

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

*HOUSING – Housing Act 2004, Parts 2 and 3 – Appeal against refusal of licence for Part 3 house – Whether facts post-dating housing authority’s decision relevant – Whether FTT erred in deciding that Second and Third Respondents were fit and proper persons – Provision of Services Regulations 2009 – whether licences deemed granted on expiry of reasonable time where no fixed time for determination published by housing authority.*

APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL  
(PROPERTY CHAMBER)

BETWEEN:

LONDON BOROUGH OF WALTHAM FOREST

Appellant

-and-

NASIM HUSSAIN (1)  
FHCO LIMITED (2)  
FARINA HUSSAIN (3)  
LUXCOOL LIMITED (4)

Respondents

Re: 158 Blackhorse Road, London E17 6RH,  
44 Westbury Road, London E17 6RH and other properties

Mr Justice Fancourt, Chamber President  
Heard on: 19 July 2022

Decision Date:

*Mr Ashley Underwood QC and Mr Riccardo Calzavara, instructed by Sharpe Pritchard LLP, for the Appellant*

*Mr Justin Bates and Mr Nick Grant, instructed by Anthony Gold Solicitors, for the Respondents*

The following cases are referred to in this decision:

R (Gaskin) v Richmond-upon-Thames LBC [2018] HLR 8 (“*Gaskin No.1*”)

Y1 v Secretary of State for the Home Department (unrep) (13.11.13)

R (Begum) v SIAC [2021] UKSC 7; [2021] AC 765

Clark v Manchester City Council [2015] UKUT 129 (LC)

Hastings Borough Council v Turner [2021] UKUT 258 (LC)

Sheffield City Council v Hussain [2020] UKUT 292 (LC)

Herefordshire Council v Rhode [2016] UKUT 39 (LC)

Marshall v Waltham Forest LBC [2020] UKUT 35 (LC)

R (Gaskin) v Richmond-upon-Thames LBC [2018] EWHC 1996 (Admin); [2019] PTSR 567 (“*Gaskin No.2*”)

Vodafone 2 v Revenue and Customs Commissioners [2009] EWCA Civ 446; [2010] Ch 77 at [37])

## **INTRODUCTION**

1. In this appeal, the London Borough of Waltham Forest (“the Council”) appeals against a decision of the First-tier Tribunal (Property Chamber) (“the FTT”) dated 16 August 2021 (“the Decision”). The Decision relates to applications made by, among others, FHCO Limited (“FHCO”) to the Council for licences under Part 3 of the Housing Act 2004 (“the 2004 Act”) in relation to 158 Blackhorse Road, London E17 6RH and the revocation by the Council of such a licence previously granted to Farina Hussain in relation to 44 Westbury Road, London E17 6RH.
2. FHCO and Ms Hussain were the appellants in the FTT against the refusal of its applications for a Part 3 licence and the revocation of her Part 3 licence respectively. The FTT allowed the appeals of FHCO and Ms Hussain against the determination by the Council, by which it had refused to grant FHCO licences and revoked Ms Hussain’s licence.
3. Before the FTT, there had also been appeals by Mrs Nasim Hussain (the mother of Ms Hussain) and Luxcool Limited against the Council’s refusal to grant them licences relating to other properties, but those appeals were unsuccessful and, save on one matter raised by way of cross-appeal, they have not sought to pursue their appeals further.
4. The issues before the FTT in FHCO’s and Ms Hussain’s appeals were whether FHCO and Ms Hussain were fit and proper persons to be licence holders, pursuant to s.88(3)(a)(i) of the 2004 Act.
5. The Act confers the original decision-making power on such questions on the local housing authority, in this case the Council, and it provides for the applicant, licence holder or any relevant person to be able to appeal its decision. Any such appeal is specified by the Act to be by way of a re-hearing, and the FTT is given power to confirm, reverse or vary the decision of the local housing authority.
6. The Council concluded that FHCO (of which Ms Hussain was the sole director at the time) and Ms Hussain herself were not fit and proper persons to be licence holders. This was because of their association with persons who had committed offences involving fraud or dishonesty, namely Ms Hussain’s mother and father. Mrs Nasim Hussain and her husband, Tariq Hussain, had been convicted of offences of dishonesty relating to the licensing under Part 2 or Part 3 of the Act of many properties owned or controlled by them in the same part of Greater London.
7. The Council concluded on the evidence it had that Ms Hussain had been closely involved in the family property rental business and was tainted by the unlawful conduct of her parents, such that she was not a fit and proper person, and neither therefore was the limited company that she owned and controlled.
8. The FTT heard evidence about these matters over a hearing lasting 2 days. It reached a different conclusion so far as FHCO and Ms Hussain were concerned, namely that they were fit and proper persons to be licence holders, and therefore it allowed their appeals. As a

result, the FTT reversed the Council's decision and directed that FHCO should be granted licences for a 3 year period running from 30 August 2021 and that Ms Hussain's licence should be "reinstated".

9. With the permission of the FTT, the Council appeals against those parts of the Decision on 3 grounds, and further seeks permission from this Tribunal to pursue a fourth ground of appeal.
10. On 21 January 2022, the Deputy President of this Tribunal granted all four Respondents permission to cross-appeal on a discrete question of law arising from the facts, namely whether under the Provision of Services Regulations 2009 ("the Services Regulations") licences were deemed to have been granted to Mrs Nasim Hussain, FHCO and Luxcool Limited because the Council did not make a decision on their applications for licences within a reasonable time. The Respondents contend that if their applications for licences were deemed to have been granted they cannot later have been refused by the Council, and so the purported refusals were of no legal effect.

### **THE GROUNDS OF APPEAL**

11. The 4 grounds of the Council's appeal are:

“1. The FTT misdirected itself by seeking to assess whether FHCO was a fit and proper person as at the date of the appeal hearing rather than at the date of the decisions under appeal, and by failing to take into account the Council's findings about FHCO's fitness as at that relevant date.

2. The FTT wrongly held that the Council had no power to pose questions directed to eliciting FHCO's absence of assets, reserves or employees.

3. The FTT erred in allowing Farina [Hussain]'s appeal, reversing the Council's decision to revoke her licence, and "reinstating" her licence.

4. The FTT misdirected itself as to the evidence about Farina [Hussain], and therefore wrongly concluded that both she and FHCO were fit and proper persons to be licence holders.”

12. The ground of cross-appeal by the Respondents is that the FTT erred in its interpretation of the Services Regulations by holding that licences could not be deemed to have been granted in circumstances where the Council had not complied with its obligation under the Services Regulations to fix in advance and identify a period of time within which it would determine licence applications.

### **GROUNDS 1 AND 4**

13. It is convenient to address together and first the first ground of appeal (for which the Council has permission) and the fourth ground (for which it has not). There is acknowledged on both

sides to be some interplay between them. Having heard the argument, I consider that permission to appeal should be granted on the fourth ground, since it passes the test of being reasonably arguable, and I will address the argument on its merits.

Background facts

14. The relevant facts can be quite shortly stated.
15. In 2015 and 2016, Mrs Nasim Hussain submitted licence applications under Part 2 and Part 3 of the 2004 Act for many properties. These made false statements about gas appliances. Licences were granted pursuant to the 2015 applications but not pursuant to the 2016 applications.
16. On 28 September 2016, Mrs Nasim Hussain was interviewed by the Council under caution, in the presence of Ms Hussain, in relation to misleading statements made in the 2016 licence applications. Ms Hussain was quite vocal at the interview in seeking to prevent her mother being questioned about any of the 2015 applications, but did not intervene when her mother explained that she did not know the answers to questions because her family did everything, and that the Council should instead ask her husband, son and daughter (Ms Hussain), who ran the business.
17. On 19 January 2017 Ms Hussain submitted a licence application under Part 3 of the 2004 Act in respect of 44 Westbury Road. A licence was granted on 16 February 2017 that would expire on 31 March 2020.
18. Following this interview, there were further interviews under caution of Mrs Nasim Hussain, Mr Tariq Hussain, Mr Wahab Hussain (Ms Hussain's brother) and Ms Hussain, each of whom gave "no comment" responses to almost all questions, including questions about what was stated in the licence application forms. Ms Hussain answered the question about where she lived by giving the address of the family home in Chigwell.
19. At that time, Mrs Nasim Hussain, Mr Tariq Hussain and Mr Wahab Hussain signed prepared statements, but Ms Hussain did not. Each of Mrs Nasim Hussain, Mr Tariq Hussain and Mr Wahab Hussain stated that they were not involved with the preparation and submission of licence application forms to the Council.
20. However, on 12 May 2017, Mrs Nasim Hussain pleaded guilty to four offences of knowingly or recklessly supplying false information to the Council in connection with the licence applications made in 2016, and she was fined £40,000.
21. Applications for Part 3 licences were made by FHCO on 6 February 2018. At the time (and when the licences were later refused), Ms Hussain was the sole director and shareholder and the company had no assets, turnover, capital reserves or employees.
22. On 29 June 2018, Tariq Hussain pleaded guilty to four offences of fraudulently backdating gas safety certificates and was fined £1,000.

23. On 4 October 2018, the Council gave notice to FHCO and Ms Hussain of its intention to refuse to grant and to revoke licences, allowing a period for the recipients to make submissions. Ms Hussain made representations in response but on 5 November 2018 the Council wrote to her stating that her parents were not fit and proper persons, in view of their convictions, and that her close association with them meant that she could not be regarded as a fit and proper person either.
24. The Council's formal decision was made and communicated on 23 November 2018. The reasons for the decision were given as the convictions of Mrs Nasim Hussain and Mr Tariq Hussain. Similar decision letters were issued to Mrs Nasim Hussain and Luxcool Ltd.
25. The Respondents lodged their appeals at the FTT on 20 December 2018.
26. In July and August 2019, Mrs Nasim Hussain was convicted of three further offences of failing to comply with licence conditions in respect of installation and maintenance of smoke alarms.

#### The FTT Decision

27. The FTT heard the appeal on 24 and 25 May 2021 and published the Decision on 16 August 2021. It heard evidence from Ms Hussain, Mr Wahab Hussain, Ms Tina Mitchell, who by that time had become a second director of FHCO, and Mr David Beach, an environmental health officer and director of enforcement for the Council. It did not hear evidence from Mrs Nasim Hussain or Mr Tariq Hussain.
28. In its decision, the FTT first disposed of Mrs Nasim Hussain's appeals and then turned to Ms Hussain's appeal against the revocation of her licence in respect of 44 Westbury Road. It noted the Council's case that the property business was a family business, of which Ms Hussain was part, and that it was likely that she was a party to the false declarations in the applications and involved in an attempt to cover up wrongdoing. It noted the Council's reliance on Ms Hussain's stance in the interview of her mother; her mother's prepared statement; and Ms Hussain's failure to respond to questions about FHCO raised in a letter dated 20 February 2019 ("the 13 questions"), despite an initial indication from her solicitors that she was willing to provide evidence of being a fit and proper person.
29. The FTT then summarised the evidence given by Ms Hussain and Mr Wahab Hussain as to their not being involved in managing their mother's properties, except that in Ms Hussain's case, as a trainee accountant, she acted as her bookkeeper, and that it was Mr Tariq Hussain who dealt with the management of the business. Ms Hussain is recorded as explaining that she was advised by her solicitors not to answer the 13 questions because they were intrusive and irrelevant and not the usual questions asked when a licence application was made.
30. The FTT noted that the Council's decision was founded on Ms Hussain's sharing culpability for the provision of false information, her playing a vital role in the family business and being probably party to the false declarations and central to an attempt to cover them up. It then stated that "the evidence does not support those assertions", pointing out that there was no evidence of any wrongdoing by Ms Hussain and that the evidence did not support Mr

Beach's assertions of close involvement in wrongdoing. Although it was likely that Mrs Nasim Hussain needed help in completing the application forms, the FTT accepted the evidence of Ms Hussain and Mr Wahab Hussain that this was probably provided by Mr Tariq Hussain.

31. The FTT concluded that Ms Hussain's conduct during her mother's first interview was not, properly analysed, such as to create an inference adverse to her about her role in her parents' business, and that her own "no comment" interview was explained by her solicitor's advice not to answer questions. The FTT did not accept that Mrs Nasim Hussain's unfitness to be a licence holder was directly relevant to Ms Hussain's fitness, absent any impropriety established against Ms Hussain herself. If the failure to answer any of the 13 questions about FHCO, on advice, might be some evidence relating to FHCO's fitness, it was not in relation to Ms Hussain personally. In relation to her management of her flat at 44 Westbury Road, there was nothing unsatisfactory about her performance of her role. Ms Hussain had, by the time of the hearing, almost qualified as an accountant and was, on the basis of what the FTT saw of her, "an intelligent and responsible individual".
32. The FTT expressed its conclusion as follows:

"We do not agree that her mother's unfitness to be a licence holder is directly relevant to her own fitness to be a licence holder. The Council's conclusion that Farina was a vital part of the family business and that she was likely to have been involved in giving the false gas safety declarations is not, in our view, supported by the evidence. On the evidence before us, we determine that she is a fit and proper person to hold a licence."
33. Turning to FHCO's appeal, the FTT noted that in the decision letters no reasons specific to FHCO were identified by the Council as to why it was not a fit and proper person and it reminded itself of FHCO's separate legal personality. It noted that only one of two directors was said to be tainted by association with Mr and Mrs Hussain. The FTT held that FHCO was a fit and proper person since it had not contravened any duty or committed any offence and neither had either of its two directors. FHCO was a member of the National Residential Landlords Association and the Property Redress Scheme. It noted Ms Mitchell's relative lack of experience as a director but did not consider that that cast doubt on FHCO's fitness.
34. As for the failure by FHCO to answer any of the 13 questions, the FTT considered that the information sought went beyond what, under The Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006, as amended ("the 2006 Regulations"), a local housing authority was entitled to require as a condition of making an application for a Part 2 or Part 3 licence. By analogy with the case of R (Gaskin) v Richmond-upon-Thames LBC [2018] HLR 8 ("*Gaskin No. 1*"), the FTT held that the 13 questions had wrongly been "the imposition of a condition precedent to the acceptance of an application" and not a request for voluntary further information, and for that reason – and because Ms Hussain had not answered on the basis of legal advice not to do so – the failure to answer was not relevant to the issue of FHCO's suitability to be a licence holder.

The statutory provisions

35. Ground 1 of the Council’s appeal is that the statutory provisions in the Act required the FTT to decide the appeal on the basis of facts that existed at the date of its own decision, 25 November 2018, disregarding any matters that post-date that decision. It accepts that the FTT could properly take into account matters that existed but were not known to the Council at the time of its decision but disputes that anything that happened after that time could properly be taken into account by the FTT.

36. Section 88 in Part 3 of the 2004 Act provides:

“(1) Where an application in respect of a house is made to the local housing authority under section 87, the authority must either—

(a) grant a licence in accordance with subsection (2), or

(b) refuse to grant a licence.

(2) If the authority are satisfied as to the matters mentioned in subsection (3), they may grant a licence either—

(a) to the applicant, or

(b) to some other person, if both he and the applicant agree.

(3) The matters are—

(a) that the proposed licence holder—

(i) *is a fit and proper person to be the licence holder, and*

(ii) *is, out of all the persons reasonably available to be the licence holder in respect of the house, the most appropriate person to be the licence holder...*” (*emphasis added*)

Where a valid application is made, the authority therefore must grant or refuse a licence, and, where satisfied as to the matters required to be established by the applicant, they may grant a licence.

37. Section 89 of the Act provides:

“(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 or (as the case may be) the



manager of the house, 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 .....

.....

(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 or (as the case may be) the manager of the house.*” (*emphasis added*)

Thus, the authority must have regard to a relevant conviction of the proposed licence holder and must have regard to a relevant conviction of a person associated with the proposed licence holder but *only if* they consider that such conviction is relevant to the fitness of the proposed licence holder. What weight the authority gives to any such evidence is, however, a matter for its reasonable discretion.

38. Section 93 provides:

“(1) The local housing authority may revoke a licence—

(a) if they do so with the agreement of the licence holder,

(b) in any of the cases mentioned in subsection (2) (circumstances relating to licence holder or other person) .....

(2) The cases referred to in subsection (1)(b) are as follows—

(a) where the authority consider that the licence holder or any other person has committed a serious breach of a condition of the licence or repeated breaches of such a condition;

(b) where the authority no longer consider that the licence holder is a fit and proper person to be the licence holder ....”

39. By para 31 of Schedule 5 to the Act, the applicant for a licence or any relevant person may appeal to the appropriate tribunal against a decision by the local housing authority to refuse to grant the licence or to grant it, or in relation to the terms of the licence.
40. By para 32 of Schedule 5, the licence holder or any relevant person may appeal to the appropriate tribunal against a decision by the local housing authority to vary or revoke a licence or to refuse to vary or revoke a licence.
41. Para 34 of Schedule 5, headed “**Powers of tribunal hearing appeal**”, states:

“(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 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.”

### Ground 1

42. Mr Underwood QC, on behalf of the Council, while accepting that the appeal was a re-hearing and not just a review of its decision, submitted that the natural reading of the words of para 34(2) is that any new matters to which the tribunal can have regard are matters that existed at the time of the authority’s decision, albeit the authority was unaware of them when it made its decision. He suggested that it is an unnatural use of language to refer to matters that did not yet exist or had not happened as being matters “of which the authority were unaware”, as para 34(2)(b) does.
43. Mr Underwood further submitted that that reading was one that gave best effect to the degree of deference that Parliament must have intended the tribunal to have to the decision of the decision-maker identified by the statute. He submitted that it would be odd if an appeal allowed a tribunal to overturn an authority’s decision based on things that did not exist at the time, which would have the effect of cutting the primary decision-maker out of the process.

44. He submitted that what Parliament must have intended was that although the matter would be re-heard, the FTT would defer to the judgment of the primary decision-maker, and that meant effectively reviewing the decision that the local housing authority made at the time that it made it, not making a new decision in what might be rather different circumstances a year or more later, without regard to the authority's reasons for making the decision that it did at the time that it did.
45. Mr Underwood referred in his written submissions to the open judgment of the Special Immigration Appeal Commission in Y1 v Secretary of State for the Home Department (unrep) (13.11.13) on a deprivation of nationality appeal as supporting such an interpretation. It is clear that that decision is the basis for his submission about the relevance of "after-coming material", as his skeleton argument described it.
46. That appeal was pursuant to s.2B of the Special Immigration Appeals Commission Act 1997, which merely states that "a person may appeal" a decision, without stating the basis of the appeal. A previous court decision had determined that an appeal to SIAC was a challenge to the merits of the decision, not just a review of the exercise of discretion, such that the Commission reached its own conclusion on the facts but gave great weight to the assessment of the Secretary of State. The Commission accepted that it should be very careful in considering material that came into existence after the decision, save where it could found an inference as to the correctness of the Secretary of State's decision. Importantly, the reason for that was said to be to avoid the error of making a fresh decision rather than conducting an appeal.
47. However, as was explained by the Supreme Court in the recent case of R (Begum) v SIAC [2021] UKSC 7; [2021] AC 765, a case concerned with an appeal under the same jurisdiction, it does not confer on SIAC or anyone else the power to re-make the Secretary of State's decision. The power to decide is conferred only on the Secretary of State. SIAC is therefore limited to considering the correctness of the decision that has been made, which is a wider basis for challenge than judicial review but narrower than a review or re-hearing in which a tribunal has power to re-make the decision.
48. At [66] to [69] of his judgment in the Begum case, with which the other Justices agreed, Lord Reed PSC said:

“[66] The discretion is one which Parliament has confided to the Secretary of State. In the absence of any provision to the contrary, it must therefore be exercised by the Secretary of State and by no one else. There is no indication in the 1981 Act or the 1997 Act, in its present form, that Parliament intended the discretion to be exercised by or at the direction of SIAC. SIAC can, however, review the Secretary of State's exercise of his discretion and set it aside in cases where an appeal is allowed, as explained below.

[67] The statutory condition which must be satisfied before the discretion can be exercised is that "the Secretary of State is satisfied that deprivation is conducive to the public good". The condition is not that "SIAC is satisfied that deprivation is conducive to the public good". The existence of a right of appeal against the

Secretary of State's decision enables his conclusion that he was satisfied to be challenged. It does not, however, convert the statutory requirement that the Secretary of State must be satisfied into a requirement that SIAC must be satisfied. That is a further reason why SIAC cannot exercise the discretion conferred upon the Secretary of State.

[68] As explained at paras 46-50, 54 and 66-67 above, appellate courts and tribunals cannot generally decide how a statutory discretion conferred upon the primary decision-maker ought to have been exercised, or exercise the discretion themselves, in the absence of any statutory provision authorising them to do so (such as existed, in relation to appeals under section 2 of the 1997 Act, under section 4(1) of the 1997 Act as originally enacted, and under sections 84-86 of the 2002 Act prior to their amendment in 2014 .....). They are in general restricted to considering whether the decision-maker has acted in a way in which no reasonable decision-maker could have acted, or whether he has taken into account some irrelevant matter or has disregarded something to which he should have given weight, or has erred on a point of law: an issue which encompasses the consideration of factual questions, as appears, in the context of statutory appeals, from *Edwards v Bairstow* [1956] AC 14. They must also determine for themselves the compatibility of the decision with the obligations of the decision-maker under the Human Rights Act, where such a question arises.

[69] For the reasons I have explained, that appears to me to be an apt description of the role of SIAC in an appeal against a decision taken under section 40(2). That is not to say that SIAC's jurisdiction is supervisory rather than appellate. Its jurisdiction is appellate, and references to a supervisory jurisdiction in this context are capable of being a source of confusion. Nevertheless, 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 upon the nature of the decision under appeal and the relevant statutory provisions. Different principles may even apply to the same decision, where it has a number of aspects giving rise to different considerations, or where different statutory provisions are applicable."

49. An appeal from a decision of a local housing authority under Parts 2 and 3 of the Act is a very different exercise from the appeals in these nationality cases. In the first place, the appeal under the 2004 Act is expressly stated to be a re-hearing. While an appeal by way of re-hearing does not mean that the FTT starts with a clean sheet of paper and ignores the authority's decision and reasons, it does mean that the question for it is not limited to whether the authority's decision-making process and conclusion were valid in law. The FTT may have regard to matters of which the authority was unaware. Most significantly, the FTT is given power to re-make the decision, even to the extent of directing the local housing authority to issue a licence where it had refused to do so. That clearly indicates the nature of the re-hearing that is to be conducted, and the discretion and degree of responsibility for the ultimate decision that the FTT has.
50. Although, as Mr Underwood further submitted, the formulation in para 34 of Sched 5 to the 2004 Act as to the nature of the appeal, or formulations to the same substantial effect, are found in many statutes and statutory instruments, the right approach is to construe the words

used in their immediate context, with regard to the nature of the decision under appeal. Exactly the same formulation appears in various places in the 2004 Act, including appeals against notices relating to emergency remedial action, overcrowding decisions, declarations of HMOs, improvement notices, prohibition orders and interim and final management orders, as well as the immediate context relating to grant, refusal and revocation of Part 2 and Part 3 licences. I accept that Parliament must have intended that essentially the same approach to an appeal would be taken by the appropriate tribunal in all such cases under the 2004 Act. But still, the approach of the FTT in an individual case must be expected to be coloured by the nature of the decision under appeal and the statutory provisions in issue.

51. There is, in my judgment, no reason to read para 34(2) of Sched 5 as if it said that matters that occur after the date of the authority's decision are to be disregarded, even if they are relevant to the question of whether the authority's decision was wrong. I do not agree that the words "matters of which the authority was unaware" signify that the matters must have been in existence at the time of the authority's decision. On an appeal, the appellant will not yet have had a hearing of their case, though they will have had the chance to make representations to the local housing authority and place documents before the authority's relevant officer for consideration. In enacting para 34 in the terms that it did, Parliament would have expected that the appropriate tribunal would hear evidence about the licensing issue from all parties concerned and reach its decision taking into account the evidence that was relevant to the issue.
52. As a matter of principle, the appropriate tribunal will be expected to have regard to the decision of the authority and its reasons: it is on the authority that Parliament confers the primary decision-making power. But the fact that the tribunal is expressly empowered to have regard to matters that were not known by the authority demonstrates that the degree of deference due to the authority is qualified. The degree of deference will be on a sliding scale, depending in particular on the nature of the evidence that the tribunal hears that the authority did not have and its bearing on the decision. If highly relevant material of which the authority was unaware is in evidence before the tribunal, deference to the original decision is likely to be significantly reduced; whereas, if no new material is put before the tribunal, the degree of deference is likely to be greater.
53. The position is in my judgment correctly stated in previous decisions of the Deputy President of this Tribunal.
54. Clark v Manchester City Council [2015] UKUT 129 (LC) was an appeal under the same statutory provisions as in issue in this appeal, but in that case against a refusal by the local housing authority to vary the terms of a Part 2 licence. The issue was whether the FTT had approached its task on review in the wrong way, by reviewing the decision of the authority rather than undertaking a rehearing. The Deputy President said that Parliament was likely to have had in mind, when enacting para 34 of Schedule 5, the previous law under the Housing Act 1985 (where the appeal provisions referred only to the jurisdiction of the county courts "on appeal"). As such, the appeal was a complete rehearing, with the tribunal hearing evidence and making up its own mind in place of the decision made by the authority, though with proper regard to the views expressed by the authority. The Deputy President considered that the amount of deference due from the FTT to the authority would depend on the subject

matter of the decision under challenge, but might be less than was due from the county court, in view of the fact that the FTT was a specialist tribunal.

55. Hastings Borough Council v Turner [2021] UKUT 258 (LC) was an appeal against the grant of a Part 2 licence, in which the same statutory provisions were in play. The issue was whether the FTT had failed to accord the authority's decision sufficient respect by requiring the authority to bear the burden on the appeal of justifying its own decision, instead of placing the burden on the appellant to satisfy the FTT that the authority's decision was wrong. It was argued by the respondent that because the appeal was a re-hearing, the FTT was right to require the authority to prove its case that the grant of the licence was justified, in particular that the licence holder was a fit and proper person.
56. Unsurprisingly, the Deputy President held that the FTT had fallen into error. The fact that the appeal was a re-hearing did not mean that the authority was required to start again and prove that its decision was justified:

“...I accept Mr Manning’s submission that on a matter involving the exercise of a discretion, or an evaluative judgment, the authority’s decision was entitled to respect and that, on a re-hearing, the onus was on Ms Turner to persuade the FTT to take a different view. On an appeal by way of re-hearing from a decision of a regulatory authority it falls to the appellant to lead evidence and to establish a basis on which the appellate tribunal can be satisfied that *a different outcome is justified.*”  
(*emphasis added*)

The Deputy President explained that the tribunal does not start with a blank sheet of paper and disregard the authority’s decision:

“The Tribunal has often explained ... that on a re-hearing it is for the FTT to make up its own mind on the basis of the material presented to it and giving proper weight to the decision of the authority. Its task is not to conduct a review of the authority’s decision-making ... At the stage of the FTT’s determination of the appeal the task of deciding whether there were suitable management structures or funding arrangements and of forming a view on any relevant allegations was that of the FTT, and not of the authority. That task was to be performed on the basis of the material put before the FTT, which could include material which was not provided to the authority when it made its decision (paragraph 34(2)(b), Schedule 5, 2004 Act”.

57. Why then should material that is relevant to the correctness of the decision but which post-dates the decision be excluded from consideration in all cases?
58. The answer given by Mr Underwood, apart from what he says is the natural reading of the words of the statute and deference due to the authority’s decision, is that taking such factual material into account would lead to absurd results.
59. Mr Underwood gave three examples of this absurdity.

60. First, where an authority gives notice under s.40 of the 2004 Act in relation to emergency remedial action in residential premises, the authority has power to enter and do the works and subsequently recover the cost of the works. If, before the appeal of the licence holder or the person having control is heard, the works are completed, such that by the date of the hearing no emergency remedial action was required, it would be absurd if the FTT were to decide the appeal taking into account that there was no longer emergency remedial action required.
61. Second, an authority may make an interim management order (“IMO”) where necessary to protect the health, safety or welfare of occupiers. Once the IMO is in force, the authority may take any immediate steps that are necessary. It is entitled in some circumstances to recoup expenditure from rent or recover it from the relevant landlord. The steps taken before the hearing of the appeal might mean that, by that time, the justification for an IMO may no longer exist. It would be absurd if the FTT took into account the changes made as a result of the IMO having been actioned.
62. Third, a failure to apply for a licence for an HMO or Part 3 house may result in prosecution or the imposition of a financial penalty under s.249A of the 2004 Act. The authority must first serve notice of intent and then a final notice, which can be the subject of an appeal. If, before the appeal was heard, an application had been made for a Part 2 or Part 3 licence, there would be no continuing offence. It would be absurd if the FTT had to decide whether the property was unlicensed in the context of its having become licensed since the date of the notice.
63. To meet these arguments, the Respondents gave examples of cases in which it would be equally absurd if the FTT was unable to take into account matters that had occurred since the date of the authority’s decision. Where an authority decides that a person is not a fit and proper person, it would be absurd if the FTT could not take into account a relevant conviction of that person or a business associate or family member after the authority’s decision, or other events that cast light on the correctness or otherwise of the authority’s own decision. If works had been done in the interim, this would be likely to have a bearing on the terms of any continuing requirement and so on the terms of the order. Similarly, matters discovered during the works but unknown at the date of the authority’s notice or order might cast light on whether the notice or order was justified.
64. It seems to me that the fallacy in the arguments of the Council based on absurdity is that the question on appeal is not considered starting with a blank sheet of paper on the basis only of the facts as they stand on the hearing date. The question is always whether the decision of the authority is wrong (Hastings BC v Turner). Depending on the nature of the decision under appeal and the statutory wording, events that have happened subsequently may be relevant or irrelevant to that assessment. For example, the mere fact that the authority has completed all specified works is likely to be irrelevant to the question of whether it was right to have served notice and entered to do the works in the first place. On the other hand, evidence of the condition of the property discovered during the works may be highly relevant to that question. The fact that a house has belatedly been licensed is irrelevant to the question of whether an offence was committed at an earlier time. So, in Sheffield City Council v Hussain [2020] UKUT 292 (LC), it was held that an assessment of the seriousness of an offence committed under the Management of Houses in Multiple Occupation (England)

Regulations 2016 had to be made at the time of the offence and should not take into account later events; however, in exercising discretion as to the amount of the penalty, the tribunal could properly take into account mitigation by way of belated compliance with the authority's requirements.

65. In all cases the FTT is required to have regard to the decision of the authority and its reasons, as well as to any relevant evidence given to it at the re-hearing. It is not required to decide the appeal on the basis of facts post-dating the decision if they cast no light on the question of whether the decision of the authority was wrong: the statute merely provides that the appeal *may* be determined having regard to matters of which the authority was unaware. This Tribunal has already decided that it is wrong in principle to have regard *only* to the facts at the date of the appeal hearing (Herefordshire Council v Rhode [2016] UKUT 39 (LC)).
66. The touchstone, in my judgment, is always the nature of the decision under appeal, the statutory provisions in issue and whether matters that have happened subsequently are relevant to assessing whether the decision of the authority is shown to have been wrong. In any such appeal, the FTT should ask itself whether new evidence that it hears, including events subsequent to the authority's decision, is relevant to the question of whether the decision is wrong, and if so should weigh that evidence with the facts known to the authority and any reasons for its decision in deciding whether, at the time of the appeal, any different outcome is justified. Where the question is, as it is here, whether the authority was wrong to refuse to grant, or to revoke, a licence on the basis that the proposed licensee is not a fit and proper person, evidence that tends to show whether that person is now a suitable person is likely to be relevant and should be taken into account by the FTT, whether the factual matters occurred before or after the authority's decision. That is because the reality of the appeal is a contention that a licence should now be granted, or allowed to remain in place.
67. I therefore reject Ground 1 of the Council's appeal. Para 34(2) of Schedule 5 to the 2004 Act is not to be read as limiting the appropriate tribunal to consideration of matters that existed at the date of the authority's decision.

#### Ground 4

68. I turn to Ground 4 in the light of my conclusion on Ground 1.
69. The decision for the FTT on the appeals of FHCO and Ms Hussain was whether the Council was wrong to conclude that neither was a fit and proper person to be a licence holder, by reason of the association of Ms Hussain with Mrs Nasim Hussain and Mr Tariq Hussain (which was the only reason given by the Council for refusing and revoking licences). The Council was required to have regard to that evidence, pursuant to s.89(1) and (3) of the 2004 Act, because it appeared to Mr Beach on behalf of the Council that it was relevant to the question of whether Ms Hussain and FHCO were fit and proper persons.
70. The FTT was entitled to take into account its own impression of Ms Hussain, who gave evidence to it, and the evidence that it heard from her and other witnesses about the circumstances of the offences committed and the family business. In my judgment, it was also entitled to take into account the suitability of Ms Hussain and FHCO to be licence



holders as they appeared to be on the date of hearing. That is because the question was not one of suitability to hold a licence only on a particular date, namely the date of the Council's decision, 23 November 2018, but whether Ms Hussain or FHCO are fit and proper persons to hold a licence after that date: in Ms Hussain's case the existing licence ran until 31 March 2020, and in FHCO's case new licences would be for a period going forwards from the date of the FTT's decision. It is true that the FTT lost sight of the fact that the term of Ms Hussain's single licence had already expired by the time of the hearing before it. In view of that, in Ms Hussain's case any changed circumstances post-dating 31 March 2020 were probably irrelevant. Subject to that point, the FTT was entitled to take into account the suitability of the appellants at the time of the hearing before it, as well as their suitability at any earlier time, in deciding whether to allow the appeals.

71. The FTT took into account Ms Hussain's progress with her accountancy studies and the fact that FHCO, which had not begun to do business at the time of the authority's decision, was by the time of the appeal hearing a trading company with appropriate affiliations, a second director and an income stream to support its responsibilities as a licence holder. There were therefore changed circumstances by the date of the FTT hearing, and these were relevant to the FTT's own assessment of whether FHCO was a fit and proper person to hold licences.
72. However, the real basis of Ground 4 of the appeal, as advanced by Mr Underwood, is the FTT's alleged failure to have regard to the Council's judgement and conclusions based on the matters that were known to it. The Council's case is that it was right to reach the conclusion that Ms Hussain was implicated in, or at least closely connected to, her parents' wrongdoing. The evidence before Mr Beach in that regard was strong, though the Council's factual conclusion about Ms Hussain's involvement was largely inferential. Mr Underwood submitted that the FTT wholly failed to have regard (and deference) to the Council's conclusion based on the evidence that the Council considered relevant, and that it should have attached substantial weight to the conclusions of the Council. For that reason, he submits that the FTT's decision is wrong in law.
73. Given the inferential nature of the factual conclusions that the Council reached, and given the detailed evidence that the Council heard from Ms Hussain and Mr Wahab Hussain, I consider that Mr Underwood's proposition is over-stated. This was not a case like Marshall v Waltham Forest LBC [2020] UKUT 35 (LC) in which the FTT wrongly failed to have regard to a legitimate policy that the local housing authority was applying in determining the amount of a civil penalty. In this case, Mr Beach, on behalf of the Council, reached factual conclusions about the extent to which Ms Hussain was involved in or connected with the family business and the wrongdoing that had been proved against Mr and Mrs Hussain. Having reached the factual conclusion that she was involved, it was almost inevitable that the Council would reach the further conclusion that Ms Hussain was not, and her one-woman company was not, a fit and proper person to be a licence holder.
74. All the relevant facts (including the statements made by Mr and Mrs Hussain and the transcript of Mrs Hussain's interview) and further evidence were before the FTT, which was required to reach its own decision. It is not the case that the FTT disregarded the evidence that was before Mr Beach or concluded that the convictions of Mr and Mrs Hussain were irrelevant: it referred to the interviews under caution and the written statements in the Decision. The FTT explained the basis for the Council's conclusion and decision and the

FTT referred to it in the Decision. It noted the fact that Ms Hussain did not challenge her mother's answers and went "no comment" in her own interview, used her parents' address, and that she did not provide any answers to the 13 questions.

75. The FTT heard live evidence from Ms Hussain and her brother and heard them cross-examined by Leading Counsel, who no doubt put to them all the inferences that were to be drawn from the interviews and prepared statements. The FTT also heard Mr Beach explain why he reached the conclusion he did, namely that Mrs Nasim Hussain was being used as a front by Ms Hussain and her father and brother for a criminally-run family business. The FTT found the denials of Ms Hussain to be credible. It reached its own conclusions on the same factual issues that Mr Beach had previously addressed and concluded that Ms Hussain had probably not been involved in submitting the fraudulent licence applications.
76. In my judgment, there is no proper complaint here that the FTT failed to have regard to the Council's conclusion. It heard in detail from Mr Beach about it, but it was required to make up its own mind about the same issues, with the benefit of further evidence and, in particular, seeing Ms Hussain give evidence and being cross-examined. The FTT simply disagreed, on the basis of all that it had heard, with Mr Beach's conclusion about Ms Hussain's involvement in her parents' wrongdoing. The FTT referred to Government guidance, which was reflected in the Council's own internal guidance, and correctly identified the relevant question, which was whether the unfitness of Mr and Mrs Hussain was directly relevant to Ms Hussain's and FHCO's fitness to be a licence holder. It concluded that the Council was wrong to have concluded that Ms Hussain was implicated in the wrongdoing and that her parents' wrongdoing did not result in her being unsuitable to hold a licence.
77. In considering the broader question of whether FHCO was a fit and proper person to be granted a licence, the FTT was (for reasons that I have already given) entitled to take into account the circumstances as they were at the time of the hearing before it, including the progress that Ms Hussain had made professionally by the time of the appeal, the establishment of FHCO as a trading entity, and the presence of a second director.
78. In view of the factual material relating to Ms Hussain that was before the Council when it made its decision, the FTT's conclusion on appeal may not have been an obvious outcome. However, it had the very considerable benefit of seeing and hearing Ms Hussain tested on her involvement in her parents' wrongdoing and on her and her company's suitability to be a licence holder, and it came to factual conclusions in her favour with the benefit of that evidence. Such conclusions cannot easily be impugned on appeal. Mr Underwood did not argue that the Decision was wrong in law because there was no evidence capable of supporting it. His argument was based on the alleged failure of the FTT sufficiently to defer to (and have regard to) the Council's decision and the reasons for it. For reasons I have stated, I do not agree that it failed to have regard to that decision. In view of the further live evidence that the FTT heard relating to the same matters, the FTT did not have to defer to the earlier judgement of Mr Beach as long as it had regard to it and to the convictions of Mr and Mrs Hussain, which it did.
79. As regards FHCO's fitness, Ms Hussain having been found to be a fit and proper person herself, the main plank in the case for FHCO not being a fit and proper person fell away.

The FTT was entitled to take into account the financial standing, experience and additional director that FHCO had by the time of the appeal hearing in considering whether the Council was wrong in concluding that FHCO was not a fit and proper person. That is because it was effectively deciding whether FHCO should be licensed for the future, and so it had to decide whether FHCO was then a fit and proper person. I will deal separately below, under Ground 2, with the argument about Ms Hussain's failure to answer on behalf of FHCO the 13 questions raised by the Council. Subject to that discrete question, Ground 4 appears to have no traction in relation to FHCO and the appeal on that ground is dismissed.

## **GROUND 2**

80. The Council contends that the FTT was wrong to conclude that it had no power to ask questions about FHCO's assets, reserves and employees, and therefore was wrong to reject the failure to answer those questions as irrelevant to FHCO's fitness to be a licence holder.
81. The matter arose in this way. Prior to refusing licences, Mr Beach had indicated to Ms Hussain that the Council would be prepared to grant licences to an unconnected third party having full day-to-day control over lettings and management. After the Respondents' appeals against the Council's decisions were filed with the FTT, there was correspondence between the solicitors then acting for them and the Head of Litigation at the Council. Under a heading "Various Appeals to the First-tier Property Tribunal", solicitors for the Respondents wrote in an open letter dated 1 February 2019:

"We are writing to make a proposal for settling the various issues in the various appeals currently before the Tribunal.

In order to avoid the expense of fully litigation the appeals we propose that FHCO Limited be substituted as an alternative licence holder for all the properties in the attached schedule."

The letter then explained that FHCO was independent of Mr and Mrs Hussain, had an excellent track record to date, had Ms Hussain as the sole director and shareholder, and that Ms Hussain was fully independent of her family and would not be under any undue influence from them. It invited the Council to give reasons if it did not agree that FHCO was a suitable alternative licence holder.

82. The Council replied on 20 February 2019, pointing out that they considered that Ms Hussain had a demonstrably close association with her parents and their unlawful conduct, and attached again the transcript of the interview of Mrs Nasim Hussain under caution. It then stated:

"Notwithstanding that the Council has clear and cogent reasons for making the decision it has with regards to FHCO and Farina Hussain's applications to be licence holders, the Council is prepared to consider the request set out in your letter. However, before doing so it will be necessary for Farina Hussain to provide written representations and materials addressing the following:

- a. Her precise day-to day involvement in management of the family properties at all material times;
- b. Her means of income at the material times
- c. Whether she or her company own any of the properties the subject to the appeals and, if so, precisely how they were financed;
- d. ....
- e. Whether FHCO Ltd own any of the addresses;
- f. How many properties does FHCO manage, details of those properties, details of the addresses and owners of those properties;
- g. Confirmation that she consents to the Council making enquiries of the clients of FHCO to obtain references from them;
- h. Details of her experience of letting and managing properties;
- i. Details of her professional qualifications ....
- j. How much time does she devote to company business and what is her role in the company business;
- k. Information about FHCO Ltd – where does it trade from? How many staff are employed? Does it have a trading name?
- l. If staff are employed what are their names and roles?
- m. Copy of the Management Agreement that FHCO Ltd uses for the purposes of its business with landlords.

Following receipt of the above information the Council may wish to invite Ms Hussain for a meeting to explore further the proposal put forward and we trust that in that event Ms Hussain would be happy to attend such a meeting.”

- 83. The response from the Respondents’ solicitors dated 4 March 2019 said that they were instructed “that Ms Hussain was willing to provide written representations to evidence that she is ‘fit and proper’ to be a licence holder. However, it will not be possible to provide this ahead of the hearing on 7 March 2019.” That hearing was a first case management hearing in the appeals.

84. No written representations or further response were ever provided on behalf of Ms Hussain. At the appeal, she gave evidence to the effect that she had been advised by her lawyers not to answer the questions and had followed that advice. She argued, further, that the questions were an illegitimate attempt to compel the provision of information other than what was permitted by the 2006 Regulations in connection with an application for a licence, following the decision in *Gaskin No.1*. As summarised in para 34 above, the FTT accepted that argument and held that they amounted to the imposition of a condition precedent to the acceptance of an application, which the Council was disentitled to impose because its letter did not make it clear that the information sought was voluntary. It also noted that Ms Hussain said that her failure to answer the questions was done on legal advice, having concluded at [90] that she was entitled to follow that advice. The failure to answer was not therefore relevant to the question of FHCO's suitability.
85. It is clear that the FTT failed correctly to analyse the position. The application for a licence had been made by FHCO and others and was refused by the Council by letter dated 23 November 2018. Ms Hussain had previously applied for and been granted a licence, which was revoked by letter of the same date. The applications for a licence had therefore been disposed of and the matters were to be dealt with on appeal to the FTT. The timely appeals to the FTT meant that, pending disposal, the premises were deemed to be licensed. There were no further applications for licences that were live.
86. The appeals lodged were on behalf of each of the Respondents, including FHCO itself. The letter dated 1 February 2019 was an offer to settle all the appeals. Since FHCO was itself an appellant in relation to 6 properties, the proposal effectively invited the Council to concede that FHCO was a fit and proper person to be a licence holder, contrary to its decision. The Council responded to the proposal on the basis on which it was made, namely as an offer to deal with all the appeal properties. It was only necessary for Ms Hussain to provide answers if the Council was to consider the settlement proposal, not as a condition precedent to a valid licence application being made. The request to consider settlement terms involving FHCO being licensed did not amount to a new, formal application for a licence, nor did it re-open the applications that FHCO had previously made and that had been refused.
87. *Gaskin No.1* therefore had no materiality to the questions that were asked. That principle only applies where a local housing authority seeks to impose as a condition precedent to a valid application (which has effect as a *pro tempore* authorisation of the house, pending the authority's decision) a requirement to provide information other than that specified in Schedule 2 to the 2006 Regulations.
88. The failure of Ms Hussain to answer the questions relating (some more than others) to the suitability of FHCO with Ms Hussain as its director to be a licence holder was therefore 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. It was relevant both because 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. In that regard, although the FTT concluded that Ms Hussain was entitled to follow legal advice, it did not direct itself that the question of whether to answer some or all of the questions was her decision (or FHCO's), not the lawyers' decision; nor did it consider whether there was good reason to

refuse to answer, or whether legal advice was being used only as an excuse for not answering the questions. It is also likely that the FTT's conclusion about the unlawfulness of the questions being asked influenced its view on what if any inference should be drawn from the failure to answer.

89. I consider that the FTT reached an erroneous conclusion on the relevance of the failure to answer the 13 questions. It may be that, had it directed itself correctly on the relevance of the questions and the decision to follow legal advice, it would have reached the same conclusion for different reasons, but that is not a conclusion that this Tribunal can draw. What significance and weight, if any, is to be placed on the failure to answer the 13 questions (to which answers could not have been required by the Council at the stage of processing the applications originally), and what if any inferences should be drawn from that failure, are matters for the FTT, correctly directing itself as to the relevance of the failure to answer the 13 questions, alongside other relevant matters.
90. The appeal of the Council therefore succeeds on Ground 2, but only to the extent of remitting the question of whether FHCO is a fit and proper to the FTT for a further decision, taking into account my conclusion on Ground 2 of this appeal.
91. I have considered whether a failure reasonably to answer the 13 questions, if that were to be the FTT's conclusion, could be material to the FTT's assessment of Ms Hussain's personal suitability, but the FTT came to the conclusion at [90] that such failure was not relevant to an assessment of Ms Hussain's suitability *even if* it was relevant to an assessment of FHCO's suitability. This was on the basis that the questions were being asked in relation to FHCO and questions asked about her own finances were irrelevant. In any event, the matter was quite peripheral to the arguments advanced as to why Ms Hussain personally was not a fit and proper person. There is no prospect of the outcome of the appeal against the revocation of Ms Hussain's licence being different and therefore no need to remit her appeal to the FTT.

### GROUND 3

92. The final ground of the Council's appeal is that the FTT erred in granting relief "reinstating" Ms Hussain's licence for 44 Westbury Road.
93. Where a licence holder appeals in time against the revocation of a licence, the revocation does not take effect until the appeal is disposed of: s.93(5) of the 2004 Act. The licence therefore still exists until the FTT dismisses the appeal. But if the appeal is allowed, the revocation never takes effect and the licence continues in existence. The language of "reinstatement" is therefore inappropriate, save where an appeal has been brought out of time.
94. On the facts of this appeal, however, the licence in question was due to expire in any event on 31 March 2020. It had therefore already expired and could not be revived by an order made in August 2021.

95. Further, on 30 April 2020 Letting International Ltd was granted a Part 3 licence in respect of 44 Westbury Road. That licence had not been revoked and was due to expire only on 30 April 2025. Another Part 3 licence in relation to the same house cannot be granted under the 2004 Act.
96. For these reasons, the words “and her licence reinstated” in the decision of the FTT are inappropriate. It is sufficient that the decision of the Council to revoke Ms Hussain’s licence is reversed. That means that her licence expired in accordance with its terms and was not revoked.
97. The appeal of the Council therefore succeeds on ground 3 but this only has the limited effect of varying the terms in which the FTT summarised its decision.

### **THE CROSS-APPEAL**

98. The Respondents contend that licences were deemed to have been granted to them, by reason of the Council’s failure either to grant or refuse their applications within a reasonable time of the applications having been made.
99. In the case of the applications of Mrs Nasim Hussain and Luxcool Ltd, the applications were made on 19 May 2016. In the case of FHCO, the applications were made on 6 February 2018. In both cases, the applications were not refused until 23 November 2018. The argument is therefore that before they were actually refused they were deemed to have been granted, and so cannot at a later time have been refused. The FTT appeared to find, *obiter*, in [103], that a reasonable time for dealing with the May 2016 applications expired no later than June 2017 and that a reasonable time for dealing with FHCO’s February 2018 applications had not expired by 23 November 2018.
100. In any event, the FTT held that there was no deemed grant of licences to Mrs Nasim Hussain and Luxcool Ltd because the Council had not failed to deal with the applications within a fixed period for determination made public in advance of the time when the applications were made. That was because the Council had not publicised a fixed period within which applications for licences would be determined.
101. The relevant regulation is reg 19 of the Services Regulation, which was first promulgated to give effect in English law to Directive 2006/123/EC of the European Parliament and the European Council dated 12 December 2006 on services in the internal market (“the Directive”).
102. The schemes in Parts 2 and 3 of the 2004 Act are “authorisation schemes”, local housing authorities are “competent authorities” and the owners of HMOs or Part 3 houses renting rooms to individual occupiers are providing “services”, all within the meaning of the Directive. These points were authoritatively decided by the Divisional Court in R (Gaskin) v Richmond-upon-Thames LBC [2018] EWHC 1996 (Admin); [2019] PTSR 567 (“*Gaskin No.2*”) and it was common ground before me that these conclusions were applicable to the facts of this case.

103. Reg. 19 of the Services Regulation provides:

“(1) Authorisation procedures and formalities provided for by a competent authority under an authorisation scheme must secure that applications for authorisation are processed as quickly as possible and, in any event, within a reasonable period running from the time when all documentation has been submitted.

(2) That period must be fixed and made public in advance.

(3) When justified by the complexity of the issue, that period may be extended once, by the competent authority, for a limited time.

(4) The extension and its duration must be notified to the applicant, with reasons, before the original period has expired.

(5) In the event of failure to process the application within the period set or extended in accordance with the preceding provisions of this regulation, authorisation is deemed to have been granted by a competent authority, unless different arrangements are in place.

(6) Any different arrangements must be justified by overriding reasons relating to the public interest, including a legitimate interest of third parties.”

104. Reg. 20 provides, so far as material:

“(1) All applications to a competent authority for authorisation under an authorisation scheme must be acknowledged as quickly as possible.

(2) The acknowledgement must specify—

(a) The period referred to in regulation 19(1);

(b) the available means of redress;

(c) whether the authorisation is deemed to have been granted in the absence of a response within the period specified....”

105. The effect of regs 19 and 20 is therefore that, on making an application, the authority is required to identify in its acknowledgement a reasonable period for processing the application, which must be a fixed period that it has previously publicised. The authority cannot specify whatever period it thinks is appropriate for that application, or say that the period applicable is “a reasonable period of time”. The reasonable period is determined as being (subject to its lawfulness) the fixed period publicised in advance. By virtue of reg 19(5), there is deemed grant of authorisation upon failure to deal with the application within



that previously publicised fixed period of time, which point of time will be identifiable by both authority and applicant by reason of compliance with reg 20(1) and (2)(a).

106. While accepting the Respondents' submission that, as a matter of principle, the Services Regulation should be given a "conforming interpretation", with a view to giving effect where possible to the meaning and purpose of the underlying Directive (Vodafone 2 v Revenue and Customs Commissioners [2009] EWCA Civ 446; [2010] Ch 77 at [37]), there is no difference of any substance between the words of article 13 of the Directive and the language of regs. 19 and 20. It is clear from article 13 that the purpose of the Directive is not just that authorisation applications will be dealt with within a reasonable time but that the authority will have: determined in advance what period of time is a reasonable time for certain types of application; will have published it in advance; and will have notified the applicant of it, so that the exact time at which authorisation is deemed granted, if not previously refused or expressly granted, is quite clear.

107. Mr Bates relied upon recitals to the Directive, in particular recital (43):

"One of the fundamental difficulties faced, in particular by SMEs, in accessing service activities and exercising them is the complexity, length and legal uncertainty of administrative procedures. For this reason, following the example of certain modernising and good administrative practice initiatives undertaken at Community and national level, it is necessary to establish principles of administrative simplification, inter alia through the limitation of the obligation of prior authorisation to cases in which it is essential and the introduction of the principle of tacit authorisation by the competent authorities after a certain period of time elapsed. Such modernising action, while maintaining the requirements on transparency and the updating of information relating to operators, is intended to eliminate the delays, costs and dissuasive effects which arise, for example, from unnecessary or excessively complex and burdensome procedures, the duplication of procedures, the 'red tape' involved in submitting documents, the arbitrary use of powers by the competent authorities, indeterminate or excessively long periods before a response is given, the limited duration of validity of authorisations granted and disproportionate fees and penalties. Such practices have particularly significant dissuasive effects on providers wishing to develop their activities in other Member States and require coordinated modernisation within an enlarged internal market of twenty-five Member States".

Here too, as regards tacit authorisation, the recital states that it occurs after a "certain period of time" elapses, and that it is "indeterminate" and excessively long periods before a response that are intended to be eliminated.

108. Mr Bates referred also to the terms in which the EU Commission rejected an amendment of the Directive proposed by the EU Parliament and Council, stressing that "tacit authorisation (in the absence of a reply from the authorities) is key to facilitating the freedom of establishment".

109. Accepting those points as to the ambition of the Directive and the crucial importance placed on tacit authorisation, it is nevertheless clear that the EU left the question of what post-Directive authorisation schemes were justified and the means of specifying the set time for decisions under all authorisation schemes to Member States, and that the UK left these matters to the competent authorities, subject to the restrictions contained in the Services Regulations. Reg 18 requires any procedures and formalities specified by a competent authority under an authorisation scheme to be clear and be made public in advance. Tacit authorisation therefore depends on the competent authority specifying the reasonable period in advance, as a fixed period.
110. The purpose intended by article 13 and reg 19 would be defeated, rather than supported, if reg 19 were interpreted as meaning that, in any case where an authority did not publicise in advance and notify the fixed period within which an application would be determined, there would be a deemed grant after the expiry of a reasonable period of time, or that in any event the application had to be dealt with within a reasonable period. It would enable authorities who did not specify a period of time to fall back on an uncertain period of time and would leave an applicant in an uncertain position and vulnerable to delay.
111. The FTT noted that the Council had published a decision not to specify a fixed period of time on the basis that there was an overriding public interest in safety, falling within reg 19(6), that justified its not doing so. It held that, as a matter of interpretation of reg 19 of the Services Regulations in light of the Directive, there could be no deemed grant where a fixed period had not been specified and elapsed, and that whether the Council had acted lawfully in doing what it decided to do was a public law issue that could only be determined on a judicial review application, not on a statutory appeal against an express refusal of a licence.
112. I agree with the conclusion that the FTT reached. It is not possible to interpret reg 19 to provide a fall-back position that, upon default in specifying and notifying a fixed period of time, there was a deemed grant of a licence after a reasonable time for dealing with the application had elapsed. Whether the government or the Council or both were in default of their duties under the Directive and the Services Regulations respectively is not a matter that the FTT was entitled to consider. It was only entitled to decide, on a re-hearing, whether the Council was wrong to refuse to grant the Respondents licences and, on the facts, whether a licence was deemed to have been granted to any Respondent under reg 19(5).
113. Mr Bates's final argument was that the Council was disentitled to rely on its own wrong in having failed to comply with reg 19(2) (under which it should have publicised and specified a fixed period for determining such applications), which is what it was doing by arguing that no deemed grant could have arisen in this case. The simple answer to this argument is that it assumes what it seeks to prove, namely that, as the Respondents assert, the Council was not entitled under reg 19(6) to elect for overriding reasons relating to the public interest not to specify a fixed period. That is not an issue that the FTT or this Tribunal on appeal can determine. In any event, I would require cogent argument supported by authority before I was willing to conclude that a well-known principle of private law could be applied under the Services Regulations, without more, to a local housing authority performing a public housing function. No authority was cited.

114. I therefore dismiss the Respondents' cross-appeal. It is unnecessary to address the Council's further argument that the express refusals to grant licences, if ineffective because of prior deemed grants, nevertheless took effect as revocations of the licences that were deemed granted. That interesting question should be decided in a case where the outcome depends on the answer, with the benefit of full argument.

The Hon Mr Justice Fancourt

9 September 2022

**Right of appeal**

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.