First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	**:**	**CHI/00HG/HPO/2021/0001**
Property	**:**	**Flat 2,** **9 Bedford Park,** **Plymouth,** **PL4 8HN**
Applicant	**:**	**Mr. Raad Polus Bihnam**
Respondent **Represented by**	**:**	**Plymouth City Council** **Helen Morris (solicitor)**
Application	**:**	**Appeal against Prohibition Order (paragraph 7 of Schedule 2 of the Housing Act 2004 ("the Act"))**
Application date	**:**	**24th May 2021**
Tribunal	**:**	**Judge Edgington (chair)** **Bruce Bourne MRICS** **Peter Gammon MBE BA**
Date & place of hearing:		**9th September 2021 as a video hearing from Havant Justice Centre in view of Covid pandemic restrictions**

DECISION

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1. The decision of the Tribunal is that the Applicant's appeal against the Prohibition Order dated 4th May 2021 alleging Category 1 hazards of 'space and overcrowding' and 'excess cold' is quashed.

2. For the avoidance of doubt the reasons for the HHSRS assessment also mention a Category 2 hazard of 'entry by intruders' but this is not part of the Prohibition Order and no work is required from the Applicant therein to remedy any such hazard.

Reasons

Introduction

3. This application is made by one of the owners of the freehold property known as 9 Bedford Park, Plymouth in which the property is situated. It is a 3 storey terraced house built before 1920 which was converted into 4 flats some years ago. The other owner is believed to be the Applicant's wife, Mrs. Ghada Hikmat Bihnam who has not taken any part in this application. It is unfortunate that throughout this case, the Respondent has spelled the Applicant's name as 'Binham' rather than 'Bihnam' which is discourteous, to say the least.

4. The Prohibition Order served on the 4th May 2021 is suspended until the current occupant, Thomas Swift vacates. Despite the advice in LACORs guidance at page 74 in the bundle provided for the Tribunal, it is not time limited. It sets out Category 1 hazards of 'space and overcrowding' and 'excess cold'.

5. In essence, the Applicant, a civil engineer with a degree from Imperial College of Science, Technology & Medicine, says that the Respondent has misunderstood the law, has not measured the property accurately and is not prepared to listen to his suggestions for satisfying their requirements.

6. The Tribunal made a directions order timetabling this case to this final hearing.

The Statutory Framework

7. The Act introduced a Statutory scheme enabling local authorities to assess the condition of a property based on risk to occupants with power to serve notices and orders on owners requiring action to be taken to reduce risk or restrict the use of a property.

8. The scheme is based on an assessment of risk using the Housing Health and Safety Rating System ("HHSRS"). The most serious risk of harm to a person creates a Category 1 hazard and if a local authority makes a Category 1 hazard assessment, it becomes mandatory under Section 5(1) for the local authority to take appropriate enforcement action. All other risks simply enable the local authority, in its discretion, to take such action.

9. A person served with a Prohibition Order can appeal to this Tribunal which "may by order confirm, quash or vary the prohibition order" (Schedule 2, paragraph 11(3) to the Act).

10. As far as the time for compliance is concerned, section 24(2) of the Act says that "*the general rule is that a prohibition order becomes operative at the end of the period of 28 days beginning with the date specified in the notice as the date on which it is made*". However, there are specific provisions allowing a local authority to suspend operation of the Order, as in this case.

11. Any appeal is by way of a 'rehearing' according to the Act. This is rather a misnomer as there has not been a hearing yet. In the Upper Tribunal case of **Herefordshire Council v Rhode** [2016] UKUT 39 (LC), Judge Cooke assisted Tribunals by setting out her determination of what a 're-hearing' was. The Tribunal's task is to look at the local authority's decision and then consider the

evidence available at the time it made its decision. It should then consider whether the correct decision had been made. In other words, the Tribunal's task was not to simply consider the state of a property on the day of the Tribunal's determination and then make a decision based purely on that.

Inspection

12. Judge Whitney's directions order makes it clear that the Tribunal will probably not be inspecting the property although any application by a party for such an inspection will be considered if it is received on or before 27th August 2021. No such application has been received.

13. The Tribunal has been assisted by having photographs of the property in the bundle although the Respondents seem to be black and white.

The Hearing

14. The hearing was attended by the Applicant, Helen Morris, solicitor for the Respondent, the witnesses Amy Marshall and Andrew Elvidge and it is understood that 2 officers from the Respondent were observing. The Tribunal's case worker explained practical formalities in respect of the hearing.

15. The Tribunal Judge then introduced himself and the other Tribunal members. He then explained that he would ask some questions which arose from the papers and then invite each side to put their case. The Tribunal wing members would be invited to put any questions they had at the appropriate time. That was how the hearing proceeded.

16. Ms. Morris called Amy Marshall to give evidence. She is a Senior Community Connections Officer and confirmed that her statements in the bundle were correct. She was in some difficulty in explaining how the measurements of the rooms had been calculated and Mr. Elvidge, a Technical Lead, took over this matter as the 2 of them had taken the measurements. The Tribunal allowed him to do this even though he had not made a formal written statement. He eventually said that the bedroom was 5.4 sq metres in size and the whole flat excluding the bathroom was 17.25 square metres. They had to concede that the measurements on page 135 were not correct.

17. As far as the tenant, Mr. Swift was concerned, he had convinced Ms. Marshall that he was a vulnerable person and he complained about being cold. He was ill. He didn't want emergency work carried out because he had been homeless before and didn't want to be homeless again. She didn't question him about the heated towel rail being removed from the flat by him, as alleged by the Applicant.

18. She confirmed that she was guided by the LACORS guidance and, in particular by new working examples published in February 2020. Unfortunately no details of these examples were exhibited although it was pointed out that one line of reference details at the top of page 149 was in respect of those examples.

19. She was repeatedly asked what law she was relying upon to substantial the minimum sizes she was suggesting should be followed. Her only answer was to quote from the LACORS guidance at page 71 which contains working examples,

but none for 1 person living alone in an older self contained flat. It may be that the 2020 examples she refers to deal with that.

20. The Applicant than gave evidence. He also confirmed that his statements were correct. He rather surprised everyone by saying that Mr. Swift had changed round the flat to so that the lounge became his bedroom and the bedroom became his lounge. He accepted that Mr. Swift was a vulnerable person and he agreed that he helped him out by giving him loans for money to be put in the electricity meters for this flat. When asked how old Mr. Swift was, he said that he was in his 40's.

21. He was firmly of the view that the flat was not too small and, as had been accepted by the Respondent, it did not contravene the tests set out in the **Housing Act 1985** for the offence of overcrowding. He said that as the Respondent had said that he should change the heating in the flat, he would do so by fitting alternative night storage heaters with a new separate meter for the tenant to feed. The Applicant would clearly need to get the heated towel rail back from Mr. Swift and refit that or provide some other form of fixed heating.

Discussion

22. The first point to make is that local authorities are often on a 'hiding to nothing' in these cases. Here, there is a pre-1920 terraced house which has been converted into flats. The flat in question is small, to say the least. A local authority would be very unlikely to give planning permission for this type of development nowadays.

23. If a local authority officer genuinely feels, as clearly Amy Marshall does in this case, that there is a hazard and action needs to be taken, then they can be faced with quite unwarranted criticism. The Tribunal believes that Ms Marshall has acted with motives which are laudable i.e. she wants to improve the Applicant's tenant's home environment and make sure that any hazards are reduced or eliminated. The Applicant needs to understand that these laws are designed to protect people's health and safety which sometimes means requiring property owners to do things they do not want to do.

24. Unfortunately, the assessment and the decisions taken need to be evidence based and the Tribunal is concerned about what has actually happened in this case. The main problem with the assessment is the resulting situation. Whatever is being suggested by the Applicant is being rejected and nothing by way of improvements to this flat to resolve any problems seems to be acceptable to the Respondent.

25. What is being said, in effect, is that this property as it stands has to be removed from the letting market as it will never be hazardless. The only suggestion being made by the Respondent is that either 2 of the flats in the house have to be joined together i.e. there will be one less flat available for the housing market or, alternatively, the Applicant has to extend this flat into the rear courtyard which is going to be expensive and very disruptive to the rest of the building even if there are no planning permission/Building Regulation problems.

26. The evidence of the Applicant on page 44 is that the present tenant was homeless and had been placed by a local authority in a Travelodge Hotel where he had been unable to have a hot meal for some 2 months. The Applicant says that he had sympathy for him which is how he came to be living in the property. Ms. Marshall clearly empathises with this and feels that Mr. Swift's vulnerability increases the risk to him. However, making a Prohibition Order without any time limitation has the potential to exacerbate the problem rather than solve it.

27. The Tribunal was troubled by this decision. To make a Prohibition Order which was suspended until the tenant moved out but without any time limit and then providing that the Applicant and his wife could live there when there are allegedly Category 1 hazards of space and overcrowding for only 1 person plus excess cold does not seem logical to this Tribunal. It is said that the current occupier wants to move but what happens if he can't find anywhere or, more likely, can't afford the rent deposit which is likely to be needed? Even under the terms of this order, it is possible that Mr. Swift will be there for a considerable time. Surely the whole point of the LACORS advice on time limits is to ensure that this does not happen because people could then continue to suffer the effects of Category 1 hazards indefinitely. Also, if there are two category 1 hazards, why are the Applicant and his wife able to live there?

28. The Order (page 201) says that the use of emergency powers "*would require works to be carried out or prohibit part or all of the premises immediately due to an imminent health and safety risk. The hazards do not present an imminent risk of serious harm to the health and safety of any of the occupiers of the premises or other residential premises Therefore the service of an emergency prohibition order or undertake emergency remedial action is* ***not*** *considered the most appropriate course of action*".

29. This wording is ambiguous, to say the least. The whole point of making it mandatory for local authorities to take action in respect of a Category 1 hazard is because such hazards, according to section 2(1) of the Act mean "*any risk to the health or safety of an actual or potential occupier of a dwelling*". As far as Mr. Swift is concerned, that alleged risk is just going to continue.

Discussion – crowding and spacing

30. This property was let as a dwelling for a single man. There seems to be evidence that he has someone staying with him from time to time but that is his choice. The Applicant says that he should have had a single bed but the tenant has decided to have a double bed. The response, at page 40, is that it is not unreasonable for an adult to have a double bed and the room needs to be big enough for this.

31. The LACORS guidance at page 71 makes it clear that a bedroom for a single person is much smaller than a double bedroom. It is also clear (and admitted on page 147) that sections 325 and 326 of the **Housing Act 1985** relating to statutory overcrowding, have not been breached.

32. The HHSRS Operating Guidance starting at page 117 makes it clear that this hazard is mostly about overcrowding rather than simple lack of space for a single person. For example, the health effects paragraph starts with the following:

> "*11.06 Lack of space and overcrowded conditions have been linked to a number of health outcomes, including psychological distress and mental disorders, especially those associated with a lack of privacy and child development. Crowding can result in an increased* (sic) *in heart rate, increased perspiration, reduction of tolerance, and a reduction of the ability to concentrate. Crowded conditions are also linked with increased hygiene risks, an increased risk of accidents, and spread of contagious disease*"

33. In September 2017, Ms. Marshall inspected the property and did not identify any hazards, let alone two Category 1 hazards. At page 40 she says that such visit was for the purpose of investigating a statutory nuisance. It also says that '*due to changes in guidance in relation to Crowding and Spacing, particularly new working examples which were published in February 2020, the Local Authority have a duty to consider the most appropriate course of action when a Category 1 hazard is identified*'.

34. This seems to suggest that the law changed in 2020 which is not, of course, correct. Sections 3 and 4 of the Act make it clear that a local housing authority must review housing and if, for any reason, they suspect that a Category 1 hazard exists, they must inspect and if they are correct in their initial assessment, they must take action. They did neither in 2017. New working examples would not suddenly create 2 Category 1 hazards.

35. What seems to be clear is that the only reason why this assessment has been made is because of guidance given by LACORS on the minimum size of a bedroom for a single person. At page 71, the list of room sizes does not include a 1 bedroom flat for 1 person and such guidance then says:

> "*Although the number of working examples for crowding and space is small, the information suggests that, as a rule of thumb and, depending on layout and design, a room of around minimum size 9.5m2 is suitable as a double bedroom for 2 persons and a bedroom of 6.5m2 or above is suitable as a single bedroom for 1 person. This information is useful to help practitioners decide on whether bedrooms are suitable as single or double bedrooms although it must only be used as an approximate guide. The type of property e.g. flat or house, layout, design, size of living space and overall size of the premises will also be relevant*"

36. In this case we have a flat for a single person with a bedroom big enough for a single bed plus a lounge/kitchen and a shower room/toilet. Suggesting that the lounge is not big enough for the tenant to entertain a guest or that a guest would have to go though the bedroom to get to the toilet might be relevant in HHSRS when considering overcrowding but not otherwise. Further, there is no

assessment of the health effects referred to in the HHSRS Operating Guidance i.e. the assessment of risk.

37. It is, of course, acknowledged that the 37 square metre DCLG National Described Space Standard does not apply but the comment on page 39 that '*this flat is significantly smaller than the ideal*' is hardly relevant. A large percentage of the population may well say that about their accommodation.

Discussion – excess cold

38. The assessment here is based on the cost to the occupier of providing electricity to 2 heaters and the lack of the heated towel rail in the shower room. There has been no assessment of whether there is, in fact, excess cold. As far as the heated towel rail is concerned, there is a photograph of this in the bundle and it is clearly a large heater which is fixed. The Applicant says that, to his surprise, it has been removed by the tenant. The response at page 37 is that this is not disputed by the Respondent but there was no heater there when the property was assessed i.e. the Applicant is being penalised for having his fixed heater removed by the tenant.

39. This is an old property with basic problems which cannot be changed such as lack of insulation in the solid exterior walls of a terraced house. Part of the flat has a flat over it which means that the walls and roof under the flat above have as much insulation as a property of this age can have. No credit seems to be given for this, for the double glazed windows and doors or the E rating assessed for thermal efficiency (page 53), which is within the minimum requirement for letting property. There has been no measurement of temperature achievements.

40. The HHSRS Operating Guidance for this hazard is not contained in the bundle but it has been considered by the Tribunal. Under the heading 'Preventative Measures and the Ideal' there is no mention of the cost of using ordinary electric heaters. It just says that heaters should be efficient and controllable by the occupier. In this case we have 2 heaters and the missing heated towel rail which seem to have been controlled by the occupier. There is no assessment of how much the present occupier is paying for electricity as compared with any other system.

41. Ms. Marshall clearly takes the view that Mr. Swift is vulnerable and should have the cheapest form of heating available. The problem with what she suggests is that when Mr. Swift has his separate electricity meter, he may not, as is presently the case, be able to afford to pay for his electricity. The Tribunal accepts the Applicant's evidence that he simply charges Mr. Swift the basic cost of electricity without any uplift and loans him money when he can't afford to pay for his electricity. The difference in the cost of running between 2 electric heaters and a large heated towel rail as opposed to 2 off peak storage heaters and the towel rail is not going to be that great in a flat of this size. They will only be used when it is cold and everyone accepts that Mr. Swift has total physical control over temperatures.

42. In the Upper Tribunal case of **Bristol City Council v Aldford Two LLP** [2011] UKUT 130 (LC), the then President, George Bartlett QC, dealt with an

appeal against an Improvement Notice with excess cold allegations quite similar to this case. The issue in that case was the form of heating which was by convector heaters. The Council had ordered that the works under the Improvement Notice should be the replacement of the convectors with gas central heating or electric night storage heaters.

43. In their assessment of the hazard, the Council classified the property as a pre-1920 flat. The assessments by that case officer were exactly the same as for this case i.e. Class I 31.6, Class II 4.6, Class III 21.5 and Class IV 42.3. This produced a hazard rating score of 1819, putting the hazard in band C. Ms. Marshall's assessment in the case now being considered is 3275 i.e. in Band B (page 151). How she can do this without apparently undertaking any proper assessment of whether there is actually any excess cold or unreasonably excessive cost of electricity is not understood.

44. Judge Bartlett said in the **Bristol** case that the Residential Property Tribunal ("RPT") "*...had noted from their inspection firstly that the tenants themselves had no complaint about the heating and were happy to control it for the time and the hours that they wanted in the respective rooms. Secondly that notwithstanding that it was a cold day outside the premises appeared to be warm. Thirdly and based on the Tribunal members' own knowledge and inspection of many similar premises, that the heating system that was provided at these premises should be perfectly adequate and is not abnormal for these types of premises*".

45. The RPT quashed the Improvement Notice. The Council argued that the reasons for the decision were inadequate and had failed to give any proper consideration of the assessment of the hazard upon which the Council's case depended. The Upper Tribunal disagreed with the Council but said that as the RPT had found that there was a Category 1 hazard, they should have gone on to consider the alternatives. Its view was that a hazard awareness notice was appropriate.

46. The then President had already said that "*The needs and preferences of the actual occupiers, as well as those of the vulnerable group considered for the purpose of the assessment, are in my judgment material to the choice of enforcement action to be taken. Moreover even on the council's assessment the hazard is a band C hazard, the bottom band in category 1, and that assessment, as I have said, is likely to be too high. So far from being reasonable in these circumstances to require a new heating system to be installed it would in my judgment be palpably unreasonable to require this.*"

47. He went on to say that the 2004 Act, the Regulations and the statutory guidance have created a system of assessment that is complex. "*By reducing to numerical terms essentially subjective judgments of risk the system may give a misleading impression of scientific precision to the assessment results. The objective standards provided to guide the subjective judgments – national averages of the incidence of harm and distribution between the four classes – have a statistical basis that is self-evidently fragile. What has been done is to produce a national average probability of the incidence* (of harm) *Such average values are only as*

dependable as the statistics that underlie them, and it is evident that they have been derived by routes that, in the absence of direct statistical evidence, are inevitably indirect. The Operating Guidance itself makes this clear."

48. The **Bristol City Council v Aldford** case dealt with a Council assessment undertaken following an inspection on 11th May 2009. Two years later, in the 2011 version of the guidance published by the Chartered Institute of Environmental Health (CIEH), there is a specific section on assessing excess cold hazards. It points out that the Operating Guidance published at the same time as the Act relied upon data from 1997 to 1999 when the average number of excess winter deaths per year was about 40,000 whereas the average in 2011 was 25,000. It then goes on to say:

> "*The average likelihood and health outcomes in the Operational Guidance for excess cold now provide an over-estimate of the potential for harm. This is due to improvements in energy efficiency and changes in evidence for winter deaths since publication. These changes mean that the current 'average' for many built types no longer scores above the 1000 threshold. It is important that practitioners do not automatically consider a type of dwelling to be a Category 1 hazard, but considers deficiencies which exist which could lead to sub-optimal temperatures*".

49. The Operating Guidance itself says that "*….the inspector should assess the likelihood of a member of the vulnerable age group suffering a potentially harmful occurrence in the next twelve months*". The vulnerable age group for excess cold cases is people over 65. Mr. Swift's only relevant vulnerability would appear to be his small income and, as has been said, the saving in income by changing the heaters is not likely to be great and the installation of his own separate meter could increase his problems.

Conclusions

50. As to the reasons, the then President in the **Bristol City v Aldford** case above said that in his view, RPTs "*should not shy away from making their own assessment of the hazard and should not treat the figures given for national averages as compelling…..the tribunal will bring its knowledge and experience to bear in evaluating the evidence and reaching its conclusion, and it will, importantly, bring common sense to bear in the judgment that it makes*".

51. Upon consideration of the evidence and submissions of the parties and based also on the comments of George Bartlett QC, as the then President of the Upper Tribunal, the Tribunal concludes that the Respondent has not provided sufficient evidence that the hazards which may exist are serious enough to warrant either a Category 1 hazard assessment or the action proposed. In these circumstances the Prohibition Order is quashed.

52. As the Applicant has said that he is willing to fit the new heating system as suggested by the Respondent, the Tribunal did wonder whether it could make an Improvement Notice. It decided that as this was a straightforward suspended Prohibition Order, it could only confirm, quash or vary that order, not create an

entirely new form of enforcement, particularly as a category 1 hazard has not been proved.

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Judge Bruce Edgington
13th September 2021

ANNEX - RIGHTS OF APPEAL

i. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.