



Neutral Citation Number: [2023] EWCA Civ 398

Case No: CA-2022-001378

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
Anthony Elleray KC sitting as a judge of the High Court
CO/4149/2021

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/04/2023

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE ARNOLD
and
LORD JUSTICE EDIS

Between :

THE KING Appellant
(on the application of SO)
- and -
THANET DISTRICT COUNCIL Respondent

- and -
(1) KENT COUNTY COUNCIL Interested
(2) THE CROWN ESTATE Parties
(3) THE JUSTICES AT
MAIDSTONE MAGISTRATES'
COURT

Mr Tim Baldwin and Ms Lara Simak (instructed by Watkins and Gunn) for the
Claimant

Mr Andrew Lane and Mr Jack Barber (instructed by Thanet District Council Legal and
Democratic Services) for the Defendant

The Interested Parties did not appear and were not represented

Hearing dates: 28 March 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 14 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Edis :

1. The claimant, SO, was an 18 year old Pavee Traveller at the time of the issue of these proceedings, and she has mental health problems. She has been anonymised in these proceedings for her protection. The claim concerns her residence in a vehicle on land at Ramsgate Port (“the Land”) which the Defendant, Thanet District Council, has attempted to bring to an end by giving a direction under section 77(1) of the Criminal Justice and Public Order Act 1994 (“the 1994 Act”).
2. This is a claim for judicial review, permission having been granted by Bean LJ in respect of the two grounds identified at [8] below. He made this order on appeal from Mr. Anthony Elleray KC who had refused permission to seek judicial review after a rolled up hearing in a written reserved decision on 8 July 2022. Bean LJ refused permission on three further grounds and retained the judicial review in the Court of Appeal. He said this about grounds 1 and 2, on which he gave permission:-

Ground 1 raises a point of law – whether a temporary consent to occupation must be withdrawn before service of a s 77 notice – on which the appeal has a real prospect of success. Since the decision under appeal was given at a rolled-up hearing I do not think that any useful purpose would be served by a further hearing in the Administrative Court.

Ground 2 may add little to Ground 1 but I will not prevent the Appellant from raising it in this court.

3. The reference to “a s77 notice” is a reference to a direction given by Thanet District Council under section 77(1) of the 1994 Act. This provision is the subject matter of these proceedings, and I will set it out now. It provides:-

(1) If it appears to a local authority that persons are for the time being residing in a vehicle or vehicles within that authority’s area—

- (a) on any land forming part of a highway;
- (b) on any other unoccupied land; or
- (c) on any occupied land without the consent of the occupier,

the authority may give a direction that those persons and any others with them are to leave the land and remove the vehicle or vehicles and any other property they have with them on the land.

4. Section 77(3) is an offence-creating provision which is to be read alongside the statutory defence provided by section 77(5). These sub-sections are in these terms:-

(3) If a person knowing that a direction under subsection (1) above has been given which applies to him—

(a) fails, as soon as practicable, to leave the land or remove from the land any vehicle or other property which is the subject of the direction, or

(b) having removed any such vehicle or property again enters the land with a vehicle within the period of three months beginning with the day on which the direction was given,

he commits an offence and is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(5) In proceedings for an offence under this section it is a defence for the accused to show that his failure to leave or to remove the vehicle or other property as soon as practicable or his re-entry with a vehicle was due to illness, mechanical breakdown or other immediate emergency.

5. By section 77(6) “*occupier*” means the person entitled to possession of the land by virtue of an estate or interest held by him.
6. The rest of section 77 and section 78 provide machinery for enforcement of section 77(1) directions and for a complaint to be made to the magistrates’ court for an order requiring the removal of vehicles and persons. Failure to comply with a lawful section 77(1) direction is a criminal offence under section 77(3), and a removal order can be made in consequence of that under section 78(1). Section 79 contains provisions about service of documents and giving notice of documents to affected persons. It is to be noted that the provisions contemplate a direction being “given” at one point in time and then “served” at a later stage.
7. The result of the decision of Bean LJ is that we are dealing with a claim for judicial review at first instance and not sitting as an appellate court. There has been no decision on the merits of the two grounds before us. It is therefore not necessary for us to review the procedural history or the decision of the judge in the High Court, save to a very limited extent. We are concerned with the merits of the claim, and not with reviewing any first instance decision on it.

The Grounds

8. The Grounds look like grounds of appeal, because that is how they started life. As a result of Bean LJ’s order, they are now the substantive grounds on which SO submits that the section 77(1) direction served on the Land where she lived in a vehicle on 1 December 2021 was invalid and should be quashed. They read as follows:-

Ground 1: The learned judge was wrong to hold that the service of the direction notice pursuant to s 77 Criminal Justice and Public Order Act 1994 on the 1 December 2021 was lawful without the Defendant first giving any notice to those on the Land or those representing them of the withdrawal of consent to occupy the Land at Ramsgate port ahead of the service of the said notice.

Ground 2: The learned judge was wrong to hold that there was no evidence from Karen Constantine challenging the failure of the Defendant to give notice of the withdrawal of consent prior to the service of the s77 directions notice on 1 December 2021 or that the occupancy of the Land was temporary and “up to 5 months”.

9. Stripped of their appellate appearance, the substance of the complaints has been reformulated by Mr. Baldwin, on behalf of SO, in answer to questions from the court. Reflecting those submissions, they can be set out as follows:-

Ground 1: The service of the direction notice pursuant to s 77(1) of the 1994 Act on the 1 December 2021 was unlawful because the Defendant as occupier of the land had permitted SO to enter on the Land at Ramsgate port and to reside there in a vehicle, and had not given notice of any decision to withdraw consent before giving and serving the section 77(1) direction. In those circumstances, SO was not a person within any of the three positions described in section 77(1)(a)-(c) of the 1994 Act, and no direction in respect of her residence could lawfully be given at the time when Thanet District Council gave this one.

Ground 2: There is evidence which the court should accept from Karen Constantine, a councillor of Kent County Council, challenging:-

- a) the failure of Thanet District Council to give notice of the withdrawal of consent prior to the service of the section 77(1) direction on 1 December 2021;
- b) and the claim that the occupancy of the Land was temporary and “up to 5 months”.

10. It will be noted that there is no challenge before us to the decision to terminate the permission which had been given to this group to reside on the Land. That decision is not really addressed in the evidence before the court, but appears to have been made by the Senior Management Team of the Thanet District Council. We do not know when it was taken. The challenge is based on the failure to give notice of that decision before giving the section 77(1) direction.
11. The statement of Karen Constantine referred to in Ground 2 is dated 20 May 2022, and was not material which Thanet District Council could take into account when issuing the section 77(1) direction in November 2021. While Ground 2 may have had some additional purpose as a ground of appeal against the decision of the judge, it is not a separate ground of challenge to that direction in these judicial review proceedings. The statement is simply part of the evidence which we will have to consider when deciding whether Ground 1 is made out in law or in fact. It is not necessary to say anything more about Ground 2.

The facts

12. There is a great deal of evidence before us, because the complaints made by SO about Thanet District Council have been wider in scope than the proceedings now are. I

will limit my summary strictly to what is necessary for deciding whether the section 77(1) direction should be quashed for the reason given in Ground 1, as reformulated above.

13. The Land which was the subject of the section 77(1) direction is part of an old car park which was formerly part of the ferry terminal. It is comprised of two parcels, one owned by Thanet District Council and other owned by the Crown Estates but leased to Thanet District Council. Thanet District Council is therefore entitled to possession of all of the Land by virtue of an estate or interest held by it and is, for the purposes of this statutory scheme, the occupier: see section 77(6) at [5] above. The Land is described as “Land behind fence in front of the Ferry Terminal, Western Terminal, Ramsgate Harbour, 21 Military Rd, Ramsgate CT11 9FT” in documents called “Code of Conduct for Traveller Negotiated Stopping Site” issued by Thanet District Council on 21 May 2021. These are important documents which I will call “the Code of Conduct documents”. Initially they related only to one of the two parcels of land, but when the area made available to SO and her family was expanded by the inclusion of the second parcel, it is clear that the Code of Conduct documents applied to both parcels.
14. On 4 May 2021 the group of Travellers including SO arrived at another site, called the Water Treatment Plant at Palm Bay, and set up camp. This is a grassed area of the Council's land. The land is opposite a primary school and is an area that is used daily by the local community. Thanet District Council sought their removal using the section 77/78 procedure provided by the 1994 Act, but on 27 May 2021 the magistrates refused to make a removal order because of the acute medical needs of some family members, including one woman who was pregnant and whose pregnancy was thought to be very high risk. As appears from the Code of Conduct documents, dated before this hearing, arrangements were in hand to provide another site for this group of Travellers. They moved to the Land following that hearing, with the consent of Thanet District Council who intended that they should reside there in their vehicles.
15. It is clear that it was not intended by Thanet District Council that SO and her family would be permitted to occupy the land permanently. The high-risk pregnancy would result in birth in September, although very sadly the child did not survive. Another child who was receiving treatment in May involving the investigation of a lump on the neck was expected to require less frequent treatment once that investigation was complete. It was clear from the documents that the occupation of the Land was intended to last until these acute issues has passed. No end date for this occupation was specified by Thanet District Council, or agreed.
16. The provision of the Land was the subject of a document called “Thanet District Council (TDC) Equality Impact Assessment” which is undated but whose content makes it clear it pre-dated the occupancy of the Land. The project dealt with in the Assessment is described as the

“Provision of a short term negotiated stopping site for a specific travelling community due to concerns for welfare and court order to take child care and the need for extra families”.

Under “Aims and Objectives”, this appears:

“The Council recognises the duty to facilitate the Traveller way of life and protect this without discrimination. Therefore, the council will provide a temporary site with water, showers and toilet facilities for a period of approximately 5 months to meet the welfare needs of two individuals who are under specialist hospitals for complex needs. The site needs to be adequate in size, secure and have suitable facilities.”

17. The Equality Impact Assessment was not seen by the families on the land until the section 77(1) direction was served. It is evidence of what Thanet District Council intended and decided, but not of what was communicated to those occupying the Land prior to the giving of the section 77(1) direction. The period of “approximately 5 months” is not contained in any document which was given to the families prior to the direction being given. There is no witness evidence which contends that it was communicated orally either.
18. The Code of Conduct documents provide a “start date of negotiated stopping site” and contain these things (in which I have added emphasis):-

End Date of *Negotiated* Stopping Site: The use of the *tolerated* site and welfare to be reviewed every 3 weeks *until further notice*.

By staying on Thanet District Council land/property you agree to abide by the rules set out below. Where the stay is *permitted*, be mindful that you are *guests* of both the Council and Local Community, and should behave accordingly.

The Council will visit to check on your welfare and circumstances and to offer general advice and assistance. This will give you a chance to tell us of any specific welfare factors you feel should be taken into account *before a decision is made about the future of the stopping site*.

19. During the stay of the families on the Land, welfare checks and inspections of the site were carried out, and recorded on forms headed “Thanet District Council (TDC) Unauthorised Encampment Form”. This is a form prescribed by the Council’s policy document called “Process for dealing with Unauthorised Encampments (UE’s)” issued in February 2021. It is Annex 1 to that policy, called “Welfare Questionnaire Form”. The policy document defines unauthorised encampment as:-

“Unauthorised Encampment (UE) for the purpose of this process means any encampment or structure being used to occupy land without permission. This includes but is not exclusive to vehicles, motor homes, caravans, tents and any other structure.”

20. Given that in this case the Land was being occupied by vehicles *with* permission, as the Code of Conduct documents make clear, using these forms and following this policy may have caused a lack of focus on the legal relevance of permission being

given to occupy the site for an undefined period of time, which the documents presume had not been given.

21. At all events, although the Unauthorised Encampment Form relates to unauthorised encampments, as defined, they include a box which records the “Intended Duration of Stay” as “Until Further Notice”. A number of these documents came into existence during the occupancy of the Land by SO and her immediate family, being filled in as a result of regular site visits.
22. In September 2021 a section 77(1) direction was issued in respect of the land. After some uncertainty as to its scope it has become clear that this related to another group of Travellers who had arrived on the Land without permission after SO and her immediate family had entered with permission. There is no need to say anything more about this, except that it was followed by a complaint under section 78 seeking a removal order which was adjourned on 9 November 2021 to be heard in the magistrates’ court on 8 December 2021.
23. On 30 November 2021 a second section 77(1) direction was issued, this time served on SO and her families and intended to result in their departure from the Land. This is the direction with which this claim is concerned. It was in these terms (the year should have been 2021, but nothing turns on that error):-

**THANET DISTRICT COUNCIL
CRIMINAL JUSTICE AND PUBLIC ORDER ACT 1994
DIRECTION UNDER SECTION 77***

To: All Occupants of Vehicles on land known as:
Ramsgate Marina, Military Road, Ramsgate, Kent, CT11 9FT

TAKE NOTICE that it appears to the Council that you are residing in a vehicle or vehicles within the Local Authority area on: 30th November 2020

Unoccupied land not forming part of the highway

and you (together with any other persons with you) are DIRECTED forthwith to leave the land and also to remove the vehicle or vehicles and any other property any of you have with you from the land.

DATED THIS 30th day of November 2020

24. A blank template specifying the use of this form is Annex 2 to the Unauthorised Encampment policy described above. It relates to unoccupied land, and directs the recipient to leave the land “forthwith”. It is common ground that the Land, which is specified in the direction, was in fact occupied land, because it has an occupier as defined in section 77(6), namely Thanet District Council. The form was therefore not apposite and, again, may have had the effect of diverting a proper focus on the legal relevance of the consent to reside in vehicles on the Land which Thanet District Council had itself given as evidenced in the Code of Conduct documents.

25. The November direction was served on 1 December 2021 by means which are not now challenged. An attempt was then made to join SO and the recipients of the November direction with the recipients of the September direction whose case was by then listed before the magistrates' court on 8 December 2021. Those proceedings have been stayed in consequence of the judicial review proceedings.
26. The only procedural event during the judicial review proceedings which I now need to record is an order for directions by Lang J on 4 April 2022 which included a direction that Thanet District Council should supply a witness statement setting out:-

“The circumstances in which the Claimant was authorised by the Defendant to reside at the Ramsgate Marina site; the date on which permission was given; the basis upon which the Defendant contends that the permission granted was only temporary; the date upon which the temporary permission expired, or was otherwise terminated.”

27. The resulting evidence did not add materially to what can be deduced from the documents from which I have quoted above, and I therefore propose to deal with this judicial review claim on the basis of what can be safely concluded from those documents.

The submissions

28. SO and Thanet District Council supplied written and oral submissions on the short issue which is now before the court, namely whether, in the circumstances of this case, a section 77(1) direction could not lawfully be given to the group including SO because they were not residing on the Land without the consent of the occupier. It is agreed that they began residing on the Land with the consent of Thanet District Council, and that no notice of any decision to revoke that consent had been communicated to them prior to the giving of the section 77(1) direction.
29. Mr. Baldwin, on behalf of SO, submits that in the absence of such notice she was not a person within any of the three categories in section 77(1)(a)-(c), and no direction could lawfully be given. Because, as explained above, this was occupied land and not a highway, the only category she could have fallen into was that in section 77(1)(c), namely a person residing on occupied land without the consent of the occupier.
30. He submits that the revocation of consent could only be effective when it was communicated to SO. This, he says, is so both as a matter of law and also as a result of the documents identified above, especially the Code of Conduct documents.
31. He further submits that if there is a requirement that notice of withdrawal of consent be given in order to put SO within section 77(1)(c), then as a matter of public law that notice must be reasonable. Thanet District Council has a duty to act fairly and this requires the giving of reasonable notice when bringing to an end a placement of this kind. Thanet District Council would be required to take a decision on what the length of notice should be, given all relevant factors of which it was aware. In this case, no notice was given before the giving and service of the s77(1) direction, and the failure to give reasonable notice is a breach of the public law duty which should lead to the quashing of the direction.

32. Mr. Lane, for Thanet District Council, submits that all that was required was a decision by the Council to bring to an end the period of time when it consented to the residence on the Land of SO and her family group. The 1994 Act does not require that this decision be communicated to them to be effective for the purposes of the giving of a section 77(1) direction, the simple fact that consent has been withdrawn is enough.
33. Alternatively, if notice is required, then the service of the section 77(1) direction itself constitutes such notice. The rights of those residing on the land are sufficiently protected because the requirement is only to leave the land “as soon as practicable” and this allows a court to take into account the circumstances (including the absence of any notice) in deciding whether a person has committed the offence of failing to leave the land as soon as practicable. No removal order under section 78 can be made unless that is established. Therefore, there is no breach of any public law duty to act fairly and reasonably by giving no notice of the direction to leave the Land as soon as practicable. The procedure adopted allows consideration (by the court) of all relevant welfare issues.

Discussion

34. In my judgment, the answer to the question in this case is derived from the construction of section 77(1) itself. This enables a local authority to take a decision to give a direction if it “appears” to it that “persons are for the time being residing” “on any unoccupied land without the consent of the occupier”. In my judgment, this means that the necessary state of affairs must exist at the time when the decision is taken to give the direction. That is the point at which the local authority decides what “appears” to it to be the case. All the verbs are in the present tense, and not the future tense. The local authority has to decide whether it “appears” that the person “is for the time being residing” without its consent (where, as here, it is the occupier of the land). The local authority is not empowered to give a direction if the person is currently residing on the land with consent, but will no longer be doing so after the direction is “given” and then, later, “served” in accordance with section 79 of the 1994 Act. To be lawful, the necessary state of affairs described in section 77(1)(c) must exist at the start of the process and not be the result of the process. On its true construction, this provision therefore requires any consent which has existed to be withdrawn to the knowledge of the person to whom the direction will be given by notice before the local authority can lawfully give a direction.
35. I do not accept that the terms of section 77 provide all necessary safeguards to protect the reasonable interests of a person who has been residing on land perfectly lawfully and with the consent of the occupier. I do not take such a broad view of the statutory phrase “as soon as practicable” as was suggested by Mr. Lane. The terms of section 77(5) suggest strongly that, in its context, it actually means “forthwith”, as the notice used by Thanet District Council said it did. This is because the statutory defence there provided only becomes available once the prosecutor has proved that a person has failed to vacate the land as soon as practicable. This may be proved even where that failure was “due to illness, mechanical breakdown or other immediate emergency”. The effect of the statutory defence is to allow those three factors to be relied upon by the recipient of a section 77(1) direction to avoid criminal liability. The narrow list of such factors militates strongly against other, less potent, considerations being considered at the prior stage of determining whether it is proved

that the recipient failed to leave the land “as soon as practicable” after receiving the section 77(1) direction. If it were otherwise, section 77(5) would not be necessary.

36. Further, the first two sub-paragraphs in section 77(1) are aimed at cases where the person residing on land in a vehicle obviously has no right to be doing so. The third of those provisions, residing on occupied land without the consent of the occupier, should be construed so that the statutory purpose of all three categories in the list is consistently achieved.
37. The submissions of the Thanet District Council, if accepted, would mean that a resident on land who genuinely and reasonably believed that they were there with the consent of the occupier would become liable to a criminal conviction if they did not leave in haste following the unexpected service of the section 77(1) direction. The Act does not deal with the way in which consent of an occupier may be brought to an end, which may perhaps be a gap. A construction which allowed that to happen without the resident knowing anything about it, or only learning of it at the point when the obligation to leave became enforceable by criminal sanction has nothing to commend it. This is a criminal statute and principle requires that criminal offences should not be created except by clear law. As Bennion, Bailey and Norbury on Statutory Interpretation 8th Ed at Section 26.4 put it:-

“This principle forms part of the context against which legislation is enacted and when interpreting legislation a court should take it into account.”

38. Therefore, section 77(1)(c) should not be construed so that a person who has resided on land with the consent of the occupier, and who does not know that the consent no longer exists, may be lawfully served with a section 77(1) direction. Consent may come to an end because it was only given for a fixed period which has elapsed, or because it was terminable on notice which has been given. In either of these events, the person who had been residing on land with consent will know that this is no longer the case. Where the occupier is a local authority who owes public law duties to the residents in its decision-making the section 77(1) process should not become available in a case where there had been consent “until further notice” until a decision has been made as to what constitutes reasonable notice of the ending of that consent, and until such notice has actually been given.
39. Just as the 1994 Act provides no route by which consent may be withdrawn with the result that a person is no longer residing on land with consent for the purposes of section 77(1)(c), so the policy document referred to at [19] above does not do so either. It is plainly intended to deal with unauthorised encampments and not authorised encampments where a local authority wishes to bring that authorisation to an end. It was, nevertheless, followed in this case and the Welfare Questionnaire Form at Annex 1, and the standard form direction at Annex 2 were used. The Welfare Form contains a box which requires the “Intended Duration of Stay” to be inserted, which would be inappropriate in the case of an unauthorised encampment as defined in the Policy document. This confusion explains how matters proceeded in this case, and it would not be difficult to re-draft the documents so that they include a further step in such cases requiring notice of the withdrawal of consent to be given in cases where that is necessary.

40. Further, and in any event, in my judgment the circumstances of this case clearly required the Thanet District Council to give reasonable notice to SO and her family (the group affected by the November direction) of the ending of the consent to reside on the Land and their consequent obligation to vacate it. The Code of Conduct documents made it clear that the residence on the Land was “permitted” or “tolerated” and the occupants were “guests”. They described the Land as a “negotiated stopping site”. That situation would be the subject of reviews every three weeks and would last “until further notice”. It was expressly stated that termination of their residence on the Land would require a “decision about the future of the stopping site”. All of this language was incorporated in the permission (perhaps a licence) to reside on the land. The word “tolerated” may be an attempt to avoid using words such as “permit” because it implies a passive acceptance of an unwelcome situation. In this case it is not an apt word to describe what happened, because Thanet District Council did actually permit the group including SO to reside on the Land, and did positive acts to supply water and toilets to enable them to do so.
41. This language was not used by a private landowner, but by a local authority with public law duties. I consider that these duties are important to the outcome of this case. Parliament has chosen to make the power to give section 77(1) directions only available to local authorities, who must exercise it in accordance with these duties. A local authority acting reasonably and fairly having used such language would consult before making the decision to withdraw consent, as part of the Code of Conduct documents suggests. The failure to do this is not something which is criticised in these proceedings. However, such a local authority would also then inform those affected of what the decision was, and allow them a reasonable time to vacate the Land before being made subject to criminal sanctions for failing to do so “as soon as practicable”.
42. It is unnecessary to consider what might be a reasonable time in this case because no attempt was made to give reasonable, or any, notice before the process of removing SO by the use of draconian powers was implemented. If reasonable notice was required, then Thanet District Council failed to give it. My conclusion that it was required is not derived from any contractual relationship between SO and Thanet District Council based on the terms of a licence but from the public law duties of Thanet District Council when dealing with persons in SO’s situation.

Decision

43. I would therefore grant SO judicial review of the section 77(1) direction and quash it.
44. I have not found it necessary to consider whether this issue could properly be litigated in the magistrates’ court in proceedings either alleging a criminal offence under section 77(3) or seeking a removal order under section 78(1). I would not, as a matter of discretion, refuse relief in this case on the ground that there is another remedy and so this issue does not arise for decision.

Lord Justice Arnold

45. I agree.

Lord Justice Underhill

46. I also agree.