Neutral Citation Number: [2024] EWCA Civ 1037

Case No: CA-2023-002486

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL (LANDS CHAMBER)
Upper Tribunal Judge Cooke
[2023] UKUT 263 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/09/2024

Before :

LORD JUSTICE PETER JACKSON
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE BIRSS

- -

Between :

City of Bradford Metropolitan District Council	**Appellant**
- and -	
Hasan Kazi	**Respondent**

- -
- -

Riccardo Calzavara and **Jeremy Ogilvie Harris** (instructed by **City of Bradford Metropolitan District Council**) for the **Appellant**
The **Respondent** represented himself

Hearing dates: 24 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 10 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Birss:

1. This case concerns civil penalties under s249A of the Housing Act 2004 imposed by City of Bradford Metropolitan District Council against Mr Kazi, a local landlord. The relevant property is at 2 Laisteridge Lane, Bradford BD7 1RD. The case comes to this court as an appeal by Bradford Council from the decision of Upper Tribunal Judge Elizabeth Cooke sitting in the Upper Tribunal (Lands Chamber) in a judgment dated 30 October 2023. The Upper Tribunal had allowed an appeal by Mr Kazi against the decision of the First-Tier Tribunal (Property Chamber) dated 19 January 2023.

Background

2. Mr Kazi is an experienced landlord in Bradford. He owns a large number of properties one of which is 2 Laisteridge Lane. The property is a large four-storey house converted (without planning permission) into 8 self-contained flats. It is a house in multiple occupation (HMO) because the flat conversion did not comply with building regulations.

3. Mr Kazi has housed there a number of tenants in difficult circumstances, and, for example, received a letter from the Council's housing department in September 2020 thanking him for housing a homeless person in one of the flats.

4. In June 2021 after a complaint from a tenant, one of the Council's environmental health officers inspected the property and served 8 improvement notices on Mr Kazi, specifying a number of category 1 and category 2 hazards. Among the requirements were the installation of a proper heating system and a new kitchen in each of two flats. There were also requirements for work to be done on the common parts, including new entrance doors to address fire hazards, and repair or replacement of the locking system in the main entrance door.

5. A visit in October 2021 showed that, while some of the work had been done and the two notices relating to flats 1 and 4 had been partially complied with, new kitchens and heating systems had not been installed. In December 2021 the Council issued three notices of its intention to issue a financial penalty.

6. A penalty of £14,250 was imposed for each of two offences of failing, contrary to s30 of the Housing Act 2004, to comply with improvement notices served on Mr Kazi in relation to Flat 1 and Flat 4 of the property respectively. A third civil penalty was imposed for the offence of failing to comply with regulations relating to HMOs, contrary to s234 of the 2004 Act. That was £18,790.31. These penalties were determined by the Council pursuant to its Private Sector Housing Enforcement Policy and in particular Appendix 1 relating to penalties. I will refer to this as the "Policy".

7. Mr Kazi appealed to the FTT. Both sides were represented at the hearing.

8. It its decision the FTT was satisfied beyond reasonable doubt that Mr Kazi had committed the offences contrary to s30 and s234. The decision then addressed the penalties. A matrix of harm and culpability forms part of the Council's Policy. The FTT identified the culpability aspect as high, on the basis of Mr Kazi's history of non-compliance and the fact he is an experienced landlord. The risk of harm was identified as medium. Putting these together gave a starting point for each offence of £15,000.

No aggravating factors were identified. In relation to the flats (the s30 offences) a single mitigating factor was found, namely that Mr Kazi had cooperated with the investigation and had carried out some of the works required, albeit leaving important aspects undone (such as replacing the kitchens). That led to a 5% discount, bringing the amount to £14,250.

9. The HMO penalty had the same starting point in the matrix of harm and culpability and the same absence of any aggravating factors. The same mitigating factor identified above also applied to the HMO, but in addition a further mitigating factor was identified in that some of the poor conditions found within the flats were caused by the tenants. Two 5% discounts, one for each of the two mitigating factors, were applied bringing the amount to £13,500.

10. At this stage a further aspect of the Council's policy called the "final determinant" was taken into account. This aspect compares the sum determined in the manner described with the cost of carrying out the works identified, with some adjustments. If the adjusted cost figure is higher than the sum, then the adjusted cost figure is the amount which is taken as the penalty, subject to an overall cap of £30,000. In the case of the HMO the adjusted cost was determined to be £18,790.31 and so that amount was imposed as the penalty for the s234 offence. This "final determinant" approach is ostensibly concerned with removing a financial benefit for non-compliance.

11. The overall result was that the FTT had arrived at the same penalties as had been imposed by the Council.

12. On Mr Kazi's appeal to the Upper Tribunal, the Council did not appear. We asked the Council's counsel, who was not instructed at the time, if there was a reason why that happened. There was no good reason for the non-attendance. The result was the judge was not assisted with adversarial argument on the meaning and effect of its policy. I believe that may explain what happened. In this judgment paragraphs in the UT judgment will be given square brackets but references to paragraphs of other documents will not be indicated in this way.

13. The judge observed that she did not know what a particular sentence in the Council's Policy meant ([43]), and held that the relevant part meant that for each aggravating or mitigating factor the penalty would be adjusted by 5% and by no other amount ([44]), and that this rigid approach to the adjustment amount fettered the Council's discretion and had no purpose. The judge also decided that the "final determinant" aspect was irrational and also unlawfully fettered the Council's discretion ([57]).

14. The judge decided to re-make the decision. There was no challenge to the £15,000 starting point. In relation to each s30 offence a discount of 25% was allowed for the same mitigating features as had been recognised before (cooperation and some work done). A further 20% discount was applied for the s30 offences for the role of the tenants in either causing the disrepair or making it difficult to do the work. No issue relating to the final determinant arose and so the penalty for the two s30 offences was £8,250 each. For the HMO offence it was difficult to assess the level of discount for the mitigation relating to what work had been done, and there may or may not have been an element of double counting with the other two penalties since some of the work required may or may not have been the same work. The judge decided that £10,000 would be the appropriate penalty.

15. The Council were granted permission to appeal by Falk LJ on three grounds. The first is that the UT erred by allowing challenges to the Council's Policy *per se*, in the context of an appeal against financial penalties imposed by the Council. The second is that the UT erred in construing the Council's Policy as containing an absolute limit on the amount by which a penalty may be reduced in respect of mitigating features so as arguably to fetter its discretion. The third is that the judge erred in reducing the penalties imposed by the Council to account for the tenant's contribution to the state of the property in the light of the facts as found by the FTT and, so far as relevant, herself.

16. In this court the Council appeared, represented by counsel. Mr Kazi represented himself, with the assistance of a McKenzie friend who did not take part in the proceedings.

17. At the outset of the appeal counsel explained that the Council did not seek to appeal on the "final determinant" aspect of the judge's decision. We do not need to consider that further. Counsel also reiterated that the Council no longer pressed the third ground of the appeal. The effect of dropping that ground was clarified in a brief written exchange after the hearing. I will come back to that below.

Legislation

18. The starting point is the Housing Act 2004. Section 2 of the 2004 Act defines category 1 and 2 hazards in the context of the condition of any dwelling or HMO. Section 5 provides at s5(1) that if a local housing authority considers that a category 1 hazard exists they must take appropriate enforcement action in relation to that hazard. An improvement notice is one of the specified kinds of appropriate enforcement action in s5(2). Section 7 provides that a local housing authority may take the same steps in relation to category 2 hazards. Thus, as counsel submitted, there is a duty to act under section 5 and a power to do so under section 7.

19. By s249A of the Act a local housing authority may impose a financial penalty on a person if satisfied beyond reasonable doubt the person's conduct amounts to a relevant housing offence. That includes offences under s30 and s234. By s249A(4) the Act provides that the amount of a financial penalty imposed under this section "is to be determined by the local housing authority". There is also a £30,000 limit but, as counsel submitted, aside from that this section is widely drafted in the way it leaves the amount of the penalty to the local authority.

20. Paragraph 5 of Schedule 13A of the Act, concerning Financial Penalties under s249A, provides that the local authority makes the decision to impose a penalty and its amount. Moreover Paragraph 10 provides for an appeal to the FTT against either or both of the decision to impose the penalty or the amount of the penalty. By paragraph 10(3)(a) such an appeal is to be a re-hearing of the local housing authority's decision, and on appeal, the FTT may confirm, cancel or vary the notice (paragraph 10(4)). Counsel submitted that this scheme allows the FTT in effect to step into the local housing authority's shoes, the point being that this is not a scheme for appealing the local housing authority's housing policy, rather it is a scheme for appealing a penalty made by that authority. I agree and I note that the same point was made at paragraph 53 of *Marshall v Waltham Forest LBC* [2020] UKUT 35 (LC). *Marshall* was also a decision of UT Judge Cooke.

The grounds of appeal

21. It is convenient to start with the interpretation of the Council's Policy, i.e. the second ground of appeal. This will illuminate the UT's criticisms of the Policy in relation to mitigating and aggravating factors. In this court the skeleton argument filed by Mr Kazi supported the criticisms, arguing the Policy was incomprehensible.

22. The relevant passage of the UT's decision begins at [40]. The judge starts by identifying one of the issues to address as being how the Council and the FTT had assessed as potential mitigation the fact that some of the problems were caused by the tenants. At [42] the decision notes that the FTT allowed this mitigation in relation to the common parts (i.e. for the HMO offence) but not for the two s30 offences.

23. Although I have mentioned some of these paragraphs above, it is worth setting out [43] to [47] of the UT decision, as follows:

> 43 The FTT, as we saw above, did allow a 5% reduction in the penalty for the breach of the HMO regulations because it accepted that some aspects of the condition of the property were within the control of the tenants, in particular its cleanliness. In doing so the FTT followed the respondent's enforcement policy which states (at its page 33):
>
> > "For each aggravating or mitigating factor which applies to each specific case the level of fine [will] normally be adjusted by 5% of the initial fine… The only exception to this principle will normally be for the number of items of non-compliance which will be 5% for the first 5 items and 10% for any number of items greater than this level of non-compliance with items on any notice which has not been complied with."
>
> 44. I do not know what that last sentence means. But it appears to be the respondent's policy that each aggravating or mitigating factor will adjust the penalty by 5% and by no other amount. [*Mr Kazi's representative's*] third argument under this ground of appeal is that is an artificial limit.
>
> 45. I agree. The policy fetters the respondent's discretion and I fail to see any purpose in it. The FTT in adopting that aspect of the policy fettered its own discretion.
>
> 46. The FTT adopted that policy not only in respect of the mitigation arising from the tenants' contribution to the HMO offences, but also in respect of the mitigation allowed because of the fact that Mr Kazi had done some of the work required. Again, it fettered its discretion and the FTT should not have adopted this policy.
>
> 47. I take the view that the FTT exceeded the generous bounds of its discretion by failing to allow mitigation in respect of all

> three offences on the basis of the tenants' contribution to the state of the property, and in adhering to the respondent's inexplicable 5% limit upon the effect of mitigation.

24. Here the Policy is found to fetter the discretion by only permitting adjustments for aggravating or mitigating factors of 5% and no other amount. The decision also holds that the FTT erred in following this Policy both in general ([45]) and in respect of two items of mitigation the FTT identified ([46]). There was said to be an inexplicable limit of 5% on the effect of mitigation ([47]).

25. Reading the passage in the judgment as a whole it may be that the apparently puzzling sentence cited at [43] was thought to have a bearing on the issue of a fetter. It is possible that the Council's inexplicable non-attendance and the manner in which the quoted passage from the policy is laid out in the quotation above might have contributed to the difficulty.

26. In his oral submissions Counsel took this court through the Policy, highlighting aspects which were said to show that it does not act as a fetter on the discretion at all. The policy starts, at p4, setting out four aims of the policy as follows:

> "The aim of this policy is to secure effective compliance with legislation while minimising the burden to the Council, individuals, organisations and businesses.
>
> The policy is explained in general terms, as it is intended to be applied in a wide range of situations, the approach adopted by the Private Sector Housing Service when carrying out the Council's powers to enforce a wide range of legislation.
>
> The policy is based on the following principles: -
>
> * **Consistency**: to ensure that similar issues are dealt with in the same way
>
> * **Fairness**: to ensure a fair and even handed approach
>
> * **Transparency**: to ensure that the enforcement action taken by the Council is easily understood by individuals, organisations and businesses
>
> * **Objectivity**: all enforcement decisions will be fair, independent and objective."

27. Then at paragraph 1.9 the Policy recognises that any policy is unlikely to take account of every situation, that each case needs to be considered on its merits and that the Policy was to operate as a guide to Council officers. A set of possible enforcement options is set out at paragraph 2.0, the range including no action, civil penalties, prosecution and emergency measures.

28. The guidance on civil penalties, as an alternative to prosecution, is in Appendix 1 to the main Policy document. On its first page (p26 overall) there is a summary of the statutory guidance as to the process and criteria that need to be followed, including

culpability, harm, and aggravating and mitigating factors. The summary also makes the point that the penalty must be fair and reasonable. At p30-31 factors characteristic of different levels of culpability are set out, including, in relation to high culpability, a history of non-compliance and an experienced landlord.

29. The culpability/harm matrix table is at p32, with £15,000 for high culpability with medium harm. The rubric above the table expressly makes the point that the amounts stated are those which would "normally" be imposed. The table also has a minimum fine level, ranging from £6,000 for high culpability cases to £2,000 for low culpability.

30. Next is a list of aggravating and mitigating factors, introduced with a sentence expressly making the point that the list is not exhaustive and that other factors may be considered depending on the circumstances of each case. Nine aggravating factors are listed, such as previous convictions, obstruction of the investigation and a lack of a tenancy agreement. The list includes the following passage at the 5th bullet: "Number of items of non-compliance – greater the number the greater the potential aggravating factor". There is then a bullet point list of nine mitigating factors, including cooperation, health preventing reasonable compliance, and good character.

31. Immediately after the lists of aggravating and mitigating factors appear two distinct paragraphs (put together in the quoted passage as it appears in the UT at [43]). They are:

> For each aggravating or mitigating factor which applies to each specific case the level of fine normally be adjusted by 5% of the initial fine, up to the maximum £30k or to the minimum fine for each determined level of culpability and harm as shown in the table above.
>
> The only exception to this principle will normally be for the number of items of non-compliance which will be 5% for the first 5 items and 10% for any number of items greater than this level of non-compliance with items on any notice which has not been complied with.

32. The first paragraph is clear. For each aggravating or mitigating factor which applies the level of penalty will *normally* (my emphasis) be adjusted by 5% up to the £30,000 statutory maximum or the relevant minimum in the table. So for any given mitigating or aggravating factor, each one would normally be worth 5% but could be worth more or less. They would normally be cumulative and so two mitigating factors would normally be worth 10%, and so on. Nothing here prevents adding together two discounts for two mitigating factors nor awarding (say) 4% for one and 20% for another, if that is appropriate.

33. The meaning of the second paragraph is also clear, although it might have been better drafted. It is concerned with what the only exception to this principle (i.e. to the first paragraph) would normally be. The exception is not concerned with mitigation at all, it is concerned with the impact of one particular aggravating factor – that is items of non-compliance. Clearly there could be a number of such items, and the paragraph provides that the total uplift normally, in a case with from 1 to 5 (inclusive) items of non-compliance, will be a single 5% figure. If there are more than five items then a

single figure of 10% will normally be imposed. The word normally again makes clear that this is not a hard and fast rule, and this second paragraph is clearly an exception to the first. One can see why it is an exception and also that it will often come up. Multiple items of non-compliance – just as in this case – are likely to be routine. The paragraph is also clear that it is not suggesting this is the only exception there could ever be. Indeed, standing back, this paragraph seems to me to be a sensible and fair attempt to deal with multiple items of non-compliance, otherwise the way in which an enforcement notice had been drafted, which will enumerate and set out the items required to be fixed, could matter more than the substance.

34. I infer that the judge did not have the assistance we have had in this court on the Policy as a whole. Reading it as a whole, the Policy does not fetter the decision maker's discretion on penalties. The percentage to be applied for a given item of mitigation would normally be 5% but it does not have to be and all the circumstances are relevant. Factors can be added together individually and therefore mitigation can accumulate. The same is true for aggravating factors. When considering aggravating factors, the fact that two items of non-compliance will normally produce a single 5% uplift just as one item would is sensible, does not undermine the flexibility of the rest of the policy and is itself qualified by the term "normally".

35. Therefore, irrespective of whether the UT's decision about the rationality and lawfulness of the Policy was open to it or not, in fact on analysis these aspects of the Policy do not operate as a fetter on discretion nor are they marred by any lack of clarity. It follows that the FTT, in basing its approach on the Policy, was not acting in error.

36. There was a suggestion by the judge that in its application of the Policy the FTT's approach treated 5% as the only sum which a mitigating factor might justify but I do not read the FTT's decision in that way. For example, after dealing with the two flats together and allowing 5% mitigation for Mr Kazi's cooperation (at paragraphs 39-41), the FTT then turns to mitigation in the case of the HMO holding at paragraph 43 that "again" the 5% figure "is reasonable" for Mr Kazi's cooperation and that a "further 5% is appropriate" for the mitigation arising from the tenants causing some of the breaches. This language shows the FTT had turned its mind to whether 5% was reasonable and is inconsistent with the idea that the FTT thought it was bound to award that percentage and no other.

37. Both in his skeleton argument and orally Mr Kazi submitted that in its application of the Policy the Council uses a computer program, which gives the housing officer no facility to adjust the factors for mitigation or aggravation. Counsel for the Council disputed this but there is no evidence either way and it is irrelevant in any event because what matters on this appeal are the express terms of the Policy and the FTT's decision.

38. In his submissions Mr Kazi also drew attention to the fact that he takes housing referrals from the Council. That is not in dispute and the FTT had it in mind but did not accept it as mitigation in paragraph 41, noting it was a sad state of affairs that such accommodation was deemed suitable for referral. As the UT judge noted at [29], the reason the FTT did not accept this as mitigation was because that approval came from a different section of the local authority and from a person who was not a trained environmental health officer. There is no basis for interfering with these conclusions.

39. Accordingly the second ground of the appeal succeeds. Coupling that with the Council not challenging the final determinant point means that there was nothing wrong with the FTT's conclusion in relation to the s234 penalty which was reached prior to the application of the final determinant aspect and which therefore stands. That was a penalty of £13,500, based on starting from £15,000 and applying two 5% discounts for the two items of mitigation.

40. In relation to the s30 offences, the dropping of the third ground of appeal has to be taken into account. That ground challenged the UT's decision that the FTT should also have applied the second mitigating factor, that the problems were due in part to the tenants' behaviour, to these s30 offences as well.

41. The effect of dropping the third ground had not been addressed in the oral submissions before this court and so we gave directions for brief written submissions from the parties. The Council submitted that the right thing to do in these circumstances was to apply a further 5% discount to the two s30 offences. That would be the normal discount and there was no reason to depart from that norm. This would have the result that the penalties for these two offences ought to be £13,500 each.

42. Mr Kazi contended that a higher discount should be given, first because the tenants' behaviour was terrible and second because he considered that to allow 5% would amount to being bound by the language in the Policy which puzzled the judge in the UT and which, he argued, appeared to involve putting a 5% limit on the amount which could be allowed for multiple items (up to the first five) whether they were mitigation or aggravation. That would fetter the Council's discretion.

43. I have already addressed the second point raised by Mr Kazi. The Policy, properly interpreted, does not contain that or any other fetter on the discretion to be exercised.

44. In terms of settling the amount of this penalty, this arises because we are setting aside the decision of the Upper Tribunal and exercising the power under s14(2)(b)(ii) of the Tribunals Courts and Enforcement Act 2007 to re-make the decision. In taking this course the Court of Appeal has all the powers of Upper Tribunal (s14(4) of the 2007 Act).

45. As mentioned already, the FTT had decided that a 5% discount for that mitigating factor was a reasonable one in the context of the s234 offence. The impact of the tenants' behaviour on the work required in relation to the common parts, which was the relevance of this point in relation to the s234 HMO offence, will no doubt not be identical to its impact in relation to the works to which the s30 offences applied, but there is no basis for finding that the degree to which the impact of that behaviour differs is materially greater (or lesser) in relation to the two s30 offences as compared with the s234 offence.

46. In my judgment, there is no reason not to apply the normal discount of 5% provided for in the Council's Policy. That is a reasonable, appropriate and proportionate sum in this case. The result is that these s30 offences should each attract a penalty of £13,500.

47. That is sufficient to dispose of the appeal to this court. It is not necessary to examine the first ground of appeal. The issue, which the judge clearly recognised at [11] to [13], involves examining the relationship between two principles. The first is the principle

identified in Judge Cooke's own decision in *Marshall v Waltham Forest* (aspects of which were approved in passing by the Court of Appeal in *Sutton v Norwich City Council* [2021] EWCA Civ 20 and in *Waltham Forest LBC v Hussain* [2024] KB 154, CA), which I will characterise briefly as the FTT not being the place to challenge a local authority's policy on penalties. Instead such a challenge should be brought in the Administrative Court. The second is the principle of administrative law that a public body may not adopt a policy which fetters its own discretion (the judge cited *R v Port of London Authority ex p Kynoch* [1919]1 KB 176 but see also *British Oxygen Co Ltd v Minister of Technology [1971] AC 610*) such that on an appeal of this kind the FTT would be likely to depart from a policy if the policy had that effect. I prefer to leave any further consideration of that issue, while legally interesting, to a case in which it matters.

Conclusion

48. I would allow the appeal and hold that the civil penalty for each of the three offences in this case should be £13,500.

Lady Justice Elisabeth Laing:

49. I agree.

Lord Justice Peter Jackson:

50. I also agree. The Council is fortunate to have been allowed to bring a second appeal after it unaccountably failed to defend Mr Kazi's appeal in the UT in Leeds, depriving the judge of the assistance we received. Counsel was therefore wise to concede that, even if the appeal succeeded, the Council should not recover its costs from Mr Kazi. In allowing the appeal on the basis identified by Birss LJ, we will make no order for costs.