction under the Human Rights Act 1998 should deal with the argument in one or other of two ways: (i) by giving effect to the law, so far as it is possible for it to do so under section 3, in a way that is compatible with article 8, or (ii) by adjourning the proceedings to enable the compatibility issue to be dealt with in the High Court; (b) if the defendant wishes to challenge the decision of a public authority to recover possession as an improper exercise of its powers at common law on the ground that it was a decision that no reasonable person would consider justifiable, he should be permitted to do this provided again that the point is seriously arguable: *Wandsworth London Borough Council v Winder* [1985] AC 461.'

I added that, as the common law as explained in *Wandsworth Borough Council v Winder* was compatible with article 8, it provided an additional safeguard. Lord Scott of Foscote (para 174), Baroness Hale of Richmond (para 192) and Lord Brown of Eaton-under-Heywood (para 212) agreed with what I said in that paragraph."

"44. The other part of para 110, referred to by the Court of Appeal [in *Doherty*] as gateway (b), was designed to leave open the possibility of a challenge on public law grounds that the public authority's decision to bring the claim was so unreasonable as to be unlawful. Its purpose was also to make it clear that this objection could be advanced as a defence in the county court. …"

"52. As I said earlier, the speeches in *Kay* show that the route indicated by this gateway [i.e. Gateway (b) in para 110 of *Kay*] is limited to what is conveniently described as conventional judicial review. In para 60, for example, Lord Nicholls indicated that he had in mind a challenge in accordance with *Wandsworth Borough Council v Winder* [1985] AC 461 on grounds which, he said, had nothing to do with the Human Rights Act 1998. In para 208 Lord Brown too acknowledged that this was a quite different basis from that which the Act provides upon which a public authority's claim for possession could be challenged. In para 110 of my own speech I described this as a challenge that would be made at common law, on the ground that the decision was one that no reasonable person would consider justifiable. In para 114 I said that the grounds on which the decision to claim possession could be judicially reviewed were whether it was arbitrary, unreasonable or disproportionate.

53. Gateway (b) then asserts that in possession cases brought by a public authority a defence which takes the form of a challenge to its decision to seek possession may be available. The court is not bound to make the order if the decision to seek it can be challenged on the ground that it was an improper exercise of the respondent's powers. In this respect the two routes, or 'gateways', may be said to work together to address the incompatibility due to the lack of a procedural safeguard, which is the fundamental point that is at issue in this case. Gateway (a) addresses the question whether the court can read and give effect to the statutes in a way that is compatible with article 8. If it cannot do this, it will be open to the defendant by way of a defence to argue under gateway (b) that the order should not be made unless the court is satisfied, upon reviewing the respondent's decision to seek a possession order on the grounds that it gave and bearing in mind that it was doing what the legislation authorised, that the decision to do this was in the *Wednesbury* sense not unreasonable. This route offers a

> procedural protection under the common law. If taken, it will enable the grounds on which the respondent based its decision to be scrutinised. It might, on the facts of this case, provide the appellant with an effective defence to the making of the possession order. The fact that it is available as a defence seems to me to strengthen the argument, should it be needed, that it also provides him with the protection which he seeks against an infringement of his Convention right.
>
> 54. The Court of Appeal said in para 61 that it could see no purpose in remitting the case to the judge. I disagree, with respect, with this assessment. In para 43 of his judgment the judge said that it seemed to him that in this case judicial review would be able to check the fairness and legality of the respondent's decision. Now that it is clear that arguments of that kind may be presented by way of a defence to the proceedings under gateway (b), I think that he should be given the opportunity to carry out that exercise. Any factual disputes that may exist between the parties as to the facts on the basis of which the decision was taken will be capable of being resolved by him too. Lord Brown's observations in para 210 of his opinion in *Kay* add a further point that is relevant to this issue. The site had been occupied as their home by the appellant and his family for about 17 years when the notice to quit was served. So it could be argued that it was unfair for the respondent to be able to claim possession without being required to make good the reasons that it gave in its own statement of claim for doing so.
>
> 55. I think that in this situation it would be unduly formalistic to confine the review strictly to traditional *Wednesbury* grounds. The considerations that can be brought into account in this case are wider. An examination of the question whether the respondent's decision was reasonable, having regard to the aim which it was pursuing and to the length of time that the appellant and his family have resided on the site, would be appropriate. But the requisite scrutiny would not involve the judge substituting his own judgment for that of the local authority. In my opinion the test of reasonableness should be, as I said in para 110 of Kay, whether the decision to recover possession was one which no reasonable person would consider justifiable. The further point to which Lord Brown referred will have a part to play in that assessment."

58. The result is that a public law challenge, whether of the *Winder* sort or of the *Rafferty* sort, can be raised as a defence to a possession claim.

59. Such public law challenges are not limited to conventional judicial review grounds. It is open to a defendant to contend that the possession proceedings are a disproportionate interference with his Convention rights (cf. *Manchester City Council v Pinnock* [2009] UKSC 45, [2011] 2 AC 104) or constitute unlawful discrimination in breach of statute (cf. *Lewisham LBC v Malcolm* [2007] EWCA Civ 763, [2008] Ch 129). Further, (of

relevance to this case), a defendant may defend a possession claim on the ground that the local authority is in breach of its duty in respect of the welfare of children under section 11 or 28 of the Children Act 2004. In *Hertfordshire County Council v Davies* [2018] EWCA Civ 379, [2018] 1 WLR 4609, Sharp LJ said:

> "23. Where a (county) court is asked to make an order for possession of someone's home by a local authority, the court has the power, when a defence based on art. 8 of the Convention is raised, to assess the proportionality of making the order and, in making that assessment, to resolve any relevant dispute of fact notwithstanding that the defendant has no domestic right to remain."
>
> "30. For my part I can see no practical reason for distinguishing between the position of a defendant who wishes to rely on a defence that in exercising a particular function the local authority did not have regard to the rights of the defendant and his family under art. 8 of the Convention (the appellant's pleaded case here) and that of a defendant who wishes to rely on the failure of a local authority in precisely the same context to comply with its duty under s.11 of the 2004 Act. The respondent raised no principled argument for drawing such a distinction, resting principally on the way the matter was put in *Winder*. As I have said, the law has developed since then. Further, to my mind it makes perfect sense for issues about the wellbeing of children caught up in possession proceedings to be dealt with at the same time and before the same tribunal whether they are raised by reference to art. 8 or s.11. In either case, the same or similar sensitive factual questions are likely to arise which the process of judicial review is not well adapted to determining, and which are better left to the county court. Certainly, it was not suggested to us that if there were to be a real issue about the wellbeing of children who were at risk of being evicted, the appropriate venue for the determination of those issues would be the Administrative Court."

The Defendants' Public Law Defences

60. The defences raised in these proceedings fall into the following categories:

1) Conventional judicial review grounds (*Wednesbury* unreasonableness);

2) Breach of section 28 of the Children Act 2004;

3) Unlawful interference with Article 8 and Article 14 rights;

4) Unlawful discrimination in breach of the Equality Act 2010.

(1) Wednesbury unreasonableness

61. The caution required of a court before it strikes down a public body's decision to seek possession was affirmed by the House of Lords in *R v Hillingdon London Borough Council, ex parte Puhlhofer* [1986] AC 484, a judicial review case concerning the obligations of a local authority under the Housing (Homeless Persons) Act 1977. Lord Brightman, with whom the other members of the appellate committee agreed, said at 518:

> "Although the action or inaction of a local authority is clearly susceptible to judicial review where they have misconstrued the Act, or abused their powers or otherwise acted perversely, I think that great restraint should be exercised in giving leave to proceed by judicial review. The plight of the homeless is a desperate one, and the plight of the applicants in the present case commands the deepest sympathy. But it is not, in my opinion, appropriate that the remedy of judicial review, which is a discretionary remedy, should be made use of to monitor the actions of local authorities under the Act save in the exceptional case. The ground upon which the courts will review the exercise of an administrative discretion is abuse of power — e.g. bad faith, a mistake in construing the limits of the power, a procedural irregularity, or unreasonableness in the *Wednesbury* sense – unreasonableness verging on an absurdity: see the speech of Lord Scarman in *R v Secretary of State for the Environment, ex parte Nottinghamshire County Council* [1986) AC 240, 247-248. Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely."

62. In that context, and against the background of the general legal position summarised above, I preface the following discussion with a repetition of the following points. First, there is no challenge in these proceedings to the lawfulness of the Site Allocation Policy. Second, none of the defendants have been allocated pitches on the Ellen Ridge Site. Third, the only challenge that has been made to a refusal of an application for a pitch was that of Miss Caroline McDonagh, which was dismissed. Fourth, none of the defendants contended at trial that they were entitled to the allocation of a pitch on the Ellen Ridge Site. Fifth, all of the defendants accepted that they are trespassers on the Ellen Ridge Site. In his oral closing submissions, Mr Cottle said in terms: "We do not challenge the decision not to allocate. We do not claim a right to a pitch on the site. We challenge the response to the unlawful encampment."

63. The defence raised by the defendants is that the decision to institute and pursue possession proceedings was unlawful, as being *Wednesbury* unreasonable and taken in disregard of relevant considerations, because the Council did not give necessary consideration to the possibility of tolerating the defendants as trespassers, either on Site C or on any other piece of land; in that regard, it failed to have regard to (i) the fact that

it was in breach of its duty under section 103 of HWA, (ii) the fact that the defendants' cultural way of life as Travellers, albeit not qualifying them for allocation of a pitch, was of sufficient importance to them to cause them to remain for long periods of time on unauthorised encampments, and (iii) the prevalence of unauthorised encampments within its area and the public benefit of minimising such encampments.

64. Mr Cottle was insistent that the defence need not be limited to unreasonableness but can include other conventional grounds, such as failing to take account of relevant factors. This is true. But as Lord Hope's remarks in *Doherty* made clear, a court will refuse to vindicate a local authority's proprietary rights only if it considers the decision to seek possession to be outside the range of reasonable decisions; a challenge to a perfectly good claim in vindication of the local authority's rights will not succeed merely on the basis that a hole can be picked in the decision-making process. See also the remarks of Sharp LJ in the *Hertfordshire County Council* case, cited below.

65. A convenient starting point for consideration of this line of defence is to identify why this case is different from *Rafferty*. In that case, the plaintiff council was in admitted breach of its duty, under section 6 of the Caravan Sites Act 1968

> "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."

Thus Ralph Gibson LJ could speak at 477, in the passage set out above, of "[t]he 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". Although (as Mr Cottle himself observed in his oral submissions in response) it may not have been strictly correct to refer to a duty owed "to" the gypsies, the important point was that, if the duty had been performed, provision would have been made for the defendant gypsies in *Rafferty*.

66. In the present case, the relevant statutory duty is under section 103 of HWA. In paragraphs 44 to 49 of the Appeal Judgment I explained why it was hopeless for Mr Patrick McDonagh or for any other defendant to contend that the duty under section 103 was owed personally to him or her. At paragraphs 50 to 59 of the Appeal Judgment I explained why the more indirect argument being advanced by Mr Patrick McDonagh on the basis of section 103 was also untenable. I shall not repeat the contents of those paragraphs here.

67. At trial, the indirect argument was pursued in a very lightly repackaged version, as follows: that the Council was in breach of the section 103 duty and that, if it had not been in breach, there would be sufficient places to meet the needs of the very group that it is considering evicting (Mr Cottle's skeleton argument, paragraph (iv)).

68. There is nothing in this argument, for the simple reason that the defendants do not contend that they are entitled to the allocation of a pitch. It might be a good argument to say: "The Council is under a section 103 duty to provide such-and-such a number of pitches; it has failed to provide them; I satisfy the criteria of entitlement for a pitch; the reason why I have not been allocated a pitch is because the Council has failed to provide the number of pitches it is bound to provide." That was the essential form of the

argument that found favour (in a different statutory context) in *Rafferty*. However, it is not this case. Once the defendants accept that they have no entitlement to be allocated pitches, reliance on section 103 can go nowhere.

69. If the defendants have housing needs, the Council as housing authority has statutory duties in respect of meeting those needs. For reasons explained in the Appeal Judgment, from the fact that a person is a Traveller it does not follow that he or she has a need for a caravan pitch. There may or may not be such a need; in respect of each case, the existence of a need is a question to be addressed by reference to the information and evidence available to the local authority at a specific time. In these proceedings, it is accepted that the Council operated a lawful policy and it is not contended that the policy was unlawfully misapplied in the case of any defendant.

70. This highlights a feature of the case, and one that according to Ms Aspey's evidence has been taken in to account by the Council in seeking possession: those in unlawful occupation of the Ellen Ridge Site either have not applied at all for a pitch or, as is the case with at least Mr Patrick McDonagh and Mr Edward McDonagh, have applied for a pitch and been lawfully refused. The wrongful entry onto the Site on 4 July 2019 followed immediately upon, and was quite obviously a response to, the Council's final rejection of Mr Patrick McDonagh's application for a pitch in its letter of 2 July 2019. Mr Patrick McDonagh is no stranger to legal proceedings or to legal representation. He could have challenged the Council's decision directly by seeking judicial review, as his sister Miss Caroline McDonagh was then doing with the professional assistance of the Community Law Partnership. Instead of doing so, he committed wilful trespass in direct and provocative contradiction of an unwelcome administrative decision that was reviewable by legal process.

71. Mr Cottle emphasised what he said was the importance to the defendants of their cultural way of life; he said that this was not being respected by the Council. Again, however, it is necessary to repeat some points already made: first, the fact that a person is a Traveller does not mean that a local authority necessarily has an obligation to make a caravan pitch available for occupation by that person (see the Appeal Judgment); second, the defendants do not contend that the Site Allocation Policy is unlawful; third, no defendant contends that in his or her case the Site Allocation Policy was unlawfully misapplied; fourth, no defendant contends that he or she is entitled to be allocated a pitch on the Ellen Ridge Site. As regards the importance of the cultural traditions and way of life of Travellers, I refer to what I said in paragraphs 61 to 63 of the Appeal Judgment, with reference to paragraphs 62, 65 and 66 of the Policy Judgment.

72. In those circumstances, the argument appears to come down to the following: that, although the defendants do not have accommodation needs that the Council is under a duty to meet by the allocation of a pitch on the Ellen Ridge Site, yet because the defendants have shown intent to continue occupying unlawful encampments and because that intent results from their cultural heritage as Travellers, they should for some (unspecified but temporary) period be tolerated as trespassers on land in respect of which they have no rights of occupation.

73. Such an argument seems to me to make little sense. I can understand the argument that, if by reason of cultural heritage a person has accommodation needs that a local authority is under a duty to meet but is unable to meet, the local authority ought in some circumstances reasonably to tolerate trespass on its land by the person whose needs are

not being met. But that is not the case being advanced by the defendants in the present case. They accept that they do not have accommodation needs that the Council is duty-bound to meet by the provision of a place on which to site caravans. (If they did not accept that fact, the evidence considered and relied on by the Council would suffice to establish it.) The argument that, although the Council has no duty to provide the defendants with pitches, it ought not to be allowed ever to evict the defendants from Council-owned land on which they are trespassing would be perverse—it would, by denying to the Council the ability to enforce its lawful rights, in effect impose a duty that does not exist at law—and is not the argument advanced by Mr Cottle. Rather, he contends that the Council ought to provide a temporary stopping place by way of tolerated trespass. But why? Once it is accepted that (contrary to the position in *Rafferty*) the trespass results from a personal choice that, whatever its motivation, is not caused by a breach of statutory duty by the Council (I leave aside the section 103 argument dealt with above), the justification for preventing the Council from enforcing its private law rights disappears (subject to matters discussed below). And, if it is said that only short-term toleration is appropriate, it is necessary to ask why it is appropriate. What is the purpose of, say, a 3-month toleration (the period for which a transit pitch may be occupied; cf. the Mobile Homes Act 1983, Schedule 1, Part 1, Chapter 3)? And what is to happen after that period? If the justification for an initial period of toleration will apply equally to any further period of toleration, characterising it as temporary is just a fig-leaf for a denial of the Council's entitlement to enforce its private law rights. If temporary toleration is to be required, it must serve some purpose beyond turning a blind eye to trespass.

74. One possible response would be that, although the defendants are not entitled to be allocated pitches, yet they have nowhere else to go for the time being: whatever their accommodation needs, they cannot at present be met. However, this argument will not avail the defendants. First, the fact that a person is on a housing authority waiting list does not mean that the housing authority ought to be unable to assert its private law rights if that person unlawfully occupies public land or buildings. Second, none of the defendants in this case has established an evidential basis from which to launch any argument along these lines. Mr Patrick McDonagh has advanced no case based on his personal circumstances. Mr Edward McDonagh is a named occupier of his mother's house for the purposes of her claim for Housing Benefit, and he was using that address in 2018. He has stated to the Council's Housing Officers that he is willing to consider socially rented bricks & mortar accommodation. As for Miss Shannon Ward, she made a homelessness application in February 2020 and was allocated and moved into bricks & mortar accommodation; then on 14 April 2020 she informed the Council that she was moving into privately rented accommodation and did not require its further assistance.

75. Mr Cottle referred to the Welsh Government's *Guidance on Managing Unauthorised Camping* (2013), which was "aimed at addressing the specific issues around the unauthorised encampments of Gypsies and Travellers" (Introduction, paragraph 5). He referred to the mention of transit pitches (paragraph 33) and to the recognition in policy H15 of the Newport Local Development Plan that provision was required for 7 transit pitches within Newport. He also referred to the comment in the Guidance that local authorities "can consider providing temporary stopping places", which are similar to tolerated encampments but are set aside specifically for occupation (paragraph 35).

76. In my judgment, these considerations do not avail the defendants in the present case.

1) Although it is true that the Council has not made any provision for socially owned transit pitches in Newport, the defendants do not contend that they require transit pitches; they want permanent pitches. The point of a transit pitch is to provide a temporary resting place in an itinerant life. These defendants do not say that they are itinerant, at least by desire. To talk of transit pitches is merely to introduce confusion.

2) The reference in the Guidance to "temporary stopping places" states expressly that they "are intended to serve a particular short-term purpose". This is the point mentioned above. To talk of short-term toleration of trespass invites the question of the purpose of such toleration. If the purpose is merely to provide the first 3 months of trespass with immunity from action, it provides no justification at all.

3) If the argument is that temporary toleration ought to be considered by way of analogy with transit pitches, the answer is that there is no analogy. The pretended analogy is merely to imply that, because there should be social provision of transit pitches, trespass by way of unauthorised encampments ought to be tolerated for periods equivalent to those for which transit pitches could lawfully be occupied. That is obviously fallacious.

4) The *locations* of transit pitches and permanent pitches are unlikely to be the same, because it is recognised that mixing the two on one site is unlikely to be successful (Guidance, paragraph 34). This indicates the option of tolerating an unauthorised encampment on the Ellen Ridge Site is unlikely even to be appropriate (quite apart from whether it would be unreasonable to reject it). This leads to the next point.

77. Mr Cottle relied on the section of the Guidance headed "Approaches to Resolving Unauthorised Encampments". I shall set out here only the first two paragraphs in that section:

> "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."

78. Mr Cottle submitted that the Council acted unlawfully in bringing possession proceedings without first considering the three Paths and, in particular, without considering whether the defendants' occupation should be tolerated for a period on either Site B or Site C or part of the Land to the west of Site A but not included in the Ellen Ridge Site. He relied in particular on the following evidence provided by the Council, either through Ms Aspey or in response to requests made under CPR Part 18:

- That part of the Land which is outside the Ellen Ridge Site and lies to the west of Site A is generally available for development at a later date, but the Council has no present plans or permissions in respect of that part of the Land.

- The Council has no present plans to develop Site C for authorised pitches. The needs currently identified can be met by the further development of Site A.

- Occupation of Site C by the defendants would not block the development of either Site A or Site B.

- The Council has not looked to identify land for an unauthorised encampment, because it does not accept that they have a need for any such encampment. It will not permit unauthorised encampment on the Ellen Ridge Site itself, because this would nullify the operation of its Site Allocation Policy.

79. In my judgment, reference to the three-Path approach identified in paragraph 41 of the Guidance does not assist the defendants.

1) The premiss of the approach is that the encampment is of persons in respect of whom the local authority ought to be making provision by way of authorised encampments (cf. "if an unauthorised encampment arises and there are no alternative authorised pitches in the area"). That is not the premiss on which the defendants have advanced their case. As it is accepted that the conjunction of (a) provision in accordance with the section 103 duty and (b) allocation of pitches in accordance with the Council's lawful policy would not, on the evidence available to the Council at present, result in (c) an entitlement on the part of any defendant to be allocated a pitch, the premiss does not apply.

2) The possibility that the defendants would "move on voluntarily" (Path 2) does not arise for consideration. They have not done so and the Council was justified in thinking that they would not do so.

3) The alternatives to eviction are therefore limited to (a) permitting the defendants to remain on the Land and (b) finding an alternative site for them to move onto.

4) The evidence from Ms Aspey, neither challenged nor rebutted, is that the Council has no available land except the Land. Its *Delivery and Implementation Background Paper* (December 2013) identified two other areas of land on which provision might be made for pitches; however, the evidence is that one of these is owned by the Welsh Government, which refused to make it available, and the

other is no longer available; the only place where provision could be made is therefore the Land. Accordingly, the options are Site B, Site C and the area of the Land to the west of Site A.

5) Mr Cottle did not in fact urge that Site B would be a suitable location for a tolerated trespass. He was right not to do so, not least because Site B is adjacent to Site A and would result in a manifestly unacceptable state of affairs, in which an authorised (managed) encampment and an unauthorised (unmanaged) encampment were next to each other.

6) However, if I understood him correctly, Mr Cottle advanced a bolder submission in connection with Site B: that the Council had been unreasonable in maintaining its Site Allocation Policy at a time when there were insufficient persons qualified under the policy to fill anything beyond Site A. I reject that submission. Ms Aspey said, very reasonably, that the Ellen Ridge Site had to be available to meet not only present need—which, I observe, is very much greater in early 2021 than it was two years previously—but also future need during the period of the next Assessment, which is due to be carried out in 2022 (an extension was given to local authorities as a result of the disruption caused by Covid-19). Mr Cottle's submission really amounted to saying that, although the defendants were not entitled to be allocated pitches, it was unreasonable of Council to refuse to treat them as though they were so entitled. I regard any submission to that effect as without merit.

7) An additional reason why toleration of a trespass by the McDonaghs on Site B would be unacceptable is that those who have been found to be entitled to pitches on the Ellen Ridge Site have made clear their unwillingness to move to the pitches while the McDonaghs are on site. (I should say that the evidence as to the conduct of the trespassers on the Land seems to me to make that position of the successful applicants both understandable and reasonable. This view was only confirmed by my observation of Mr Patrick McDonagh, who appeared to have limited respect for the court process and whose evidence to me, like his information to Deputy District Judge Jackson, regarding his history of occupation of bricks and mortar lacked candour.) Ms Aspey observes that since the McDonaghs entered upon the Land in July 2019 not only have no other families moved onto the Ellen Ridge Site in order to take up allocation of pitches but no other Gypsies or Travellers have moved onto the Land by way of unauthorised encampment, although unauthorised encampments have occurred elsewhere in Newport.

8) Mr Cottle focused on Site C, because it is not directly adjacent to Site B and has a separate entrance. He submitted that the Council ought to have considered tolerating an unauthorised encampment on Site C; I understood the contention to be that such an encampment could have been tolerated until such time, if ever, as Site C needed to be developed for the purposes of the authorised Ellen Ridge Site. In my view, this submission is subject to the objections that have been mentioned several times already. In a *Rafferty*-type case, where the defendants' inability to station their caravans on authorised sites is due to the local authority's breach of a duty to provide pitches to which the defendants would be entitled, the facts might (though they might not) be such as to make it unreasonable of the local authority to seek possession instead of tolerating the

defendants' trespass on other parcels of its land. That is not this case. In cross-examination, Ms Aspey said: "We would not look to find land for a tolerated encampment, because they [the defendants] have not shown that they need it." I regard that simple and straightforward approach as being entirely lawful.

9) There are, in any event, further reasons why it is reasonable not to consider Site C as a suitable location for a temporary tolerated encampment. It is evident from the dimensions of the Land, from the plans that are in evidence and from Ms Aspey's evidence that the entirety of the Land is not very large. The distance between the separate entrances to Site C and to Sites A and B is a matter of a few minutes' walk. However, the distance between Site C and Site B themselves is very small. The information available to the Council gives it reasonable grounds for believing that the present unlawful encampment is a cause of disturbance even to those who are not on the Land, that the defendants have not behaved on the Land in a reasonable manner (there are photographs showing what amounts to vandalism of the existing building on site; although it is impossible to identify the specific persons responsible for this, it has happened during the period of the defendants' unlawful occupation of Site A and Site B), and that those persons to whom pitches have been allocated have expressed unwillingness to reside on the Ellen Ridge Site if the McDonagh family is there also. (A further matter that the Council has not raised concerns planning considerations. The grant of planning permission for the Ellen Ridge Site was subject to numerous conditions concerning ecology, roads and footways, landscaping, and fencing for mammals. The supposition that, because there is planning permission for an authorised site on particular land, unauthorised encampments on the land in its undeveloped state are appropriate land use is false.)

10) These same considerations apply also to the land to the west of Site A, save that this land is not currently intended for development as part of the Ellen Ridge Site itself. Indeed, while in the case of Site C it is known that the land is suitable for development into a location for the siting of caravans, there is no evidence at all that the land to the west of Site A is suitable even in principle and subject to planning conditions suitable for that purpose. Mr Cottle made much of the lack of current plans to develop the land, but there is no evidential basis for so much as thinking that anyone could reasonably have contemplated permitting an unauthorised encampment on that land.

11) Mr Cottle also made much of the large number of unauthorised encampments in the Newport area. This might be a relevant factor in conjunction with a *Rafferty*-style situation, as described above, but I cannot think that it carries any weight by itself. The prevalence of a particular kind of lawbreaking does not itself indicate that the conduct in question ought to be tolerated. A local authority faced with repeated unlawful encampments within its area may come to the conclusion that it is more sensible to put up with them than to spend time and money on enforcement action. But that is the kind of decision that a local authority is entitled to make for itself. The county court (or, indeed, any court) is ill-equipped to make that decision for the elected authority and has no right to do so.

80. In the present case, the Council considered whether to move the defendants onto a different part of the Ellen Ridge Site and decided that it should not do so. It reconsidered the matter again, with specific reference to the Guidance, after the Appeal Judgment and again decided to proceed with possession proceedings. I see no proper basis for interfering with its decision. I also consider that the Council was entirely justified in thinking that it ought not to be strong-armed by Mr Patrick McDonagh and his family into reversing its own lawful decisions that were not subject of challenge by available means.

81. If I had taken the view that the Council had failed to consider alternatives to seeking possession, I should anyway not have acceded to the public law defence. First, the decision to seek possession was one that the Council was reasonably entitled to make. That is a short, decisive answer. Second, in any event, a challenge to the Council's conduct by way of an application for judicial review (which, for reasons explained above, was the strictly appropriate way of raising the matters relied on) would not have succeeded if it appeared to the court to be highly likely that the outcome for the defendants would not have been substantially different if the conduct complained of had not occurred: see section 31(2A) of the Senior Courts Act 1981. I am entirely satisfied that no amount of consideration of any of the alternatives to eviction suggested by Mr Cottle would have led to a different outcome.

(2) The Welfare of the Children

82. Miss Shannon Ward advances this ground in the following paragraphs of her defence:

> "14. The Claimant failed, despite being required as a matter of public law derived from Article 3 of the UNCRC and or under section 11(2) of the Children's (sic) Act 2004 to carry out a lawful assessment of the relevant children's principal needs, merely counting that the decision to evict concerns fifteen children.
>
> 15. The Claimant failed as required by Article 3 of the UNCRC, (a) to identify, given those assessed needs, which outcome was in the children's best interests; and (b) to attach substantial weight to achieving the outcome that was in the children's best interests.
>
> 16. The Claimant wrongly failed to ensure that no other matter was treated as having inherently more importance than achieving the outcome that was in the children's best interests."

The child to whom her defence specifically relates is her daughter, Sophia McDonagh, who was born on 25 February 2019. In principle the matters raised in the defence also engage consideration of other children, including Mr Patrick McDonagh's young son, Eddie McDonagh, who is five years old.

83. Section 11 of the Children Act 2004 applies in England. The corresponding and identical provision in respect of Wales, and therefore the provision that applies in this case, is section 28, which provides in part:

> "(1) This section applies to each of the following—
>
> (a) a local authority in Wales;
>
> (2) Each person and body to whom this section applies must make arrangements for ensuring that—
>
> (a) their functions are discharged having regard to the need to safeguard and promote the welfare of children …"

84. Article 3.1 of the UN Convention on the Rights of the Child ("UNCRC") provides:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

85. In *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, the Supreme Court considered section 11 of the Children Act 2004 and Article 3.1 of UNCRC in the context of decisions about immigration, asylum, deportation and removal. The following passages from the judgment of Lady Hale are relevant:

> "23. For our purposes the most relevant national and international obligation of the United Kingdom is contained in article 3.1 of the UNCRC: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. …
>
> 24 … [T]his duty applies, not only to how children are looked after in this country while decisions about immigration, asylum, deportation or removal are being made, but also to the decisions themselves. This means that any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be 'in accordance with the law' for the purpose of article 8.2. Both the Secretary of State and the tribunal will therefore have to address this in their decisions.
>
> 25 Further, it is clear from the recent jurisprudence that the Strasbourg court will expect national authorities to apply article 3.1 of UNCRC and treat the best interests of a child as 'a primary consideration'. Of course, despite the looseness with which these terms are sometimes used, 'a primary consideration' is not

the same as 'the primary consideration', still less as 'the paramount consideration'. … However, questions with respect to the upbringing of a child must be distinguished from other decisions which may affect them. The UNHCR, in its Guidelines on Determining the Best Interests of the Child (May 2008), explains the matter neatly, at para 1.1:

> 'The term "best interests" broadly describes the well-being of a child ... The CRC neither offers a precise definition, nor explicitly outlines common factors of the best interests of the child, but stipulates that: the best interests must be the determining factor for specific actions, notably adoption (article 21) and separation of a child from parents against their will: article 9; the best interests must be a primary (but not the sole) consideration for all other actions affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies see: article 3.'

This seems to me accurately to distinguish between decisions which directly affect the child's upbringing, such as the parent or other person with whom she is to live, and decisions which may affect her more indirectly, such as decisions about where one or both of her parents are to live. Article 9 of UNCRC, for example, draws a distinction between the compulsory separation of a child from her parents, which must be necessary in her best interests, and the separation of a parent from his child, for example, by detention, imprisonment, exile, deportation or even death.

26 Nevertheless, even in those decisions, the best interests of the child must be a primary consideration. As Mason CJ and Deane J put it in the case of *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 292 in the High Court of Australia:

> 'A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it.'

As the Federal Court of Australia further explained in *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133, para 32:

> '[The tribunal] was required to identify what the best interests of Mr Wan's children required with respect to the exercise of its discretion and then to assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration.'

> This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first. That seems, with respect, to be the correct approach to these decisions in this country as well as in Australia."

86. Section 11 was considered in the context of housing in *Kensington and Chelsea Royal London Borough Council v Mohamoud* [2015] EWCA Civ 780, [2015] HLR 38. The issue that arose in that case was whether a housing authority was obliged to carry out an assessment under the 2004 Act when carrying out its functions under Part VII of the Housing Act 1996 in order to comply with its duties under section 11(2) of the 2004 Act. Within that context, Sharp LJ, with whom Black and Longmore LJJ agreed, mentioned some factors that cast light on the proper approach to sections 11 and 28 of the 2004 Act (I omit some of the references):

> "26. For present purposes it also important to note the following.
>
> 27. First, tenancies granted under Part VII of the 1996 Act, including to families with dependent children, are not secure tenancies. A local authority is not therefore required under domestic law to establish any particular ground for the termination of a tenancy, when seeking possession from a tenant on whom a Notice to Quit has been served. There are clear policy reasons for this. The homelessness regime provides the local authority with the flexibility in the management of its housing stock that it needs if it is to respond quickly and responsibly to the demands that the pressing social problem of homelessness give rise to, and the housing stock from which the local authority provides this temporary accommodation may not be owned by the local authority but will have been obtained from a housing association or a private landlord …
>
> 28. Secondly, children are expressly catered for in the legislative scheme in Part VII in two respects. At the beginning of the process the presence of a dependent child gives rise to the priority need and the provision of temporary accommodation. At the end of the process that presence is catered for by section 213A of the 1996 Act. This provides a link or bridge between the exercise of local housing authority functions under Part VII and the functions of local authority social services under the 1989 Act. In the normal course, if a parent, who is in temporary accommodation, is not owed the main housing duty under Part VII (the situation which is posited here) then a Children Act assessment will have to be undertaken of any dependent child in any event.

29. Thirdly, as can be seen, by its structure, the legislative scheme in Part VII provides for periods of 'temporary deferral' by default, between the making of the section 184 decision, and the point at which a Notice to Quit may be served; as do legal proceedings in the event they are taken, as they were here.

30. Fourthly, both the local authority seeking possession of temporary accommodation provided under Part VII, and the court hearing any subsequent claim for possession are required to act compatibly with an occupier's rights under article 8 of the Convention: see *Manchester County Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104; [2011] HLR 7 and *Hounslow LBC v Powell*. So is a court which conducts a review in accordance with section 204 of the 1996 Act: see *R (on the applications of N) v London Borough of Newham and London Borough of Lewisham* [2014] UKSC 62; [2014] 3 WLR 1548; [2015] HLR 6. An adjudication of proportionality in these respects is therefore accommodated within the existing framework of the legislative and court procedures.

31. Fifthly, the 'best interests' or wellbeing of the child may be relevant to the proportionality of interference with rights under article 8 of the Convention as explained in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166 …

32. The general approach in such cases derives from Article 3(1) of the United Nations Convention on the Rights of the Child 1989 which says: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, best interests of the child shall be a primary consideration.' The wellbeing of a child is not necessarily determinative and may be outweighed by other factors, but it must be considered first, and is a primary consideration where the decision directly affects the child's upbringing: *ZH (Tanzania)* Baroness Hale of Richmond JSC at paras 25 and 33.

33. In *Collins* Richards LJ did not think section 11 added materially to the article 8 analysis in any event (see para 14); and approved the observation of Hickinbottom J in *Stevens v Secretary of State for Communities and Local Government* [2013] EWHC 792 (Admin); [2013] JPL 1383, that it will not usually be necessary for the decision-maker to make their own inquiries as to evidence that might support the child's best interests: see para 16.

34. Sixthly, if a court is satisfied that eviction would be disproportionate, either on a review or in possession proceedings, it can prohibit the eviction for as long as that is the case: see *Manchester City Council v Pinnock*, Lord Neuberger

> MR paras 45 and 64; and *Hounslow London Borough Council v Powell*, Lord Hope of Craighead DPSC paras 62 and 63.
>
> 35. Seventhly, where an applicant has no right under domestic law to remain in possession of a property, the threshold for raising an arguable case of a lack of proportionality is a high one …
>
> 36. Eighthly, the legitimate aims within the scope of article 8.2 of the Convention, for the purposes of determining proportionality, include the vindication of the local authority's rights of ownership and enabling it to comply with its public duty in relation to the allocation and management of housing stock: *Manchester County Council v Pinnock* Lord Neuberger MR at 51 and *Hounslow LBC v Powell* Lord Hope of Craighead DPSC at 36.
>
> 37. Ninthly, the court will deal with the matter summarily unless it is seriously arguable; the onus will be on the defendant to raise the issue, and there is no need for the structured approach to the issue of proportionality which might be applicable in other contexts, such as immigration: indeed such a structured approach would be wholly inappropriate in the context of a statutory regime that has been deliberately designed by Parliament, for sound reasons of public policy, so as not to provide an occupier with a secure tenancy: *Manchester County Council v Pinnock*, Lord Neuberger MR at paras 54 and 61 and *Hounslow v Powell*, Lord Hope of Craighead at para 41."

87. Having considered the particular facts of the cases before the Court, Sharp LJ continued:

> "66. Quite apart from the difficulty of analysing what the section 11 duty obliges local authorities to do, when the appellants' case is detached from the specifics of any particular function they carry out, and looking at the matter more generally, it would be wrong in my judgment to construe section 11 of the 2004 Act so that it changes the nature or scope of the functions to which it relates …
>
> 67. Further, as in *Collins*, it is difficult to see how the section 11(2) duty adds anything material to the article 8 analysis. If it does so, it seems to me, more as a matter of form, rather than substance.
>
> 68. Standing back for a moment, if the respondents were required to engage in an assessment of children in homelessness cases under Part VII as Mr Knafler suggests, this would be extraordinarily burdensome in terms of cost and resources and – in the overwhelming number of cases - simply futile. As outlined above, the law already caters for the position of

> children, it allows for the assessment of proportionality at various stages, it has built into it various periods when any particular facts can be raised which might (in the most exceptional case) bear on the proportionality of an eviction, and mandate a temporary halt of the process, and the legislation, together with the procedural protections available to protect the article 8 rights engaged, provide for such matters to be independently assessed by a court. Hard pressed social workers would be diverted from their vital child protection work in relation to children in need as defined by the legislation, to conduct thousands of child assessments on the off chance that there were exceptional facts, of which the local authority which had already conducted a detailed review of the parent's circumstances was, as yet, unaware, and the parent did not think to raise with the local authority him or herself. If the appellants' arguments are correct, then one child might be the subject of any number of such assessments (presumably these would then be required further back into the process). There is moreover an existing duty on the part of local authorities to conduct a Children Act assessment in respect of any child in need, whose parent is likely to lose their accommodation; and local housing authorities and children's services/departments are under a duty to co-operate in any event: see section 10 of the 2004 Act and section 27 of the 1989 Act."

88. Having rejected the appellants' arguments, Sharp LJ concluded, significantly:

> "70. If however, contrary to my view, there was a duty to conduct an assessment as the appellants assert, I do not think these facts show any basis for interfering with the possession orders that were made, as there is no link between the making of those orders, and a failure to conduct such an assessment. I t would follow that a failure to comply with such a duty did not give rise to a defence to the claims in any event: see *Wandsworth LBC v Winder* [1985] AC 461 HL at 509E-F and *London Borough of Hackney v Lambourne* (1993) 25 HLR 172, at 181."

89. Section 11 of the 2004 Act was further considered by the Court of Appeal in *Hertfordshire County Council v Davies*. A service occupier of a dwellinghouse was dismissed and his employer, the local authority, sought possession. One ground of defence was that the local authority's decision to serve a notice to quit had been in breach of section 11 because (i) the defendant's children faced street homelessness if evicted, (ii) the children were in full-time education, and (iii) the dwellinghouse was the only home the children had ever known. The defence was rejected at first instance and on appeal. Sharp LJ, with whom Davis and David Richards LJJ agreed, referred to her earlier judgment in *Mohamoud* and, with reference to the facts of the case before her, said:

> "30. … As the hearing developed it seemed to me that the breach of the s.11 duty, as the judge found it to be, had no relevance on the facts to the substantive matter at issue in these proceedings,

> namely whether an order for possession should be made or not. It is notable for example, that no mention was made of the position of the appellant's children in his skeleton argument, and we were referred to no material about them during the course of argument. This lacuna in the appellant's case was at one with the position in the pleaded defence where the appellant failed to particularise how, if at all, consideration of the children's welfare would have made any difference to the ultimate outcome of this claim. As for the evidence before the judge, the court made no finding as to the children having any unusual or compelling circumstances beyond the normal and understandable difficulties arising from the uncertainty over the future of their home. Those difficulties however, unfortunate as they were, could not provide a justification for allowing this family with no private law right to remain in the bungalow, to stay there after the ending of the service occupancy, even on a temporary basis; or for depriving the respondent of its otherwise unanswerable property rights. There was nothing in other words that supported even faintly, even at the pleadings stage, a case that any consideration of the position of the children when the notice to quit was served would have made any difference to the outcome of the action for possession. In the light of these matters the s.11 issue might have been disposed of on a summary basis. Further, as Mr Lane pointed out, the appellant did not seriously suggest before the judge that art.8 on its own imposed any bar to possession in this claim, and in those circumstances it could not be suggested that the corresponding defence refused by reference to s.11 of the 2004 Act had been made out.
>
> 31. Thus the reality of the position seems to me to be that the issue raised in relation to s.11 was in its own way as theoretical as that raised in relation to the Public Sector Equality Duty under s.149 of the 2010 Act. It had no direct or relevant application to this case. As Mr Vanhegan accepted in argument, the most the appellant could have hoped for, even had—contrary to realities—his defence raised by reference to s.11 been successful, was a temporary reprieve; as it is, these legal proceedings have meant he, and his family, have remained in the bungalow for nearly three years since his licence to occupy was terminated."

90. Those remarks are pretty much directly applicable in this case. At times Mr Cottle appeared to suggest that the alleged failure of the Council to turn its mind to the primary consideration of the welfare of the children at the time of commencing proceedings meant that the claim must be dismissed. Even if there were such a failure, no such conclusion would follow. There is no reason whatsoever for supposing that the section 28 consideration provides a reason for refusing a possession order. It seems to me that the defence as advanced in the present case is an example of the unhappy tendency in possession cases for lawyers to trawl through every conceivable legal point and present them without any thought to reality. The pleaded defence raises nothing beyond an

alleged failure to go through a particular course of reasoning. Such a failure would not ground a defence; it might at most explain why a substantive reason for not seeking possession had been overlooked. In this case, regular enquiries have been made through the Welfare Assessments that have been carried out periodically; they have shown no cause for concern about the children on the Land and no reason why possession ought not to be sought. After my decision to allow the appeal from the possession order, the Council's social workers carried out a specific assessment of the children's wellbeing. Again, it found no cause for concern about their care and welfare. The social workers expressed the view that it would be best for the children to remain on the Land. The Council considered this information and decided that it did not outweigh the factors militating in favour of seeking possession. That decision was one that the Council could reasonably have made. One might think that any other decision would have been somewhat extraordinary.

(3) Convention Rights

91. The defences of Mr Edward McDonagh and Ms Shannon Ward both contend that the Council's decision to seek possession of the Land is a disproportionate and unlawful interference with their right under Article 8 of the European Convention on Human Rights. In particular, they say that the Council owes a positive duty by reason of Article 8 to refrain from policies or practices that oblige assimilation of persons belonging to national minorities against their will; and they say that the UK Government has ratified the Convention for the Protection of National Minorities, which requires that special consideration be given in individual cases to ways and means of facilitating an individual's cultural traditions that are important to him or her. (I note that the effects of eviction on the children present on the Land also falls to be considered with regard to Article 8; see above. I shall say no more on that aspect in the present context.)

92. Article 8 provides:

> "Right to respect for private and family life
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 provides:

> "Prohibition of discrimination
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or

> other opinion, national or social origin, association with a national minority, property, birth or other status."

93. The general principles applicable to Article 8 defences to possession claims were set out by Etherton LJ in *Thurrock Borough Council v West* [2012] EWCA Civ 1435, [2013] HLR 5, in the context of rights of succession to a secure tenancy:

> "22. The principles to be applied are clear. First, it is a defence to a claim by a local authority for possession of a defendant's home that the possession is not necessary in a democratic society within Article 8(2) , that is to say it would be disproportionate in all the circumstances. An order for possession in such a case would be an infringement of the defendant's right under Article 8 to respect for his or her home and so unlawful within the Human Rights Act 1998 s. 6(1).
>
> 23. Secondly, the test is whether the eviction is a proportionate means of achieving a legitimate aim: *Pinnock* at [52]. The Supreme Court said there that it would prefer to express the position in that way rather than use the yardstick of confining an arguable Article 8 defence to "very exceptional cases" as mentioned by Lord Bingham in *Kay v Lambeth BC* [2006] UKHL 10, 2 AC 465 , at [29] and endorsed by the European Court in *McCann v UK* (2008) 47 EHRR 913 at [54] and *Kay v UK* [2011] HLR 13 at [73].
>
> 24. Thirdly, it is nevertheless clear that the threshold for establishing an arguable case that a local authority is acting disproportionately and so in breach of Article 8 where re-possession would otherwise be lawful is a high one and will be met in only a small proportion of cases: Hounslow BC v Powell [2011] UKSC 8, [2011] 2 AC 186 , at [35] (Lord Hope). The circumstances will have to be exceptional to substantiate an Article 8 defence: *Powell* at [92] (Lord Phillips), *Corby BC v Scott* [2012] EWCA Civ 276, [2012] HLR 23 at [35] (Lord Neuberger MR)). I…
>
> 25. Fourthly, the reasons why the threshold is so high lie in the public policy and public benefit inherent in the functions of the housing authority in dealing with its housing stock, a precious and limited public resource. Local authorities, like other social landlords, hold their housing stock for the benefit of the whole community and they are best equipped, certainly better equipped than the courts, to make management decisions about the way such stock should be administered: *Powell* at [35]. …
>
> 26. Fifthly, that is why the fact that a local authority has a legal right to possession, aside from Article 8 , and is to be assumed to be acting in accordance with its duties (in the absence of cogent evidence to the contrary), will be a strong factor in support of the proportionality of making an order for possession

> without the need for explanation or justification by the local authority: *Pinnock* at [53] and *Powell* at [37] (Lord Hope). It will, of course, always be open to a local authority to adduce evidence of particularly strong or unusual reasons for wanting possession: ibid.
>
> …
>
> 29. Sixthly, an Article 8 defence on the grounds of lack of proportionality must be pleaded and sufficiently particularised to show that it reaches the high threshold of being seriously arguably: *Powell* at [33] and [34] (Lord Hope).
>
> 30. Seventhly, unless there is some good reason not to do so, the Court must at the earliest opportunity summarily consider whether the Article 8 defence, as pleaded, and on the assumption that the pleaded facts relied upon are correct, reaches that threshold … If the pleaded defence does not reach that threshold, it must be struck out or dismissed: ibid. The resources of the court and of the parties should not be further expended on it.
>
> 31. Eighthly, even where an Article 8 defence is established, in a case where the defendant would otherwise have no legal right to remain in the property, it is difficult to imagine circumstances in which the defence could operate to give the defendant an unlimited and unconditional right to remain: comp. *Pinnock* at [52]. That might be the effect of a simple refusal of possession without any qualification. It is particularly difficult to imagine how that could possibly be appropriate in a case where the defendant has never been a tenant or licensee of the local authority. Otherwise, the effect of the Article 8 defence would be that the Court would have assumed the local authority's function of allocating its housing stock, preferring the right of the defendant to remain, without any tenancy or contract, over all the other people entitled to rely on the local authority's statutory housing duties and without the benefit of any knowledge of who those people are and their circumstances and of other relevant matters which would properly guide the local authority in housing management decisions."

94. The one matter relied on by the defendants in the present case is the factor of their cultural heritage as Irish Travellers. However, the cultural heritage in question is addressed by sections 101 and 103 of HWA and by the allocation of pitches in accordance with a lawful policy. If an individual is wrongly refused a pitch, he or she can challenge that refusal. In the present case, no relevant challenge has been brought to any refusal and it is not contended that any defendant had an entitlement to the allocation of a pitch. It is unarguable that in those circumstances the decision to seek possession from trespassers on the Council's land was a disproportionate interference with their Article 8 (or Article 14) rights by reason of the fact that they are Irish Travellers. (See also paragraph 71 above and the references therein.) Further, even if such a case could have been made out, it could not possibly justify a refusal to give to

the Council possession of its own land after it has been unlawfully occupied for nearly two years, for the reason indicated in Etherton LJ's eighth principle in *Thurrock.*

(4) Equality Act 2010

95. The defence of the second defendant, Mr Edward McDonagh, contains the following paragraph:

> "Edward McDonagh avers that he is disabled, suffering from mental health problems, and the disability implications of the challenged decisions involved the claimant doing 'all that can reasonably be expected of it to accommodate the consequences of the disabled person's disability': see *Akerman-Livingstone v Aster Communities Ltd (formerly Flourish Homes Ltd)* [2015] UKSC 15, which here meant sharply focusing on the different options as explained in the [Welsh Government Guidance for managing unauthorised encampments], rather than deciding to evict for the insufficient reasons relied on by the claimant."

Materially identical paragraphs were contained in the defences of the third defendant, Miss Kathleen McDonagh, and the fourth defendant, Miss Ward.

96. Although the defences did not say so in terms, it appeared that they might presage an argument that the Council's actions in seeking possession of the Land were discrimination against persons having a disability as defined in section 6 of the Equality Act 2010. In the event, no such argument was advanced. I record that the evidence fell far short of establishing that any defendant had a disability within the terms of the Act. Mr Edward McDonagh gave evidence that he had problems with his mental health, but he was unwilling to explain what they were. He has disclosed no medical records in respect of any period since June 2018, and the latest entry in his medical records does not show that he had any active mental health problems. As for Miss Ward, she has produced no medical records at all and she chose not to give evidence at trial. On two occasions—once to a housing officer in February 2020 and once to social workers in August 2020—she has confirmed to the Council's employees that she has no health issues.

Conclusion

97. I shall make an order for possession as claimed.

98. Consequential matters, including the appropriate terms of the order, will be dealt with on paper after I have received written representations.