



# Breach of s. 11 Children Act 2004 does not necessarily preclude orders for possession

In an important decision for local housing authorities, *Hertfordshire County Council v Davies*, the Court of Appeal has confirmed the lawfulness of an order for possession notwithstanding that the landlord had failed to comply with its duties under s. 11 of the Children Act 2004.

[Andrew Lane](#) and [Tara O'Leary](#), who acted for Hertfordshire County Council, explain the judgment and its significance.

## The case

Mr Davies was a school caretaker employed by Hertfordshire County Council who moved, in 2003, with his family into a bungalow on the school grounds. The Council sought possession of the premises after his dismissal from his post in 2015. In June 2017, following a High Court trial, Laing J found ([\[2017\] EWHC 1488 \(QB\)](#)) that he had occupied the premises under a service occupancy agreement which had terminated automatically upon the end of his employment. He had no security of tenure and thus remained within the bungalow as a trespasser. She made an order for possession, dismissing a plethora of defences in public and private law.

In doing so, the Judge found that the Council had failed to comply with its s. 11 duties insofar as it had failed to provide evidence showing that it had considered the need to safeguard and promote the welfare of Mr Davies' children before deciding to serve a notice to quit (which, though unnecessary, was a "function" for the purposes of s. 11(2)(a) of the 2004 Act). Despite finding that there had been a breach of s. 11 the possession order was made. Mr Davies was granted permission to appeal on a single ground, questioning the impact of the said breach."

## The judgment

1) The Court of Appeal confirmed that it was open to defendants in possession proceedings to raise public law defences, including under s. 11, even where they lacked any private law right to remain in their properties. That principle is now well established pursuant to *Pinnock* and *Mullen*, among other authorities: paras. 21 to 30.

2) Crucially, however, the Court affirmed what it had said in *RBKC v Mohamoud* [\[2015\] EWCA Civ 780](#); [\[2015\] HLR 38](#) that there may be cases, such as here, where



it is difficult to see how the s. 11 duty adds anything in substance to the defence already available under Art. 8 ECHR: paras. 30 to 33.

Lady Justice Sharp said in this regard:

*"30...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."*

### **Lessons learnt**

- This judgment demonstrates both the practical difficulties caused by somewhat arid and technical defences and the need for those running such defences to demonstrate their relevance to and impact on the point in issue.
- It is interesting to note that Lady Justice Sharp also 'drew into' her analysis another of the defences raised, the public sector equality duty when she noted at paragraph 31 of her Judgment: *"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."*
- This extends the relevance of the case beyond local authorities and through to private registered providers of social housing, such as housing associations.
- Finally, one of the submissions put to the Court on behalf of the Council was that the children's circumstances would be considered by the local housing authority approached by the family for housing assistance (*Barnsley MBC v Norton* [2011] EWCA Civ 834; [2011] HLR 46). Laing J had queried in discussion with counsel whether that applied where the public authority with the duty (in *Norton* the public sector equality duty) was not the same as the public authority who would assist with any application for housing assistance. Lady Justice Sharp had no such qualms however and at paragraph 32 said:

*"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."*

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