Neutral Citation Number: [2023] EWCA Civ 733

Case No: CA-2022-002032

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (Lands Chamber)
MR JUSTICE FANCOURT
[2022] UKUT 241(LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/6/23

Before :

LORD JUSTICE LEWISON
LADY JUSTICE ANDREWS
and
LORD JUSTICE SNOWDEN

- -

Between :

WALTHAM FOREST LONDON BOROUGH COUNCIL	**Appellant**
- and -	
(1) MS NASIM HUSSAIN	
(2) FHCO LTD	
(3) MS FARINA HUSSAIN	
(4) LUXCOOL LTD	**Respondents**

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Ashley Underwood KC and Riccardo Calzavara (instructed by **Sharpe Pritchard LLP**) for the **Appellant**
Justin Bates and Nick Grant (instructed by **Anthony Gold Solicitors**) for the **Respondents**

Hearing date: 7 June 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 26/6/2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Andrews:

INTRODUCTION

1. This appeal raises important issues of principle concerning the nature and scope of the statutory jurisdiction of the First-tier Tribunal (Property Chamber) ("the FTT") on an appeal from a licensing decision made under Parts 2 and 3 of the Housing Act 2004 ("the 2004 Act").

2. The key issue is whether, as the Upper Tribunal (Lands Chamber) ("UT") held, when hearing such an appeal the FTT makes its own assessment as to whether, *on the date of the appeal,* someone *is* a fit and proper person to hold a licence; or whether, as the appellant ("the Council") contends, the task of the FTT is to determine whether the decision of the local housing authority to grant, refuse or revoke a licence was wrong, and therefore to consider whether the individual concerned *was* a fit and proper person *on the date on which that decision was made*.

3. A subsidiary, related issue is whether the FTT is entitled to have regard to information which came into existence after the decision under appeal was taken, or whether the FTT must only consider information that was available at the time of that decision (though this may include information which was not then known to the local housing authority).

STATUTORY BACKGROUND

4. Part 3 of the 2004 Act makes provision for houses to be licensed by a local housing authority if they are in an area designated by that authority as a "selective licensing area", subject to certain exemptions. A number of factors must be taken into consideration by the authority when reaching a decision to designate an area in their district as a selective licensing area. These are specified in section 80. A decision to designate involves the exercise of judgment as to whether the area is or is likely to become an area of low housing demand, and if so, whether making such a designation will, when combined with other measures taken in the area by the authority (alone or with others) contribute to the improvement of the social or economic conditions in the area.

5. Houses in multiple occupation ("HMO") are subject to a separate licensing regime under section 61(1), which falls within Part 2 of the 2004 Act, and are not required to be licensed under Part 3 (section 85(1)(a)).

6. Sections 63(1) and 87(1) of the 2004 Act provide that applications for either type of licence must be made to the local housing authority, and sections 64(1) and 88(1) specify that upon receipt of such an application, the authority must either grant a licence or refuse to grant a licence. The authority is obliged to ensure that such applications are determined within a reasonable time (sections 55(5)(b) and 79(5)).

7. Whether the application is made under Part 2 or Part 3, no licence may be granted unless the authority is satisfied that the proposed licence holder is "a fit and proper person to be the licence holder" (sections 64(2), 64(3)(b)(i), 88(2), and 88(3)(a)(i)).

8. The prescribed approach when determining whether the prospective licence holder is a "fit and proper person" is essentially the same whether the application is made under Part 2 or Part 3. Section 89 (which governs applications made under Part 3) provides, so far as is material, that:

> "(1) In deciding for the purposes of section 88(3)(a) or (c) whether a person ("P") is a fit and proper person to be the licence holder …, the local housing authority must have regard (among other things) to any evidence within subsection (2) or (3).
>
> (2) Evidence is within this subsection if it shows that P has –
>
> (a) committed any offence involving fraud or other dishonesty, or violence or drugs, or any offence listed in Schedule 3 to the Sexual Offences At 2003 …
>
> (b) practised unlawful discrimination on grounds of sex, colour, race, ethnic or national origins or disability in, or in connection with, the carrying on of any business; or
>
> (c) contravened any provision of the law relating to housing or of landlord and tenant law.
>
> (3) Evidence is within this subsection if –
>
> (a) it shows that any person associated or formerly associated with P (whether on a personal, work or other basis) has done any of the things set out in subsection (2)(a) to (c), and
>
> (b) it appears to the authority that the evidence is relevant to the question whether P is a fit and proper person to be the licence holder…"

9. Where the application is made in respect of a HMO under Part 2 of the 2004 Act, it is a further relevant consideration if P (or a person associated or formerly associated with them) has acted otherwise than in accordance with any applicable code of practice approved under section 233 (section 66(2)(d)).

10. The authority has power to revoke a licence in certain specified circumstances, including where it no longer considers that the licence holder is a fit and proper person to be a licence holder (sections 70(1)(b), 70 (2)(b), 93(1)(b) and 93(2)(b)).

11. Schedule 5 of the 2004 Act contains the detailed procedure which the local housing authority must follow when it decides to grant, refuse or revoke a licence. For example, before granting a licence, it must serve a notice under paragraph 1, containing the information specified in paragraph 2, together with a copy of the proposed licence, on the applicant and each "relevant person" as defined in paragraph 13 (including, in particular, the owner of the property if they are not the applicant). The authority must then consider any representations made (and not withdrawn) during the consultation period specified in the notice. It is only after following that process that the authority can grant the licence. A similar "minded to" process is required to be followed if the authority proposes to refuse or revoke a licence.

12. The provisions concerning the right of appeal to the FTT also appear in Schedule 5. Paragraph 31 is entitled "Right to appeal against refusal or grant of licence" and provides as follows:

> "(1) The applicant or relevant person may appeal to the appropriate tribunal against a decision by the local housing authority on an application for a licence –
>
> (a) to refuse to grant the licence, or
>
> (b) to grant the licence.
>
> (2) An appeal under sub-paragraph 1(b) may, in particular, relate to any of the terms of the licence."

13. Paragraph 32, which is in virtually identical terms, provides for a similarly unqualified right of appeal by the licence holder or relevant person against a decision by the local housing authority to vary or revoke a licence, or to refuse to vary or revoke a licence.

14. Paragraph 34 is entitled "Powers of tribunal hearing appeal" and provides as follows:

> "(1) This paragraph applies to appeals to the appropriate tribunal under paragraph 31 or 32.
>
> (2) An appeal –
>
> (a) is to be by way of a re-hearing, but
>
> (b) may be determined having regard to matters of which the authority were unaware.
>
> (3) The tribunal may confirm, reverse or vary the decision of the local housing authority.
>
> (4) On an appeal under paragraph 31 the tribunal may direct the authority to grant a licence to the applicant for the licence on such terms as the tribunal may direct."

THE DECISIONS IN THIS CASE

15. Since the individual respondents and other relevant persons are members of the same family, in order to avoid confusion (and without intending any disrespect), I shall refer to them by their first names.

16. This case concerns licences for residential properties in the Walthamstow area (London E17) owned by Nasim Hussain ("Nasim") or by companies belonging to her, which were sought by Nasim, or by her daughter Farina, or by companies associated with them. On 12 May 2017, Nasim pleaded guilty to four offences of knowingly or recklessly supplying false information in connection with applications for licences which she had made to the Council in May 2016 for seven properties in Old Church Road owned by her company Luxcool Ltd ("Luxcool"). Nasim was the sole

shareholder of Luxcool at all material times. She was also the sole director until 9 January 2020, when she was replaced by her husband Tariq and their son Wahab. The applications falsely asserted that the properties did not contain gas appliances.

17. In September 2016, fraudulently backdated gas safety certificates were supplied to the Council in respect of those properties. On 29 June 2018 Tariq pleaded guilty to fraudulently backdating the certificates.

18. On 23 November 2018, the Council invoked its power under section 93 to revoke a residential property licence that it had granted under Part 3 of the 2004 Act to Farina in July 2017 in respect of a flat in Westbury Road. At the same time, the Council refused applications for licences made by the second respondent ("FHCO") on 6 February 2018 in respect of six residential properties in Blackhorse Road. At that time, Farina was the owner and sole director of FHCO, which had no assets, capital reserves, or staff. It had not traded in its first year since incorporation.

19. The Council decided that Farina was not a fit and proper person because she was associated with her parents' criminality. FHCO was Farina's alter ego and could not be disassociated from her. Farina and FHCO appealed to the FTT.

20. On 1 February 2019, Farina's solicitors wrote to the Council in an attempt to settle their appeals and parallel appeals by Nasim and Luxcool, by proposing FHCO as an alternative licence holder for all the relevant properties. On 20 February 2019, the Council sought further information by asking 13 questions regarding Farina and FHCO. They considered that the answers to those questions would enable them to properly consider the settlement proposal. However, they received no response.

21. Whilst the appeals were still pending, on 3 February 2021, Tina Mitchell was appointed as a second director of FHCO.

22. The appeals were heard remotely on 24 and 25 May 2021. Farina and Ms Mitchell both gave evidence, as did Farina's brother Wahab. Their parents did not give evidence. This is a matter of some significance to which I will return.

23. In its decision promulgated on 16 August 2021, the FTT (Judge Amran Vance and Mr T Sennett) decided that both Farina and FHCO were fit and proper persons to hold a licence. It purported to reinstate Farina's licence (although it would already have expired), and granted FHCO licences for three years, rather than the usual five years, explaining that this was "in order for FHCO, a fairly new company with limited lettings experience, to demonstrate its suitability for the grant of longer licences."

24. The parallel appeals to the FTT by Nasim against the revocation of licences previously granted to her by the Council in respect of 22 properties, and against the Council's refusal to grant her licences in respect of the seven properties in Old Church Road, were heard on the same occasion and were dismissed. So too was the appeal by Luxcool against the Council's decision to make final management orders in respect of those seven properties. Those aspects of the FTT's decision were not appealed.

25. The Council appealed to the UT on four grounds; the respondents unsuccessfully cross-appealed on a discrete matter pertaining to the Council's delay in dealing with the licence applications.

26. In his decision promulgated on 9 September 2022, the Chamber President, Fancourt J ("the Judge") dismissed the appeal on two of the grounds raised, which are the two principal grounds of this appeal. He held that the FTT was entitled to take into account the suitability of the proposed licence holders at the time of the hearing before it, as well as their suitability at any earlier time, in deciding whether to allow their appeals [70]. He said that whilst the evidence before Mr David Beach, the Council's enforcement officer, that Farina was implicated in, or at least closely connected to her parents' wrongdoing was strong, despite being "largely inferential" [72], the FTT was entitled to reach its own conclusions on the same issues, with the benefit of further evidence and, in particular, having seen Farina give evidence and being cross-examined [76]. The FTT was entitled to have regard to the circumstances as they were at the time of the hearing before it, including the progress that Farina had made professionally by the time of the appeal, the establishment of FHCO as a trading entity, and the presence of a second director [77].

27. The Judge rejected the submission that the FTT failed to have proper regard to the Council's judgment and conclusions based on the matters that were known to it. He held that the FTT took into account the explanations given by Mr Beach for reaching those conclusions, but it "simply disagreed" with his conclusions [74]-[76]. It did not have to defer to the judgment of the Council, as long as it had regard to it. Although the conclusion reached on appeal "may not have been an obvious outcome" in the light of the factual material relating to Farina that was before the Council when it made its decision, it was reached with the "considerable benefit" of seeing and hearing Farina's evidence tested in cross-examination, and such conclusions cannot easily be impugned [78].

28. The UT allowed the appeal on two other grounds. The Judge found that the FTT had erroneously concluded that the Council had no power to ask questions about FHCO's assets, reserves and employees in February 2019. Those 13 questions could not have been asked at the time when FHCO's original applications for a licence were pending. However, the questions that were asked related to a proposal for settlement of the appeals, which effectively invited the Council to concede that FHCO was a fit and proper person to be a licence holder, contrary to its earlier decision. There was no inhibition on the Council asking questions in that context, the answers to which would have been relevant to any decision whether to accept the settlement proposals.

29. The Judge held that the failure by Farina to answer questions pertaining to the suitability of FHCO (with her as its sole director) to be a licence holder was relevant to the question that the FTT had to decide, namely, whether the Council was wrong to conclude that FHCO was not a fit and proper person [86]–[88]. It was relevant because both the Council and the FTT lacked information about how the business of FHCO was run and what its assets were, and because the failure to answer questions on its behalf "might have some bearing on an assessment of the character of the company's directors".

30. The significance and weight to be placed on the failure to answer the questions was a matter for the FTT, and so the question whether FHCO is a fit and proper person had to be remitted to that tribunal for a further decision [89]. However the Judge refused to remit to the FTT the question of Farina's fitness and propriety to be a licence holder, on the basis that this was unnecessary, because there was no prospect of the outcome of the appeal against the revocation of her licence being different [91].

31. The Judge also accepted the Council's argument that the FTT was wrong to purport to "reinstate" Farina's licence, which had already expired and could not be revived. Another entity had been granted a Part 3 licence in respect of the Westbury Road property following the expiry date. Therefore the FTT should only have reversed the decision to revoke Farina's licence [97]. However that made no practical difference apart from changing the appropriate form of relief.

32. The Council appeals against the decision of the UT on three grounds:

> (1) The UT erred in finding that: (a) that the question on appeal was whether the proposed licence holder was a fit and proper person at the time of the appeal, rather than whether she was fit and proper at the time of the Council's decision, and (b) accordingly, the FTT was entitled to take account of matters that did not exist at the time of that decision;
>
> (2) The UT erred in failing to recognise that the FTT was required to defer to the local authority's earlier judgment in relation to Farina's and FHCO's fitness and propriety;
>
> (3) The Upper Tribunal erred in failing to remit to the FTT the question whether Farina's failure to answer the 13 questions was relevant to her own fitness and propriety.

33. Before addressing each of those grounds in turn it is necessary to set out the facts in a little more detail in order to explain the basis upon which the Council formed the view that Farina was associated with her parents' criminality, and was therefore not a fit and proper person to hold a licence.

FACTUAL BACKGROUND

34. On 12 June 2015, Nasim submitted licence applications to the Council under Parts 2 and 3 of the 2004 Act in respect of 23 properties, in which it was falsely asserted that the properties did not contain gas appliances. She subsequently provided 21 gas safety certificates for those properties that post-dated the licence applications. The Council granted her 22 property licences between August 2015 and February 2016. They took no further action in respect of the false statements at that time.

35. However, on 19 May 2016 Nasim submitted licence applications for the seven properties owned by Luxcool, located in Old Church Road. Again the applications falsely stated that the properties did not have gas appliances. When the Council challenged that statement, Nasim asserted that it had not been possible to attach the gas safety certificates to her online applications. That was untrue. On 13 September 2016, four gas safety certificates were provided to the Council; these had been fraudulently backdated by Tariq.

36. On 28 September 2016, Nasim was interviewed under caution by officers of the Authority, including Mr Beach, in relation to the misleading statements made in the 2016 licence applications. An interpreter was used. Farina was present. Farina was quite vocal at the interview in seeking to prevent her mother from answering certain of the questions that were put to her (including objecting quite forcefully to the Council officers even asking the questions).

37. The FTT held that her interjections appeared to be designed to limit the Council's questioning to questions regarding the specific properties identified in the letter they had sent to Nasim asking her to attend for interview, i.e. the properties in Old Church Road which were the subject of the 2016 licence applications. Whilst that was a fair conclusion to draw, the concomitant was that she was trying to preclude any questions being put to Nasim (or answered by her) about the 22 properties for which licences had already been granted, again on the basis of false statements about the absence of gas appliances.

38. Early on, Farina said to the Council officers:

> "… we're going round in circles because you're going to sit here and you might divulge (?) into all of our other properties, all of our other licences. We're not here to talk about any other (?) situation. We're here to only talk about Old Church Road."

It was true that the Council wished to talk to Nasim about the applications for licences for the properties in Old Church Road, which had not yet been determined; but it was quite understandable that they might wish to explore how it had come about that Nasim had again made applications for licences to the Council stating that the properties in question had no gas appliances, and subsequently gas safety certificates were produced which demonstrated that at least some of them did. It could be inferred that Farina wished to avoid anything being said by Nasim which might put the licences that had already been granted in jeopardy, which is inconsistent with her being unaware of something that might do so.

39. During the course of that first interview, Nasim was recorded as stating (through the interpreter) that although the properties she owned were in her name, she did not know the answers to the Council's questions because "… her family…run it, her husband, her son and her daughter, they run the business". When asked to identify the daughter, she confirmed that it was "the daughter that's here today", i.e. Farina. When asked who owned the properties, after a degree of prevarication Nasim accepted that she did, "but her husband and her children run the business. They do the day-to-day dealings with the business." She said repeatedly that if the Council invited the family collectively, they could answer the questions together, and that she did not want to give incorrect information. "They run the business on her behalf so they know the information."

40. Nasim made the assertion that her family, including Farina, ran the family property business on no fewer than 60 occasions during the course of the interview. No attempt was made by Farina to correct her. Although it was Nasim, not Farina, who was being interviewed, at no stage did Farina seek a break to discuss matters with her mother privately, as she might have done if her mother had said something that Farina knew to be incorrect or at least inaccurate – particularly as Nasim said more than once that she did not wish to give the Council incorrect information.

41. In Nasim's second interview under caution on 11 April 2017, she answered "no comment" to all questions. However, she gave a written statement to the Council in which she said: "my family, namely my husband (Tariq) son (Wahab) and daughter (Farina) and sometimes others assist with the day-to-day running of the business, which includes the preparation of applications and corresponding with the council."

Nasim denied being involved in the preparation and submission of licence application forms to the Council. She said that Tariq was responsible for the maintenance of the properties and any gas safety checks.

42. Tariq, Wahab and Farina were interviewed under caution at around the same time. Each of them gave "no comment" answers to almost all the questions, although in answer to a question about where she currently lived, Farina gave the address of her parents' home in Chigwell. At the start of Farina's interview on 27 March 2017 (which therefore pre-dated her mother's second interview) Farina was specifically informed that the main reason for the interview was to find out what her involvement was in the family business. She confirmed that she understood that if she did not mention something then which she later relied on in court, an inference could be drawn by a judge as to why she did not answer when given the opportunity to do so.

43. Tariq and Wahab provided prepared statements in which, like Nasim, they specifically denied being involved in the preparation and submission of licence application forms. In contrast to all the other members of her family who were interviewed, Farina provided no written statement. In her evidence to the FTT, Farina stated that her solicitor advised her to provide a "no comment" response. The same firm of solicitors represented all members of the family.

44. Despite her previous denials of involvement in preparing the licence applications, on 12 May 2017 Nasim pleaded guilty to four offences of knowingly or recklessly supplying false information to the Council in connection with the licensing applications submitted in 2016, and was fined £40,000. On 29 June 2018, Tariq pleaded guilty to four offences under section 1 of the Forgery and Counterfeiting Act 1981 for fraudulently backdating the gas safety certificates produced on 13 September 2016. He was fined £1,000.

45. On 23 November 2018 (the same date as it made the decisions in respect of Farina and FHCO) the Council revoked the licences previously granted to Nasim for the 22 properties, and refused to grant licences to her for the seven properties in Old Church Road.

46. At the hearing before the FTT, Farina gave evidence that, apart from the flat in Westbury Road, which she had taken on as a trial property, her involvement in the business relating to her mother's properties was limited to acting as bookkeeper. She said that, at the time of her interview under caution, she lived during the week at an address in Gerrards Cross, but returned to her parents' home at weekends, where she stayed in a "granny flat". This account was partly supported by Wahab, who referred in his witness statement to Farina helping their mother with the bookkeeping at weekends.

47. Farina said that she had set up FHCO in November 2017 to manage properties on behalf of other landlords because she had enjoyed managing the Westbury Road flat. The reason FHCO did not trade for the first year after incorporation was because she was studying part-time for the Association of Chartered Accountants qualification. By the time of the hearing of the appeal by the FTT she had almost qualified as an accountant (having passed 12 out of 14 exams) and had completed a London Landlord Accreditation scheme course.

48. Both Farina and Wahab denied any involvement with preparation of the licence applications. The FTT held that it was more likely than not that Nasim completed the application forms with the assistance of her husband Tariq, and that there was no evidence that either of their children was more deeply involved in the family business than they said they were.

THE GROUNDS OF APPEAL

GROUND 1

49. The answer to the important issues raised by Ground 1 (and identified in paragraphs 2 and 3 of this judgment) depends on the correct interpretation of paragraph 34 of Schedule 5 to the 2004 Act, and in particular sub-paragraph (2).

50. It was common ground that the fact that the appeal is "by way of re-hearing" does not suffice in itself to provide an answer as to the time at which the fitness and propriety of the licence holder is to be judged by the appellate tribunal.

51. Statutory appeals "by way of re-hearing" may range from re-hearings "in the fullest sense of the word", where the appellate body treats the matter as if it arises for consideration for the first time, with the opportunity to rely on fresh evidence, unconstrained or restricted by the decision under appeal, to something much closer to a review of the decision under appeal. See the discussion of that range by May LJ in *E I Dupont de Nemours & Co v S T Dupont* [2003] EWCA Civ 1368, [2006] 1 WLR 2793 at [84]–[98].

52. Whereabouts within the spectrum the appeal will fall, and how the appellate body will approach the matter, depends on the context, and in particular on the intention of Parliament to be discerned from the relevant statutory provisions. As Lord Reed PSC observed in *R (Begum) v Secretary of State for the Home Department* [2021] UKSC 7, [2021]AC 765 at [46]:

> "Modern authorities concerned with the scope of the jurisdiction of tribunals hearing appeals against discretionary decisions by administrative decision-makers have adopted varying approaches, reflecting the nature of the decision appealed against and the relevant statutory provisions."

He added, at [69]:

> " … the characterisation of a jurisdiction as appellate does not determine the principles of law which the appellate body is to apply. As has been explained, they depend on the nature of the decision under appeal and the relevant statutory principles."

53. Mr Bates, who appeared with Mr Grant for the respondents, did not go so far as to submit that appeals under paragraph 34 of Schedule 5 were re-hearings in the fullest sense, with the FTT treating the matter as though it arises for consideration for the first time, unconstrained by the decision under appeal; but he did submit that they were close to that end of the spectrum, and that the task of the FTT is to make up its own mind as to whether the applicant is (now) a fit and proper person to hold a

licence. He relied on the observations of the Deputy President of the Upper Tribunal in *Clark v Manchester City Council* [2015] UKUT 129 (LC) at [37]–[41], who decided by analogy with the approach taken in pre-2004 Act authorities, including the decision of the Court of Appeal in *London Borough of Brent v Reynolds* [2001] EWCA Civ 1843, [2002] HLR 15, that the appeal is "a complete re-hearing, but not one which disregards entirely the decision of the local housing authority". That approach commended itself to the Judge in the present case.

54. Mr Bates submitted that the purpose of the statutory appeal was to achieve resolution of the position "on the ground", and to avoid the processes that would be involved in the matter going back for the housing authority to make a fresh decision in the light of material developments since its decision under appeal was made. That could only be achieved by the FTT making up its own mind on the question of fitness and propriety on an up to date basis, taking into account all evidence that was relevant to determining that question, irrespective of when it arose. He sought to draw support for this submission from sub-paragraphs (3) and (4) of paragraph 34 of Schedule 5. He also drew a distinction between appeals under that paragraph and appeals to the County Court under section 204 of the Housing Act 1996, which (unlike appeals in respect of licensing decisions under Parts 2 and 3 of the 2004 Act) are expressly restricted to points of law.

55. Section 204(3) of the 1996 Act provides that "on appeal the court may make such order confirming, quashing or varying the decision as it thinks fit". Mr Bates contrasted that language with the language of paragraph 34(3) of Schedule 5 to the 2004 Act, which contains no power to "quash" the decision of the local housing authority. Quashing involves the primary decision-maker remaking the decision, whereas under paragraph 34(3) the FTT has the power to vary the decision if it disagrees with it.

56. Moreover, Paragraph 34(4) expressly envisages the FTT directing the local authority to issue a licence, which Mr Bates contended is consistent with the FTT determining for itself that the applicant is a fit and proper person to hold the licence as at the time it makes that order.

57. Mr Underwood KC, who appeared with Mr Calzavara for the Council, submitted that matters relating to where on the spectrum of "re-hearings" an appeal under paragraph 34 lies, and cases such as *Clark v Manchester City Council*, were relevant to Ground 2, but shed no light on the question whether the date on which fitness and propriety was to be determined was the date of the primary decision or the date of the appeal. He submitted that on the ordinary interpretation of the language of paragraph 34 itself, and taking the context into account, the correct date had to be the former, not the latter.

58. The question for the FTT to determine on appeal was whether the decision of the Council that Farina and FHCO were not fit and proper persons to hold a licence was wrong. That question could only be answered by evaluating the decision at the time when it was made. It is irrelevant that if the FTT were looking at the matter afresh on the basis of all the information available to it at the time of the appeal, both predating and postdating the Council's decision, it might reach a different conclusion at the time of the appeal. What matters is whether, after affording appropriate weight and respect to the Council's decision, the FTT considered that the Council should have reached a

different conclusion about fitness and propriety at the time when the decision was made. If it reaches that stage, it has the power to re-make the decision for itself.

59. Mr Underwood further submitted that Parliament plainly intended the decision as to fitness and propriety to be taken by the primary decision-maker (the local housing authority) on whom it had expressly conferred the responsibility for licensing, and not by the specialist tribunal. The "minded-to" process that must be followed each time a licensing decision is made by the authority involves it in exercising numerous value judgments, as indeed does the initial decision to designate an area as a selective housing area under Part 3 of the 2004 Act, thereby subjecting the authority itself to a host of statutory obligations. Even the relevance of the dishonesty of a person associated with the applicant to the applicant's fitness and propriety is a value judgment to be exercised by the authority. He contended that it is not appropriate for an appellate tribunal, however specialist, to substitute its own value judgments because it simply disagrees with a decision of this nature reached by the person to whom responsibility for making it has been entrusted by Parliament.

60. Mr Underwood referred to the observations of Lord Hoffmann in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153 at [49]:

> "However broad the jurisdiction of a court or tribunal, whether at first instance or on appeal, it is exercising a judicial function and the exercise of that function must recognise the constitutional boundaries between judicial, executive and legislative power. Secondly, the limitations on the appellate process. They arise from the need, in matters of judgment and evaluation of evidence, to show proper deference to the primary decision-maker."

Although those observations were made in the very different context of an appeal against a decision made by the Special Immigration Appeals Commission ("SIAC") on an appeal against a decision by the Secretary of State to make a deportation order, Mr Underwood pointed out that they were made at a time when SIAC, a paradigm example of a specialist tribunal, had express statutory powers to find facts and to exercise its own discretion if it concluded that the Secretary of State should have exercised their discretion differently. Even against that statutory background, the House of Lords recognised that there were inherent limitations on SIAC's exercise of those powers. By the time of the decision in *Begum v Secretary of State for the Home Department* (above) those powers were no longer expressly conferred on SIAC by statute. The Supreme Court held that in the absence of clear language conferring jurisdiction on it to do so, an appellate tribunal such as SIAC could not exercise a fact-finding function or substitute its own judgment for that of the primary decision-maker.

61. Mr Underwood submitted that very clear language would be needed to displace the fact-finding and decision-making functions devolved upon the local authority by Parliament. It was very unlikely that Parliament intended this complex series of value judgments to be bypassed by enabling an applicant for a licence to throw all their armoury at an appeal. The idea that the FTT decides the question of fitness and propriety (a value judgment depending on findings of fact) as at the date of the appeal rides roughshod over Parliament's intentions by treating the authority's decision as just a stepping stone on the way to the final decision. An appeal should not be seen as

an opportunity to address concerns or deficiencies highlighted by the authority. If there is a material change since the decision to refuse (or grant) the licence, the proper way to deal with it would be for the applicant to make a fresh application or for the authority to use its powers of revocation, as the case may be.

Discussion

62. I begin consideration of Ground 1 by referring to the language of paragraph 34 itself. Sub-paragraph (2) states that the appeal is to be by way of a re-hearing, *but* may be determined having regard to matters of which the authority were unaware. The word "but" which introduces the proviso in (b) is important. In this context it enables something to be done which would not otherwise be permitted. Without the proviso, the FTT would not be entitled to consider matters that were unknown to the primary decision-maker. Thus Parliament cannot have intended there to be a re-hearing in the fullest sense.

63. In my judgment the proviso assists in resolving the issue as to the time at which the question of fitness and propriety must be considered. Were it not there, the FTT would be constrained to consider only those matters that were known to the housing authority, and therefore by necessary implication, known and in existence at the time when the decision was made. That points inexorably to the conclusion that the task of the FTT is to determine whether the decision under appeal was wrong at the time when it was taken.

64. "Wrong", as Upper Tribunal Judge Cooke explained in *Marshall v Waltham Forest LBC* [2020] UKUT 35 (LC), [2020] 1 WLR 3187 at [61]–[62], means in this context that the appellate tribunal disagrees with the original decision despite having accorded it the deference (or "special weight") appropriate to a decision involving the exercise of judgment by the body tasked by Parliament with the primary responsibility for making licensing decisions. It does not mean "wrong in law". Put simply, the question that the FTT must address is, does the Tribunal consider that the authority should have decided the application differently?

65. I find considerable force in Mr Underwood's submissions that Parliament intended the licensing decision to be taken by the local housing authority, and that their decision should not be treated as a mere step on the path to a final decision being taken by the FTT, based on the latter's own evaluation of the evidence, including matters which could only be relevant if the decision were to be taken afresh as at the date of the appeal.

66. The fact that the FTT is empowered by the proviso to consider matters that were not known to the housing authority is an indication that the FTT must make up its own mind on the question of fitness and propriety, when deciding whether the application should have been refused or granted, or whether the licence should have been revoked. Plainly this would encompass a relevant matter which existed at the time of the decision, such as a conviction or relevant professional qualification.

67. The question whether the FTT is able to consider matters that did not exist at that time, and therefore could not have been taken into account when the decision was made, is more difficult to answer. The proviso contains no express time limit, but generally speaking, an event which occurs after a decision is taken will not be

relevant to the assessment of whether that decision was right or wrong at that time. There is an obvious illogicality in the proposition that the Council were wrong to conclude that Farina was not a fit and proper person in November 2018 because she has subsequently achieved, or made significant progress towards achieving, certain relevant professional qualifications, and demonstrated to the satisfaction of the FTT that she has been doing a good job of managing the Westbury Road property in the intervening period.

68. At first sight, therefore, there is much to be said for interpreting the proviso as implicitly restricted to matters of which the authority was unaware at the time of the decision under appeal. The FTT would be considering whether, if the authority had taken into account further information that was available but not provided to it at the time, as well as the information on which it did rely, it should have reached a different conclusion.

69. However, the reason why I am not prepared to accept that restriction is that the test for determining what matters the FTT can take into account under the proviso must be one of relevance to the task it is performing. Evidence that an applicant may now be a fit and proper person, for reasons that the authority could not have taken into consideration, has no bearing on the answer to the question whether the authority was wrong to conclude that they were not a fit and proper person in November 2018, unless it can legitimately shed light on the applicant's character at that time.

70. It is not impossible to conceive of scenarios in which matters arising after the decision might be relevant in that sense, though they may rarely arise. For example, suppose the authority has decided that someone is not a fit and proper person to be a licensee, and after the decision is made, that person is convicted of an offence of dishonesty committed before the decision was made. The conviction might serve to endorse the view formed by the authority about that person's fitness and propriety at the time when the licensing decision was taken, even though it could not have been part of the material that was considered at that time.

71. It would probably be more difficult to argue that the licence holder's bad behaviour *after* the decision to grant a licence was taken could be taken into account by the FTT on an appeal against the grant of the licence. Although much depends on the facts and circumstances of the individual case, it seems unlikely that such behaviour would be relevant to the question whether they were a fit and proper person at the time when the decision was taken, however relevant it might be to the question whether they are a fit and proper person to continue holding a licence. In those circumstances, the authority would probably have to go through the statutory procedure for revoking the licence.

72. Mr Bates argued that this would cause delay, and that restricting the material to which the FTT can refer is less satisfactory than resolving the issue of fitness and propriety once and for all on appeal. It would have the undesirable consequence that someone who is unfit to hold a licence would remain a licence holder. However, that difficulty is inherent in the licensing scheme, which places the primary responsibility for assessing suitability on the local authority, and expressly includes a revocation process. Parliament has decided that a certain procedure must be followed if a licence is to be revoked. Whilst that means some delay, the minimum consultation period under the "minded to" procedure is relatively short (14 days). If the local housing

authority makes a decision to grant a licence and it subsequently transpires that the licence holder is not a fit and proper person, it can correct the situation by following that procedure. Conversely, if someone becomes a fit and proper person after the refusal and prior to the hearing of the appeal they can, and should, make a fresh licence application. That is operating the scheme in the way that Parliament intended.

73. For those reasons, I have concluded that the UT was wrong to find that it was open to the FTT to decide the appeal by addressing fitness and propriety as at the date of the appeal.

74. Moreover it was wrong to do so on the basis of material that did not exist at the time of the decision and which could not possibly have been relevant to the question whether the Council's refusal or revocation of the licenses in November 2018 was wrong. It is plain from the FTT's decision that it only regarded FHCO as a fit and proper person to hold a licence because of matters that had occurred after the decision under appeal was taken, including the appointment of a second director. Indeed it expressly found, at [127] in the context of Nasim's appeal against the Council's decision to make Interim Management Orders in respect of the Old Church Road properties, that it was "doubtful that as at 6 December 2018, FHCO would have been an appropriate alternative licence holder," because it had no assets or reserves and no employees despite having been incorporated a year earlier, in November 2017. It took that view despite accepting Farina's explanation for why FHCO did not trade in that year.

75. The FTT also took into account irrelevant matters arising after the decision (such as her more recent property management track-record, when compared with that of her mother) when considering Farina's own appeal.

76. For those reasons, and the further reasons given by Lewison LJ, with which I respectfully agree, I would allow this appeal on Ground 1.

GROUND 2

77. Where a re-hearing on appeal does not involve the appellate tribunal starting afresh, the appellate tribunal may still be required to make up its own mind on the application in place of the original decision maker. But even then, if the decision involves the exercise of a discretion, or judgment, by another person or body, the appellate tribunal will not interfere with the original decision unless, having afforded it what is variously described in the authorities as "great respect", or "considerable weight", it is satisfied that the decision was wrong. In making that evaluation the appellate tribunal must pay proper attention to the decision under challenge and the reasoning behind it. If the decision is based on the application of a lawful policy it must ask itself whether the impugned decision, and any different decision that it proposes to make, is in accordance with that policy. The burden lies on the party challenging the decision to satisfy the appellate tribunal that it should take a different view from the primary decision maker.

78. There is a long line of cases concerning the respect to be paid to decisions taken by local authorities on matters of policy, or decisions taken in the exercise of a discretion or value judgment, but I do not consider it necessary to refer to them in this judgment. Suffice it to say that Judge Cooke discusses them in detail in *Marshall v Waltham*

Forest LBC (above). They include *Sagnata Investments v Norwich Corporation* [1971] 2 QB 614, *R (Hope and Glory Public House Ltd) v City of Westminster Magistrates' Court* [2011] PTSR 868, and, perhaps most pertinently, *Brent London Borough Council v Reynolds* (above). That case is probably the most closely analogous, as it concerned the scheme for appealing to the County Court against licensing decisions in respect of HMOs taken under the Housing Act 1985.

79. Mr Bates submitted that it could be inferred that Parliament intended to "codify" the approach adopted in *Brent v Reynolds* in the statutory provisions for appealing against licensing decisions taken under the 2004 Act. I do not consider that inference can be safely drawn. The 2004 Act did not codify the previous licensing scheme. But that case does illustrate that, whilst the FTT is at liberty to depart from a licensing decision if it disagrees with it, it should "pay great attention to any view expressed by the local housing authority, and should be slow to disagree with it."

80. Mr Bates submitted that the decision under appeal is the logical starting point for any appeal, but is no more than part of the factual matrix against which the FTT carries out its re-hearing. I disagree. True it is that the FTT is not asking itself whether the decision of the authority was within the range of decisions reasonably open to it, as it would do on a judicial review. It is deciding whether the authority made the wrong decision. But in doing so, the FTT must pay careful attention to the reasons why the authority reached the decision that it did, and explain why it disagrees with them. Since Parliament intended such decisions to be taken by the authority, the FTT must afford the decision the weight and respect that must be afforded to any decision involving a value judgment made by the decision maker which was also the finder of primary fact.

81. In the present case, the FTT referred at [61] to the Council's statement of case in which it adumbrated its reasons for concluding that Farina was not a fit and proper person. It next referred to the relevant government guidance which Mr Beach said that he applied in accordance with the Council's internal policy. This made it clear that the Council had to be satisfied that the wrongdoings of the person associated with the applicant for the licence were directly relevant to the fitness of the latter to manage the property or licence – another value judgment to which appropriate deference had to be shown.

82. Having set out in detail the evidence given by Farina and Wahab, the FTT concluded that the evidence did not support the Council's assertions that Farina shared culpability for the provision of the false, misleading and fraudulent information that led to her parents' convictions, that she played a vital role in the family business, that it was likely that she was a party to the false gas safety certificates, and that she was central to the attempted cover-up of the false declarations.

83. The FTT said at [83] that the Council's suggestion that Farina was involved appeared to it to be "speculation" based on Nasim's answers in her first interview. However that appears to me to be a mischaracterisation of the evidence. Nasim's evidence in her first interview and repeated in her written statement, prepared when she was legally represented and supplied to the Council at the time of her "no comment" second interview, was direct evidence of Farina's involvement in the day to day running of the family business, including assisting in the applications made to the Council. As the FTT noted, Nasim did not differentiate between the roles played by

each family member (save in her prepared statement when she stated that Tariq was responsible for maintenance of the properties). However, that supports rather than negates the inference that they all had similar knowledge of the business.

84. Mr Underwood made the telling point that Nasim did not give evidence to the FTT and was not cross-examined, yet the FTT was prepared to make a finding, without having had the same advantage of hearing from her, that she was not telling the truth about her daughter's involvement. There is nothing in its decision to indicate that it appreciated that it was hampered by the absence of a critical witness upon whom the primary decision-maker relied, let alone that it gave appropriate weight to the fact that the Council *did* see and hear her, and had the opportunity to test her answers by asking questions (albeit that she failed or refused to answer most of them). The FTT also disbelieved Tariq's evidence that he was not involved in making the applications to the Council, again without attaching any weight to the fact that the Council officers interviewed him under caution, whereas the FTT did not see or hear from him.

85. Farina's position in her evidence and under cross-examination that her involvement in the family business was confined to assisting her mother with the book-keeping at weekends fell to be assessed against her behaviour, including on the occasion of her mother's first interview, in which she clearly associated herself with that business (using the expression "we" throughout) and did all that she could to prevent Nasim saying anything that might put the earlier licences in jeopardy.

86. Farina is plainly intelligent and articulate. Whilst her decision to give a "no comment" interview was taken on legal advice, she knew that the Council was interested in knowing the extent of her involvement in the family business, and chose to keep quiet about it despite understanding that an adverse inference could be drawn from her silence. She was the only member of the family who did not produce a prepared statement denying involvement in the application process. Against that background, the Council was plainly entitled to draw an adverse inference from Farina's failure to do or say anything to contradict her mother's statements to the Council at any stage prior to the decision being taken, notwithstanding that she was legally represented.

87. Farina also chose not to answer the 13 questions and as the Judge recognised at [88], her failure to answer questions on behalf of her company might have some bearing on the Council's assessment of her character.

88. Whilst the FTT was entitled to take into account its own impression of Farina, having heard her give evidence and being cross-examined, it had to weigh that against the Council's impression of her and its impression of her mother, who they had the advantage of seeing and hearing. The FTT disagreed with the decision despite the fact that it had not seen and heard from the key witness upon whom Mr Beach's decision relied.

89. In my judgment the FTT failed to afford sufficient deference to the Council's decision and the reasons for it. The Judge was wrong to say that the FTT did not have to defer to the earlier judgment of Mr Beach so long as it had regard to it and to the convictions of Nasim and Tariq. The FTT might have been entitled to reach the conclusions that it did, if it had properly directed itself; but it did not properly engage with the material which underpinned the Council's decision and therefore wrongly

assumed that it was based on speculation rather than hard evidence which the Council was best placed to assess.

90. I would allow this appeal on Ground 2 also.

GROUND 3

91. Ground 3 is academic in the light of the answers to Grounds 1 and 2, but I consider that this Ground is also made out. There is an obvious illogicality and inconsistency of approach in the UT's conclusion that Farina's failure to answer the 13 questions was relevant to the assessment of her character as a director of FHCO for the purposes of determining whether that company, with Farina as a director, was a fit and proper person to hold a licence, but it was unnecessary to remit that matter to the FTT to be taken into consideration in the assessment of whether she was a fit and proper person to hold a licence in her own right.

92. Mr Bates acknowledged the force of that analysis, but submitted that it was open to the UT to decide that the matter was so tangential in the light of the FTT's assessment of Farina's character as to be irrelevant to the question whether her licence should be revoked. I am not persuaded. Having reached the conclusion that it did on its relevance to FHCO's fitness and propriety, the UT clearly erred in failing to remit to the FTT the question whether Farina's failure to answer the questions had a bearing on her own fitness and propriety.

CONCLUSION

93. I would allow the Council's appeal on all three grounds. The correct legal approach and assessment of the relevant evidence would have resulted in the dismissal of Farina's and FHCO's appeals to the FTT. Farina failed to show that the Council's decision to revoke her licence was wrong at the time when it was made. Indeed the FTT made no finding that it was wrong at that time. As the UT (unlike the FTT) recognised, the evidence before the Council that Farina was associated with her parents' wrongdoing was strong. Farina had been afforded ample opportunity to explain her position within the family business, and had chosen not to do so. So far as FHCO was concerned, the FTT indicated that in its view the Council would have been right to find it was not a fit and proper person to hold a licence in December 2018 (and thus by necessary implication it would have been right to refuse its licence applications in November 2018).

94. It follows that this Court should confirm the Council's decisions respectively to revoke Farina's licence and refuse to grant licences to FHCO, pursuant to paragraph 34(3) of Schedule 5 to the 2004 Act, and set aside the decisions of the FTT and UT to the extent that they are inconsistent with that confirmation. Of course, it remains open to Farina or FHCO to make a fresh application to the Council for a licence.

Lord Justice Snowden:

95. I agree that the appeal should be allowed for the reasons given by both Andrews LJ and Lewison LJ.

Lord Justice Lewison:

96. I agree with the reasoning and conclusions of Andrews LJ on all three grounds of appeal. I add a few words of my own on ground 1.

97. It was common ground between the parties that the description of an appeal as a "re-hearing" did not tell you much about the approach that an appellate tribunal should adopt in any particular case. As May LJ explained in *Dupont*, the word "re-hearing" has many different shades of meaning. The principles to be applied by an appellate tribunal depend on the nature of the decision under appeal and the relevant statutory provisions: *Begum* at [69]. The relevant statutory provisions will include not only the specific statutory provision which permits an appeal to be brought, but also the statutory scheme giving rise to the challenged decision.

98. Some caution must be exercised in reading across decisions on licensing appeals. As this court explained in *Kavanagh v Chief Constable of Devon and Cornwall* [1974] QB 624 (an appeal against the refusal of a firearms licence) many administrative functions are carried out by the magistrates or the Crown Court as successors to quarter sessions. Roskill LJ put it as follows:

> "… from medieval times until 1971 a court of county quarter sessions had wide jurisdiction only a part of which involved the trial of criminal cases. That administrative jurisdiction included the hearing of appeals of this kind and the fulfilment of many different duties which had descended from earlier times. Before county councils existed quarter sessions were the main administrative body for a county. When in the last century county councils were created, they were given certain administrative duties. But the courts of quarter sessions retained other administrative duties which have since been added to."

99. In addition earlier cases were decided before the reorganisation of the tribunal system. Under the tribunal system established by the Tribunals Courts and Enforcement Act 2007 I consider that, when hearing an appeal, the FTT is a true appellate tribunal. It is not exercising an administrative function.

100. At the heart of any appeal against a decision must, in my judgment, be a contention that the decision under appeal was wrong in some sense. As Judge Cooke explained in *Marshall v Waltham Forest LBC* [2020] UKUT 35 (LC), [2020] 1 WLR 3187 at [61]:

> "The answer to the conundrum is that the idea "unless it is wrong" is being used in two different senses. Both in *Joffe* and in *Sagnata* the court rejected the idea that the lower court was exercising a narrow jurisdiction and could assess only whether the original decision was one that could have been reached on the evidence. The idea that the original decision stands "unless it was wrong", that is, wrong in law, is expressly rejected. In both cases the court stressed that this was a rehearing and not (to use a modern term) a review. But in both cases—in *Joffe* in the words I quoted at para 57 and in *Sagnata* by reference to

> those quoted words—the court stressed that the original decision carries a lot of weight; and it is in this sense that it is true that the courts will not vary it unless it is wrong. Here "wrong" means a decision with which the court disagrees; the court can vary that decision where it disagrees with it, despite having given it that special weight."

101. But this does not mean that the appellate tribunal is entitled to decide an appeal by reference to facts which occurred after the date of the local authority's decision, except to the extent that they throw light on the question whether the local authority's decision was wrong. To decide otherwise, and to hold that the FTT may legitimately conclude that circumstances have changed since the local authority's decision and that, although it was right at the time, events have since moved on, would be to countenance an ever-moving target. Thus if there were an appeal to the Upper Tribunal and that tribunal held that the FTT had made an error of law, the UT is entitled to remake the decision: 2007 Act s. 12 (2) (b). The logic of Mr Bates' argument is that the UT would decide the appeal on the basis of the facts as they existed at the date of the hearing before the UT. This can and does happen in some immigration and asylum appeals, but that is because it is expressly authorised by section 85 (4) of the Nationality, Immigration and Asylum Act 2002. In addition, in immigration and asylum cases the functions of the tribunal are an extension of the decision-making process, so that it stands in the shoes of the Secretary of State: *Singh v SSHD* [2017] EWCA Civ 362, [2017] 1 WLR 4340 at [33]. If there were then an appeal from the UT to this court, and this court found that the UT had made an error of law, this court is also empowered to remake the decision: 2007 Act s. 14 (2) (b). Again, the logic of Mr Bates' argument is that this court would decide the appeal on the basis of the fact as they stood at the date of the appeal. I find it difficult to believe that such is the intention to be attributed to Parliament.

102. In my judgment, the statutory scheme in which the right of appeal is embedded supports that view. The grant or refusal of a licence is a discretionary decision to be exercised by the local housing authority. The authority may only exercise their discretion to grant a licence "if *the authority* are satisfied" of the matters mentioned in section 88 (3) of the 2004 Act: 2004 Act s. 88 (2). One of those matters is whether the applicant is "a fit and proper person" to hold a licence, which is itself an evaluative decision. Section 89 amplifies the test for fitness. It provides that the local housing authority must have regard to certain kinds of evidence. One of those categories is evidence that shows that a person associated or formerly associated with the applicant committed certain offences and "it appears to the authority" that the evidence is relevant to the applicant's fitness: 2004 Act s 89 (3). There is, in addition, an elaborate procedure laid down by Schedule 5 which requires the authority to notify the applicant that it is proposing to refuse a licence; and to entertain representations before coming to a final decision.

103. As Mr Underwood KC submitted, if the FTT (or, for that matter, the UT or this court) could decide an appeal by reference to the situation as it stood on the date of the appeal, all the discretionary and evaluative powers conferred on the local housing authority could simply be by-passed. It is true that on an appeal the appellate tribunal may consider matters of which the authority was unaware. But those matters must, in my judgment, be restricted to matters which tend to show that the local housing

authority's decision was right or wrong at the time when it was made. Thus the appellate tribunal is not confined to deciding whether on the evidence before it, the local housing authority was entitled to reach the decision that it did. The appellate tribunal may decide that matters of which the authority was unaware show that the authority's decision was wrong. In that sense, the appellate tribunal is entitled to set aside a decision with which it disagrees.

104. I conclude, therefore, that on an appeal against an authority's refusal to grant a licence, the question before the appellate tribunal is whether the authority's decision was wrong. It follows that the FTT was wrong to decide the different question: namely, whether on the facts as they stood at the date of their own decision, Farina or FHCO was a fit and proper person.