Neutral Citation Number: [2023] UKUT 287 (LC)

UTLC Case Number: LC-2023-262

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
ON APPEAL FROM THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
FTT Ref: LON/00BB/HBA/2022/0001

Royal Courts of Justice
Decision Date: 6 December 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – BANNING ORDER – banning order offences - spent convictions – construction of sections 15 and 16 of the Housing and Planning Act 2016 – section 7(3) of the Rehabilitation of Offenders Act 1974 – discretion – whether justice can be done without admitting evidence of spent convictions

BETWEEN:

JAHANGIR HUSSAIN

Appellant

-and-

LONDON BOROUGH OF NEWHAM

Respondent

Re: 76 Cranmer Road,
Forest Gate,
London, E7 OJL

Upper Tribunal Judge Elizabeth Cooke
Royal Courts of Justice
28 November 2023

Ms Leanne Buckley-Thomson for the appellant, instructed by Addison & Khan Solicitors
Mr Andrew Lane for the respondent, instructed by OneSource Legal Services

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The following cases are referred to in this decision:

Hussain v Waltham Forest LBC [2020] EWCA Civ 1539

Knapp v Bristol City Council [2023] UKUT 118 (LC)

1. This is an appeal from a banning order made against the appellant Mr Hussain by the First-tier Tribunal ("the FTT") under the Housing and Planning Act 2016, with the effect that he was prohibited from letting property or from managing tenanted property for three years. It raises the question whether a banning order can be made on the basis of convictions that are spent by the time the order is made.

2. The appellant was represented by Ms Leanne Buckley-Thomson and the respondent local housing authority by Mr Andrew Lane, both of counsel, and I am grateful to them.

The factual and legal background

3. On 1 October 2021 at the East London Magistrates' Court the appellant was found guilty of seven offences under the Housing Act 2004. One was an offence under section 72 of the 2004 Act, the offence of managing or being in control of a house in multiple occupation (76 Cranmer Road, London E7) that was required to be licensed and was not so licensed. The other offences were all breaches in respect of the same property of the Management of Houses in Multiple Occupation (England) Regulations 2006. The breaches included the presence of fire hazards, black mould spores, and material that rendered the property unsafe. The appellant was fined a total of £10,000 and also ordered to pay costs and a victim surcharge.

4. The offences were all committed in 2018. They are "banning order offences", meaning that they can be the basis of a banning order made under the Housing and Planning Act 2016. Section 14 of the 2016 Act provides:

> "(1) In this Part *"banning order"* means an order, made by the First-tier Tribunal, banning a person from—
> (a) letting housing in England,
> (b) engaging in English letting agency work,
> (c) engaging in English property management work, or
> (d) doing two or more of those things.
> …
> (3) In this Part *"banning order offence"* means an offence of a description specified in regulations made by the Secretary of State.

5. Section 15 of the 2016 Act provides:

> "(1) A local housing authority in England may apply for a banning order against a person who has been convicted of a banning order offence."

6. Section 15 goes on to set out the procedure to be followed by the local housing authority if it seeks to have a banning order made. Within six months of the date of the conviction for the relevant offence the authority must give the person concerned notice of its intention to seek an order, inform them of its reasons for doing so and invite him to make representations within a period of at least 28 days. The authority must then consider any representations it receives during the notice period.

7. Section 16 provides:

> “(1) The First-tier Tribunal may make a banning order against a person who—
>
> (a) has been convicted of a banning order offence, and
>
> (b) was a residential landlord or a property agent at the time the offence was committed (but see subsection (3)).
>
> (2) A banning order may only be made on an application by a local housing authority in England that has complied with section 15.

8. Section 16(4) provides:

> “(4) In deciding whether to make a banning order against a person, and in deciding what order to make, the Tribunal must consider—
>
> (a) the seriousness of the offence of which the person has been convicted,
>
> (b) any previous convictions that the person has for a banning order offence,
>
> (c) whether the person is or has at any time been included in the database of rogue landlords and property agents, and
>
> (d) the likely effect of the banning order on the person and anyone else who may be affected by the order.”

9. That is a non-exhaustive list; the FTT may consider other relevant matters. Section 17 provides that a banning order must specify the length of the ban being imposed, which may not be less than 12 months.

10. In April 2018 the Ministry of Housing, Communities and Local Government issued non-statutory guidance entitled “Banning Order Offences under the Housing and Planning Act 2016”. The guidance is addressed to local housing authorities, but paragraph 5.2 states that tribunals may also have regard to it. At paragraph 3.4 it says:

> “A spent conviction should not be taken into account when determining whether to apply for or make a banning order.”

11. We now have to turn to the provisions of the Rehabilitation of Offenders Act 1974. Section 1(1) provides for offences to become “spent”:

> "… [W]here an individual has been convicted, whether before or after the commencement of this Act, of any offence or offences, and the following conditions are satisfied, that is to say—
>
> (a) he did not have imposed on him in respect of that conviction a sentence which is excluded from rehabilitation under this Act; and
>
> (b) he has not had imposed on him in respect of a subsequent conviction during the rehabilitation period applicable to the first-mentioned conviction… a sentence which is excluded from rehabilitation under this Act;
>
> then, after the end of the rehabilitation period so applicable…, that individual shall for the purposes of this Act be treated as a rehabilitated person in respect of the first-mentioned conviction and that conviction shall for those purposes be treated as spent."

12. Section 4 provides that once a conviction is spent, certain evidence is inadmissible and certain questions cannot be asked of the rehabilitated person in any proceedings:

> "(1) Subject to sections 7 and 8 below, a person who has become a rehabilitated person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction; and, notwithstanding the provisions of any other enactment or rule of law to the contrary, but subject as aforesaid—
>
> (a) no evidence shall be admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in England and Wales to prove that any such person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction; and
>
> (b) a person shall not, in any such proceedings, be asked, and, if asked, shall not be required to answer, any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary thereto."

13. In *Hussain v Waltham Forest LBC* [2020] EWCA Civ 1539 the Court of Appeal upheld the Upper Tribunal's decision that section 4(1)(a) makes evidence of spent convictions inadmissible but does not prevent evidence of the circumstances surrounding those convictions being adduced. It also upheld the Upper Tribunal's finding that a local housing authority is a "judicial authority" when considering whether to grant an HMO licence. The issue in that case was whether the appellant was a "fit and proper person" to hold an HMO licence; conduct such as the forgery of gas safety certificates was obviously relevant to that issue, and the effect of the decision was that it could be taken into account by the local authority in deciding whether to grant a licence and by the FTT in hearing an appeal from the refusal of a licence, even though evidence of the conviction itself was inadmissible.

14. Section 4(1) is expressly subjected to section 7 which specifies in sub-sections (1) and (2) certain circumstances in which evidence of spent convictions is admissible, and goes on to say:

> "(3) If at any stage in any proceedings before a judicial authority in England and Wales [other than proceedings already specified in subsections (1) and (2)] the authority is satisfied, in the light of any considerations which appear to it to be relevant (including any evidence which has been or may thereafter be put before it), that justice cannot be done in the case except by admitting or requiring evidence relating to a person's spent convictions or to circumstances ancillary thereto, that authority may admit or, as the case may be, require the evidence in question notwithstanding the provisions of subsection (1) of section 4 above, and may determine any issue to which the evidence relates in disregard, so far as necessary, of those provisions."

15. The length of the rehabilitation period (i.e. the time it takes for a conviction to become spent) varies with the sentence imposed. Section 5 of the 1974 Act sets out certain sentences, such

as life imprisonment, which are "excluded from rehabilitation", and goes on to provide for the periods applicable in other cases. Where the sentence imposed is a fine, then the rehabilitation period is 12 months. That means that the appellant's six convictions became spent on 30 September 2022. Therefore they were not spent when the respondent served notice under section 15, in March 2022, nor when it applied to the FTT for a banning order in May 2022, but were spent when the FTT heard the application on 30 November 2022 and issued its decision on 15 February 2023.

16. The FTT has power to revoke or vary a banning order if the underlying convictions have become spent since the order was made (section 20):

> "(4) If the banning order was made on the basis of one or more convictions that have become spent, the First-tier Tribunal may—
> (a) vary the banning order, or
> (b) revoke the banning order."

The FTT's decision

17. Before setting out the evidence and deciding whether to impose a banning order on the respondent's application, the FTT decided a preliminary issue: whether evidence of the appellant's spent convictions was admissible. It set out the parties' arguments. The respondent (the applicant before the FTT) argued that the MHCLG guidance (paragraph 10 above) is non-statutory; that the convictions were only recently spent, and that they should be admitted pursuant to section 7(3) of the 1974 Act. Section 20 of the 2016 Act demonstrated that Parliament had spent convictions in mind and that if a banning order was not to be made on the basis of spent convictions it would have said so. For the appellant (the respondent in the FTT) it was argued that justice could be done by declining to admit evidence of the spent convictions. It was clear that the government thought it unjust to have orders made on the basis of spent convictions as the MHCLG guidance demonstrates as well as section 20 of the 2016 Act.

18. Both parties argued that the decision in *Hussain v Waltham Forest* supported their position.

19. The FTT said this at its paragraph 25:

> "As accepted by both parties the MHLCG Guidance is non-statutory. Whilst the Tribunal have taken it into account, we do not consider it to be a tool of interpretation of the 2016 Act. Given the steps that need to be taken by a Local Authority in proceeding with a Banning Order and the length of time before any matter could come before a Tribunal for determination, it would seem extraordinary that convictions that were spent at the time of a hearing could not be taken into account. We consider that section 20 sits alone and describes a scenario when a conviction is unspent at the time of making a Banning Order but subsequently becomes spent. We do not agree that section 20 implies that the convictions need to be unspent at the time of making the Banning Order. It is accepted that in contrast to *Hussain v Waltham Forest*, in this case one of the 'ingredients' of section 16 of the 2016 Act is that the Respondent, is a person who has been convicted of a Banning Order offence. However, we consider that the

> crucial part about whether the fact that the Respondent has been convicted can be admitted is dealt with by section 7(3) of the 1974 Act. The Tribunal is a judicial authority and by section 7(3) is satisfied that for justice to be done in our consideration of this application for a Banning Order, we need to know about Mr Hussain's convictions. Therefore, we admit the evidence relating to the convictions that were spent on 30 September 2022. However, the fact that the convictions are spent is a factor we take into account when making our determination below."

20. That is the decision now appealed with permission from the FTT. It determined the preliminary issue; the FTT then went on to consider the arguments for and against making a banning order. At its paragraph 89 it concluded:

> "We acknowledge that Banning Orders should be reserved for the most serious offenders but overall we consider that this is such a case and as such we make a Banning Order in respect of the respondent."

21. If the appeal against the decision on the preliminary issue were to succeed then the banning order would have to be set aside, because there would then be nothing to satisfy the requirement of section 16(1)(a) of the 2016 Act (paragraph 7 above). But if the appeal from the preliminary issue decision fails – and it does, for the reasons I shall explain – then the banning order stands because there is no separate appeal from the decision to make a banning order once evidence of the convictions had been admitted.

22. The appellant has permission to appeal, granted by the First-tier Tribunal, on the following ground:

> "The First-tier Tribunal erred in law in considering the spent convictions at all and/or where those convictions are being relied upon as the banning order offences to satisfy section 15 of the 2016 Act. Further or in the alternative the First-tier Tribunal acted irrationally in concluding that justice could not be done without considering the spent convictions and/or in relying only upon such spent convictions to satisfy the requirements of section 15 of the 2016 Act."

23. Ms Buckley-Thomson, for the appellant, argued that as one ground with distinct limbs, and it is convenient to treat the appeal as being made on two separate grounds, as follows.

Ground 1: construction of sections 15 and 16 of the 2016 Act

The arguments

24. The first ground is that the words "has been convicted of a banning order offence" in sections 15(1) and 16(1) of the 2016 Act are to be construed as referring only to convictions that are not spent.

25. If that is correct, then a banning order could not be made on the basis of spent convictions alone, with the result that if the landlord's only convictions were spent then a banning order

could not be made, whether or not evidence of spent convictions was admitted pursuant to section 7(3) of the 1974 Act.

26. Ms Buckley-Thomson drew my attention to *Bennion, Bailey and Norbury, Statutory Interpretation*, sections 21.1 and 11.1; the 2016 Act is to be read as a whole, with each provision in it not treated as standing alone but interpreted in its context as part of the instrument. With that in mind, she argued that since section 20 indicates that a banning order may be revoked or varied once the conviction on which it is based has become spent, it must have been Parliament's intention that such an order could not be made on the basis of a spent conviction. Any other construction would be unfair because a landlord whose conviction was live at the time of making the order but became spent during its currency would get a second chance and the opportunity to argue to a fresh panel of the FTT that the order should be revoked, whereas a person whose conviction was already spent at the time the FTT made its decision would get no such second chance; yet the person whose conviction is already spent at that point should be in a better position than the person whose conviction is still live.

27. Moreover, argued Ms Buckley-Thomson, the MHCLG guidance states that orders "should not be made" on the basis of spent convictions; that makes clear the government's intention, which in turn provides a window into the intention of Parliament. Banning orders should not be routinely used, they should be reserved for the most serious cases, and consistent with that intention they should not be made on the basis of spent convictions.

28. Ms Buckley-Thomson contrasted the decision in *Hussain v Waltham Forest* which was made in the very different context of HMO licences where the relevant material was the facts on which the conviction was based; a conviction or its absence was not a condition precedent to the decision of the local housing authority to give or withhold a licence. By contrast in the present case a conviction is a condition precedent to making of a banning order, and the context of those two references to convictions – in particular section 20, and the MHCLG guidance – make it clear that Parliament intended sections 15(1) and 16(1) to refer only to unspent convictions.

29. Ms Buckley-Thomson referred to some FTT decisions on this point; but those decisions do not create precedent and in any event are fact-specific, so I am not assisted by considering them.

30. In response Mr Lane observed that the MHCLG guidance is not binding upon courts and tribunals. As to section 20, there is no unfairness in the different treatment of offenders with spent and unspent convictions. The landlord whose conviction is live at the time the order is made but which then becomes spent may apply to have the order revoked or varied, and the FTT has a discretion whether or not to do so. By contrast, an order can only be made against a landlord with spent convictions if the local housing authority is able to persuade the FTT to admit the evidence of the convictions on the basis of section 7(3) of the 1974 Act; and even if the convictions are admitted, the housing authority then has to persuade the FTT to make an order on the basis of those convictions. And the fact that Parliament made provision about spent convictions in section 20 indicates that Parliament's attention was drawn to the possibility of convictions becoming spent; it could have stated in sections 15(1) and 16(1) that only unspent convictions were relevant but it chose not to do so.

Discussion and conclusion

31. Essentially Ms Buckley-Thomson offers two arguments in favour of her construction of sections 15(1) and 16(1). The first is the MCHLG guidance. Such guidance has no statutory force (as she accepts) and is not binding upon the FTT (as she also accepts). It is not a tool of construction. The intention of the government is not the same as the will of Parliament expressed in statute.

32. If anything, the guidance proves the opposite to the construction for which Ms Buckley-Thomson argues; if the statute had provided that only unspent convictions were relevant then either the statement in the guidance that an order "should not be made" on the basis of spent convictions would be unnecessary, or it would have been worded differently (for example, as "orders cannot be made").

33. The guidance does not provide any support for Ms Buckley-Thomson's construction of sections 15(1) and 16 (1).

34. Nor does section 20. I agree with Mr Lane's observation that section 20 shows that Parliament had spent convictions in mind. It could easily have provided expressly in sections 15(1) and 16(1) that only unspent convictions were relevant but it chose not to do so. And the availability of an application for revocation or variation under section 20 does not generate any unfairness for the reason Mr Lane gave.

35. Accordingly, Ms Buckley-Thomson's construction of sections 15(1) and 16(1) is untenable. The words "has been convicted" mean exactly what they say. The 1974 Act has the effect that evidence of spent convictions will be inadmissible, unless the FTT is persuaded, pursuant to section 7(3), that "justice cannot be done" except by admitting that evidence.

36. The appeal fails on ground 1. Ground 2 is about the decision that the FTT took pursuant to section 7(3).

Ground 2: that the FTT erred in the exercise of its discretion

37. The second ground is argued in the alternative on the basis that ground 1 fails. In that case, it is argued, the FTT acted irrationally in deciding that justice could not be done without admitting the spent convictions.

38. Ms Buckley-Thomson referred to *Knapp v Bristol City Council* [2023] UKUT 118 (LC). That was a challenge to the FTT's decision to make a banning order; there was no question of spent convictions. The main issue in the appeal was whether the FTT had complied with the requirement in section 16(4)(a) of the 2016 Act (paragraph 8 above) and had given proper consideration to the seriousness of the banning order offence. The Tribunal (the Deputy President, Mr Martin Rodger KC) said this at paragraph 39 about the Tribunal's role in such an appeal:

> "…It is not for this Tribunal to consider whether the offences of which the appellant was convicted were sufficiently serious to justify the making of a

banning order – that was the FTT's job. In the absence of some error of law I may only set aside or interfere with the FTT's decision if I am satisfied that there is some identifiable flaw in its reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of its conclusion."

39. Although the issue in the present appeal is a different one, I agree that that paragraph describes the Tribunal's role in the present case.

40. Ms Buckley-Thomson argued that the FTT's decision to admit the evidence was irrational for four reasons

    a. First, because it was irrational for the FTT not to have taken into account the unfairness generated by section 20.

    b. Second, because the FTT's assertion that it gave "significant weight" to the MCHLG guidance is inconsistent with its decision to admit evidence of the spent convictions (thus ignoring the direction in the guidance that orders should not be made on the basis of such convictions). Moreover the FTT failed to give proper consideration to the government's intention as expressed in the guidance.

    c. Third, the FTT's argument was circular: in effect it said that a banning order could not be made without admitting the spent convictions, and that persuaded the FTT to admit the spent convictions.

    d. Finally, the FTT failed to consider the consequences for the appellant of making a banning order, which should have been part of its consideration of whether justice could be done without admitting the evidence.

41. I have already addressed and rejected the argument about section 20. As to the FTT's treatment of the MHCLG guidance, I fail to see any irrationality. The FTT was entitled to take it into account, and was entitled nevertheless to admit the evidence of spent convictions and therefore to open up the possibility of a banning order being made on the basis of such convictions despite what the guidance said. It was not bound by the government's intention but by the law. The FTT also accepted and gave effect to the view expressed in the guidance that banning orders should be used for the most serious offences (paragraph 1.7 of the guidance), and it was in that context that the FTT said it gave significant weight to the guidance. There was no inconsistency in the FTT's approach and no "gap in logic".

42. Taking the fourth point next, Mr Lane drew my attention to paragraph 86 of the FTT's decision in which it considered the impact of a banning order on Mr Hussain and his family. As Ms Buckley-Thomson said, that does not answer her point that the effect of an order upon the appellant should have been considered as part of the decision whether or not to admit the evidence of the convictions pursuant to section 7(3) of the 1974 Act.

43. One answer to that argument is that it does not appear to have been made to the FTT by counsel for the appellant (not Ms Buckley-Thomson on that occasion). But had it been made, in my judgment the proper response from the FTT would have been that the effect of an order upon the appellant fell to be considered later, under section 16(4)(d), if the evidence of the convictions was admitted. In taking the preliminary decision the FTT rightly focussed not on personal circumstances but on whether it could do its job at all in the absence of the evidence. And its reasoning was not circular (to move on to Ms Buckley-Thomson's third point). For justice to be done, the FTT had to at least look at the evidence. That did not mean that it was necessarily going to make a banning order; it was simply that consideration of the local housing authority's application could not get off the ground unless evidence of the spent convictions was admitted.

44. In my judgment the FTT's decision to admit the evidence of spent convictions was not irrational. Certainly neither section 20 of the 2016 Act nor the MHCLG guidance renders such a decision irrational. The FTT took into consideration other relevant factors, in particular the fact that the convictions were not spent when the application was made and that they were very recently spent. The FTT will no doubt not invariably decide to admit evidence of spent convictions; it will have regard to the circumstances of the case before it, for example to whether only spent convictions are in issue or a mixture of spent and live convictions, to the time when the offences were committed, and to the time when the convictions became spent. It will have in mind the Court of Appeal's decision in *Hussain v Waltham Forest* that evidence of circumstances surrounding past convictions is admissible, which will be of assistance in doing justice in cases where there are both spent and live convictions.

45. Where the FTT does admit evidence of spent convictions it will then give very careful consideration (as it did in the present case) to whether a banning order should in fact be made on the basis of such convictions. The statute does not prevent a banning order being made on that basis, but it is unlikely that that will happen except in a very serious case, as the FTT held that this was.

46. There was no irrationality in the FTT's decision to admit evidence of the spent convictions and the appeal fails on the second ground.

Conclusion

47. The appeal fails on both grounds and the FTT's decision to impose a banning order upon the appellant for a period of three years stands.

Upper Tribunal Judge Elizabeth Cooke

6 December 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.