UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 139 (LC) **UTLC Case Number: LC-2022-599**

Venue – Royal Courts of Justice

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

HOUSING – CIVIL PENALTY – whether the First-tier Tribunal should have increased the civil penalty on the basis of evidence given by the appellant at the hearing – procedure following claim that the person who gave evidence at the hearing before the FTT was not the appellant – decision set aside on the basis of a serious procedural irregularity and the -matter remitted to the FTT to determine the amount of the penalty

BETWEEN

LONDON BOROUGH OF WALTHAM FOREST

Appellant

-and-

ADIL RAHMAN

Respondent

Re: 1037A Forest Road,
London,
E17 4AH

Upper Tribunal Judge Elizabeth Cooke
8 June 2023
Decision Date: 19 June 2023

Mr Riccardo Calzavara for the appellant
Mr Arfan Rahman for the respondent

The following cases are referred to in this decision:

Leicester City Council v Morjaria [2023] UKUT 129 (LC)

Sutton v Norwich City Council [2021] EWCA Civ 20

Waltham Forest LBC v Marshall [2020] 1 WLR 3187 (LC)

Introduction

1. This is an appeal by the London Borough of Waltham Forest against a financial penalty imposed by the First-tier Tribunal on the respondent Mr Adil Rahman in respect of a failure to licence rented property. The appellant says that as a result of evidence given by the appellant at the hearing before the FTT the penalty imposed should, in line with the appellant's enforcement policy, have been higher.

2. The appellant was represented in the appeal by Mr Riccardo Calzavara of counsel and the respondent by Mr Arfan Rahman, and I am grateful to them both.

The factual and legal background

3. The background can be simply stated. The appellant is the owner of 1037A Forest Road, London E17 4AH. It is a ground floor flat, and was let in May 2015 to a Mrs Muza who remains the tenant to this day. The property is within an area where there is a selective licensing scheme in operation under Part 3 of the Housing Act 2004, and so must be licensed under section 85 of that Act. The respondent had a licence for the property from July 2015 until it expired on 31 March 2020. He failed to apply for a new licence until October 2021 despite reminders from the appellant. In September 2021 the appellant informed the respondent of its intention to issue a civil penalty of £6,000 (pursuant to section 249A of the Housing Act 2004); on 22 November 2021 the respondent issued a final notice, reducing the penalty by 20% to £4,800 because of the receipt of the licence application in October.

4. The level of penalty was set by the appellant in accordance with its enforcement policy – a policy that it has developed in compliance with government guidance (*Civil Penalties under the Housing and Planning Act 2016: Guidance for Local Housing Authorities* (April 2018)). In accordance with that policy and on the basis of the information it held about the respondent the appellant regarded his offence as one committed by a landlord controlling five or fewer dwellings and therefore as a "moderate band 2 offence" attracting a civil penalty of at least £5,000.

5. The respondent appealed that penalty to the FTT under paragraph 10(1) of Schedule 13A to the 2004 Act. Paragraph 10 of that Schedule goes on to provide:

> " (3) An appeal under this paragraph—
>
> (a) is to be a re-hearing of the local housing authority's decision, but
>
> (b) may be determined having regard to matters of which the authority was unaware.
>
> (4) On an appeal under this paragraph the First-tier Tribunal may confirm, vary or cancel the final notice.
>
> (5) The final notice may not be varied under sub-paragraph (4) so as to make it impose a financial penalty of more than the local housing authority could have imposed."

6. The appeal to the FTT is a re-hearing. If the FTT is satisfied beyond reasonable doubt that the offence has been committed then it may impose a penalty. The decision as to the level of the penalty is the FTT's own, but the local housing authority's own enforcement policy remains crucial to its decision on the level of penalty. In *Waltham Forest LBC v Marshall* [2020] 1 WLR 3187 (LC) the Tribunal took a tour of the authorities relevant to judicial decisions about matters on which the primary decision-maker was a public authority with a policy. It concluded as follows:

> "The court can and should depart from the policy that lies behind an administrative decision, but only in certain circumstances. The court is to start from the policy, and it must give proper consideration to arguments that it should depart from it. It is the appellant who has the burden of persuading it to do so. In considering reasons for doing so, it must look at the objectives of the policy and ask itself whether those objectives will be met if the policy is not followed. …
>
> 55. Nothing in these cases, or in the present appeals, detracts from the court's or a tribunal's ability to set aside a decision that was inconsistent with the decision-maker's own policy. Nor have the above cases said anything to cast doubt upon the ability of a court or tribunal on appeal to substitute its own decision for the appealed decision but without departing from the policy. … It goes without saying that if a court or tribunal on appeal finds, for example, that there were mitigating or aggravating circumstances of which the original decision-maker was unaware, or which of which it took insufficient account, it can substitute its own decision on that basis."

7. A video hearing of the appeal to the FTT took place on 9 August 2022. In its decision following that hearing, dated 31 August 2022, the FTT said at its paragraph 18:

> "Both parties attended the hearing, The Appellant was joined by his son Mr Arfan Ahmed, who largely spoke on his father's behalf. The Respondent was represented by Mr R Calzavara of counsel."

8. The FTT then went through the evidence, including evidence about the condition of the property. It said:

> "32. The Appellant was asked whether he had any other properties in Waltham Forest. He said that he had a few others, and then said that he had 3 others. He and his son appeared very unclear as to the precise addresses of these properties. Eventually they identified three specific properties which, they said, also had selective licences."

9. Later the FTT said:

> "When asked to further clarify what properties he owned, the Appellant disclosed that he also had a property in Lewisham and several properties in Birmingham, the latter being managed by agents. Again, he and his son appeared very unclear as to the actual addresses of those properties."

10. The FTT went on to state that it was satisfied beyond reasonable doubt that the offence had been committed; it rejected a defence of reasonable excuse. As to the level of the penalty to be imposed, Mr Calzavara argued that a higher penalty should now be imposed. The appellant's policy states that where a landlord controls or owns "a significant property portfolio" the failure to licence is viewed as a "band 4 offence" and attracts a civil penalty of £15,000 or above, and Mr Calzavara argued for a penalty on that level.

11. The FTT declined to increase the penalty, saying:

> "56. Whilst the Tribunal accepted that it had the power to increase the penalty imposed, it decided that it would not be appropriate to do so on this occasion. It considered that as the Appellant was unrepresented it would not be fair to consider such a course without giving him time to consider his position and an opportunity to take advice."

12. The appellant appeals that decision, with permission from the FTT. The Tribunal in giving directions in the appeal said that two issues were raised, namely:

    a. Whether the FTT has power to increase the penalty imposed by a local housing authority on the basis of further information provided by the appellant during the hearing; and

    b. If the FTT has power to increase the penalty, whether, having regard to the policy of the local housing authority, the tribunal in this case was nevertheless entitled to decline to do so for the reasons it gave.

13. The Tribunal directed that the hearing would be a review of the decision of the FTT; that meant that there was no scope for further evidence to be adduced by either party as to the number of properties owned by the respondent.

The first issue in the appeal: the FTT's power to increase the penalty

14. This is not a difficult issue. The FTT did not doubt that it had power to increase a penalty just as it has power to reduce it. That is uncontrovertibly true. As Mr Calzavara points out, if the local housing authority imposed a penalty on a landlord on the basis that he or she owned and was renting out, say, 15 properties, and the FTT found as a fact in the appeal that he or she owned only one, then it is implausible to suggest that the FTT should or could do anything other than to start from the local authority's policy and determine the penalty on the basis that only one property was owned Such a penalty would no doubt be substantially lower. Conversely, in a hypothetical case where the local authority proceeded on the basis that one property was owned but the FTT found as a fact that 15 properties were owned then the FTT would determine the penalty on the basis of that finding of fact.

15. In either case, the principles set out in *Waltham Forest LBC v Marshall* would apply. The FTT must start from the local housing authority's policy, and it would be for the landlord to persuade it to depart from that policy. If the FTT was considering a departure, it must ask itself whether the objectives of the policy would be achieved if it departed from the policy,

bearing in mind that one of the reasons for having the policy is to ensure consistency between offenders. Those principles are relevant in all cases, whether the end result is a lower or higher penalty.

16. Mr Calzavara asks the Tribunal to go further. He argues that the FTT "was *required* to apply the Council's policy", and that "It is plain that a proper application of the policy *required* that the starting penalty be increased to £15,000" (my emphasis). It is important to appreciate that although the FTT starts from the policy and must have good reasons for departing from it, it is not bound by the policy and it is not possible definitively to state or list the circumstances in which, as the Tribunal put it in *Waltham Forest v Marshall*, the FTT can and should depart from the policy.

17. In *Leicester City Council v Morjaria* [2023] UKUT 129 (LC) the Tribunal (the Deputy President) said at paragraph 54:

> "In *Sutton v Norwich City Council* [2021] EWCA Civ 20, at [13]-[14] the Court of Appeal endorsed guidance given by this Tribunal (Judge Cooke) in *Marshall v Waltham Forest LBC* [2020] 1 WLR 3187, at [54] and [62], which explained that the FTT should start from the policy of the local housing authority and consider whether the objects of the policy will be met if it is not followed, but that if, having afforded the policy considerable weight, the FTT disagreed with the authority's conclusions it is entitled to vary the penalty indicated by the policy."

18. *Morjaria* itself is an example of a case where it was right to depart from the local housing authority's policy. The FTT in the present case took the view that there were good reasons for doing so, and ground 2 calls for an assessment of whether the FTT was entitled to do so for those reasons.

19. So the answer to the first issue is yes, as the FTT itself accepted, the FTT does have the power to increase the penalty imposed by a local housing authority on the basis of further information provided by the appellant during the hearing. That is not to say that it was bound to do so.

The second issue: was the FTT entitled to decline to exercise its power to increase the penalty in this case

20. The second issue calls for an examination of the decision taken by the FTT in this case. Had the appeal proceeded as the appellant and the Tribunal expected no doubt Mr Calzavara and Mr Arfan Rahman would have made submissions as to whether this was a case where it was right for the FTT to depart from the appellant's policy.

21. But the appeal did not proceed as expected.

22. At the hearing of the appeal on 8 June 2023 the respondent was represented by Mr Arfan Rahman, who represented him at the FTT. With Mr Arfan Rahman was a gentleman whom he introduced as the respondent, Mr Adil Rahman. Mr Calzavara expressed concern that this gentleman was not the person who attended the FTT, who was understood by all who

were present at that hearing to be Mr Adil Rahman, and who was cross-examined by Calazavara on the basis that he was Mr Adil Rahman and was the author of the application to the FTT.

23. Mr Arfan Rahman agreed, and said that the gentleman who was with him at the FTT video hearing was not his brother, Mr Adil Rahman, but his father, Mr Khalil Rahman. He said that neither he nor his father had been asked to identify themselves. His father had not been sworn and was not asked to confirm that the signature on the form of application to the FTT was his. He said he did not know why he had not said to the FTT that his father was not Mr Adil Rahman.

24. That was certainly most surprising news. It is clear on reading the FTT's decision that the FTT thought the gentleman with Mr Arfan Rahman was the person appealing the civil penalty, referred to in the FTT's judgment as "the Appellant" and who the FTT stated in its decision was present (see paragraph 7 above).

25. Neither the respondent himself nor Mr Arfan Rahman queried the terms of the FTT's description of the proceedings or of the evidence before it after receiving the FTT's decision. And the respondent's grounds of objection to the appeal did not state that the person who gave evidence in the FTT was not Mr Adil Rahman.

26. It is not possible for this Tribunal to make findings of fact as to who attended the FTT or as to whether the gentleman who gave evidence there or the gentleman in court at the hearing of the appeal is Mr Adil Rahman, the respondent to the appeal and the person upon whom the civil penalty is imposed. Nor is it appropriate for the Tribunal to make any finding as to whether the respondent, Mr Arfan Rahman or Mr Khalil Rahman or any of them have behaved improperly. Equally, it is impossible to determine ground 2 of the appeal because it appears that the evidence given to the FTT may not have been given by Mr Adil Rahman.

27. Instead, I set aside the FTT's decision as to the level of the penalty (only) on the basis that it now appears that it was made under a misapprehension as to the identity of the person who gave evidence to the FTT relevant to the level of the financial penalty. The matter is remitted to the FTT for a fresh determination of the level of the penalty to be imposed; the FTT's finding that it was satisfied beyond reasonable doubt that an offence had been committed remains in place. The order that accompanies this decision requires Mr Arfan Rahman, Mr Adil Rahman and Mr Khalil Rahman each to provide a witness statement to the FTT setting out the addresses of the properties they own and exhibiting the registers of title to those properties (or copies of the deeds if title is unregistered) and requiring each of them to attend the re-hearing taking with them photographic identification.

28. Technically the appeal succeeds, in the sense that the FTT's decision is set aside but it is important to note that the decision is set aside for reasons unrelated to the grounds of appeal.

29. At the conclusion of the hearing on 8 June Mr Calzavara made an application for an order that the respondent pay to the appellant costs of the FTT hearing on 9 August 2022, under rule 13(1) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) 2013, and

Mr Arfan Rahman argued against the making of such an order on the basis that neither he nor his father had done anything wrong and that his father had told the truth throughout. I have asked for further submissions on that application and will determine it after receipt of those submissions.

Upper Tribunal Judge Elizabeth Cooke

19 June 2023

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.