Neutral Citation Number: [2018] EWCA Civ 379

Case No: A2/2017/1897

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
Mrs Justice Elisabeth Laing
HQ16X01766

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/03/2018

Before :

LORD JUSTICE DAVIS
LADY JUSTICE SHARP
and
LORD JUSTICE DAVID RICHARDS

- -

Between :

BRYN COLIN DAVIES	**Appellant**
- and -	
HERTFORDSHIRE COUNTY COUNCIL	**Respondent**

- -
- -

Toby Vanhegan and Riccardo Calzavara (instructed by **Arkrights Solicitors**) for the **Appellant**
Andrew Lane and Tara O'Leary (instructed by **Hertfordshire County Council Legal Services**) for the **Respondent**

Hearing date : 29 November 2017

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Approved Judgment

Lady Justice Sharp:

Introduction

1. This appeal is brought against an order for possession dated 22 June 2017, made by Elisabeth Laing J. Permission to appeal was granted on 16 August 2017 by Thirlwall LJ on a single ground. This was whether the judge erred in law in determining as a matter of principle that the respondent's failure to comply with its statutory duties under section 11 of the Children Act 2004 (section 11 of the 2004 Act) and section 149 of the Equality Act 2010 (section 149 of the 2010 Act) could not provide a defence to its claim for possession.

2. Notwithstanding the terms in which permission was given, the issue of principle raised in relation to section 149 of the 2010 Act is a theoretical one: this is because the appellant was not given permission to challenge the judge's conclusion that section 149 had no application on the facts, nor was he given permission to challenge the judge's reasons for reaching that view. Having heard brief argument about this at the outset of the hearing, we decided in the circumstances that no useful purpose would be served by the expression of (obiter) views on a point that could have no effect on the outcome of the appeal, and that the appeal and submissions should be confined to the issue raised in relation to section 11 of the 2004 Act.

Facts

3. The facts can be briefly summarised. The appellant became the resident school caretaker at a school (Sheredes in Hertfordshire: 'the school') in January 2003. He and his family moved into a bungalow (called the School Bungalow) on the school site when he took up his employment. The respondent is not a local housing authority. It owns the bungalow. When the appellant started work, the school was managed by the respondent in the discharge of its education functions. On 1 September 2016, the school became an academy; and it is now owned and run by an Academy Trust. The respondent leases the school grounds to the Academy Trust. The bungalow is excepted from the lease, because the appellant is still there.

4. The appellant, as the judge found, occupied the bungalow pursuant to a service occupancy. His licence to occupy ended on 12 June 2015 when he was dismissed for gross misconduct (the appellant's subsequent application to the Employment Tribunal claiming compensation for unfair dismissal, but not re-engagement or re-instatement, was unsuccessful). Thereafter, the appellant and his family, that is his wife and four children now aged 19, 17, 15 and 11, have had no private law right to remain in the bungalow, but have continued to live there as trespassers.

5. The respondent served the appellant with a document with the title "Notice to Quit" dated 12 June 2015, on the 16 June 2015. The notice to quit required the appellant to give up possession of the bungalow on 10 July 2015. The appellant failed to give up possession. Possession proceedings were commenced in the County Court at Hertford on 10 September 2015. One of the defences raised by the appellant to the claim was that the service of the notice to quit was unlawful "in a public law sense."

6. The relevant part of the pleadings said as follows:

"15. The service of the notice to quit was also unlawful in a public law sense because the claimant did not have regard to

(a) the rights of the defendant and his family under article 8 of the Convention;

(b) the defendant's disability and the claimant's duties under the Equality Act 2010,

(c) the best interests of the children and the need to safeguard and promote their welfare in accordance with section 33 of the Children Act 2004.

16. The defendant is disabled within the meaning of section 6 and Schedule 1 of the Equality Act 2010.

17. The claimant is in breach of sections 15, 19, 35 and 149 of the Equality Act 2010…

19. It is denied that the claimant is entitled to the relief claimed in paragraph 10, or any relief. The making of a possession order would be disproportionate and unreasonable, in breach of the Equality Act 2010, section 11 of the Children Act 2004, a breach of article 8 of the Convention, and give rise to a breach of article 14 when read with article 8. These breaches have been particularised above, but the following should also be taken into account.

PARTICULARS

(a) The property has been the family home since 1 January 2003 which is over 12 years.

(b) The family have no other accommodation.

(c) If evicted, the family risk street homelessness which would have an enormously detrimental impact on the physical and mental health of all the family members.

(d) The defendant has been a good tenant.

(e)The children are all in full time education.

(f) The defendant's sons were born and brought up at the property. It is the only home that they know.

(g) The defendant's wife is the sole carer of her father who lives in the next road.

> (h) The property has been specially adapted for the defendant's needs.
>
> (i) In June 2011 the defendant underwent surgery for two slipped discs. In April 2014 he had a double hernia operation. The defendant is a blue badge holder. In April 2015 he had a level access shower installed, which the parties paid for.
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> (j) The defendant is suicidal and is under the care of the Crisis Assessment and Treatment Team of the Hertfordshire University NHS Foundation Trust who are seeing him on a daily basis pending a psychiatric assessment. He is also suffering from depression and panic attacks for which he is taking mediation. He took an overdose. He is extremely vulnerable at the present time."

7. The only reference to the section 11 duty and to the position of the appellant's children is to be found in the parts of the defence set out above.

8. The claim was transferred to the High Court on the appellant's application and it was tried by Elisabeth Laing J on 16 and 17 May 2017. She heard oral evidence from the appellant, his wife and two daughters amongst others. The appellant's freestanding defence that the service of the notice to quit was unlawful because no regard was had to his article 8 rights and those of his family, was not pursued on his behalf at trial. As I understand it, the defence raised by reference to section 11, though mentioned in the skeleton arguments, did not feature during the course of the trial either.

9. Judgment was handed down on 21 June 2017: see [2017] EWHC 1488 (QB). In the course of a long judgment, the judge dealt meticulously with the many issues raised on behalf of the appellant. Most of her conclusions are not challenged in this appeal. It is sufficient therefore to summarise her findings.

10. The judge held that the appellant was a service occupier of the bungalow at the inception of his employment agreement: see para 98. A change in his job description did not result in him ceasing to be a service occupier because the terms of his employment were not amended: see para 100. Accordingly, the appellant had no security of tenure and there was no need to serve a notice to quit complying with section 5 of the Protection from Eviction Act 1977, because the agreement terminated automatically upon the appellant's dismissal: see para 102. Further, neither of the duties under section 149 of the 2010 Act and section 11 of the 2004 Act, provided a defence to a claim for possession: see para 105. She said, if she was wrong on that point, that she would have found that the section 11 duty had been breached by service of the notice to quit but because there was no evidence of the appellant's disability at the time of service of the notice to quit there was no breach of section 149: see paras 106 to 107. As there was no evidence of disability at the time of service of the notice to quit, there had been no indirect discrimination under section 19 of the Equality Act 2010. In any event, seeking possession was a proportionate means of achieving a legitimate aim: see paras 110 and 111. In relation to the latter point,

though by the time of the trial the respondent had transferred its responsibilities for the school to the Academy Trust, the judge found it to be in the public interest that the respondent should recover possession of the bungalow so that it could decide (in conjunction with the Academy Trust) how best the bungalow could be used for public purposes when it became vacant (when the school would take a decision as to whether it required a new resident caretaker). Finally, the appellant had counterclaimed asking for a declaration of incompatibility (on the ground that para 2 of schedule 1 to the Housing Act 1985 was incompatible with the appellant's rights under the Convention). The judge held that the exemption from security of tenure for service occupiers is not incompatible with article 14 of the Convention and, in any event, the difference in treatment was objectively justifiable: see paras 113 and 116.

11. The public law defence raised by reference to section 11 of the 2004 Act was dealt with in the judgment in concise terms (reflecting no doubt the lack of emphasis given to it at trial). At paras 6 and 7 of her judgment the judge said that as a matter of principle the appellant was entitled to raise public law challenges as a defence to a private law claim for possession: see *Wandsworth London Borough Council v Winder* [1985] AC 461. She also said there must be a link between the breach of public law which is asserted and a private law right, citing *Tower Hamlets LBC v Abdi* (1993) 25 HLR 80, at p.87, and *London Borough of Hackney v Lambourne* (1993) 25 HLR 172. The judge said that what she had to decide was what impact, if any, those defences may have on the respondent's claim.

12. The judge's determination of the section 11 issue is to be found in paras 104 to 106 of her judgment where she said this:

> 104. The Defendant's pleaded challenge is only to the service of the notice to quit in this case. For the reasons I have given, service of the notice to quit was not necessary to bring the agreement to an end. The agreement had ended automatically with the Defendant's dismissal. Nonetheless, I accept that at the point when the agreement ended, the Council could have let the Defendant stay in the Bungalow with his family, and that the Council made an active decision to serve the notice to quit. In doing that, I accept that the Council was exercising a function. The decision the Council made was whether to enforce the agreement in accordance with its terms or not.
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> 105. I also accept that this was the exercise of a function to which section 149 of the 2010 Act and section 11 of the 2004 Act could apply in theory. However, neither of those duties confers a private law right on the Defendant. That means, on the authority of *Mohamoud*[1] and *Lambourne*, that even if the Defendant could have applied for judicial review of the decision to serve the notice to quit, on the grounds that the Claimant had not complied with those public law duties, any failure to comply with them would not provide a defence to the

[1] *Kensington and Chelsea Royal London Borough Council v Mohamoud, Wandsworth London Borough Council v Saleem* [2015] EWCA Civ 780; [2015] HLR 38; [2016] PTSR 289

> claim for possession. Contrast the attack on the decision to increase the rent due in Winder's case.
>
> 106. In case I am wrong about that point of principle, I should say something briefly about each duty. I would have held that section 11 did apply, and that the Claimant breached it in serving the notice to quit because, on the evidence, the Claimant gave no thought at all to the presence of the Defendant's children in the Bungalow or to the effect of the service of the notice to quit on their welfare."

13. The appellant's challenge in this appeal concerns what the judge said in para 105 of her judgment. Mr Vanhegan on behalf of the appellant submitted that the judge seems to have decided that a defence based on the duty arising under section 11 of the 2004 Act cannot provide a defence to a claim for possession where there is no private law right to possession. It was common ground before the judge however that such a defence *could* arise in principle; the case for the respondent was only that this was not a defence that could succeed on the facts. In his skeleton argument Mr Vanhegan had said that but for her decision on the point of principle, the judge would have decided that the section 11 defence defeated the claim for possession. Mr Vanhegan did not pursue that point in argument however. His submission was that if we were to find for the appellant on the point of principle, the right course would be to remit the matter to the judge so she could decide whether the section 11 defence succeeded on the facts.

14. The respondent through Mr Lane did not challenge the judge's conclusion in para 106 of her judgment that if a duty under section 11 of the 2004 Act did apply, then the respondent was in breach of it. His first submission was that the judge's view that section 11 could not provide a defence to a claim for possession in the absence of a private law right was sound. As the argument before us developed however, it became clear that he rested principally on the case the respondent had advanced at trial, now raised in the Respondent's Notice. This was that if this Court were to agree that section 11 of the 2004 Act could in principle provide a defence to a claim such as this, then the appeal should nonetheless be dismissed as, in all the circumstances of the case, it was an inevitable finding that it was lawful, reasonable and proportionate to make an order for possession of the bungalow.

Discussion

15. Section 11 places duties on a local authority (along with other bodies) to ensure that their functions, and any services they contract out to others, are discharged with regard to the need to safeguard and promote the welfare of children. The material part of section 11 provides that:

> "(1) This section applies to each of the following-
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> (a) a local authority in England;
>
> …

> "(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 …"

16. The way in which the section 11 duty can apply to the functions performed by local authorities has been considered by the courts in a number of cases including *Huzrat v Hounslow London Borough Council* [2013] EWCA Civ 1865; [2014] HLR 17 *Mohamoud*, cited; footnote one above, and *Nzolameso v Westminster CC* [2015] UKSC 22; [2015] PTSR 549.

17. The obligation imposed on those who are subject to the statutory duty under section 11 is not confined to the making of strategic arrangements: it is to ensure that decisions affecting children have regard to the need to safeguard them and promote their welfare. That does not mean however that the particular function being carried out is redefined, and the reach or impact of the section 11(2) duty is qualified both by the nature of the function being carried out, and what the particular circumstances require: see *Mohamoud* at paras 8 to 10 and *Nzolameso* at 24 to 25, approving observations made by Pitchford LJ in *Castle v Comr of Police of the Metropolis* [2012] 1 All ER at paras 50 to 51.

18. The issue that arose in *Mohamoud* was whether the housing authorities concerned were obliged to carry out a 2004 Act assessment when carrying out their functions under Part VII of the Housing Act 1996, in order to comply with their duties under section 11(2) of the 2004 Act. It was held that the duty under section 11 (2) of the 2004 Act was not freestanding; it could not be detached from the statutory functions it was designed to secure and ought not to be construed so that it changed the nature or scope of those functions. Accordingly, section 11(2) did not oblige an assessment of a child's best interests before issuing a notice to quit in relation to accommodation which that child occupied pursuant to the local authority's duties under Part VII of the Housing Act 1996. It was further held that the section 11(2) duty added nothing material to the analysis under article 8 of the Convention; and that even if the local authorities in that case had been under the duty to conduct the kind of assessment for which the appellant contended, on the facts, any failure to comply with that duty would not have given rise to a defence to the claims for possession since there was no link between the making of those orders and a failure to conduct such an assessment. Accordingly, there was no basis on which to interfere with the possession orders: see paras 63 to 73.

19. The relevant function carried out by the local authority in this case was the decision to serve the notice to quit, followed by its service. The judge's summary of the position in this respect in para 104 of her judgment was therefore an accurate one. As she pointed out, the appellant's pleaded challenge was only to the service of the notice to quit. Accordingly, I do not accept Mr Vanhegan's submission that it is open to the appellant to argue that there had been a failure to comply with the section 11 duty by reference to some other (as yet unpleaded and unspecified) functions carried out by the respondent, either in the appeal or on remittal if that were to be the outcome.

20. Though service of the notice to quit was not necessary to bring the service occupancy agreement to an end, at the point when that agreement ended, as the judge said, the respondent could have let the appellant stay in the bungalow with his family. The making of the (discretionary) decision to serve the notice to quit was therefore an exercise of a function which left room for a consideration of the children's welfare (had the decision been a factual one then the section 11 duty could have had no part to play in making it: see *Huzrat* at para 26 and *Nzolameso* at para 25).

21. Thus far I agree with the judge. In my opinion however in principle it is open to someone in the position of this appellant to raise a section 11 defence to possession proceedings brought by a local authority, notwithstanding the lack of a private law right to remain in possession. If therefore what the judge said in para 105 of her judgment was to the contrary effect, then in this respect she was, in my view, in error. I put the matter in that way, because although this appeal has proceeded on the basis that this was what the judge meant, in my view, the matter is not entirely clear. Either way however, in fairness to the judge, it should be said that the point of principle with which we are concerned was not examined before her, nor was she referred to the authorities on this point that were placed before us.

22. It is not necessary, for the purposes of this appeal, to examine the line of authority starting with *O'Reilly v Mackman* [1983] 2 AC 237, where the courts explored the relationship between the relatively new procedure, as it was then in RSC Order 53, and ordinary actions. The underlying concern, initially at any rate, was that it would be contrary to public policy and an abuse of the process of the court to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of ordinary action, thereby evading the procedural provisions for the protection of authorities: see the opinion of Lord Diplock in *O'Reilly v Mackman* at p. 285. See further *Winder* at p. 508 to 510. However the law has developed since then, in particular in relation to cases where defendants, both tenants and licensees, have sought to rely on article 8 of the Convention as a defence in possession proceedings brought against them by local authorities. Furthermore, the court's approach to the sort of procedural questions that concerned the court in O'*Reilly v Mackman* has become less technical and more pragmatic.

23. The starting point for our consideration seems to me to be these more recent developments, the result of which, in summary, is as follows. 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 article 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. See *Manchester County Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104, and *Hounslow London Borough Council v Powell* [2011] UKSC 8, [2011] 2AC 186. See further, *Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2008] UKHL 57; [2009] 1 AC 367; *Mullen v Salford City Council* [2010] EWCA H.L.R. 35 (a case affirmed on other grounds in *Hounslow*) and the (minority) opinion of Lord Bingham of Cornhill in *Kay & Anor v. London Borough of Lambeth & Ors* [2006] UKHL 10; [2006] 2 AC 465 at paras 29 and 30.

24. In *Doherty* the local authority owned a site that had been used for many years as a travellers' caravan site. The defendants, a family of gipsies, had been resident on the site for many years. Using its statutory powers of management, the local authority served a notice to quit, terminating the defendants' licence to occupy that site and then commenced proceedings for possession. The defendants relied on inter alia their right to respect for their home under article 8 of the Convention in their defence. The local authority argued that the decision to take possession proceedings was an administrative one that could be challenged by judicial review. The judge relying on the contractual and proprietary rights of the local authority gave summary judgment on the claim, with a stay of execution pending a claim for judicial review or an appeal. Notwithstanding the local authority's unqualified right to possession as a matter of domestic law, the House of Lords decided the article 8 issue should be remitted for determination to a High Court judge, that being an issue which could be raised in the proceedings for possession, where it would be for the judge to resolve any dispute on the facts: see paras 21, 33, 49 to 51, 54 to 57, 67, 70, 84, 89, 105 and 124.

25. In *Mullen* Waller LJ giving the judgment of the Court said this at paras 47 to 49 and 74:

> "47. There were various threads to this argument pursued by Mr Underwood and Mr Rutledge supported by Mr Holbrook in his skeleton for Manchester. Reliance was placed on section 38 of the County Courts Act 1984, which precludes the County Court from granting mandamus, and certiorari. That however may only go to remedy. Mr Underwood argued more relevantly that on a proper analysis of the decision in *Wandsworth London Borough Council v. Winder* [1985] AC 461 *("Winder")* a public law defence was only open to a litigant to defend a private law remedy. Thus he argued that Lord Hope's reference at [110] of *Kay* to *Winder* as the foundation for the gateway (b) defence demonstrated that in *Kay* the majority in the House of Lords in adopting [110] were describing no more than the traditional public law defence in the County Court where the defendant had a private right on which the public law aspect depended. Thus his argument was that in the non-secure tenancy cases since none had any private right, it followed that a public law defence was never available to them as a defence in the County Court. He accepted, of course, that they had the right that any interested party has to apply for judicial review to the Administrative Court but that was a different matter. This submission he suggested had the merit of putting all non-secure occupiers in the same position i.e. of having to persuade the County Court that they had an arguable case for Judicial Review so that the possession proceedings would be adjourned, and of those occupiers having the further hurdle of persuading the Administrative Court to grant permission to bring the application for Judicial Review.
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> 48. But Mr Underwood had to accept that in *Doherty* the majority in the House of Lords had contemplated that even in a case where the

> occupier did not have a private right, he could run a public law defence in the County Court and that we were bound by that decision.
>
> 49. That concession was clearly right and we can leave this issue there…"

And later on at para 74:

> "We are thus bound to hold that gateway (b) can apply to any decision of the local authority relevant to seeking possession which could be the subject of judicial review."

26. Similarly in *Pinnock* Lord Neuberger PSC said this at para 81:

> "The same conclusion [that the County Court had jurisdiction to deal with a defence which relies on an alleged breach of the defendant's article 8 Convention rights] can be justified on the rather wider basis that, where a tenant contends that the decision of a local authority landlord to issue, or indeed to continue, possession proceedings can in some way be impugned, the tenant should be entitled to raise that contention in the possession proceedings themselves, even if they are in the County Court. This seems to us to follow from the decision of the House of Lords in Wandsworth v Winder [1985] AC 461, as cited and approved in the present context in Kay v Lambeth [2006] 2 AC 465 para 110, and again in Doherty v Birmingham [2009] 1 AC 367, paras 56, 123 and 157 (see para 28 above). This approach also derives strong support from the observations of Lord Bingham in Kay v Lambeth [2006] 2 AC 465 para 30."

27. In making the observations in para 30 in *Kay* to which Lord Neuberger referred in *Pinnock*, it is to be noted that Lord Bingham drew no distinction between the position of a tenant or licensee. It was Lord Bingham's view that – in addition to the fact that effect had to be given to section 7(1)(b) of the Human Rights Act 1998 [2] - raising article 8 issues in the County Court rather than by way of judicial review was:

> "…consistent with authorities such as *Wandsworth London Borough Council v Winder* [1985] AC 461 and *Boddington v British Transport Police* [1999] 2 AC 143 and respects the principle that if other means of redress are conveniently and effectively available to a party they ought ordinarily to be used before resort to judicial review: see, for example, *R v Huntingdon District Council, Ex p Cowan* [1984] 1 WLR 501, 507. Where a party seeks relief, on conventional judicial review

[2] "(1) a person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) [i.e. in a way which is incompatible with a Convention right] may …(b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act."

> grounds, which only the Administrative Court can grant, there will, of course, be no alternative to an application for judicial review, but that will very rarely, if ever, be the case where an occupier seeks to resist a possession order in reliance on article 8."

28. 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 article 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 section 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 article 8 or section 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.

29. In this connection I should refer to what I said in *Mohamoud* about the relationship between the issue of proportionality in article 8 of the Convention, and the duty arising under section 11:

> "31. …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; a case concerning immigration and asylum, *H (H)v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor intervening)* [2012] UKSC 25; [2013] 1 AC 338, a case concerning extradition and *Collins v Secretary of State for Communities and Local Government and another* [2013] EWCA Civ 1193; [2013] PTSR 1594 a case concerning planning.
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> 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 [Collins v Secretary of State for Communities and Local Government and another* [2013] EWCA Civ 1193; [2013] P.T.S.R. 1594] 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…
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> 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."

30. In my opinion it follows that the view the judge appears to have reached on the point of principle was erroneous. It does not follow however that the possession order should be set aside or that the matter should be remitted for a rehearing. In agreement with the respondent, I consider there is no basis for either of those outcomes. As the hearing developed it seemed to me that the breach of the section 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 section 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 article 8 on its own imposed any bar to possession in this claim, and in those circumstances it could not be suggested that the corresponding bar posed by section 11 had been imposed or made out.

31. Thus the reality of the position seems to me to be that the issue raised in relation to section 11 was in its own way as theoretical as that raised in relation to the Public Sector Equality Duty under section 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 section 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 3 years since his licence to occupy was terminated.

32. As I have said, the local authority is not a local housing authority. We were told that the appellant has been invited to contact the local housing authority at various stages so that the housing needs of his family can be considered in the situation they are in, but he has not taken up that offer. Nonetheless it seems to me that we are entitled to trust that if the relevant local housing authority is now asked to provide this family with assistance in accordance with the statutory duties arising under Part VI or Part VII of the Housing Act 1996 for homelessness and/or long term housing assistance as the case may be, or there are grounds for invoking the duties that arise under the 2004 Act, this will be done. In my view, it is in these respects that the needs of the family, whatever they may now be, will have to be addressed.

33. If the respondent had considered the best interests of the children by reference to section 11 of the 2004 Act before serving the notice to quit, the outcome for the appellant would in my view, inevitably have been the same.

34. For the reasons given, I would dismiss this appeal.

LORD JUSTICE DAVID RICHARDS

35. I agree.

LORD JUSTICE DAVIS

36. I also agree.