UPPER TRIBUNAL (LANDS CHAMBER)

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UTLC Case Number: LC-2021-223

HOUSING ACT 2004 – CIVIL PENALTY ORDER – burden and standard of proof – whether reliable and fair to determine facts to the criminal standard of proof without a hearing – level of penalty – inadequacy of reasons - appeal allowed in part (as to the appropriate level of penalty)

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

BETWEEN:

AFTAB RAJA

Appellant

-and-

SALFORD CITY COUNCIL

Respondent

Re: 29A Church Street,
Eccles, Greater Manchester M30 0BJ

His Honour Judge David Hodge QC
20 October 2021
Determination on written representations

The following cases are referred to in this decision:

Raza v Bradford Metropolitan District Council [2021] UKUT 39 (LC)
Sutton v Norwich City Council [2021] EWCA Civ 20, [2021] 1 WLR 1691

Introduction

1. This is an appeal by Mr Aftab Raja, the intermediate leasehold owner of 29A Church Street, Eccles, Greater Manchester, represented by AG Solicitors Limited, by which he seeks to challenge a determination of the First-tier Tribunal ('the FTT') dated 1 March 2021 confirming a financial penalty of £22,500 imposed upon him on 17 June 2019 by the local housing authority, Salford City Council ('the Council'), under the Housing Act 2004 ('the 2004 Act') s. 249A, arising out of Mr Raja's failure to apply for a licence to which Part 3 of the 2004 Act applies because it is in an area designated under s. 80 as subject to selective licensing.

The proceedings before the FTT and its Decision

2. According to the FTT's decision, in his application dated 3 July 2019 Mr Raja had indicated that he would be content with a paper determination. The FTT gave directions on 19 August. At that time Mr Raja was represented by Ms Tahira Jan; but on 18 September 2019 she informed the FTT by email that she was no longer acting as his representative. In November 2019 the FTT sent a letter to Mr Raja with a copy of its directions; and the FTT were also informed that the Council had sent a copy of their hearing bundle to Mr Raja. In December 2019 the FTT received an email informing it that Mr Raja was out of the country. At that time, despite her previous email, Ms Jan informed the FTT that all of Mr Raja's evidence was with his application. On 26 June 2020 the Council emailed the FTT to ask for an update on the progress of the case and a paper determination was arranged, which took place on 5 February 2021. This resulted in the FTT's determination confirming the financial penalty.

3. In their Decision the FTT correctly set out the applicable law and the governing procedural requirements; and they referred to the guidance relating to the imposition of financial penalties issued at both national and local levels. The FTT cited a number of decisions of the Tribunal which establish the questions to be addressed when considering an appeal against a financial penalty; and the FTT correctly analysed these decisions and their effect. They also noted the Court of Appeal's endorsement of the Tribunal's approach in their recent decision in *Sutton v Norwich City Council* [2021] EWCA Civ 20, [2021] 1 WLR 1691.

4. At [28]-[36] the FTT set out the facts, which they took from the Council's submission "as Mr Raja has not questioned them". At [37] the FTT noted that in his application Mr Raja had essentially made three points, as follows: (1) He had not received letters from the Council requiring him to have a licence; when letters were receive, he was out of the country. (2) There was no tenant in the property. (3) Mr Raja was in receipt of benefits and he could not afford the penalty. The FTT noted that Mr Raja "has not provided any evidence to support these claims". At [38]-[40] the FTT said this:

> "We have set out the facts above. The Council in their Final Notice dealt with the fact that Mr Raja had not received the notifications. They were satisfied he had received notification on numerous occasions that he required a licence.
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> The evidence from the Council's Council Tax records showed that the property was continuously let from 8 March 2016 until the tenant vacated following the Emergency Prohibition Order on 29 November 2018.
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> The terms of Mr. Raja's means in particular as to his income, no representations were received from him to the Council."

5. The FTT set out the basis of their decision at [41]-[44] as follows:

> "We agree with the Council that Mr Raja had many opportunities to apply for a licence. As a landlord it was his responsibility to be aware whether a selective licensing scheme was in operation. Landlords if they [are] away for periods of time must arrange for suitable management for the property.
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> There is clear evidence that the tenant was living in the property at the relevant time.
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> Given the failure of Mr Raja to provide any evidence it is difficult for us to judge his income. He asserts he is on benefits. We note, he did not raise the issue with the Council. In our view there is not sufficient evidence for his appeal to succeed on this ground.
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> We are aware that we must make our own determination as to the appropriate amount of the financial penalty having regard to all the available evidence. In the light of the evidence before us, particularly the need for an improvement notice and the landlord leading for the Emergency Prohibition Order, we confirm the Final Notice."

Permission to appeal

6. Mr Raja applied to the FTT for permission to appeal their decision on grounds which he summarised as follows:

> "(1) Mr Raja did not receive the Council's initial letters as he was not living at the address. When Mr Raja was later notified of the correspondence, he did not understand why he was being invited to apply for a licence.
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> (2) Mr Raja did not enter into any agreement with the alleged tenant, neither was he operating the business. The entire premises were being let to Mr Waqas Ayub of AKII'S Krispy Fried Chicken & Shake House Ltd.
>
> (3) Mr Raja did not have adequate representation; he was not offered any representation and no checks were carried out to ensure that he understood.
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> (4) The financial penalty imposed is grossly excessive and unfair, and the FTT failed to consider the factors raised within this statement when ruling in favour of the Council's consideration in determining the financial penalty.

7. On 7 April 2021 the FTT determined that it would not review its decision, and it refused permission to appeal. The FTT stated that it had considered, and taken into account, all of the points now raised by Mr Raja in reaching its original decision. That decision was said to be based on the evidence before it; and Mr Raja had raised no legal arguments in support of his request for permission to appeal. For the benefit of the parties and of the Tribunal, the FTT provided the following comments on the specific points raised by the request for permission to appeal:

> (1) No evidence was provided to either the Council or the FTT as to Mr Raja not living at the address for correspondence at the relevant time, from January to April 2018.

(2) The evidence on sub-letting of the premises to Mr Waqas Ayub was raised for the first time on seeking permission to appeal; this was not before the Council or the FTT.

(3) It was for Mr Raja to seek representation and not for the Council or the FTT to ensure that he received it. Mr Raja was represented by Ms Tahira Jan at the beginning of the application to the FTT: see [5] of the decision.

(4) The FTT pointed to [44] of its decision which was said to justify the decision.

8. Mr Raja renewed his application for permission to appeal the FTT's decision to the Tribunal, relying on the grounds previously submitted in his application to the FTT, along with additional points addressing the decision of the FTT to refuse permission to appeal.

9. In response to a letter from the Tribunal notifying the Council that an application for permission to appeal had been submitted, and inviting written representations in response to that application, by email dated 7 July 2021 the Council confirmed that it was of the view that it was neither necessary nor desirable for a hearing to be held to determine the application. The Council stated that it relied upon its submissions and evidence produced to the FTT, in accordance with the directions issued.

10. On 3 August 2021 the Tribunal (Judge Elizabeth Cooke) gave permission to appeal and issued procedural directions for the conduct of the appeal, including a direction for the appeal to be a review of the decision of the FTT, to be conducted under the Tribunal's written representations procedure. Her reasons were as follows:

> "The applicant was represented when he submitted his appeal to the FTT but ceased to be represented nearly five months before it made its decision. He indicated in his application that he would be content with a paper determination. The Tribunal has explained the risks involved in making a paper determination in a matter of this kind which requires the FTT to make a finding that the person concerned has committed an offence, and to do so on the basis of the criminal standard of proof (see ***Raza v Bradford Metropolitan District Council*** [2021] UKUT 39 (LC)), even in cases where a party has agreed to this procedure. Yet the FTT decided to make a paper determination; it also decided to accept an assurance from the applicant's former representative, some three months after she ceased to represent him, that he had no further evidence to give. It is arguable that therefore its procedure was unfair because it was not able to take relevant matters into account which an unrepresented litigant might have explained at a hearing.
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> The applicant also challenges the level of the penalty imposed. It is arguable that the FTT either failed to make its own decision as to the level of the penalty, or failed to explain the decision it made, since it did not provide reasoning to support the amount of the penalty (despite being aware that it must make its own decision on this rather than simply reviewing the local authority's decision)."

11. Pursuant to the Tribunal's procedural directions, by email dated 9 September 2021 the Council confirmed, after taking counsel's advice, that it did not wish to respond to the appeal.

Raza v Bradford Metropolitan District Council [2021] UKUT 39 (LC))

12. This was a decision on three appeals brought by landlords from separate decisions of the FTT following a determination on the papers, without a hearing. What the three appeals all had in common was that in order to make each decision, the FTT had to be satisfied to the criminal standard of proof that an offence had been committed; in each case, permission to appeal had been granted on the ground that the FTT's procedure was unfair because it made that finding without a hearing when matters of fact were in dispute. In its decision, the Tribunal explained the legal background to the appeals, gave some brief factual background to each appeal and the proceedings in the FTT, and then discussed the grounds of appeal. At [12] and [13] the Tribunal explained that financial penalties were imposed by the local authority and there was an appeal to the FTT, which was required to conduct a re-hearing. The FTT could not confirm a financial penalty unless it was satisfied beyond reasonable doubt that the relevant offence had been committed. Proof 'beyond reasonable doubt' was the criminal standard of proof, in contrast to the civil standard where the court or tribunal must only be satisfied on the balance of probabilities.

13. At [38] the Tribunal emphasised that the FTT "is responsible for the fairness of its procedure. Litigants may well consent to a procedure without understanding the implications of doing so, and it may be unfair to hold them to that agreement." The Tribunal cited from an earlier decision of the Deputy President adverting to the perils of determining disputed issues of fact on the basis of written material provided by unrepresented parties, without either the parties or the FTT having the opportunity to supplement that material by asking and answering questions at an oral hearing. Even where the parties had indicated that a paper determination was acceptable, it was nevertheless for the FTT to consider whether that was an appropriate procedure. It could not safely be assumed by the FTT that an unrepresented party would necessarily appreciate the material which ought to be provided, even in a simple case. At [42]-43] the Tribunal said this:

> "The difficulty with the procedure adopted by the FTT in these three cases was that these landlords were at risk of being found to have committed a criminal offence, there were factual issues in dispute, and the FTT made findings of fact on the basis of evidence that had not been tested in cross-examination. That made the procedure unreliable. It was also unfair because it resulted in a finding that a criminal offence had been committed without giving the landlord the opportunity to cross-examine the witnesses who gave evidence against him or to respond, under cross-examination, to the case against him.
>
> There might perhaps be cases where written evidence about disputed facts was sufficiently clear and consistent for a tribunal to make findings of fact on the balance of probabilities. But it is difficult to imagine cases where the FTT could be so sure of contested facts, on the basis of written evidence only, that it could find them proved to the criminal standard, beyond reasonable doubt. And even if the FTT could be sure, it would nevertheless be unfair, for the reasons explained, in a case where the party concerned was at risk of being found to have committed a criminal offence."

14. At [46] the Tribunal indicated that it had had some hesitation in one of the cases (that of Mr Rendell) since he had not made a witness statement to the FTT. It was not clear, from the FTT's very brief account, how much information it had received from the managing agents. If there had been a hearing where he had been represented, it would not thereafter have been open to Mr Rendell to put forward new material. But had there been a hearing, attended only by a representative of the managing agents, the Tribunal pointed out that the FTT would have had the opportunity to ask questions; it might well have realised that the defence of reasonable excuse might be available; and it could have given directions for more evidence to be filed (in fairness to unrepresented parties). It would surely have asked questions to satisfy itself about the occupation of the house during the period in question; it had made no findings about that, and it did not appear that the point had been addressed in the material before the FTT. Overall, the procedure had not been reliable, and it had not been fair to Mr Rendell.

Earlier, at [45], the Tribunal had rejected the argument of the respondent council that the outcome would have been no different had there been a hearing. That could not be known; it simply amounted to an assumption that the FTT's conclusion on the paper determination was correct. If the matter were remitted to the FTT, and the same conclusion was eventually reached following an oral hearing, that would not mean that the appeal should have failed; rather, it would mean that a result had been reached following a reliable and fair process.

15. All three appeals succeeded. Each case was remitted to the FTT to be determined following a re-hearing (whether in person or by remote video platform); and each re-hearing was to be conducted by a different panel from that which had made the paper determination. For the avoidance of doubt, the Tribunal pointed out that the decisions were set aside in their entirety, so that if the new panel were to decide that the offence had been committed, it was to make its own decision about the appropriate level of penalty (or rent repayment order).

16. Nothing in this Decision is intended to cast any doubt upon the decision in ***Raza***, or the principles stated therein as to the need for an adjudicative process that is both reliable and fair. But the reliability and fairness of the adjudicative process in each case must turn on the particular facts and issues raised by that particular case. And the Tribunal must beware of imposing an unduly inquisitorial role upon the FTT, even in cases where an appellant is unrepresented. For the principles in ***Raza*** to be engaged, and to apply, there must be a sufficient evidential basis for the identification of a dispute of relevant fact, bearing in mind the requirement for the FTT to be satisfied, to the criminal standard of proof, that an offence has been committed.

Mr Raja's appeal

17. Mr Raja's first two grounds of appeal are linked. The Council states that they sent letters to Mr. Raja's address inviting him to put forward an application for selective licensing. Initial letters, and subsequent warning letters, were sent to Mr Raja within a relatively short time scale: between 12 January and 26 February 2018, and then subsequently escalating the matter to a request for an interview on 12 March 2018. This time scale is said to have been insufficient for Mr Raja to respond to the Council, especially when taking into consideration the fact that Mr Raja says that he was not living at the address the correspondence was being sent to so that he was unaware of the fact that the Council was seeking to invite him to put forward an application for a licence. During this time period, and throughout this process, Mr Raja had been going through a difficult time, and he had separated from his wife and children. As such, he was unable to receive notification of the initial correspondence being sent to him. Furthermore, it was a condition of his bail that he was not allowed to go near his home. When Mr Raja became aware of the Council's position, he contacted them straight away, asserting that he was unaware as to why a licence was required. Mr Raja was confused as to why he was being required to enter into a licence when he was not operating the business and was otherwise pre-occupied with the ongoing personal situation with his family. He later travelled abroad for some time as a result of the circumstances taking place in his personal life and so he was not aware of further letters being sent to him until his return to the UK.

18. Furthermore, the entire premises were sublet to Mr Waqas Ayub, and they had entered into an agreement dated 1 April 2018. The company operating and managing the premises at the time was one whose director was Mr Ayub. It is Mr Raja's case that the FTT did not adequately consider the impact of the fact that he was not living at the address where the initial correspondence was being sent, so that he did not have any knowledge of the letters, nor was he liable for the premises. As the leaseholder, Mr Ayub was responsible for complying with all statutory requirements under the lease. Mr Raja is said to have had as much liability as the landlord under his own lease agreement, but the Council had not sought to invite Mr Raja's own landlord to apply for any licence. Nor had the Council

sought to invite Mr Ayub or his company to apply for a licence. It was the company which had operated the flat in the alleged manner without Mr. Raja's notice. It was Mr Ayub and the company who were in possession of the property at the time the alleged failures had taken place, and as such it was they who were responsible for any utilities being turned off.

19. The first difficulty facing Mr Raja, as the FTT pointed out, is that he had failed to provide any evidence that he was not living at the correspondence address at the relevant time, which was from January to April 2018. As noted at [31] of the FTT's decision, Mr Raja had responded by email to the Council on 9 April 2018; but this email had merely stated that he had no business at the property and therefore did not need a licence. As also noted by the FTT when refusing permission to appeal, the subletting of the premises was only raised for the first time when Mr Raja had sought permission to appeal. There is force in the FTT's observations that: (1) it was Mr Raja's responsibility, as a landlord of residential property, to be aware whether a selective licensing scheme was in operation; and (2) if they were away for any period of time, landlords must arrange for suitable management for their tenanted property. In any event, the letting of the premises was dated 1 April 2018 and so post-dated the bulk of the relevant correspondence. The grant of pre-charge conditional bail had taken place on 24 October 2018 and so post-dated the relevant period. Further, at the time that Mr Raja appealed to the FTT, indicating that he would be content with a paper determination, he had been represented by Ms Jan. Although she had ceased to be Mr Raja's representative in September 2018, it was a reasonable inference that she must have been authorised by Mr Raja to inform the FTT that all his evidence had been sent with his application when she responded to the FTT's letter in November which had provided Mr Raja with a copy of their directions. The Tribunal also notes that Mr Raja no longer contends that there was no tenant in the property. In these circumstances, the Tribunal does not consider that the FTT's procedure was in any way unfair on the basis that it had not been able to take relevant matters into account which an unrepresented litigant might have explained at a hearing. None of the matters now sought to be raised by Mr Raja have any merit; and, in any event, it is he who was responsible for failing to raise them with the FTT. This is not a case, like ***Raza***, where there was any sufficient evidential basis before the FTT which should have led it to identify any dispute of relevant fact; nor is it a case of a wholly unrepresented appellant in relation to whom any duty of appropriate inquiry properly might have arisen.

20. The third ground of appeal is that Mr Raja did not have any adequate representation, nor was he advised or offered any representation. Mr Raja is said not to be fluent in English, and at no point had the Council sought to contact Mr Raja to see if he had understood the correspondence being sent to him, or had offered him any translation services. The FTT adequately responded to this ground of appeal when refusing Mr Raja's application for permission to appeal: It was for Mr Raja to seek representation, and not for the Council or the FTT to ensure that he had received it. In any event, as noted at [5] of the decision, Mr Raja was represented by Ms Jan at the outset of the application to the FTT. Nor was there any suggestion in correspondence that Mr Raja had not understood the correspondence being sent to him, as distinct from the need for a licence. This ground of appeal is therefore manifestly ill-founded.

21. The fourth (and final) ground of appeal is that the financial penalty imposed upon Mr Raja is grossly excessive and unfair. It is contended that the FTT failed to consider all of the relevant factors to be taken into account when determining the financial penalty, as follows: (1) **The capability and track record of the offender**: Mr Raja had sublet the premises and, as such, he was not operating the business and was not aware of any obligation to obtain a licence. Therefore the Council should not have considered these matters when addressing the level of financial penalty to be imposed. As so formulated, this criticism is ill-founded because the letting to the residential tenant pre-dated the grant of any tenancy to Mr Ayub; and, in any event, the subletting of the premises was only raised for the first time when Mr Raja had sought permission to appeal so this was not a consideration that could have been present to the mind of the Council, or the FTT, when considering the level of penalty. (2)

The harm (if any) caused to the tenant of the premises: There was no physical injury caused to the tenant, neither was there any harm for the purposes of the statutory guidance. In any event, Mr Raja had not entered into any lease agreement with the tenant and so the Council should not have considered this factor when addressing the level of financial penalty to be imposed. I have already addressed the point about the identity of the grantor of the tenancy. There may have been no physical harm to the tenant, but the supply of electricity and water to the premises was interrupted; and the tenant had to be supported to find alternative accommodation. (3) **The need to punish the offender, to deter repetition of the offence, or to deter others from committing similar offences**: Whilst Mr Raja understands the need to deter offenders from committing such an offence, it is also his position that he should not be facing a grossly excessive fine in order to enable the Council to further its aims of deterrence. It is unfair for Mr Raja to be put in such a situation. Therefore the Council should not have considered this when determining the level of any financial penalty imposed. The difficulty facing Mr Raja is that these are expressed to be relevant considerations for the purposes of the statutory guidelines. (4) **The need to remove any financial benefit the offender may have obtained as a result of committing the offence**. It is said that Mr Raja had not gained any financial benefit as a result of the offence. An offender's financial situation should be considered when imposing any financial penalty. The Council had not sought to identify Mr. Raja's financial situation. He was not requested to highlight his ability to pay any financial penalty. It is said that Mr Raja was on benefits at the time. He has produced accounts that showing that his net income as a taxi driver for the year ending 2 November 2017 was £7,515; for the period 3 November 2017 to 31 August 2018 it was £6,260; and it was £6,030 for the year ended 5 April 2020. The Tribunal notes that Mr Raja has produced no records of any other sources of income (such as any property income) or any evidence of the receipt of statutory benefits.

22. The FTT acknowledged (at [44]) that it "must make our own determination as to the appropriate amount of the financial penalty having regard to all the available evidence". However, the FTT then went on to say no more than: "In the light of the evidence before us, particularly the need for an improvement notice and the landlord leading for the Emergency Prohibition Order, we confirm the Final Notice." When Mr Raja sought to appeal on the grounds that the penalty imposed upon him was grossly excessive, the FTT did no more than point to this paragraph as justifying its decision. The FTT's decision contains no statement of how the Council had calculated the financial penalty it had imposed of £22,500. There is no indication of how that penalty was assessed: of how the Council had assessed the levels of culpability and harm so as to arrive at any penalty score, of the band of penalties appropriate to the resulting penalty score, or of how any personal mitigating or aggravating features were identified and factored into the Council's calculation. There was no reasoned or articulated calculation by the FTT. There is no indication that the FTT had made their own determination of the appropriate amount of the financial penalty to be imposed on Mr Raja or of how "the evidence" had factored into the Council's figure of £22,500, which the FTT proceeded to endorse.

23. I am afraid that it is simply not possible to discern, from the terms of the FTT's Decision, whether the FTT failed to make its own decision as to the level of the penalty. If it did make its own decision, then it failed adequately to explain the basis and reasons for the decision which it made since it did not provide any reasoning to support the amount of the penalty (despite being aware that it must make its own decision about this rather than simply reviewing the Council's decision).

24. On this single ground of appeal, concerning the level of the penalty imposed, the appeal must be allowed to the extent only of setting aside the FTT's decision to confirm the level of the financial penalty imposed by the Council but not to revisit its decision that the relevant offence had been committed. I would remit the decision as to the appropriate level of penalty to the FTT to be determined following a re-hearing (whether in person or by remote video platform). Since there is no challenge to the FTT's recital of the applicable law or procedure. I see no reason or need for any

direction that the re-hearing is to be conducted by a different panel from that which made the paper determination. It will be for the appropriate listing officer to determine the constitution of the FTT which is to redetermine the appropriate level of penalty. For the avoidance of doubt, the decision is not set aside in its entirety, but only to the extent that the new panel is to make its own decision about the appropriate level of penalty.

David R. Hodge

His Honour Judge David Hodge QC

Dated: 20 October 2021