IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2019] UKUT 339 (LC)
Case No: HA/32/2019

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – licensing under parts 2 and 3 of the Housing Act 2004 - requirement for a licence holder to be a "fit and proper person" - Rehabilitation of Offenders Act 1974 - treatment of spent convictions of a rehabilitated person and related criminal proceedings - admissibility of conduct underlying a conviction – the test to be applied under s. 7(3) of the 1974 Act

IN THE MATTER OF AN APPLICATION TRANSFERRED FROM THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

(1) NASIM HUSSAIN **Applicants**

(2) FHCO LIMITED

(3) FARINA HUSSAIN

and

LONDON BOROUGH OF WALTHAM FOREST **Respondent**

Re: 36 Properties within the London Borough of Waltham Forest

The President, the Hon. Sir David Holgate and Judge Siobhan McGrath

The Royal Courts of Justice
on
11 July 2019

For the Applicants: Mr Justin Bates and Mr Nicholas Grant of counsel, instructed by Messrs Anthony Gold
For the Respondent: Mr James Findlay QC and Mr Riccardo Calzavara of counsel, instructed by Kim Travis of Waltham Forest London Borough Council

The following cases were referred to in this Decision:

R(YA) v Hammersmith and Fulham LBC [2016] EWHC 1850 (Admin); [2016] HLR 39
NT1 v Google llc [2019] QB 344
Dickinson v Yates (unreported, Court of Appeal, 27 November 1986)
R v Hastings Justices ex p. McSpirit (1998) 162 J.P. 44
Adamson v Waveney District Council [1997] 2 All ER 898
Thomas v Commissioner of Police of the Metropolis [1997] QB 813
R (Cart) v Upper Tribunal [2012] 1 AC 663
Secretary of State for Justice v RR [2010] UKUT 454 (AAC)
Gilchrist v Revenue and Customs Commissioners [2015] Ch 183
The Kingsbridge Pension Fund Trust v Downs [2017] UKUT 237 (LC); [2017] L & TR 31
Robertson v Webb [2018] UKUT 235 (LC); [2018] L & TR 31
McCool v Rushcliffe Borough Council [1998] 3 All ER 889
Leeds City Council v Hussain [2003] RTR 13
R v Crown Court at Warrington ex p. RBNB [2002] 1 WLR 1954
Reynolds v Phoenix Assurance Co. Ltd [1978] 2 Lloyds Rep. 22
Arif v Excess Insurance Group Limited (1982) SLT 183
R. v Secretary of State for the Environment, Transport and the Regions ex parte Spath Holme Ltd [2001] 2 AC 349
Francey v Cunninghame District Council [1987] S.C.L.R 6
Clifford v Clifford [1961] 1 WLR 1274
Claimant v First Defendant [2012] EWHC 3214 (Ch)

Introduction

1. This case concerns 36 residential properties in respect of which applications for property licences under Parts 2 and 3 of the Housing Act 2004 ("the 2004 Act") have been refused or in some cases revoked by the local housing authority, the London Borough of Waltham Forest. It raises an important issue about the effect of the Rehabilitation of Offenders Act 1974 ("the 1974 Act") on the consideration by the First-tier Tribunal (Property Chamber) ("FTT") of appeals against such decisions. The question is to what extent, if at all, may a conviction that has become "spent" under the 1974 Act, or the behaviour upon which that conviction was based, be taken into account by the FTT when considering whether someone is a "fit and proper person" to hold a licence. This question also arises when a local housing authority takes the licensing decision from which an appeal may be brought.

2. Each of the Applicants has an interest in one or more of the properties as owner or manager. The London Borough of Waltham Forest is the Respondent and has the duty to determine licensing applications for properties within its area.

3. The appellants before the FTT applied to strike out part of the Respondent's pleadings and evidence. That application was transferred to this Tribunal for determination under rule 25 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules"). Because we are dealing only with that application at this stage, and because in due course the substantive appeal will be heard and determined by the FTT, we agree with the parties that in this decision we should refer to the appellants before the FTT as "the Applicants". They were represented by Mr Justin Bates and Mr Nicholas Grant of counsel and the Respondent local authority was represented by Mr James Findlay QC and Mr Riccardo Calzavara of counsel. We are grateful for the clarity of their submissions and the assistance they provided to the Tribunal.

Background

4. Most of the 36 properties are in the ownership of Nasim Hussain, the First Applicant. Five are owned by a company of which she is the sole Director and three are owned by her husband Tariq Hussain. The Third Applicant, Farina Hussain, is the First Applicant's daughter and is also the sole director of FHCO Limited, the Second Applicant.

5. Some of the properties are houses in multiple occupation and required to be licensed under Part 2 of the 2004 Act. Additionally, in April 2015, Waltham Forest designated the whole of the Borough as a selective licensing area under Part 3 of the 2004 Act and as a result the remaining properties also became licensable.

6. On 12th June 2015, the First Applicant submitted 23 licence applications under Part 3 of the 2004 Act. She stated in the applications that the subject properties did not have any gas appliances so that no gas safety certificate needed to be included. The Respondent discovered this to be untrue for 21 of the properties and, following a request, gas safety certificates were produced. On that basis the Respondent granted licences for each property and took no further action in relation to the false assertion. However, because of subsequent events these licences were revoked on 23rd November 2018.

7. On 19th May 2016, the First Applicant submitted licensing applications for 7 further properties asserting that they did not have any gas appliances. Inquiries by the Respondent revealed that this was also untrue. Gas certificates were eventually provided in September 2016 but were dated 19th May 2016. The Respondent discovered that the certificates were forgeries. Eventually, on 23rd November 2018 the licence applications were refused and other licences revoked.

8. As a result of her conduct, the First Applicant was prosecuted for four offences of knowingly or recklessly supplying false information to the Respondent in connection with its functions under Parts 2 to 3 of the 2004 Act, contrary to s. 238 of that Act. On 12th May 2017 she pleaded guilty and received a fine of £40,000 on the same day. Her convictions became spent under the 1974 Act from 12th May 2018.

9. The First Applicant's husband was prosecuted for four offences under s. 1 of the Forgery and Counterfeiting Act 1981 for his part in fraudulently backdating the gas safety certificates. On 29th June 2018, he pleaded guilty and received a fine of £1,000 on the same day. His convictions became spent under the 1974 Act from 29th June 2019.

10. The Applicants appealed to the FTT against the Respondent's decisions to refuse and to revoke the licences. Directions for hearing were given on 7th March 2019 including a requirement to exchange statements of case.

11. In their statement of case, the Applicants contended that in making its decisions the Respondent had erred in law by relying upon spent convictions. The decision letter stated:-

> "On 12 May 2017, Mrs Nasim Hussain was convicted of four offences under s.238 Housing Act 2004 for supplying false or misleading information in that you informed the Housing Authority that four flats you rented at 109/111 Old Church Road E4 did not have any gas appliances, when they in fact did have gas appliances.
>
> On 29 June 2018 Mr Tariq Hussain, was convicted of four offences under the Forgery and Counterfeiting Act for falsifying Gas Safety certificates for rental properties at 109/111 Old Church Road E4."

12. The Applicants made an application to the FTT to strike out "all those parts of the statement of case, witness statement and exhibits filed by the Respondent which contravene the

Rehabilitation of Offenders Act…", relying in particular upon *R (YA) v Hammersmith and Fulham LBC* [2016] EWHC 1850 (Admin); [2016] HLR 39. On 13 May 2019 Judge Vance directed the Applicants to identify clearly those parts of the Respondent's statement of case and evidence which they were seeking to have struck out. The Applicants complied with this order on 22nd May.

13. The Respondent resisted the application to strike out contending that the decision in *(YA)* was wrong, and asked for the application to be transferred to this Tribunal (along with all the issues in the appeals) on the basis that the FTT would be bound by *(YA*) whilst the Upper Tribunal would not be so constrained. The Applicants resisted the transfer of all issues to this Tribunal but were content for their application to be so transferred (see order of 28th June 2019).

14. The power to transfer under rule 25 of the 2013 Rules requires the concurrence of the Presidents of the First-tier and Upper Tribunals. We agreed that the application to strike out should be transferred to the Upper Tribunal for determination as a preliminary issue, because the correctness of a decision of the High Court is under challenge and because the issues have a wide impact, affecting not only the licensing regime under the 2004 Act generally but many other regulatory regimes. In all other respects the appeal has been stayed for determination by the FTT in the light of our decision.

15. Rule 44A of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, provides that, in default of directions to the contrary, a transferred case is to be dealt with under the 2013 Rules. The application for strike out therefore falls to be determined under rule 9 of the 2013 Rules. So far as relevant, rule 9(3) provides:-

> "(3) The Tribunal may strike out the whole or part of the proceedings or case if –
>
> ……
>
> (d) The Tribunal considers the proceedings or case (or a part of them), or the manner in which they are being conducted, to be frivolous or vexatious or otherwise an abuse of the process of the Tribunal; or
>
> (e) The Tribunal considers there is no reasonable prospect of the Applicant's proceedings or case, or part of it, succeeding."

The Applicants rely on both rules (d) and (e) in support of their application

16. The Respondent submitted to us that the Applicants had failed to identify any basis for striking out paragraph 2(i)-(iii) of the Respondent's Statement of Case, or paragraphs 13-16 of Mr Beach's witness statement dated 25 March 2019, or items 4-7 of the exhibits. The Applicants did not argue to the contrary. We agree with the Respondent that these passages or documents should not be struck out in any event. They fall outside the proper scope of the application.

The Housing Act 2004

17. The 2004 Act came into force in 2006. Part 1 introduced the Housing, Health and Safety Rating System (HHSRS) to deal with the safety and condition of residential property. Part 2 enacted a new regime for the licensing by local housing authorities of houses in multiple occupation ("HMOs" as defined in ss. 254 and 257) and mandatory licensing for larger categories of HMO. Part 3 introduced selective mandatory licences for other residential accommodation located within designated areas.

18. Under Part 1, a local housing authority may take enforcement action against a landlord or owner of property requiring works to be carried out (an improvement notice) or prohibit the use of residential property for habitation (a prohibition order). Decisions on whether enforcement action is required are made by assessing hazards, informed by HHSRS Enforcement and Operating guidance issued by the Ministry for Housing Communities and Local Government. By s. 30 of the 2004 Act it is a criminal offence to fail to comply with an improvement notice and by s. 32 it is a criminal offence to fail to comply with a prohibition order.

19. Under Parts 2 and 3 of the 2004 Act, where an application for a licence has been made to a local housing authority, the authority must be satisfied under s. 64(3) or s. 88(3) that, amongst other matters, the proposed licence holder is a fit and proper person to be the licence holder. Section 66 provides:-

> "(1) In deciding …. 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, or violence or drugs, or any offence listed in Schedule 3 to the Sexual Offences Act 2003 (c. 42) (offences attracting notification requirements);
>
> (b) practised unlawful discrimination on ground of sex, colour, race, ethnic or national origins or disability in, or in connection with, the carrying on of any business;
>
> (c) contravened any provision of the law relating to housing or of landlord and tenant law; or
>
> (d) acted otherwise than in accordance with any applicable code of practice approved under s. 233.
>
> (4) 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 subs. (2)(a) to (d), 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 …….”

20. An authority may revoke a licence where it no longer considers that the licence-holder is a fit and property person (ss.70(2)(b), 93(3)(b)). It must revoke a licence if a “banning order” (s.15 of the Housing and Planning Act 2016 – “the 2016 Act”) is made against the licence holder (ss. 70A(1), 93A(1)). We deal with the banning order regime towards the end of this decision.

21. A person whose application for a licence has been refused, or whose licence has been revoked, may appeal to the FTT. Part 3 of sched. 5 to the 2004 Act makes provision for appeals against licensing decisions. Paragraph 34(2) and (3) provides:-

“(2) An appeal –

(a) is to be by way of a re-hearing, but

(b) may be determined having regard to matters of which the authority were unaware.

(3) The tribunal may confirm, reverse or vary the decision of the local housing authority.”

22. A person commits an offence if he has control of or manages an HMO which requires to be, but is not, licensed; if he knowingly permits an HMO to be occupied by more persons than authorised by the licence; or if he fails to comply with a licence condition (s72(1)-(3)). A person also commits an offence if he has control of or manages a house that is required to be, but is not, licensed under Part 3; or if he fails to comply with a licence condition (s.95(1)-(2)). On summary conviction he is liable to a fine (ss. 72(6)-(7), s.95(5)-(6)).

23. Section 126 and sched. 9 of the 2016 Act amended the 2004 Act so that where an authority is satisfied “beyond reasonable doubt” that a person’s conduct contravenes ss. 72 or 95 of the 2004 Act, it may impose a financial penalty of up to £30,000 instead of instituting criminal proceedings (s. 249A(1)-(4)).

24. The Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006 (SI 2006 No. 373), prescribes the content of applications under ss. 63 and 87 of the 2004 Act. Regulation 7(2) requires certain information specified in sched. 2 to be provided: para. 2 requires details relating to the HMO, including by para. 2(f)(xiii) “a declaration that any gas appliances in the HMO or house meet any safety requirement contained in any enactment.”

25. Paragraph 3 requires the applicant to give:-

"(a) details of any unspent convictions that may be relevant to the proposed licence holder's fitness to hold a licence, or the proposed manager's fitness to manage the HMO or house, and, in particular any such conviction in respect of any offence involving fraud of other dishonesty, or violence or drugs or any offence listed in schedule 3 to the Sexual Offences Act 2003;

(c) details of any finding by a court or tribunal against the proposed licence holder or manager that he has practised unlawful discrimination on grounds of sex, colour, race, ethnic or national origin or disability in, or in connection with, the carrying on of any business;

(c) details of any contravention on the part of the proposed licence holder or manager of any provision of any enactment relating to housing, public health, environmental health or landlord and tenant law which led to civil or criminal proceedings resulting in a judgement being made against him…."

26. Under s. 238 a person commits an offence if he supplies any false or misleading information to a local housing authority in connection with any of their functions under Parts 1 to 4 or 7 of the 2004 Act and he does so knowingly or recklessly. He is liable to a fine on conviction. In this instance a local housing authority does not have any power to impose a financial penalty as an alternative to prosecution.

Rehabilitation of Offenders Act 1974

27. Where a person is convicted of an offence which is not excluded from rehabilitation, his conviction will be treated as "spent" after the end of the rehabilitation period, and he will be treated as a "rehabilitated person". Section 1(1) provides:-

"Subject to subsections (2), (5) and (6) below, where 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 in accordance with section 6 below a sentence which is excluded from rehabilitation under this Act;

then, after the end of the rehabilitation period so applicable (including, where appropriate, any extension under section 6(4) below of the period originally applicable to the first-mentioned conviction) or, where that rehabilitation period ended before the commencement of this Act, after the commencement of this Act, 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."

28. It is important to note that an individual cannot become a "rehabilitated person" under the

1974 Act where he has simply engaged in *conduct* amounting to a criminal offence. Rehabilitation under this legislation only applies where that conduct has resulted in a *conviction*, and that conviction has subsequently become "spent".

29. Section 4 provides:-

> "(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.
>
> (2) Subject to the provisions of any order made under subsection (4) below, where a question seeking information with respect to a person's previous convictions, offences, conduct or circumstances is put to him or to any other person otherwise than in proceedings before a judicial authority—
>
> (a) the question shall be treated as not relating to spent convictions or to any circumstances ancillary to spent convictions, and the answer thereto may be framed accordingly; and
>
> (b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent conviction or any circumstances ancillary to a spent conviction in his answer to the question.
>
> (3) Subject to the provisions of any order made under subsection (4) below, —
>
> (a) any obligation imposed on any person by any rule of law or by the provisions of any agreement or arrangement to disclose any matters to any other person shall not extend to requiring him to disclose a spent conviction or any circumstances ancillary to a spent conviction (whether the conviction is his own or another's); and
>
> (b) a conviction which has become spent or any circumstances ancillary thereto, or

any failure to disclose a spent conviction or any such circumstances, shall not be a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him in any way in any occupation or employment.

(4) The Secretary of State may by order—

(a) make such provision as seems to him appropriate for excluding or modifying the application of either or both of paragraphs (a) and (b) of subsection (2) above in relation to questions put in such circumstances as may be specified in the order;

(b) provide for such exceptions from the provisions of subsection (3) above as seem to him appropriate, in such cases or classes of case, and in relation to convictions of such a description, as may be specified in the order.

(5) For the purposes of this section and section 7 below any of the following are circumstances ancillary to a conviction, that is to say—

(a) the offence or offences which were the subject of that conviction;

(b) the conduct constituting that offence or those offences; and

(c) any process or proceedings preliminary to that conviction, any sentence imposed in respect of that conviction, any proceedings (whether by way of appeal or otherwise) for reviewing that conviction or any such sentence, and anything done in pursuance of or undergone in compliance with any such sentence.

(6) For the purposes of this section and section 7 below *"proceedings before a judicial authority"* includes, in addition to proceedings before any of the ordinary courts of law, proceedings before any tribunal, body or person having power—

(a) by virtue of any enactment, law, custom or practice;

(b) under the rules governing any association, institution, profession, occupation or employment; or

(c) under any provision of an agreement providing for arbitration with respect to questions arising thereunder;

to determine any question affecting the rights, privileges, obligations or liabilities of any person, or to receive evidence affecting the determination of any such question."

30. Section 7 is entitled: "Limitations on rehabilitation under this Act, etc." Section 7(1) provides that nothing in s. 4(1) shall affect any of a number of specified matters including the exercise of the Royal prerogative and the enforcement and issuing of any proceedings. Section 7(2) provides that nothing in s. 4(1) shall affect the determination of any issue or prevent the admission or requirement of evidence relating to a person's previous convictions or "circumstances ancillary thereto" in a number of specified proceedings including criminal proceedings. Section 7(4) gives the Secretary of State power to exclude the application of s. 4(1) "in relation to any proceedings specified in the order … to such extent and for such purposes as may be so specified."

31. Section 7(3) only applies to "proceedings before a judicial authority" as defined in s.4(6). It enables such an authority to admit or require evidence relating to a person's spent convictions or "circumstances ancillary thereto", notwithstanding s.4(1), if satisfied that justice could not otherwise be done in the case; and the authority may determine any issue to which that evidence relates disregarding s.4(1) so far as is necessary for that purpose.

Submissions

32. Broadly speaking, the parties' submissions fell into three parts: firstly, the meaning and impact of s. 4(1) of the 1974 Act; secondly, the applicability of s. 7(3) to the FTT's and the local authority's consideration of the licensing issues and thirdly whether part or parts of the Respondent's case in the appeal ought to be struck out.

The meaning and effect of section 4(1)

33. On behalf of the Applicants, Mr Bates submitted that under s. 4 the effect of rehabilitation is that "…. A spent conviction is to be wiped out altogether from the knowledge of anyone" (per Lord Denning MR, *Reynolds v Phoenix Assurance Co Ltd* [1978] 2 Lloyd's Rep 22, CA, p.24; cited with approval in *Arif v Excess Insurance Group Ltd* 1982 SLT 183). He submitted that this protection extends to include conduct upon which a spent conviction was based. In support of his argument, Mr Bates relied upon *(YA)* at [38] – [40].

34. Mr Bates submitted that the prohibition on reliance upon ancillary circumstances permeates the whole of s. 4(1) and is not confined to the prohibition in s. 4(1)(b). He says that there are three equal principles in s. 4(1) and that the section must be read as a whole with each part supporting the others. Section 4(1) is a protection afforded to a rehabilitated person in all fields of law and for all purposes. Section 4(1)(a) and (b) then support that general rule by preventing it from being circumvented in proceedings before a judicial authority. He argues that to read s. 4(1) "disjunctively" would lead to an unprincipled result since the prohibitions in ss. 4(1)(a) and 4(1)(b) could be circumvented by a local authority having knowledge of the spent conviction from any other source; and whether a person is protected by s. 4(1) would be a matter of chance.

35. Mr Bates says that in order to meet the Applicant's arguments the Respondent makes a series of points about allegedly absurd circumstances, none of which are correct.

36. In response Mr Findlay submits firstly that the judge in *YA* was clearly wrong in his interpretation of s. 4(1) and this Tribunal is not bound by the decision.

37. Secondly, he submits that the meaning of s. 4(1) is clear. The words "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" give broad protection to an offender in respect of those matters, but it does not give any protection against reference being made to the conduct underlying that conviction.

38. Thirdly, he says there is no justification for the purposive interpretation adopted in *YA*. Section 4(1) is structured so as to make separate provision for the specific prohibitions in ss. 4(1)(a) and 4(1)(b). Section 4(1)(a) excludes evidence in "proceedings before a judicial authority" that a person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence where the conviction is spent. Section 4(1)(b) prevents questions being asked in any such proceedings about a person's past which cannot be answered without acknowledging or referring to a spent conviction "*or any circumstances ancillary thereto"*. The reference to "ancillary circumstances", as defined in s. 4(5) is confined, in this context, to s. 4(1)(b) and does not apply to s. 4(1) or 4(1)(a).

39. Fourthly, he contends that in any event the judge's approach in *YA* to "purpose" was too narrow. Mr Findlay relies upon *NT1 v Google llc* [2019] QB 344 where the Court stated that the exceptions in ss. 7 and 8 "cannot be treated as necessarily exhaustive of the circumstances in which information about a spent conviction may be disclosed."

40. Fifthly, he submits that the judge's decision in *YA* leads to absurd consequences. If a person carries out a criminal act for which he is *not* prosecuted, or for which a prosecution fails, or for which the authority imposes a civil penalty pursuant to s.249A of the Housing Act 2004 instead of prosecuting, that act could be relied upon by an authority in determining an application before it. However, on the judge's logic, if that person is convicted and fined, no authority could rely on that act after 12 months had passed. He says that Parliament cannot have intended this perverse outcome (In this context see [28] above).

41. Sixthly, he submits that the consequences would be profound wherever there is a coincidence of civil and criminal liability. For example, if a construction company negligently and in breach of health and safety regulations kills an employee, that company could be prosecuted and convicted and be sentenced to a large fine. If *YA* is correct, no civil case could be brought if it were to come to trial more than 12 months after the date of sentence. Similarly, if a driver negligently caused a car accident and was successfully prosecuted in relation to his driving, then the injured party could not rely on that driving behaviour in a civil claim if the conviction had become spent.

42. In the context of housing licensing cases, Mr Findlay submits that there are particular difficulties: s.89 explicitly requires consideration of any contravention of "any provision of the law relating to housing or of landlord and tenant law."

43. Furthermore, the effect of the statutory process which has to be followed under the 2016 Act before an application for a banning order can be made (section 15(3)-(6)), is that a conviction may become spent by the time the application is heard and will necessarily be spent before the order expires. The interpretation in *YA* sits uneasily with s. 20(2)-(4) of the 2016 Act which provides that whilst a banning order "must" be revoked if the underlying conviction is overturned, it need not be after a conviction becomes spent. There is a similar difficulty with the management of the "rogue landlord" database (ss. 31(2)(b) and 36(1)-(4)).

Section 7(3) of the 1974 Act

44. For the Applicants, Mr Bates submits that when a local authority is considering the initial application for a licence, it is not acting under s. 4(1); rather it is acting under s. 4(2), which applies where questions are asked "otherwise than in proceedings before a judicial authority" and therefore s. 7(3) may not be relied upon at that stage.

45. Secondly, he contends that although the hearing before the FTT is *de novo* and may involve the Tribunal considering "… matters of which the authority were unaware…", that is irrelevant to the question. He submits that the FTT may only receive admissible evidence and the 1974 Act makes the disputed material inadmissible.

46. Thirdly, he argues that because the local authority is prohibited from having regard to spent convictions and related material, it would be a very rare case where the FTT could take them into account under s. 7(3). It would lead to a perverse incentive for the authority to reject an application on flimsy grounds, knowing that it could seek to bolster its case by asking the FTT to have regard to such material.

47. As a matter of principle, he says that the power in s. 7(3) is a restrictive power and is to be applied narrowly. He relies on the Court of Appeal's decision in *Dickinson v Yates* (unreported, 27 November 1986). He also relies upon the same approach taken by Sedley J (as he then was) in *R v Hastings Justices ex p. McSpirit* (1998) 162 J.P. 44 and in *Adamson v Waveney District Council* [1997] 2 All ER 898.

48. Mr Bates submits that there are two possible outcomes:-

(i) The primary case for the Applicants is that this Tribunal should determine that the spent convictions and related material should be left out of account by the FTT. Whilst there is the possibility of an authority applying to rely on such material under s. 7(3), the test is high and the prospects of such evidence being admitted are remote. On the present application, there simply is no basis to consider that any properly directed tribunal could decide to admit the evidence;

(ii) Alternatively, the Upper Tribunal should give guidance to the FTT as to how to apply the s. 7(3) test and then remit the case with directions.

49. On behalf of the Respondent, Mr Findlay submits that both the local authority and the FTT are entitled to consider and determine applications for licences and appeals on the basis of the conduct underlying the spent convictions and, furthermore, if the FTT considers it necessary in the interests of justice to do so, the convictions and offences themselves.

50. He contends that the proceedings before the Respondent and the FTT were before a judicial authority in each case because:-

(i) In determining applications for licences and in determining whether to revoke existing licences, the Respondent was determining a question that affects the "rights, privileges, obligations or liabilities of [a] person" (s. 4(6) of the 1974 Act);
(ii) There can be no doubt that the applications before the FTT are "proceedings before a judicial authority."

51. Mr. Findlay contends that s. 7(3) confers a broader discretion. He relies on *Thomas v Commissioner of Police of the Metropolis* [1997] QB 813, CA where Evans LJ said that the "discretion is a broad one […] In the context of civil proceedings, this means taking account of the interests of both parties, and justice requires that there should be a fair trial between them". He submits that Saville LJ took the same view.

52. Mr Findlay says that as the application before the Respondent fell within s. 4(6), it was entitled to disapply the prohibitions against adducing evidence to prove that the offences had been committed and against asking questions regarding those offences and ancillary circumstances, including the underlying conduct. He submits that the convictions of the First and Third Applicant are relevant to the statutory test of whether the proposed licence holder is a fit and proper person.

53. He submitted that even taking *Thomas* at its strictest, justice could not be done without admitting evidence of the convictions and the circumstances ancillary thereto. It would therefore be clearly inappropriate for the Upper Tribunal to strike out any part of the Respondent's statement of case and/or evidence.

54. Finally, he submitted that the Respondent's consideration of the application could not have fallen under s. 4(2) rather than s. 4(1). Not only was the Respondent acting as a judicial authority, it had no need to ask questions to ascertain information about the conviction and the circumstances leading thereto, because it was already aware of these matters, having been the prosecuting authority in the case.

The issues

55. The 1974 Act introduced protections for rehabilitated offenders in relation to their spent convictions, and the offences, sentences and criminal process relating thereto. The Act also provides some protection in relation to "circumstances ancillary to a conviction" which includes "conduct constituting that offence or those offences". The parties have also referred to that behaviour as conduct underlying the conviction, or conduct upon which the conviction was based, without drawing any distinction between any of them. In this decision we use the shorthand "conduct" to refer to all these expressions.

56. The first and main issue between the parties is whether in the appeal before the FTT, and on a proper construction of s. 4(1) of the 1974 Act, the Respondent may lead evidence and rely upon the *conduct* of the Applicants (as opposed to the spent convictions, and the offences, sentences and criminal process relating thereto) and the FTT may take into account that conduct when determining the Applicants' appeal.

57. The Applicants submit that by virtue of the 1974 Act such conduct may not be taken into account and therefore should not be referred to in any pleadings or evidence before the FTT. The Respondent says that although s.4(1) prevents reliance upon the convictions and the offences, sentences and criminal process relating thereto, it does not prevent reliance upon the conduct or activity which amounted to an offence or resulted in the conviction. This is an important issue because it potentially affects the operation of many licensing and regulatory regimes. For example, the concept of a "fit and proper person" is often used to test whether a person qualifies to be the holder of a licence or permit, and their previous behaviour may be relevant to that decision.

58. The Applicants say that this issue was resolved in their favour by the decision of Mr. Peter Marquand (sitting as a Deputy High Court Judge) in *R(YA) v Hammersmith and Fulham LBC* [2016] EWHC 1850; (Admin); [2016] HLR 39. The Respondent submits that the relevant parts of that judgment are incorrect and should not be followed by this Tribunal. We were told by counsel that their researches had not revealed any admissible *Pepper v Hart* material on the issues of construction.

59. We note that a number of principles are well-established. The High Court and Upper Tribunal have equivalent status, save for judicial review of a refusal by the Tribunal to grant permission to appeal to itself from the FTT (*R (Cart) v Upper Tribunal* [2012] 1 AC 663). A decision of the High Court is not binding on the Upper Tribunal. The Tribunal will ordinarily follow a decision of the High Court (just as one High Court judge will ordinarily follow that of another), but it is entitled not to do so if satisfied that the earlier decision was wrong (*Secretary of State for Justice v RR* [2010] UKUT 454 (AAC); *Gilchrist v Revenue and Customs Commissioners* [2015] Ch 183 [85-86], [91], [101]; *The Kingsbridge Pension Fund Trust v Downs* [2017] UKUT 237 (LC); [2017] L & TR 31 [20]; *Robertson v Webb* [2018] UKUT 235 (LC); [2018] L & TR 31 [23]).

60. There are the following further issues between the parties:-

(i) The correct legal test to be applied under s. 7(3) of the 1974 Act to any application by the Respondent to the FTT to rely upon the convictions, offences

or sentences of the Applicants and also "conduct" (if it is unsuccessful in relation to the first issue); and whether the Respondent's reliance upon material which may be the subject of such an application before the FTT should now be struck out by this Tribunal;

(ii) Whether decisions by a local housing authority under Parts 2 or 3 of the 2004 Act to grant or refuse applications for a licence, or to revoke a licence, fall outside the definition in s. 4(6) of the 1974 Act of "proceedings before a judicial authority".

61. We think it would be convenient to address matters in the following order: -

(i) "Fit and proper person";
(ii) The background to the 1974 Act;
(iii) Analysis of the 1974 Act;
(iv) Case law on section 4 of the 1974 Act;
(v) Section 4(6) of the 1974 Act – "proceedings before a judicial authority";
(vi) Section 7(3) of the 1974 Act;
(vii) Implications of the Housing and Planning Act 2016 ("the 2016 Act");
(viii) Human Rights Act 1998.

"Fit and proper person"

62. To summarise, under the 2004 Act a local housing authority may not grant a licence for a house in multiple occupation under Part 2 or for a house regulated under Part 3 unless it is satisfied *inter alia* that "the proposed licence holder" is "a fit and proper person to be the licence holder" (ss.64(3)(b)(i), 88(3)(a)(i)). The authority must also be satisfied that the proposed manager of the licensed house would be a fit and proper person for that role (ss. 64(3)(d) and 88(3)(c)). Similarly, the authority has the power to revoke a licence under Parts 2 or 3 where it considers that either the licence holder or the manager is no longer a fit and proper person (ss. 70(2)(b),(c) and 93(2)(b),(c)). The authority is obliged to revoke such a licence if a "banning order" is made against the licence holder (ss. 70A(1), 93A(1)).

63. By section 66(1) the authority must have regard to any evidence falling within s. 66(2)-(3) when deciding whether someone is a fit and proper person to be either the licence holder or the manager of a licensed house. (s. 89 is the corresponding provision for the regime in Part 3). Section 66(2) refers to evidence showing that a person has: -

"(a) committed any offence involving fraud or other dishonesty, or violence or drugs, or any offence listed in Schedule 3 to the Sexual Offences Act 2003 (c. 42) (offences attracting notification requirements);
(b) ….. ;
(c) contravened any provision of the law relating to housing or of landlord and tenant law".

> By section 66(3), the assessment of a person's "fitness" should also have regard to relevant conduct of the kind described in subsection (2) attributed to another person associated (or formerly associated) with that first person.

64. There is no dispute that the conduct upon which the offences and convictions in this case were based, involved contraventions falling within s.66(2)(c). It is important to note that that sub-paragraph does not depend upon whether an offence has been committed or a conviction obtained. It would apply to facts which were capable of amounting to an offence, but where the authority decided not to prosecute, or they failed in a prosecution to establish the offence to the criminal standard. The focus of s.66(2)(c) is upon the conduct there described, not upon criminality (contrast s.66(2)(a)). Hence, it is important for us to determine whether a local housing authority, exercising its licensing functions under Parts 2 or 3 of the 2004 Act, ceases to be entitled to rely upon a person's conduct which breaches housing law or landlord and tenant law (and therefore falls within s. 66(2)(c)), if that person is convicted of an offence based upon that conduct and that conviction becomes spent.

65. It has become common for Parliament to create criminal sanctions for breaches of many statutory requirements. The Applicants' construction of the 1974 Act would seriously impact upon licensing regimes based upon a "fit and proper person" requirement, particularly where the penalty imposed results in a conviction becoming spent after a relatively short period. A licence under Part 2 or 3 might be sought soon after the expiry of that period. Housing authorities might be discouraged from prosecuting criminal matters if they could not rely upon conduct resulting in a successful prosecution when they subsequently apply "the fit and proper person" test to a proposed (or actual) licence holder or manager. That test is of great importance for the protection of the public, in particular the well-being of potential occupiers of licensed housing.

66. Similar issues arise under other regulatory regimes concerned with the provision of services to the public and environmental protection. For example, the licensing regime for drivers of private hire vehicles relies upon a "fit and proper person" requirement. The Divisional Court has held that the objectives of this scheme are plainly intended to ensure, so far as possible, that those licensed to drive such vehicles are suitable persons to do so (*McCool v Rushcliffe Borough Council* [1998] 3 All ER 889, 891f). The Court also stated that in the licensing context the decision-maker may make findings to the civil standard of proof that a person has behaved in a particular way, notwithstanding that he or she has already been acquitted of a criminal offence relating to the same behaviour. In *Leeds City Council v Hussain* [2003] RTR 13, a case under the same licensing regime, Silber J relied upon the explanation of the "fit and proper person" test given in *McCool* and added that the test focuses on (inter alia) the impact of the licence holder's character on members of the public, in particular users of private hire vehicles and their protection [25].

67. In *R v Crown Court at Warrington ex parte RBNB* [2002] 1 WLR 1954, Lord Bingham, giving the leading judgment in the House of Lords, referred to "fit and proper person" as a "portmanteau expression, widely used in many contexts" and continued [9]:-

> "It does not lend itself to semantic exegesis or paraphrase and takes its colour from the context in which it is used. It is an expression directed to ensuring that an applicant for permission to do something has the personal qualities and professional qualifications reasonably required of a person doing whatever it is that the applicant seeks permission to do. In a case such as the present an applicant for a justices' licence under the 1964 Act seeks permission to run a public house. Thus before granting a licence justices (or the Crown Court on appeal) must think the applicant has the personal qualities and professional qualifications reasonably required of a person seeking to run the particular public house for which he or she seeks a licence. The judgment must be made not only in relation to the particular applicant but also in relation to the particular premises. But the focus is on the particular applicant's suitability to run the particular public house."

This statement applies *mutatis mutandis* to the fit and proper person test in Parts 2 and 3 of the 2004 Act. A licence holder (or manager of a house) must have the personal qualities and qualifications reasonably required of a person seeking to have the responsibilities of holding a licence under that legislation for the premises in question, including his or her ability and willingness to comply with relevant requirements of housing law and landlord and tenant law, which comprise those of the licensing regime itself, such as the proper provision of information in a licence application.

The background to the 1974 Act

68. The background to the 1974 Act is well recounted in the commentary in Current Law Statutes Annotated for that year. The statute appears to have been inspired by a report published in 1972 by Justice (and others) entitled "Living it Down: The problem of old convictions". The Committee was chaired by The Rt. Hon. Lord Gardiner.

69. The Report expressed a widespread concern that many people in society with criminal convictions, or even only a single conviction, had subsequently led blameless lives and yet their "record" would remain for ever (paras. 2 and 8). The Report distinguished between such people, referred to as "rehabilitated persons", and "recidivists" (paras. 7 - 9). It described the problems which can arise where information on an earlier offence or conviction comes to light in a different context sometime later (paras. 10 - 15). There was thought to be as many as one million people with a criminal record but who had subsequently remained free of convictions for at least 10 years (para. 16). It was this "skeleton in the cupboard" which the Report sought to address. The focus was on the stigma arising from criminal convictions, not reprehensible conduct in general, or conduct which may involve both a civil wrong and a criminal offence.

70. The Report examined solutions adopted in other jurisdictions for the rehabilitation of *offenders*. Under some legal systems an offender is rehabilitated by his or her criminal record being expunged. In others, civil rights removed upon conviction (e.g. the right to give or receive property, make a will, or hold public office) are restored after a certain period of time (paras. 22 - 24). The Report considered that those solutions would pose a number of problems for the UK.

For example, the complete expunction of criminal records for all purposes would unacceptably prejudice the work of police, intelligence and social services and licensing bodies (paras. 26(a) and 28).

71. The Report stated (para. 32): -

> "In outline, therefore, the scheme which we recommend is that:-
>
> (1) Certain persons who have been convicted of criminal offences should be classified as "rehabilitated persons" if they have not been re-convicted for a number of years;
> (2) "rehabilitated persons" should be treated *in law* – with certain necessary exceptions – as if they had not been convicted, by making inadmissible any evidence tending to show that they have committed the relevant offence, or been charged with it, or convicted of it, or sentenced for it".
>
> Thus, it is plain that the Report focused on the rehabilitation of persons in respect of evidence regarding criminal offending, convictions and punishment.

72. Much of the remainder of the Report concentrated on identifying the types of conviction which should qualify for rehabilitation, the time periods that should elapse before those convictions become spent, how rehabilitated persons should be expected to answer questions about their past, and the keeping of criminal records.

73. The Report recommended against any restrictions on the ability of persons to ask questions (para. 26(e)): -

> "Some reformers in other countries have suggested that employers, insurers and so on should be restrained from asking questions about criminal convictions, expect perhaps in a limited form like "have you any convictions which have not been wiped out by operation of law?". At first sight such a proposal looks attractive, but on closer scrutiny it turns out to have very undesirable features. To be effective, such a restriction would itself have to be enforced by law, so that people who asked questions going beyond the suggested formula would become guilty of an offence. In a country like ours, that cannot be right: people must go on being free to ask any questions they like. Instead, we think the law should enlarge the freedom of those who *answer* the question, and give them the opportunity of describing themselves as being of good character if they have lived down their past misdemeanours over a sufficient length of time. Rather than *enforcing* a more charitable social attitude towards rehabilitated persons, we think that the law would be better employed in setting an example by treating convictions of long ago as spent and irrelevant, so that their burden is removed from the rehabilitated offender, and he is made free to answer such questions on that basis."

74. The Report did not give so much attention to the extent to which evidence should be excluded. In particular, it did not address the issue in this case, namely whether the prohibition

of evidence or any reference to a previous offence, conviction, or punishment should also cover conduct underlying that conviction.

75. The overall conclusions of the Report were summarised at (para. 76), notably: -

> "(4) it is in society's interest that, when someone has done all he can do to live down his past, and enough time has passed to establish his sincerity, his record should no longer be held against him so long as he does not offend again (paras. 18-20);
>
> (6) nor is it desirable to restrict the right of people in general to ask questions designed to uncover past convictions (para. 26(e));
>
> (7) instead, the law should set an example by treating certain people as "rehabilitated persons" when they have not been reconvicted for a number of years, and making evidence of their past crimes inadmissible in the courts; but such a scheme will require a number of necessary safeguards (paras. 27-32)."

76. At (para. 77) the Report recommended a legislative scheme which included the following at p. 38:-

> "(9) a rehabilitated person should be treated for all purposes in law as someone who has not committed, or been charged with, or convicted of, or sentenced for, the offences concerned; accordingly, he should not be guilty of any offence, or liable to any penalty or adverse consequences, if that is what he says and no evidence to prove the contrary should be admissible in any court unless he himself wants it given, or as part of his antecedents if he is later convicted on indictment (paras. 27 to 32, and 41 and 42)."

77. The author of the commentary in Current Law Statutes Annotated explains that some of the recommendations of the Report were not uncontroversial. There were several attempts to introduce bills in Parliament before the 1974 Act was enacted. We note that nearly half a century has passed since then, but there has been remarkably little case law. We consider it would be helpful to analyse the relevant statutory provisions before proceeding to examine the limited amount of case law which appears to be available.

Analysis of the 1974 Act

78. The long title to the Act reads: -

> "An Act to rehabilitate offenders who have not been reconvicted of any serious offence for periods of years, to penalise the unauthorised disclosure of their previous convictions, to amend the law of defamation, and for purposes connected therewith".

Thus, the emphasis of the legislation is on rehabilitation for *offending* and *convictions*.

79. In broad terms, the framework of the 1974 Act is as follows:-

Section 1 defines who is a "rehabilitated person" and what is a "spent conviction".

Section 2 extends the scheme to offences dealt with in "service disciplinary proceedings" such as a court-martial.

Section 4 defines the legal consequences of someone who becomes a "rehabilitated person" in respect of a conviction. The consequences set out in s.4(1) are subject to any exclusion or modification made under s. 7(3) and the consequences set out in s. 4(2) and (3) are subject to any exclusion or modification under s.4(4).

Sections 5 and 6 identify those sentences which are excluded from rehabilitation (e.g. imprisonment for life) and define the length of the rehabilitation periods for other types of sentence.

Section 7 imposes limitations on rehabilitation under s. 4(1).

Section 8 restricts the application of s.4(1) in defamation proceedings.

Sections 8A and 8AA provide specific codes for dealing with cautions, warnings and similar disposals.

Sections 9 and 9A set out offences for unauthorised disclosure from official records of spent convictions or cautions.

Section 1

80. Section 1(1) lays down the general principle that where an individual has been convicted of any offence and the sentence imposed is not excluded from rehabilitation (s.5(1)), then at the end of the rehabilitation period determined in accordance with ss.5 and 6, he shall be treated as a "rehabilitated person" in respect of that conviction, which shall be treated as "spent". If, however, during the rehabilitation period the individual is convicted of a further offence then that period is extended in accordance with s.6(4). By s.1(2) an individual does not become a "rehabilitated person" in respect of a conviction unless he has served or complied with any sentence imposed in respect thereof (excluding certain lesser forms of disposal, such as a fine). The rehabilitation period for the fines imposed in this case was 12 months (s.5(2))[1].

81. We should reiterate that a person cannot become "rehabilitated" under the 1974 Act where he has simply engaged in *conduct* amounting to a criminal offence; rehabilitation only applies where that conduct has resulted in a *conviction*, which has subsequently become "spent". Likewise, the protections conferred by the Act apply in respect of "rehabilitated persons" and "spent convictions".

[1] Prior to s.139 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the period was 5 years and it appears that that remains the case in Scotland.

Section 4 – the five protections in relation to rehabilitated persons and spent convictions

The structure of subsections 4(1) to (3)

82. We have set out s.4 in [29] above. The section is headed "Effect of rehabilitation". There are broadly five "effects", which we will refer to as "protections", relating to an *individual* who becomes a rehabilitated person. Section 4(1) sets out three protections. The first part of s. 4(1) preceding s. 4(1)(a) provides the first protection. Then subparagraphs (a) and (b) of s. 4(1) provide the second and third protections respectively. Subsection 4(2) contains the fourth protection and subsection 4(3) the fifth.

83. The "first protection" (i.e. the text in s. 4(1) preceding paras. (a) and (b)) has a general effect. By contrast, section 4(1)(a) and (b) only apply in "proceedings before any judicial authority" (as defined in s.4(6)); they deal with admissibility of evidence and questioning of rehabilitated persons respectively. Subsections 4(2) and (3) apply outside such proceedings. Subsection 4(2) provides protection against questioning and subsection 4(3) provides protection against obligations to disclose under agreements or "arrangements" (including protection in the context of a profession, occupation, office or employment).

84. The words immediately preceding sub-paragraphs (a) and (b) in s.4(1) are important:-

> "*and*, notwithstanding the provisions of any other enactment or rule of law to the contrary, *but* subject as aforesaid —" (emphasis added)
>
> This text governs both subparagraphs; it does not apply to the first part of s.4(1) which sets out the first protection. The words "but subject as aforesaid" must have the effect of repeating the opening words of s. 4(1), "subject to sections 7 and 8 below". They make it plain that both subparagraphs (a) and (b) in s. 4(1), like the first protection, are subject to ss. 7 and 8. But Parliament has only inserted the phrase "and notwithstanding the provisions of any other enactment or rule of law to the contrary" in relation to subparagraphs (a) and (b) and *not* the first protection at the beginning of s.4(1). This makes it clear that, although the second and third protections override legal rules to the contrary, the first protection does not.

85. Thus, a clear distinction is drawn between the first protection on the one hand and the second and third protections on the other. Although the first protection appears at first sight to be of general legal effect, it is subject to any legal rules to the contrary. As Mr Findlay pointed out, this is a strong indication that Parliament did not intend the first protection to be construed in the same way as the second and third protections.

86. It is necessary to address each of the five protections one by one in order to see how they relate to each other and operate.

The first protection

87. The first part of s.4(1) provides: -

> "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;"

88. In our judgment, as a matter of plain language, this provision has the following consequences (subject to any legal rule to the contrary): -

(i) A person becomes rehabilitated under this provision as regards the relevant *conviction* in respect of which the rehabilitation period has expired;

(ii) That person is to be treated for all purposes in law as not having committed the offence the subject of that conviction or charged with, prosecuted for, convicted of, or sentenced for that offence. In law those matters are disregarded in the treatment of that rehabilitated person;

(iii) However, that disregard does not extend any further. In particular, there is no disregard of the conduct or behaviour itself. Instead, it is the legal consequences of that behaviour under the criminal law, namely that it involved a criminal offence and resulted in a conviction and sentence, which are disregarded;

(iv) Behaviour amounting to a criminal offence but not resulting in a conviction is not disregarded;

(v) The fact that conduct not only involved committing a criminal offence but also a civil wrong, such as a breach of housing law or landlord and tenant law, is not something which is to be disregarded under this provision.

The second protection

89. Section 4(1)(a) provides: -

> "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;"

90. This protection only arises in respect of a "rehabilitated person". The concept of a "spent conviction" has already been defined (see s.1(1) in [27] above). Section 4(1)(a) only affects "proceedings before a judicial authority" (defined in s.4(6). Its objective is to make certain evidence inadmissible in those proceedings (i.e. irrespective of the source from which the evidence comes).

91. It is important to note that both s.4(1)(a) and the preceding text (i.e. the first and second protections) use the same language to describe the matter which is either to be ignored in relation to the rehabilitated person for all purposes in law, or treated as inadmissible evidence in judicial proceedings, namely: -

"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".

Our construction of this language in sub-paras. (i) to (v) in [88] above applies also to s. 4(1)(a).

92. It is also important to note that this language, common to the first and second protections, was not used by Parliament in s.4(1)(b), s.4(2) or s.4(3) (the third, fourth and fifth protections). Whereas the first and second protections have the broad effect of treating as inadmissible in judicial proceedings or disregarding for all legal purposes the conviction and the offence, the criminal proceedings and the sentence relating to that conviction, the third, fourth and fifth protections exclude certain obligations to answer questions or to disclose information about "a spent conviction" or "any circumstances ancillary thereto", an expression defined in s.4(5)) as follows: -

"For the purposes of this section and section 7 below any of the following are circumstances ancillary to a conviction, that is to say—

(a) the offence or offences which were the subject of that conviction;
(b) the conduct constituting that offence or those offences; and
(c) any process or proceedings preliminary to that conviction, any sentence imposed in respect of that conviction, any proceedings (whether by way of appeal or otherwise) for reviewing that conviction or any such sentence, and anything done in pursuance of or undergone in compliance with any such sentence."

93. For present purposes the key point in s. 4(5) is that "ancillary circumstances" include not only "the offence or offences which were the subject of that conviction" but also "the conduct constituting that offence or those offences". It is therefore plain that Parliament recognised the distinction between "the offence the subject of [the] conviction" and "conduct constituting that offence". The first and second protections (section 4(1) down to the end of sub-para (a)), do not refer to "conduct constituting that offence" or any similar language.

94. Accordingly, under the first and second protections the *conduct* which constitutes a criminal offence the subject of a spent conviction is not disregarded for all legal purposes, nor rendered inadmissible in proceedings before a judicial authority. Those protections do not apply to such material. On the other hand, Parliament legislated so that the third, fourth and fifth protections should also cover *conduct* underlying a conviction. We discuss this distinction further below.

The third protection

95. Section 4(1)(b) provides: -

"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."

96. This protection only arises in respect of a "rehabilitated person" (who must therefore have committed an offence resulting in a conviction) and only applies in proceedings before a judicial authority. It prohibits questioning of a person which would reveal a spent conviction (or circumstances ancillary thereto). If a question prohibited by s. 4(1)(b) is put to a rehabilitated person, then he or she need not answer it.

The fourth protection

97. Section 4(2) provides: -

> "Subject to the provisions of any order made under subsection (4) below, where a question seeking information with respect to a person's previous convictions, offences, conduct or circumstances is put to him or to any other person otherwise than in proceedings before a judicial authority—
>
> (a) the question shall be treated as not relating to spent convictions or to any circumstances ancillary to spent convictions, and the answer thereto may be framed accordingly; and
> (b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent conviction or any circumstances ancillary to a spent conviction in his answer to the question."

98. This operates in parallel with s.4(1)(b) by providing a similar protection where a person is questioned outside "proceedings before a judicial authority". However, this provision is broader in two respects. First, it covers the questioning of any person, and not simply questions put to a rehabilitated person. Second, it expressly states that a person may not be prejudiced through non-disclosure of information protected by this provision. However, the protection cannot apply unless a rehabilitated person's conduct resulted in a *conviction*.

The fifth protection

99. Section 4(3) provides: -

> "Subject to the provisions of any order made under subsection (4) below, —
>
> (a) any obligation imposed on any person by any rule of law or by the provisions of any agreement or arrangement to disclose any matters to any other person shall not extend to requiring him to disclose a spent conviction or any circumstances ancillary to a spent conviction (whether the conviction is his own or another's); and
> (b) a conviction which has become spent or any circumstances ancillary thereto, or any failure to disclose a spent conviction or any such circumstances, shall not be a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him in any way in any occupation or employment."

100. First, this provision excludes or overrides any obligation of a person to disclose information in so far as that would involve revealing a spent conviction of that person (or any other person) or circumstances ancillary thereto. Second, and as a corollary of that protection, s.4(3) also prohibits reliance upon that information, or its non-disclosure, as a ground for dismissal or other prejudicial action in the context of a profession, office, occupation or employment. However, like the fourth, this protection cannot apply unless a rehabilitated person's conduct resulted in a *conviction*.

Differences between the purpose and subject matter of the five protections

101. These are important differences between the first and second protections on the one hand, and the third, fourth and fifth protections on the other, regarding (1) the purpose of the protection in relation to a "rehabilitated person" and "spent convictions" and (2) the subject matter of that protection.

102. The purposes or objects of the first two protections are very broad; i.e. (1) ignoring spent convictions of a rehabilitated person (and the related criminal process) for "all purposes in law" (subject to any legal rules to the contrary) and (2) the exclusion of evidence in any judicial proceedings. In effect, the subject matter of those protections is to be completely disregarded or treated as legally irrelevant.

103. But the purpose of the third, fourth and fifth protections is more limited or targeted. No person need answer a question or make a disclosure which would reveal a spent conviction (or ancillary matters) and certain types of prejudicial action may not be based upon that information or its non-disclosure. The third, fourth and fifth protections do not purport to treat the matters they cover as legally irrelevant. For example, a rehabilitated person may choose to answer a question or to make a disclosure so as to reveal protected information, or the party asking a question may have information about a spent conviction from another source in any event. But whether that information is admissible in any proceedings before a judicial authority, or whether it is to be ignored for all purposes in law, is controlled, so far as the 1974 Act is concerned, entirely by the first and second protections (subject to ss. 7 and 8).

104. These variations in purpose are reflected in an important distinction in the subject matter of the protections. All five of them apply to spent convictions and the commission of the offence, the charge, criminal proceedings and sentence related to that conviction. But whereas the third, fourth and fifth protections apply to "conduct constituting the offence" (s.4(5)), the first and second protections do not. It was necessary for Parliament to enact this distinction because "conduct" which amounts not only to a breach of the criminal law, but also to (inter alia) a tort or a ground for regulatory or disciplinary action, would otherwise have to be disregarded under the first protection and would be inadmissible in any proceedings before a judicial authority by virtue of the second.

105. The subject matter of the third, fourth and fifth protections is extended to include "conduct constituting the offence" because their purpose is to prevent a spent conviction being revealed through questioning or disclosure, whether by a response directly revealing that conviction, or indirectly by a response referring to an offence having been committed, *conduct* amounting to that offence, a charge, a prosecution or a sentence.

106. The second protection operates by prohibiting the giving of evidence about certain matters; it is therefore predicated upon that material *already being known*, from some source or other, at the stage when it is applied. That is not the case in relation to the third, fourth and fifth protections. For example, the party asking a question or seeking disclosure may be unaware of a spent conviction or the related offence, criminal proceedings or sentence. Parliament therefore extended these protections so that a person does not have to reveal *conduct* underlying a conviction which could lead to the questioner discovering an offence, criminal proceedings or conviction.

107. Because the purposes of these two sets of protections are different, Parliament deliberately chose to describe the subject matter to which they relate in different language. This was not accidental. We explain below why we disagree with the suggestion in *YA* that Parliament chose to use different and very specific language merely in order to define the same subject matter.

Summary

108. It is common ground between the parties that the resolution of the issues raised by the application to strike out is not affected by any exceptions to s.4(1) to (3) created by orders made under s.4(4) or s.7(4).

109. It is also common ground that the Applicants' appeal to the FTT constitutes proceedings before a judicial authority for the purposes of ss. 4 and 7 of the 1974 Act and that the appeal will proceed as a rehearing in which the FTT may have regard to matters of which the Respondent was unaware when it made its decisions against which the appeal is brought (Sched.5 para. 34 of the 2004 Act). It follows that our determination of the application to strike out involves only the powers of the FTT and is not affected by the Applicants' contention that the Respondent's decisions were not made in "proceedings before a judicial authority".

110. In the appeal before the FTT the only protections in section 4 which are engaged are those contained in sub-section (1), subject to any decision made by the FTT under s.7(3) disapplying those provisions, an issue we consider below. Subject to that qualification, the Applicants are entitled to rely on the "third protection". A rehabilitated person must not be asked, and need not respond to, any questions which if answered would reveal a spent conviction, the offence for which he was convicted, the conduct which constituted that offence, or the criminal proceedings and sentence relating thereto (s.4(1)(b)).

111. The first two protections (contained in s.4(1) down to the end of s.4(1)(a)) would (subject to any decision by the FTT under s.7(3)) prevent the Respondent from referring to, leading

evidence about, or relying upon a spent conviction, the offence the subject of that conviction, or the proceedings or the sentence relating thereto. Likewise, if the FTT became aware of any such matters by any other means it would have to disregard them. However, on a proper construction of the 1974 Act the FTT is entitled to receive, and to take into account in its determination of the appeal, evidence or information dealing with relevant *conduct* of a rehabilitated person, including conduct which has been treated under the criminal law as an offence and resulted in a conviction which is now spent.

Case law on section 4 of the 1974 Act

112. Mr Bates, on behalf of the Applicants, relied firstly upon *Reynolds v Phoenix Assurance Co. Ltd* [1978] 2 Lloyds Rep. 22. At the trial of a claim on an insurance policy for the destruction of buildings by fire, the defendant insurers sought leave to amend their pleadings to allege non-disclosure of a conviction against one of the claimants, being a spent conviction under the 1974 Act. Forbes J refused permission to amend because of the prejudicial delay to the trial which would ensue. The following week the Court of Appeal heard and determined an appeal solely concerned with that procedural issue. The Court reversed the judge's decision because they considered that allowing the amendment would cause no material prejudice. They also decided that the issue whether the conviction should be admitted was a matter for the trial judge to consider under s.7(3) of the 1974 Act, and not for the appellate court at that stage (see p.24).

113. Thus, *Reynolds* did not raise the main issue which we have to decide. However, Lord Denning MR did add some general statements about s.4(1) (p.24). He said that under s.4 a spent conviction is to be ignored for all purposes. A rehabilitated person must be treated as if "he had never been convicted at all". If he were to be asked whether he had been convicted (i.e. of a spent conviction) he need not answer, or he could reply "no". The ambit of any such question would be restricted as if it had simply asked about any unspent convictions. Mr Bates then relied heavily on the following remark of Lord Denning:-

> "The effect of this Act is that a spent conviction is to be wiped out altogether from the knowledge of any one".

Neither this statement, nor the preceding dicta, lend any support to the Applicants' argument. Lord Denning simply referred to the disregard of a spent *conviction*. He did not address the issue in the present case as to whether the first two protections apply to the *conduct* constituting the offence the subject of a spent conviction. We therefore derive no assistance from *Reynolds* on the determination of the main issue in this application.

114. The same applies to *Arif v Excess Insurance Group Limited* (1982) SLT 183, which also concerned a disputed claim under an insurance contract. The Court had to determine whether there had been a material non-disclosure of a conviction, and whether the latter was a "spent conviction" for the purposes of s.4(3)(a) (see p.185). The only passage relied upon by Mr Bates

was Lord Wylie's citation of Lord Denning's statement in *Reynolds* which we have already considered. The judgment in *Arif* did not address the issues which we have to determine in this application.

115. The main authority upon which Mr Bates relied was *YA*. This involved a challenge by a 19 year old to a decision by the local housing authority to refuse to enter him on their register of applicants for housing. They decided that he should be treated as a "non-qualifying person" under s.160ZA of the Housing Act 1996, because he had committed anti-social behaviour. That behaviour had resulted in criminal convictions which had become spent. The claimant submitted that by virtue of s.4(1) of the 1974 Act the authority should not have had regard to those matters. The authority responded that, although they had not been entitled to take into account the convictions, the offences, the criminal proceedings or the sentences passed, the 1974 Act had not required them to ignore the conduct or behaviour upon which the convictions had been based. They argued that the omission from s.4(1) down to the end of para. (a) of the phrase "circumstances ancillary to a conviction", importing the term "the conduct constituting that offence….", acknowledged the distinction between the behaviour of a rehabilitated person on the one hand and the legal consequences of that behaviour under the criminal law on the other ([35-36]).

116. The Deputy Judge rejected the authority's submissions. At [38] he said: -

> "In my judgment, it is necessary to look at s.4 as a whole and to consider the purpose behind it. Section 4(1) provides that once a conviction is spent a person "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…". The purpose is to seek to prevent the past offences coming to light and to ensure that the rehabilitated person is treated as not having committed the offence in question. Section 4(1)(a) prohibits evidence of spent convictions being produced in legal proceedings and s.4(1)(b) prohibits questioning about spent convictions and "any circumstances ancillary", the definitions of which is referred to above. This is doing no more than making it clear within the particular circumstances of those subsections that information about the conduct that constituted the offence should not be disclosed. If the section is not looked at in this way then is seems to me that the whole purpose of it is undermined. I asked Mr Baker during his submissions how a person who has been convicted of stealing a car could be described in accordance with his analysis of s.4. He replied that it would be permissible to state that the person had taken a car without the permission of the owner. To my mind those are the elements of the offence and an individual could not be a rehabilitated person unless it was permissible for them to refuse to provide such information or without a prohibition on such information being provided. Anyone hearing such a description would know that the person had committed a criminal offence".

117. Thus, the judge decided that the first part of s.4(1) down to the end of sub-para. (a) (the first and second protections), and not simply ss. 4(1)(b), (2) and (3), applies to "conduct" resulting in a conviction which subsequently becomes spent. He considered that the whole purpose of section 4 would be undermined if that first part of s. 4(1) did not prohibit reliance

upon or reference to "the conduct that constituted the offence". He illustrated his thinking by referring to the straightforward example of a person convicted of stealing a car and said that the *behaviour* involved could not be described without revealing the elements of the offence and making it plain that a crime had been committed.

118. We are unable to accept this reasoning. First, any such example must be tested on the basis that any reference to the conviction is prohibited; that much is plain. Taking the example given at face value, anyone hearing a bare description of such *behaviour*, or conduct generally, would not know or have proper grounds for thinking, that a criminal offence had been committed, or criminal proceedings pursued resulting in a conviction and sentence imposed. For example, the prosecuting authority might have decided that the evidence was insufficient to establish the relevant offence to the criminal standard, alternatively, a trial might have taken place and the person acquitted for that same reason, or in other cases a civil penalty may have been imposed instead of a criminal sanction (see e.g. s.249A of the 2004 Act.).

119. Second, we accept the Respondent's submission that it would be absurd, and cannot have been Parliament's intention, that misconduct or other behaviour could be taken into account where no charge was brought or a prosecution failed because of a lack of evidence to satisfy the criminal standard of proof, but not if a charge was made, the evidence was stronger and a conviction resulted. We should reiterate that the first part of s.4(1) down to the end of sub-para (a) has the strong effect of prohibiting regard being had to, or evidence being admitted in judicial proceedings of, the matters to which it applies.

120. Third, the judge has taken a fairly straightforward example of conduct which would strike many people as being criminal in nature, irrespective of whether they could identify the precise offence involved. That is not the case for many types of behaviour which Parliament has increasingly sought to control by creating criminal sanctions, for example, offences of a technical nature or offences of strict liability under regulatory or licensing legislation. We do not consider that the ease, or otherwise, with which conduct could be described without importing the commission of a criminal offence affords a sound basis for construing the first and second protections set out in s.4(1).

121. Fourth, and most importantly, the Court in *YA* overlooked the wide ambit of the first and second protections in section 4(1) and the seriously harmful consequences of the construction it adopted which cannot have been intended by Parliament. Conduct which constitutes a criminal offence may also have legal consequences far outside the criminal law. The same conduct amounting to a criminal offence, may also amount to a civil wrong giving rise to an actionable claim for damages, or constitute grounds for judicial review, or grounds for taking regulatory or disciplinary action for the protection of the public.

122. For example, an individual running a manufacturing business may operate on unsafe system of work, which results in the death of, or serious injury to, an employee. That conduct may involve negligence and a breach of health and safety regulations. It may also constitute a criminal offence as regards the breach of those regulations, or in some cases even manslaughter. It could also give rise to a claim in damages for personal injury and provide the Health and Safety Executive with grounds under the Health and Safety of Work Act 1974 for serving notices prohibiting a process from being carried on or requiring safety measures to be put in

place. However, if the construction adopted in *YA* and advanced by the Applicants were to be followed, the fact that a conviction is obtained would be sufficient to cause the first and second protections (i.e. the first part of s.4(1) down to the end of sub-para. (a)) to apply, so that no regard could be had in any civil proceedings or administrative process to that conduct. The injured party, or their estate, would be unable to bring a claim in damages for the harm and losses which it has caused. Equally, the HSE would be unable to serve regulatory notices to require the unsafe system to be removed or remedied, because of the first protection. Mr Bates offered no satisfactory counter-argument.

123. This last point was not addressed in *YA* and we are satisfied that Parliament could not have intended such wide, and indeed absurd, consequences to come about. Such consequences go far beyond the object of the 1974 Act to address the social stigma attaching to previous convictions and criminal offending. Fortunately, the wording used to enact the first and second protections in s.4(1) does not require the construction in *YA* to be followed. Parliament has carefully chosen language to define those circumstances in which s.4 applies to *conduct* constituting an offence, namely the third, fourth and fifth protections, and not the first and second protections.

124. Mr Bates attempted to avoid this problem by relying upon the power in s.7(4) to exclude s.4(1) by order. He referred, by way of example, to the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975 No. 1023). We are in no doubt that this approach is entirely misconceived. The role of the Tribunal or Court is to determine Parliament's intention when enacting primary legislation through the language it has used in that legislation (see *Kingsbridge* at [49-50] and *R. v Secretary of State for the Environment, Transport and the Regions ex parte Spath Holme Ltd* [2001] 2 AC 349, 396). The avoidance of an interpretation producing unreasonable or absurd results may assist in deciding whether a particular intention should, or should not, be imputed to Parliament at the time when it enacted that statute.

125. Here the issue is whether the first and second protections in s.4(1) should be construed so as to cover conduct. Mr Bates did not contend that we should impute to the legislature an intention in 1974 to enact those provisions so that they had the effect of abrogating coincident civil liability in any circumstances, particularly in the absence of any direct language to that effect. He advanced no reason as to why Parliament could conceivably have wanted to bring about such an outcome. It could not be sensible, therefore, to treat Parliament as having intended through the language of s.4(1) to wipe out coincident civil liability generally and at the same time to restore that liability generally by relying upon s.7(4) for that purpose. That would have been an absurd self-cancelling or self-defeating exercise; and, moreover, Parliament would have created a burden of producing secondary legislation capable of identifying all such civil liabilities.

126. Furthermore, it should be recalled that s.7(4) envisages the disapplication of s.4(1), in whole or in part, in specific circumstances. In that context, we would add that there is nothing in the first and second protections in s.4(1) (or elsewhere in the 1974 Act) to suggest that Parliament intended to abrogate coincident civil liabilities generally, so that they might be restored selectively by the making of orders under s.7(4) (for example, in relation to conduct).[2]

[2] We mention that SI 1975 No. 1023 disapplied s.4(1) *as a whole* in relation to the proceedings listed in schedule 3 (see Article 5) and not merely in relation to *conduct.* The schedule contains many examples of circumstances where, for example, the mere fact of a conviction might be relevant.

There is simply no reason to think that Parliament intended to prohibit reliance upon conduct in the first place, let alone treat behaviour giving rise to a civil liability as if it had never taken place. The focus of the 1974 Act was on rehabilitation in relation to "spent convictions", and offences and criminal proceedings relating to such convictions (see also s.1(1) and [27]-[28] above).

127. The judgment in *YA* continued at [39] as follows: -

> "Furthermore, section 4(1) when outlining the relevant circumstances refers to a person as being treated as someone '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.' Section 4(1)(a) also refers to the prohibition relating to a person who has 'committed or been charged with or prosecuted for or convicted of or sentenced for any offence…'. In contrast section 4(1)(b) refers to 'spent conviction or spent convictions' and includes the phrase 'or any circumstances ancillary thereto.' It is necessary in section 4(1)(b) to refer to 'any circumstances ancillary thereto' because the drafting of the section only uses the word 'conviction' and this makes it clear that the prohibition is wider than just the conviction itself. This is not necessary in the rest of section 4 as the drafting is wider and includes circumstances that are ancillary to the conviction, such as committing the offence and sentencing. Section 4(5) supports and reinforces the requirements of section 4(1)."

128. It is only in this part of his judgment that the judge addressed the point that the expression "any circumstances ancillary to a conviction" (as defined in s.4(5)) appears in s.4(1)(b), (2) and (3) but not in the preceding parts of s.4(1). He suggested that it was necessary for this expression to be incorporated and then defined in a separate sub-section (s.4(5)) because in ss. 4(1)(b), (2) and (3) the only other subject matter identified by Parliament was a "spent conviction". The judge pointed out that s.4(1) down to the end of sub-para. (a) refers to the commission of, charging with, prosecuting or sentencing for an offence which is a spent conviction. He decided that the phrase "circumstances ancillary to a conviction" was introduced in subsequent parts of s.4 to include elements which would not otherwise have been covered. We cannot accept this explanation of why Parliament used the term of art "circumstances ancillary to a conviction" for three main reasons.

129. First, it treats the use of this term and s.4(5) as if it were nothing more than a word-saving device for making the whole of ss. 4(1) to (3) apply to the same subject matter. Yet, if Parliament's object had been to make the first part of s.4(1) down to the end of sub-para. (a) apply to the same matters as s.4(1)(b), (2) and (3), there is no rational reason why it did not simply make s.4(5) apply throughout *all* of those provisions. The explanation given in *YA* imputes to Parliament an unnecessarily convoluted technique for the drafting of legislation and is all the more implausible given the clear dichotomy between sub-paras. (a) and (b) of s.4(1). Instead, s. 4(5) has a dual function. First, it provides a word-saving device solely for those provisions to which it is expressly applied (i.e. ss. 4(1)(b), 4(2) and 4(3)). Second, it repeats elements which are common to the first and second protections, but it adds the additional feature "conduct constituting that offence …".

130. Second, the judgment in *YA* at [39] glosses over that part of s.4(5) which was important to the authority's argument in that case (and the Respondent's in this). Section 4(5) expressly refers to "the conduct constituting that offence", language which is absent from the beginning of s.4(1) down to the end of sub-para. (a). This first part of section 4(1) requires the fact that the rehabilitated person was convicted of a breach of the criminal law (and the related criminal process) to be disregarded or treated as inadmissible evidence. But it does not go on to treat the conduct involved in that offence as something which never happened, or about which evidence may not be given. That is why it is so significant that sub-para. (b) of s.4(5) focuses by contrast on "the conduct" in question.

131. Third, the explanation in *YA* treats all parts of s.4(1)(2) and (3) as applying to the same subject matter, ignoring the differences between the functions of the first and second protections on the one hand, and the third, fourth and fifth protections on the other (see analysis at [101] to [107] above). In our judgment, and with great respect, the construction adopted in *YA* does not accord with either the language used by Parliament in s. 4 or the purposes of the legislation.

132. Mr Bates submitted that all three parts of ss.4(1) should be read as a whole and "not disjunctively". By "not disjunctively" he meant, in particular, that those three parts should *all* be treated as protecting "conduct constituting an offence". In one sense this submission goes too far. Mr Bates says that by virtue of *the first protection*, "conduct" would have to be ignored for all purposes in law, including the appeal before the FTT (and moreover should have been ignored by the Respondent in reaching its decisions the subject of the appeal). Evidence of conduct would be inadmissible before the FTT and could not be the subject of questioning before that tribunal. On his argument the Applicants would not need to rely upon the second or third protections; they would be otiose.

133. A second and more fundamental problem with his submission is that it conflicts with the structure of s. 4(1) explained in [84] to [86] above. In proceedings before *any* judicial authority, including the FTT (and, as we explain below, the determination of licensing applications by a local housing authority), the second and third protections are necessary (and not otiose) because they override legal rules to the contrary, whereas the first protection does not.

134. Lastly in *YA* the judge said this at [40]: -

> "It may be possible to identify in a person who has been convicted of a series of criminal offences 'bad' behaviours that do not form part of the conduct constituting the offences. If so, it would be permissible to disclose those behaviours. For example, if a person is generally violent then he/she might be described as a violent person notwithstanding any convictions. However, if he/she had committed one violent offence then, if it was spent, it would not be permissible to disclose it. In this case, there was no substantive evidence of 'bad' behaviour other than the evidence provided by way of the convictions document."

We do not follow how the possibility of relying upon evidence of bad character which on any view falls outside the controls in the 1974 Act assists in resolving the issue of whether *conduct* underlying a conviction falls within the first and second protections.

135. For the reasons we have given, on a plain reading of the language used in the 1974 Act, we do not consider that the construction of s.4(1) adopted by the court in *YA*, and advanced by the Applicants here, is correct or that it accords with the purposes of the legislation. However, on a proper construction of the 1974 Act the decision-maker is entitled to receive, and to take into account, evidence or information dealing with relevant conduct of a rehabilitated person, including conduct which has been treated under the criminal law as an offence and resulted in a conviction which is now spent (see [111] above). Accordingly, the application to strike out any of the Respondent's material of that kind must fail.

Section 4(6) of the 1974 Act – "proceedings before a judicial authority"

136. There is no dispute that the appeal before the FTT are "proceedings before a judicial authority" for the purposes of ss. 4(1)(a) and (b) and 7. The Applicants contend that the Respondent's decisions which they have appealed did not involve proceedings of that kind whereas the Respondent says they do. As we have said, given that the FTT is not restricted to the material before the Respondent when it took those decisions, this issue has no legal or practical consequence for the determination of the appeal before the FTT or the current application before us.

137. The only practical effect of this issue which has been identified to us, is that if the process leading up to a local housing authority's decision to refuse or revoke a licence are "proceedings before a judicial authority", then in an appropriate case that authority may rely upon s.7(3) of the 2004 Act to "admit or require" evidence to be given of a rehabilitated person's spent convictions, offence, and punishment, notwithstanding s.4(1). Because this is a point of general importance to local housing authorities and those affected by the exercise of their licensing powers, and because the matter has been raised before us, we will briefly give our opinion on it.

138. Section 4(6) provides: -

> "For the purposes of this section and section 7 below "proceedings before a judicial authority" includes, in addition to proceedings before any of the ordinary courts of law, proceedings before any tribunal, body or person having power—
>
> (a) by virtue of any enactment, law, custom or practice;
> (b) under the rules governing any association, institution, profession, occupation or employment; or
> (c) under any provision of an agreement providing for arbitration with respect to questions arising thereunder;
>
> to determine any question affecting the rights, privileges, obligations or liabilities of any person, or to receive evidence affecting the determination of any such question."

139. The ambit of this definition is very broad. It embraces not only courts and tribunals, but also proceedings before any person or body having power, whether by law, custom or practice, or under the rules of any association, profession, institution, occupation or employment, to determine any question affecting the rights, privileges, obligations or liabilities of any person and also to receive evidence relevant to such a determination. Plainly this definition would

cover, for example, disciplinary proceedings before a professional body or misconduct appeals conducted by employers or a sports association.

140. In the present case, it has not been suggested that a local housing authority exercising its licensing functions under Parts 2 and 3 of the 2004 Act lacks "power to receive evidence". Instead, the dispute focused on the nature of its determination. However, as the Respondent points out, there is an internal inconsistency in the Applicants' position. The FTT carries out a rehearing and then makes a determination in relation to the "rights" sought by an applicant. The FTT may decide an appeal by confirming, reversing, or varying the decision of the local housing authority (para. 34(3) of sched. 5). In an appeal against a refusal to grant a licence, the FTT may direct the authority to grant a licence to the "applicant for the licence" on such terms as the tribunal may direct (para. 34(4) of sched. 5). The FTT determines an appellant's entitlement to a right or privilege conferred by a licence granted under the legislation (or the removal of that right in the event of revocation). It is impossible to see how the legal analysis can be any different when a decision of the same nature is previously taken by the licensing authority from which the appeal is brought.

141. There appears to be little case law on the interpretation of s.4(6). In *Francey v Cunninghame District Council* [1987] S.C.L.R 6, the Appellant's application for a taxi driver's licence was refused by the District Council. Sheriff Smith held that the application process leading up to the determination by the Council constituted "proceedings before a judicial authority". He stated that the definition in s.4(6) was so broad that it included many tribunals, bodies or persons who have to make decisions on unsworn statements and written submissions. "Evidence" in s.4(6) does not refer simply to material that would be accepted as evidence in a court of law, but includes all statements of fact or opinion intended to form part of the material for the authority's determination. Mr Bates made no submission to the contrary. We agree with the judge's reasoning.

142. In *Adamson v Waveney District Council* [1997] 2 All ER 898 it was common ground that the determination by a local authority of an application for a hackney carriage licence, including the statutory question of whether the applicant was a fit and proper person to hold such a licence, was a proceeding before a judicial authority within s.4(6) (p.900f-g). Silber J proceeded on that basis (p.904e-g). We agree with the view he took.

143. Mr Bates relied on the decision in *YA* at [44] primarily for the judge's reasoning that the "rights" referred to in s.4(6) means "rights as between third parties or rights conferring status in relation to third parties". On that basis he held that s. 4(6) could not apply to the determination by an authority of any rights which the individual may have against that authority. With respect, we disagree. We do not think that it is appropriate to put this restrictive gloss on the plain language used by Parliament in the statute. Section 4(6) is wide enough to include a decision by a regulatory licensing authority (such as a local housing authority) to grant, or to refuse to grant, or to revoke, a permit or a licence. In the present case the consequence of a decision to grant, refuse or revoke a licence under Parts 2 or 3 of the 2004 Act is that the Applicants either do, or do not, have the right to control or manage property subject to the licensing regime; they would be liable to prosecution if they so acted without a licence (ss.61(1), 72(1), 85(1) and 95(1) of the 2004 Act).

144. There is no justification for confining the determination of rights in s.4(6) to rights as between parties other than the decision-maker. The explicit references in that provision to the determination of rights and obligations under the rules governing any institution, association or profession make that plain beyond any doubt. It may be that the decision in *YA* that the authority's determination in that case fell outside s.4(6) was correct on other grounds, but we refrain from expressing any conclusions on that aspect.

145. For these reasons we conclude that decisions by a local housing authority under Parts 2 or 3 of the 2004 Act to grant or refuse applications for a licence, or to revoke such a licence, involve "proceedings before a judicial authority" as defined in s.4(6) of the 1974 Act.

Section 7(3) of the 1974 Act

146. In proceedings before a judicial authority, that authority may be entitled to rely upon s. 7(3) to override any one or more of the protections in section 4(1), in so far as it may be necessary to do justice in the case. Section 7(3) provides: -

> "If at any stage in any proceedings before a judicial authority in England and Wales (not being proceedings to which, by virtue of any of paragraphs (a) to (e) of subsection (2) above or of any order for the time being in force under subsection (4) below, section 4(1) above has no application, or proceedings to which section 8 below applies) 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."

147. We have already concluded that the 1974 Act does not prevent the Respondent from leading evidence before the FTT of the *conduct* which gave rise to the spent convictions. But the Respondent says that it intends to apply to the FTT under s. 7(3) to be allowed to lead evidence on the convictions, offences or breaches of the criminal law to which they relate and the sentences passed (notwithstanding s. 4(1)(a)), and to ask questions about those matters and the underlying conduct (notwithstanding s. 4(1)(b)).

148. Section 7(3) makes it plain that the decision on whether to disapply any of the protections in s.4(1) is a matter for the judicial authority. In *Reynolds* the Court of Appeal, dealing with an appeal while the trial at first instance was still in progress, held that they should not determine whether material should be admitted under s.7(3) because that was a matter for the trial judge who had yet to pronounce on the question (pp. 25-26). In the present case a ruling on the application of s.7(3) would be a matter for the FTT to determine. If the Respondent should make any application relying upon s. 7(3) it would bear the burden of showing that the test in that provision is satisfied (see Lord Denning MR in *Reynolds* at p.24)

149. In the application before this Tribunal we are not exercising an appellate function. Instead, the determination of the application in the FTT to strike out parts of the Respondent's case has been transferred to this Tribunal, leaving all other matters, including any determination under s.7(3) of the 1974 Act, to be dealt with by the FTT. The issue for us is whether the proposed strike out is justified under Rule 7 of the 2013 Rules, because there is no reasonable prospect of the Respondent being successful in relying upon s.7(3), or because reliance upon s.7(3) in the circumstances of this case would be frivolous, vexatious or otherwise an abuse of the FTT's process. In essence, Mr Bates is contending that the test which the Respondent would need to satisfy under s.7(3) could not reasonably be met. We must bear in mind that this provision would have to be applied by the FTT as the judicial authority having regard to any considerations which appear to it to be relevant, "including any evidence which has been or may thereafter be put before it".

150. In these circumstances, much of the argument before us focused on the correct legal approach which should be taken by the FTT if asked by the Respondent to apply s.7(3). We approach this subject cautiously, given that the evidence before the FTT is not yet complete and that tribunal has not yet given a ruling on the application of s. 7(3). What we say must be read in that context and on the basis of the material now before us.

151. A critical point for a judicial authority applying s.7(3) is to identify the issue (or issues) to which the material or questioning prohibited by s. 4(1) is said to be relevant. Plainly, material or questioning which is irrelevant would be disallowed by a tribunal in any event. But the case law makes it plain that under s. 7(3) the identification of the relevant issues is critical for the application of the test "that justice cannot be done in the case except by admitting or requiring" evidence of the material in question ("the justice test").

152. In some of the authorities the material in question was said to be relevant to an issue which the judicial authority had to determine. In other cases, the prohibited material was irrelevant in that sense, but simply went to the credibility of a rehabilitated person as a witness in the proceedings. This distinction has influenced some of the statements made in the decisions and needs to be borne in mind.

153. In *Dickinson v Yates* (Court of Appeal, unreported, 27 November 1986) the claimant had claimed damages against the police for assault, wrongful arrest, false imprisonment and malicious prosecution arising from an arrest for a suspected drink-driving offence. He was acquitted of charges of assaulting a police officer in the execution of his duty and failing to give a sample under the Road Traffic Act 1972. The police defended the action on the basis that the arrest had been lawful, and any injuries sustained by the claimant had only occurred because of the way in which he had resisted that arrest. In the civil action the defendants sought to rely upon the claimant's previous convictions, which included offences under ss. 20 and 47 of the Offences Against the Person Act 1861 and were spent. It appears from the judgment of Nourse LJ and his reliance upon *Clifford v Clifford* [1961] 1 WLR 1274 at 1276, that the only issue to which the convictions were relevant was the claimant's credibility as a witness in the civil proceedings. There was no suggestion of the convictions being relied upon to establish a propensity to be violent. The trial judge refused to allow any of the convictions to be admitted. The Court of Appeal decided that he had applied the correct test and saw no basis for interfering with his decision.

154. Purchas LJ described s.7(3) as a "safety valve" to prevent an injustice occurring through the application of section 4(1). He stated that the correct approach must be "to see if there is a danger of an injustice being committed as a result of the rigid application of section 4 and unless he [the judicial authority] is satisfied that that is the case, in other words that justice cannot be done without avoiding the provisions of section 4, then the provisions of section 4 ought to stand unaffected by the provisions of section 7" (i.e. s. 7(3)). Purchas LJ also stated that in reaching a conclusion on that matter, regard may be had to the penalty imposed for a spent conviction and the gravity of the offence.

155. On the main point, Nourse LJ agreed that for s.7(3) to apply the court "must be satisfied that justice cannot be done except by letting in evidence of the spent conviction". We have not seen anything in subsequent authorities to justify a departure from that test, founded upon the clear language of the legislation.

156. Sedley J applied that same test in *R v Hastings Magistrates' Court ex parte McSpirit* (1998) 162 J.P. 44 at 47E and 48C when dealing with an undefended judicial review of a refusal by magistrates to grant a liquor licence, after having taken spent convictions into account on the issue of whether the applicant was a fit and proper person. The judge said at p.48A that there would be little point in s.4(1) of the 1974 Act if it were to be open to the justices in such a case simply to say that it was important for them to be aware of anything that may be known to the detriment of the applicant for a licence. The purpose of s.7(3) was not to confer a dispensing power to be exercised by way of a discretion, but to ensure that the prohibition on using material protected by s. 4(1) remains effective, unless the test laid down in *Dickinson* is satisfied.

157. Sedley J applied the same approach in *Adamson v Waveney District Council* [1997] 2 All ER 898, where the magistrates had admitted the applicant's spent convictions when deciding whether he was a fit and proper person to hold a hackney carriage licence. He held that they had erred in law because they had purported to admit a list of spent convictions under s.7(3) without determining at that stage whether they were relevant to any issue they had to determine. Plainly, without deciding whether a particular conviction was relevant and, if so, in what respect(s), the magistrates had not been able to apply the "justice test" laid down in *Dickinson* (pp. 901-903). The judicial authority does not have a discretion in the matter. Instead, it has to reach a judgment in accordance with the terms of s.7(3) (p.903). We agree with those statements. We also note that Sedley J dismissed the taxi driver's appeal because even if the magistrates had applied the correct test, the convictions would undoubtedly have been admitted under s.7(3), given their nature, and the licence would still have been refused (p.905).

158. Both *McSpirit* and *Adamson* were cases where the disputed material was said to go to a substantive issue which had to be determined by the "judicial authority". But the decision of the Court of Appeal in *Thomas v Commissioner of Police of the Metropolis* [1997] QB 813, like *Dickinson*, was instead concerned with the admissibility of spent convictions on the *credibility* of a rehabilitated person as a witness.

159. The claimant in *Thomas* was arrested for threatening behaviour towards two police officers. They said that they had needed to use some force on Mr Thomas when arresting him because he struggled violently. Mr Thomas was acquitted of using threatening behaviour. He

then brought an action in damages against the police for assault, false imprisonment and malicious prosecution. The trial judge ruled that two previous convictions of Mr Thomas were admissible solely on his credibility as a witness, one for unlawful wounding and the other for criminal damage. We note that he had pleaded guilty, they were not offences of dishonesty, and they did not suggest any record of lying on oath ([1997] QB 821F, 823D-F). The trial judge directed the jury that the convictions were only relevant to the issue of Mr Thomas's credit and could not be used to show any propensity on his part to be violent.

160. In the Court of Appeal the claimant argued that the convictions should not have been admitted and applied for a new trial. All members of the Court agreed that the appeal should be dismissed. However, as Warren J pointed out in *Claimant v First Defendant* [2012] EWHC 3214 (Ch), it is not possible to find in the three separate judgments "one voice" on the application of s.7(3) ([22] – [33]). But for present purposes, the important point is that *Dickinson* was referred to in *Thomas*, and there is nothing to suggest that any member of the Court intended to depart from the test stated in the earlier decision.

161. In particular, we reject the Respondent's suggestion that the judgment of Evans LJ allows a more liberal approach to the interpretation of s. 7(3) than that laid down in *Dickinson.* It is plain that he expressly agreed with the decision of Nourse LJ that s.7(3) imposes a statutory test, "the justice test", in addition to that of "materiality" or "relevance" ([1997] QB 830B). He accepted that the 1974 Act had imposed restrictions on the ability under the common law (as explained in *Clifford v Clifford*) to rely upon previous convictions to challenge the credibility of a person's evidence (p.829). At p. 830D-E Evans LJ stated that s.7(3) conferred a broad discretion, but by that he was simply referring to the fact that the judicial authority may take into account all relevant considerations. Although he added that in civil proceedings it is necessary to take into account the interests of the parties and to ensure a fair trial as between them, that cannot be taken as detracting from his immediately preceding statement of the essential legal test, that evidence within the ambit of s.4(1) must be excluded unless the judicial authority is satisfied that justice cannot be done except by admitting it.

162. The real difference between the judgments in *Thomas* lies in the way in which the members of the Court *applied* the justice test to the admissibility of spent convictions going solely to *the credibility of a witness*. That difference is accurately reflected in the headnote. Given the way in which the submissions on the application to strike out in the present case have been made, this is not an issue which we need to resolve, and we will therefore only make some observations on *Thomas* in order to assist the parties and the FTT.

163. The outcome of the appeal in *Thomas* was very much affected by the jury's conclusions on the issues they had to determine. They decided some points in favour of the defence, but others in favour of the claimant where his credibility had been "all important" ([1997] QB 826E-G; 834D; 835B). This was a point upon which the Court of Appeal was unanimous. It undermined the claimant's complaint that the decision to allow the convictions to go in had made a material difference to the outcome of the trial.

164. Evans LJ rejected Mr Thomas's submission that the convictions could only have been admitted under s. 7(3) if probative on an issue of propensity. He held that where convictions are relevant to credit, it must be in the interests of justice to require such evidence to be admitted, unless they are so trivial that no decision-maker could reasonably rely upon them. If convictions are admitted it is a matter for the decision-maker to decide how much weight to give to them on that particular issue (p. 832 B-F). Some degree of relevance to credit is a pre-requisite for admissibility, but it is also necessary to weigh the nature and degree of that relevance against any unfair prejudice to the witness on the issue of whether his evidence should be accepted (p. 833). Evans LJ decided that the trial judge had applied the correct test and his "judgment" on the matter could not be said to have been obviously wrong (p. 833A-B).

165. Sir Richard Scott V-C held that Mr Thomas's spent convictions could not have had any probative value in relation to any issue in the claim. The mere fact that the claimant had appeared in court to be respectable (a matter consistent it might be said with his status as a rehabilitated person) was insufficient to render these particular convictions relevant to his credibility, nor did they shed any relevant light on his character or the likelihood of his giving truthful evidence (pp. 823-825).

166. Saville LJ pointed out that the claimant's argument was self-contradictory ([1997]) QB 834-835). Whereas the claimant had submitted that the convictions should not have been admitted under s.7(3) because they could not have made a material difference to the assessment of his credibility, he had applied for a new trial because there was a real prospect that the convictions had made a material difference to the jury's consideration of the case. Saville LJ said that those two submissions could only be reconciled if the convictions could not have made a material difference, but the jury might wrongly have supposed that they did. That was an impossible submission in view of the directions given by the judge to the jury and the discriminating verdicts they had returned. Saville LJ stated that if the convictions could have made a material difference on credibility then, applying s. 7(3), they should not have been excluded. He added that if he had been sitting as the trial judge he might have decided to exclude them on the grounds that they appeared to have little or no relevance to credibility. However, he was not prepared to hold that the trial judge's assessment had been unreasonable.

167. The differing views of the three judges on the materiality of Mr Thomas's convictions show that where the issue arising under s.7(3) is the credibility of a rehabilitated person as a witness, a tribunal will need to consider very carefully whether the information in question is relevant to, and to what extent it could properly assist in deciding, that issue, so as to be able to determine whether *justice could not be done without allowing that information* to be used on that *particular aspect*. Relevant considerations to be taken into account include the evidential issues in the case on which a person's credibility is relevant, the availability of other evidence on those issues, the nature of his previous offence including its seriousness or triviality (see e.g. [1997] QB at 832G), whether the offence involved dishonesty, whether the person pleaded not guilty or gave evidence at trial and was disbelieved, and the nature and extent of any prejudice to that person through admitting that material [1997] QB at 833).

168. Turning to the present case, the Respondent submits (para. 70 of its skeleton) that the convictions and offences of the First Applicant and her husband (and the sentences passed) are relevant to a key issue in the appeals before the FTT. They are said to meet the test in s.7(3) because they relate directly to the suitability of the Applicants to manage or control premises

which are licensable under Parts 2 or 3 of the 2004 Act, "the fit and proper person test". The conduct underlying the convictions involves the sort of activity which the legislation is designed to avoid in the public interest. The convictions show that this behaviour was recent. The fine of £40,000 imposed on the First Applicant shows how serious her offending was and her husband's conviction arises from the same factual matrix.

169. It is unnecessary for us to say whether we accept these points. That is not our function in dealing with the application before us. Rather we have reached the clear conclusion that these matters are relevant to the justice test in s.7(3) as explained in *Dickinson* and are properly arguable under that provision. We are unable to say that that test could not reasonably be satisfied. None of the tests in rule 9(3) are met. Accordingly, at this stage we should not strike out the matters identified in the Applicants' application which go beyond "conduct". They should be left to the FTT to address in response to any application by the Respondent under s.7(3).

170. In summary, we accept that before the FTT the burden would be on the Respondent to justify reliance upon s.7(3), applying the test set out in that provision and as explained in *Dickinson*. The Respondent would have to define the relevance of the material upon which it seeks to rely in order to satisfy that test, supplying sufficient information for that purpose. Plainly, the Applicants should have a proper opportunity to respond to any such application. Given the issues currently before us, we presently consider that it must be a matter for the FTT to decide at what stage it would determine any application under s.7(3). We do not think it would be appropriate for us now to say that any issue under s.7(3) would have to be dealt with as a preliminary issue. Section 7(3) begins with the words "if *at any stage of the proceedings* before a judicial authority …" (our emphasis). Furthermore, the judicial authority will want to be able to take into account all relevant considerations. Notwithstanding the observations of the Deputy Judge in *YA* at [45] to [48], we do not think it appropriate for us at this stage to go any further into procedural requirements than we have done.

Implications of the Housing and Planning Act 2016

171. Mr Findlay drew our attention to certain provisions of the 2016 Act which allow spent convictions to be taken into account. Part 2 introduced a code for dealing with "rogue landlords" (see s.13).

172. Chapter 2 introduced a code for the making of "banning orders". Section 15(1) enables a local housing authority to apply to the FTT for an order under s. 14(1) banning a person from letting housing, or engaging in letting agency or property management work, in England where that person has committed a "banning order offence" as defined in regulation (s.14(3)). Such offences include contraventions of ss.72, 95 and 238 of the 2004 Act. Within 6 months of a relevant conviction and before making an application under s.15(1), the authority must notify the person of its intention to make such an application and allow him to make representations (s.55(3) to (6)). Thereafter there is no time limit for the making of the application. By s.16 (4) when deciding whether to make a banning order, the FTT must consider (inter alia) the seriousness of the offence for which the person has been convicted, any previous convictions for a banning order offence, and whether he has ever been included in the "rogue landlord" database (see below). A banning order must last at least 12 months (s.17(2)). So it follows that where a

person is sentenced to a fine (and so becomes a rehabilitated person after 12 months) the conviction will become "spent" before the order expires.

173. A person against whom a banning order is made may apply to the FTT under s.20(1) for the order to be revoked or varied. If the order was made on the basis of one or more convictions "that have become spent" the FTT is given a discretionary power to vary or revoke the order (s.20(4)). The tribunal is not *obliged* to take such action because the relevant conviction has become spent. On one view, the 2016 Act assumes that the FTT will have regard to the conviction (and related matters), notwithstanding the fact that it has become spent under the 1974 Act.

174. Chapter 3 of Part 2 of the 2016 Act provides for the establishment of a "rogue landlord" database. By s.30(1) where a person has been convicted of a banning order offence and the offence was committed at a time when he was a residential landlord or a property agent, the local housing authority may include him in the database maintained under s.28. Before making such an entry, the authority must, within 6 months of the relevant conviction, give the person at least 21 days' notice of its intention to make that entry (s.31). An entry must last for at least 2 years (s.31(2)(b)). There is no time limit for making the entry once the notice has been served and there is no requirement that the conviction should not have become spent before the entry is made. The person served may within the notice period appeal to the FTT under s.32 against the decision to make the entry or the length of time for which it is to last. If an appeal is brought the proposed entry cannot be made in the database until the appeal is finally disposed of (s.31(5)). The entry must confirm (inter alia) details of any banning order offences of which the person has been convicted (s.33(2)). A person sentenced to a fine may have become rehabilitated by the time any appeal is determined and yet an entry may be made by reference to a spent conviction. An entry may last beyond the relevant rehabilitation period.

175. A person included in the database under s.30 (not s.29 - see below) may apply to the local authority for removal of his entry from the database or for that entry to be varied (s.36(1)). If the entry was made on the basis of a conviction that has become spent, the authority is given a discretionary power to vary or remove the entry (s.36(4)).

176. Where a banning order is made against a person, the local housing authority *must* make an entry in the database in respect of that person for the duration of the order. Unless a successful application is made under s.20 to revoke a banning order, that entry will subsist beyond the rehabilitation period for an offence punished by the imposition of a fine.

177. We do not consider that the Respondent's analysis of the interaction between the "rogue landlord" code and the 1974 Act assists us to resolve the points of construction and the application to strike out with which we have to deal. The 2016 Act does not address the important distinction between on the one hand a conviction, offence or sentence, and on the other conduct upon which an offence or conviction is based. Furthermore, s.7(1)(d) provides that s.4(1) does not affect "the operation of any enactment by virtue of which, in consequence of any conviction, a person is subject, otherwise than by way of sentence, to any disqualification,

disability, prohibition or other penalty the period of which extends beyond the rehabilitation period applicable in accordance with section 6 above to the conviction."

Human Rights Act 1998

178. The Respondent cited the decision of the High Court in *NT1 v Google llc* [2019] QB 344 which concerned in part a claim relating to publication of spent convictions on the internet. Warby J regarded the right to rehabilitation created by s.4 of the 1974 Act as an aspect of privacy law. He stated that where a conviction becomes spent the right under Article 8 to respect for family and private life might become engaged by any use of or disclosure about the crime, conviction or sentence. But that right may come into conflict with other rights, notably the rights to freedom of information and freedom of expression under Article 10. Accordingly, the judge held that s.4 of the 1974 Act must be read down as expressing a legal policy or principle (166(1)). In that respect, it appears that both the parties and the court had particularly in mind the first protection in s.4(1) of the 1974 Act [17] and [163].

179. The Respondent relied upon the statement by Warby J that, in the context of human rights law, the exceptions to s.4(1) for which Parliament had legislated could not necessarily be treated as exhaustive of the circumstances in which information about a spent conviction might be disclosed [166(1)]. However, the Respondent did not develop that point by identifying and justifying any specific exception for the licensing regime in the 2004 Act.

180. For their part the Applicants did not advance any submissions based upon the Human Rights Act in support of their application to strike out. They were content that their application should stand or fall solely upon the construction of the 1974 Act itself. Accordingly, we have not gained any assistance from *NT1* and the 1998 Act has not affected our construction of the 1974 Act.

Conclusions

181. We summarise our conclusions on the issues between the parties as follows:-

(i) On a proper construction of the 1974 Act the FTT may receive and take into account in its determination of the Applicant's appeal, evidence or submissions dealing with relevant conduct of a rehabilitated person, including conduct which has been treated under the criminal law as an offence and resulted in a conviction which is now spent;

(ii) The correct legal test to be applied to an application by the Respondent to the FTT under s. 7(3) of the 1974 Act to rely upon the convictions, offences or sentences of the Applicants is that laid down in the provision itself, as explained by the Court of Appeal in *Dickinson v Yates* (unreported, 27 November 1986) (see [150] to [157] above). There is no justification for this Tribunal to strike out material falling

within the scope of s. 4(1) which may be the subject of such an application by the Respondent;

(iii) Decisions by a local housing authority under Parts 2 or 3 of the 2004 Act to grant or refuse applications for a licence, or to revoke such a licence, involve "proceedings before a judicial authority" as defined in s.4(6) of the 1974 Act;

(iv) For the reasons we have given the Applicants' application to strike out must be dismissed.

The Hon. Sir David Holgate Judge Siobhan McGrath

5 November 2019