

UPPER TRIBUNAL (LANDS CHAMBER)



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UTLC Case Number: LC-2021-197**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

***HOUSING – RENT REPAYMENT ORDERS* – defence of “insanity” – reasonable excuse – admission of new evidence on appeal – FTT unaware of evidence given to previous Mental Health Tribunal – appeal allowed**

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

BETWEEN:

ADEBAYO AWOLAJA

Appellant

-and-

**(1) ALVARO GESTOSO RODRIGUEZ
(2) ALBERTO CALDERON GONZALEZ
(3) XOCHILT ARMENTA
(4) REINIS ZIEDINS
(5) ANAIS LOUE**

Respondents

Martin Rodger QC, Deputy Chamber President

28 October 2021

Royal Courts of Justice

Justin Bates, instructed by Advocate, for the appellant
Clara Sherratt, of Justice for Tenants, for the respondents

The following cases are referred to in this decision:

Assicurazioni Generali SpA v Arab Insurance Group [2003] 1 WLR 577

Davis v Wiggett [2016] UKUT 358 (TCC)

Hamilton v Al Fayed [2000] EWCA Civ 3012

Hertfordshire Investments Ltd v Bubb [2000] 1 WLR 2318

IR Management Services v Salford CC [2020] UKUT 81

Ladd v Marshal [1954] 1 WLR 1489

Loake v Director of Public Prosecutions [2018] QB 998; [2017] EWHC 2855 (Admin)

Prescott v Potamianos [2019] EWCA Civ 932

R (Mohammed) v Waltham Forest LBC [2020] 1 WLR 2929; [2020] EWHC 1083 (Admin)

Singh v Habib [2011] EWCA Civ 599

Sutton v Norwich City Council [2020] UKUT 90 (LC)

Introduction

1. The main issue in this appeal is whether, because of his poor mental health, the appellant had a reasonable excuse for controlling an unlicensed HMO. A secondary issue is whether the appellant should be permitted to rely on evidence which was not before the First-tier Tribunal (Property Chamber) (FTT) when it made the decision under appeal.
2. At a hearing on 30 September 2020 the FTT determined an application for rent repayment orders brought against the appellant by the respondents, former tenants of his. The FTT's determination required the appellant to repay rent totalling £10,611.37.
3. The appellant now appeals on the basis that the FTT's decision showed that it had an inadequate appreciation of his mental health at the relevant time and had failed properly to take it into account. He maintains that the FTT should have found that he had a defence to the underlying housing offence and that it would have done so if it had taken account of a decision of the First-tier Tribunal (Health, Education and Social Care Chamber) (HESC) sitting in its mental health jurisdiction which had been published on 28 September 2019. At the FTT hearing neither the FTT panel nor the appellant's counsel, Mr Justin Bates, had seen the HESC decision although they were aware of its existence.
4. The appellant applied to the FTT for permission to appeal the rent repayment orders on the grounds that it had failed to have regard to the HESC decision which had included significantly more information about his deteriorating mental health than the FTT had taken into account.
5. The HESC decision had been referred to in passing in evidence prepared for the hearing before the FTT but it had been considered in more detail at an earlier stage when a procedural Judge had given directions in these proceedings and in an appeal which the appellant himself had brought against a financial penalty imposed on him by the local housing authority, the London Borough of Camden, under section 249(A) Housing Act 2004. Each of those matters was based on the same allegation that the appellant had been managing an unlicensed HMO.
6. When he applied to the FTT for permission to appeal the rent repayment order decision the appellant said that he had been under the impression that it would take into account the same material as had been provided to the panel in the section 249A appeal, including the HESC decision. The FTT was invited to review its decision or alternatively to give permission to appeal. It refused both applications on the grounds that its decision had been based on the evidence before it and that the appellant had raised no legal arguments in support of his request for permission to appeal.
7. Permission to appeal was subsequently granted by this Tribunal on 25 June 2021 on the grounds that it was arguable that the appellant's poor mental health gave him a defence to the relevant housing offence. The Tribunal made no decision at that stage on whether the appellant should be permitted to adduce new evidence but left that question over for consideration as part of the appeal.

8. At the hearing of the appeal the appellant was again represented by Mr Bates, who had appeared on his behalf before the FTT. On both occasions Mr Bates acted *pro bono* at the request of Advocate, the Bar *pro bono* service. The respondents were represented by Miss Clara Sherratt of Justice for Tenants. I am grateful to them both for their submissions on the appeal.

Relevant statutory provisions

9. Part 2 of the Housing Act 2004 (the 2004 Act) is concerned with the licensing of houses in multiple occupation (HMOs). An HMO which is required to be licensed under Part 2 but which is not so licensed (and in respect of which no application for a licence has been duly made) is referred to in Part 2 as an “unlicensed HMO” (section 73(1)). A person who has control of or is managing an unlicensed HMO commits an offence under section 72(1). By section 72(5) it is a defence that the person had a reasonable excuse for having had control of, or been managing, the HMO in those circumstances.
10. The mental elements of the offence of managing or controlling an unlicensed HMO contrary to section 72(1), 2004 Act were considered by the Administrative Court in *R (Mohammed) v Waltham Forest LBC* [2020] 1 WLR 2929. Landlords sought judicial review of a local authority’s decision to invite them to attend a formal interview under caution and subsequently to issue summonses in relation to offences under section 72(1). Their defence was that they had let two properties to single households who (without their knowledge) had allowed others into occupation so that the properties became HMOs.
11. The issue in *R (Mohammed)* was whether it was necessary for the prosecutor to show that the person who had control of or managed an HMO knew that he was managing or controlling an HMO which was required to be licensed. The Court (Dingemans LJ and Laing J) found that there was no such requirement and gave a number of different reasons. It was no part of the definition of the expression “person having control” that the person must know about the way in which the relevant property was actually occupied. The offence in section 72(2) did require that the person “knowingly permits” another to occupy a house, but no such requirement was included in the section 72(1) offence. The availability of a statutory defence of “reasonable excuse” lessened the need to have a mental element as part of the offence; at [44], the Court said that an absence of knowledge that the property was an HMO which was required to be licensed might be relevant to the defence of reasonable excuse.
12. As well as being at risk of criminal prosecution, a person who is in control of an unlicensed HMO is at risk of two forms of civil action, an application for a rent repayment order, and the imposition of a financial penalty.
13. By section 43(1) of the Housing and Planning Act 2016 (the 2016 Act) the FTT may make a rent repayment order if it is satisfied beyond reasonable doubt that a landlord has committed an offence to which Chapter 4 of Part 2 of the 2016 Act applies (whether or not the landlord has been convicted). The offence of having control or management of an unlicensed HMO contrary to section 72(1), 2004 Act, is one of the offences to which the Chapter applies (section 40(3)). An application for a rent repayment order may be made to the FTT by a tenant or licensee of the HMO.

14. Section 249A, 2004 Act makes provision for the imposition of a financial penalty if a local housing authority is satisfied beyond reasonable doubt that a person's conduct amounts to a relevant housing offence. Those offences include the offence under section 72(1), 2004 Act of having control of or managing an unlicensed HMO. Financial penalties are imposed by local housing authorities, whose decision may be appealed to the FTT.

The facts

15. The appellant owns the long lease of a large flat in Camden in which he lives. At some stage rooms in the flat were subdivided so that there are five bedrooms.
16. In December 2015 Camden London Borough Council introduced an additional licensing scheme under Part 2, 2004 Act which required that any HMO in the area to which it applied housing three or more people comprising two or more households must be licensed. The scheme covers the area in which the appellant's flat is located.
17. In August 2018 the appellant began to let rooms in his flat but continued to live there himself. On 8 September the first respondent, Mr Rodriguez, moved into one of the rooms. A week or two later the second respondent, Mr Gonzalez, moved in to a different room. By that time, with the appellant still living there, the flat was occupied by three or more persons comprising two or more households and had become an HMO which required to be licensed. In December 2018 the third and (for a few weeks only) the fourth respondents moved in. Finally, in April 2019 the fifth respondent moved in. Each respondent paid rent for their room to the appellant.
18. The relationship between the appellant and the respondents became difficult. Mr Ziedins, the fourth respondent, moved out after only a few weeks and the appellant changed the locks of the flat to prevent him from returning. The appellant began to express concerns to Mr Rodriguez and Mr Gonzalez that they were spying on him. As he became more suspicious of the remaining tenants, they became increasingly uncomfortable living in his house. By 15 July 2019 all except Mr Rodriguez had moved out, and at that point the property ceased to be an HMO.
19. On 22 May 2019 a number of Council officers attended at the flat wishing to conduct an inspection. Evidence of what then occurred was not provided to the FTT but it had been received by the HESC panel which recorded the following in its decision:

“It was said that on 22 May 2019 Environmental Health had attended Mr Awolaja's premises with three officers. Mr Awolaja had allegedly barricaded himself into his flat, shouting “you are hurting me” (even though he was inside and the front door was closed) and accusing the officers of wanting to kill him. During Miss Hyde's [the appellant's social worker] oral evidence a new suggestion was made that Mr Awolaja had been making strange animal noises and this, along with the rest of the account, was strongly denied. It was said that two police officers had to be called to restrain him, but the circumstances surrounding this, given that all the detail relates to the officers being outside the flat and Mr Awolaja inside, is unclear.”

Despite the appellant denying the account given by his social worker HESC made a finding that it was probable that the appellant did barricade himself into his flat and that the Council's officers felt it necessary to call for police backup. There was insufficient evidence in relation to the use of restraint to enable the panel to make a relevant finding.

20. The FTT did have the appellant's recent medical history. It showed that history he had come to the attention of mental health services in Camden in October 2018 when he registered with a new GP and was immediately referred to the Camden Early Intervention Service (EIS), a team working with Camden residents who have been diagnosed with First Episode Psychosis. His GP recorded the appellant's report that his identity had been stolen by an organisation involving the Metropolitan Police, banks, telephone companies, media organisations and social services and his belief that the lodgers at his house were members of the same group in disguise. In February 2019 the appellant visited his GP again and expressed fears that the police had been messing with his life and would eventually try to kill him. He complained that the EIS team had not been listening to him. Further GP consultations in March, April and May 2019 followed a similar pattern.
21. On 14 June 2019 Camden told the appellant that he had been operating an unlicensed HMO and suggested that he apply for a licence without delay. A check list provided by Camden of information which would be required to support an application for an HMO licence referred to building control certification of alterations made to the premises. The appellant responded on 18 June and on the following day he applied to Camden's building control department to regularise the certification of certain alterations made to his flat which had not been the subject of regulatory approval. He did not at that stage apply for a licence and had not done so by 15 July 2019 when the number of residents in the flat fell below the HMO threshold.
22. On 17 September 2019 the appellant was compulsorily detained for his own safety under the Mental Health Act 1983 following an incident in which Council officials had visited the flat for a second time and the appellant had tried to escape by climbing down electric cabling on the outside of the building. On 19 September he applied to be discharged from detention and his application was considered by the HESC panel on 26 September but was refused. HESC's decision, published on 28 September, explained that the appellant should not be discharged at that time because he was suffering from a mental disorder of a degree that warranted his detention in a hospital for assessment, and that his continued detention was justified in the interests of his own health or safety. The appellant was released from hospital on 14 October 2019.

The procedural history

23. On 9 September 2019 the respondents applied to the FTT for rent repayment orders, seeking repayment of the full amount they had paid to the appellant between 6 September 2018 and 16 July 2019, a sum which totalled £18,903. The basis of the application was that the appellant had committed the offence under section 72(1), 2004 Act of being a person in control of an unlicensed HMO. Directions were issued in the respondent's application and a hearing was fixed for 15 January 2020.

24. On 19 November 2018 Camden gave notice to the appellant that it was imposing a financial penalty of £3,000 on him under section 249A, 2004 Act on the grounds that he had committed the same section 72(1) offence on 22 May 2019 (the date on which the Council's officials had inspected the flat).
25. The appellant appealed to the FTT against the financial penalty and his appeal came before a procedural Judge on 11 December 2019. The Judge had before him an email from the appellant which I have not seen, but which was sufficient to alert him to the rent repayment proceedings, if he was not already aware of them. The Judge gave directions in both matters. He considered that the outcome of the civil penalty appeal was likely to have a material impact on the decision whether to make a rent repayment order and, if so, the amount to be repaid under it. He therefore decided that it would be in accordance with the FTT's overriding objective for the hearing of the rent repayment proceedings on 15 January to be vacated and relisted after the decision in the section 249A appeal had been published.
26. On 11 March 2020 the appeal came before an FTT panel including the procedural Judge (the section 249A FTT). It is apparent from further directions given on that day that material relevant to the appellant's mental health had been provided to the section 249A FTT by Camden, the respondent to the appeal. That material included a letter from a consultant clinical psychologist, Dr Graham Pickup, who explained that the appellant had been diagnosed with a delusional disorder in October 2018, that he found it very difficult to distract himself from concerns about his safety, and that his stress, anxiety and worry were linked to his beliefs that he was being personally targeted by various agencies. It was Dr Pickup's opinion that at the time of the alleged offence on 22 May 2019 the appellant had been suffering from marked stress, anxiety, worry, insomnia and distractibility.
27. Camden also provided the section 249A FTT with a copy of a letter from Dr Catherine King of the Camden EIS who expressed the view that the appellant had been "highly distracted, anxious and pre-occupied by disturbing thoughts which are likely to have impacted his judgment and also his ability to organise."
28. The section 249A FTT also had a copy of the HESC decision (supplied by Camden) referring to the appellant's complex delusional beliefs, his inability to engage in the community and his mental disorder which led him to respond to situations in ill-judged ways. The decision recited the evidence HESC had received from the appellant's social worker about the events of 22 May 2019.
29. The section 249A FTT considered that there was a real possibility that the appellant was suffering from a mental impairment which had a substantial and long-term adverse effect on his ability to carry out normal day to day activities and that his condition was a disability bringing him within the scope of the Equality Act 2010. It considered that such disability might provide him with a defence of reasonable excuse to the section 72(1) offence. Moreover, it suggested that in reaching its decision to impose a civil penalty Camden's public sector equality duty may have been engaged.
30. Having reached those preliminary conclusions, the section 249A FTT adjourned the hearing of the appeal and gave further directions providing for the FTT itself to request the opinion of Dr Pickup on whether, at the time of the alleged offence, the appellant was a disabled

person for the purpose of the Equality Act 2010 and, if so, on the likely impact of that disability on the commission of the alleged offence.

31. There is nothing to indicate whether the FTT engaged with the consultant clinical psychologist, as the directions anticipated. It is clear, however, that before any further hearing of the section 249A appeal could take place, Camden decided to cancel the financial penalty and gave the appellant notice to that effect on 21 May 2020. When the rent repayment proceedings were heard on 30 September 2020 by a different FTT panel, there had therefore been no determination of the section 249A appeal as the procedural Judge had originally intended.

The hearing before the FTT and its decision

32. At the hearing on 30 September 2020 the appellant was represented by Mr Bates, who acted, then as now, *pro bono*. The appellant's GP notes and the letters from Dr Pickup and Dr King were included in the material he relied on at that hearing. Information about the section 249A appeal was also available to the FTT including a copy of the directions given at the hearing on 11 March 2020 expressing concern about the appellant's status under the Equality Act and Camden's public sector equality duty and confirmation that Camden had withdrawn the financial penalty, all of which were referred to in witness statements of the appellant. Those directions also referred to the HESC decision and summarised its conclusion that the appellant should remain in detention for his own safety and described the effect of his complex delusional beliefs, his inability to engage in the community and his mental disorder causing him to behave in ill-judged ways.
33. The FTT recorded that Mr Bates accepted on behalf of the appellant that between 8 September 2018 and 15 July 2019 he was managing an unlicensed HMO and committing an offence under section 72(1), 2004 Act unless he could rely on a defence. Mr Bates submitted that two separate defences were available. First, there was sufficient evidence to justify the conclusion that the appellant had been suffering from significant mental illness at all material times which provided him with what the common law refers to as the defence of insanity. Alternatively, the appellant's mental illness provided a reasonable excuse for his failure to obtain a licence. If the FTT was not persuaded by either of those defences, the appellant disputed the quantum of the rent repayment orders sought.
34. In its decision the FTT dealt first with the suggested defence of insanity. It had been referred by Mr Bates to a decision of the Administrative Court, *Loake v Director of Public Prosecutions* [2018] QB 998, in which the Court concluded that the defence of insanity was available even for offences of strict liability involving no mental element. The defence operated to give effect to a moral principle explained by Professor Hart in *Punishment and Responsibility* (1968), p.15 which the Court quoted:

“What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise those capacities. Where these capacities and opportunities are absent, as they are in different ways in the varied cases of accident, mistake, paralysis, reflex action, coercion, insanity etc, the moral protest is that it is morally wrong to

punish because “he could not have helped it” or “he could not have done otherwise” or “he had no real choice”.

35. Adopting the McNaghten formulation of the defence of insanity, the FTT directed itself that a person does not commit an offence if, “at the time of the commission of the act in question [the person was] labouring under a defect of reason from disease of the mind as not to know the nature and quality of the Act he was doing or if he did know it, he did not know it was wrong.” The burden of establishing the defence of insanity lay upon the defendant, on the balance of probabilities. In *Loake*, at paragraph [63], the Court referred to the need for “cogent psychiatric evidence about the specific relevant aspects of the defendant’s mental state throughout his alleged course of conduct” in the absence of which the Court said it “would expect magistrates and judges to deal robustly with claimed defences of insanity.”
36. The FTT then made its relevant findings of fact, at paragraph [22] of its decision, as follows:

“The Tribunal finds that while on the balance of probabilities [the appellant] did suffer from mental illness during the relevant period there is not sufficient “cogent psychiatric evidence” before it for the Tribunal to conclude that this amounted to insanity throughout the relevant period. ...[reference to *Loake*] Dr Pickup’s letter refers to the respondent’s mental health having been affected by distressing beliefs that he was being harassed by various agencies following a data breach in 2018. He does not include the London Borough of Camden as one of those agencies. Prior to Dr Pickup’s letter the evidence before the Tribunal as to the respondent’s mental state is contained in a letter dated 30 December 2019 from Dr Catherine King, an associate specialist in the Early Intervention Service which refers to his having first been seen by that service in October 2018 and that he had been ill for some time before he was seen by the service, without being more specific.”
37. Having thus dismissed the defence of “insanity” on the grounds of insufficient evidence, the FTT next considered the statutory defence of “reasonable excuse” provided by section 72(5), 2004 Act. It found that after 19 June 2019 the appellant had had a reasonable excuse for operating the property without an HMO licence. On that date he had applied to the building control department for a building regulations completion certificate. Although that was not the correct procedure for obtaining an HMO licence the FTT found that the appellant’s “mental state may have led to his taking this incorrect course of action” and for that reason it concluded that the period during which the offence was committed which had commenced on 8 September 2018 ceased on 19 June 2019.
38. The FTT finally considered the quantum of the rent repayment order. It first reduced the total amount of the rent paid by expenses incurred by the appellant, producing a net total of rent paid during the period of the offence of £15,159. At paragraph [31] it said that the appellant’s mental health was a factor which should be taken into account, either under section 44(4) of the 2016 Act which requires the conduct of the landlord to be taken into account or simply as a further factor to which it should have regard. The tenants’ representative had suggested that a reduction of up to 20% might be justified, but the FTT considered it appropriate to discount the net rent by 30% to produce a total sum repayable of £10,611.³⁷ This sum was apportioned between the tenants by reference to the duration of their occupation.

The appeal

39. Mr Bates presented the appeal in two parts, which I will consider in turn.
40. He first submitted that even without regard to the additional material on which he sought to rely, the evidence considered by the FTT established that because of the delusional disorder with which he had been diagnosed in October 2018 he did not know that his conduct in managing an unlicensed HMO was unlawful. That was sufficient to establish the common law defence of insanity. Although *R(Mohammed)* confirmed that the offence under section 72(1) was one of strict liability, *Loake* showed that a defence of insanity was nevertheless available.
41. Alternatively, Mr Bates submitted that this Tribunal ought to admit the HESC decision in evidence which gave a much more comprehensive account of the progress of the appellant's illness and explained how his paranoid delusions had affected his behaviour. I will defer considering whether new evidence ought to be admitted until I have considered the arguments based on the material which was before the FTT.
42. Mr Bates sought to persuade me that there was a relevant conceptual difference between the common law defence of insanity and the statutory defence of reasonable excuse. Insanity was a complete defence and, he submitted, it raised a binary question in which the defence was either satisfied or not satisfied. A reasonable excuse was, as Mr Bates put it, more "open-textured" and depended on a broader judgment of the circumstances. I do not accept that distinction. Both defences require consideration of the specific effect of a person's condition on their understanding of the particular act (or failure to act) which is a component of the offence.
43. In the course of argument Mr Bates acknowledged that the distinction he identified may not matter in practice, and accepted that a person who was "insane" for the purpose of the common law defence would be likely also to have a reasonable excuse, although the converse would not necessarily follow. That would indicate, as one would expect, that circumstances giving rise to a defence of insanity are simply some among many of the circumstances which may establish a defence of reasonable excuse.
44. Where a statute provides a specific defence to an offence, and common law provides a different defence with narrower limits, it does not seem to me to be helpful for a tribunal to focus separately on the two different defences. The broad, common sense question which the section 72(5) defence obliges tribunals to consider is whether, in all the relevant circumstances, the person having control of or managing an unlicensed HMO had a reasonable excuse for doing so. It is irrelevant to that question whether the same circumstances also satisfy the common law conditions which would permit a jury or magistrate to record a special verdict of not guilty by reason of insanity.
45. To approach the potential defences in the way the FTT was invited to do in this case may lead to confusion and will almost certainly cause the tribunal to be unnecessarily distracted by considering the elements of a common law defence with which it is unlikely to be familiar. In this case, for example, the FTT's search for "cogent psychiatric evidence" may have caused it to pay less attention to other relevant evidence which cast light on the

appellant's state of health, including the evidence of some of the respondents about his erratic behaviour towards them from the commencement of their occupation. It may also have diverted it from giving proper consideration to the statutory defence of reasonable excuse.

46. The foundation of the appellant's case on reasonable excuse was that he did not know that his flat needed to be licensed as an HMO. As both the High Court and the Tribunal have previously stated (including in *R(Mohammed)* and in *IR Management Services v Salford CC* [2020] UKUT 81, at paragraphs 27 to 31) an absence of knowledge of a licensing requirement may be relevant to the defence of reasonable excuse. In *Sutton v Norwich City Council* [2020] UKUT 90 (LC) at paragraph [216] the Tribunal emphasised that ignorance by itself was not enough, and that the issue was an objective one:

“Whether an excuse is reasonable or not is an objective question for the jury, magistrate or tribunal to decide. In *R v Unah* [2012] 1 WLR 545, which concerned the offence under the Identity Cards Act 2007 of possessing a false passport without reasonable excuse, the Court of Appeal held that the mere fact that a defendant did not know or believe that the document was false could not of itself amount to a reasonable excuse. However, that lack of knowledge or belief could be a relevant factor for a jury to consider when determining whether or not the defendant had a reasonable excuse for possessing the document. If a belief is relied on it must be an honest belief. Additionally, there have to be reasonable grounds for the holding of that belief.”

47. The view has generally been taken that it is the responsibility of someone who wishes to let their property to find out whether any relevant regulatory restrictions exist and that ignorance of the need for a licence will not normally provide a reasonable excuse (although it may be relevant to culpability and therefore to the amount of a financial penalty to be imposed under section 249A). But there is no hard and fast rule and, just as much as any other defence, a reasonable excuse defence based on ignorance of the need for licensing will always require a careful evaluation of all the relevant facts. As the Tribunal put it in *Thurrock Council v Daoudi* [2020] UKUT 209 (LC), at paragraph 27: “No matter how genuine a person's ignorance of the need to obtain a licence, unless their failure was reasonable in all the circumstances, their ignorance cannot provide a complete defence.”
48. Mr Bates acknowledged that in normal circumstances an appeal against an FTT's finding of fact after consideration of the evidence would be very difficult to sustain but he suggested that the circumstances of this case were exceptional.
49. At the hearing of the appeal I put it to Miss Sherratt that the FTT's decision appeared inconsistent in a number of important respects. In particular, it made a finding that the appellant had a reasonable excuse for managing the property without an HMO licence from the date in June 2019 when he first tried to obtain building control approval for the alterations to his flat, but it did not make any specific finding in respect of the period before that date, and it did not explain why he did not then have a reasonable excuse. Ms Sherratt invited me to infer that the FTT agreed with the submission made on behalf of the respondents and recorded in paragraph 21 of the decision, that for all his health problems the appellant had been able to deal with the letting out of rooms, drawing up agreements, and receiving rents and deposits, and did not act as if he was someone who was so distracted

or unable to deal with regulation or authority that he should not be held responsible for his actions. The difficulty with making that assumption about the FTT's decision is that it is very difficult to reconcile with the FTT's conclusion that the appellant's mental health was a factor which justified a 30% reduction in the rent repayable for the whole of the period under consideration. That conclusion was only consistent with the FTT being satisfied that the appellant was suffering from a serious mental illness throughout the period under consideration, the same illness as provided him with a reasonable excuse from June 2019 onwards. If his illness was not thought in some way to explain his failure to obtain a licence it is difficult to see why it should justify a reduction at all. But the FTT did not explain why the same illness could not be the basis of a reasonable excuse from at least October 2018 and the appellant's defence was left unaddressed.

50. I am satisfied that there is a critical gap in the FTT's consideration of the defence of reasonable excuse covering the period from 8 September 2018 to 19 June 2019. In paragraph [22] it made its finding that despite it being satisfied that the appellant suffered from mental illness during the period concerned, the psychiatric evidence was not sufficiently cogent to establish a defence of insanity. In paragraph [25] it found that although the appellant's application to Camden's building control department was not the correct procedure for obtaining a licence his mental state may have led him to take an incorrect course of action and that provided him with a reasonable excuse. It did not ask itself at any point whether the fact that the appellant suffered from poor mental health provided a reasonable excuse for his failure to appreciate that when he let rooms in his house to more than two unconnected people it became an HMO, or for his ignorance that an HMO of that type required licensing.

51. The circumstances in which an appellate tribunal will interfere with what is referred to in the authorities as an "evaluative decision" are limited. What is meant by an evaluative decision, and how an appellate tribunal should approach them, was discussed by Clarke LJ in *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577, at paragraph [16], as follows:

"16. Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way."

52. In *Prescott v Potamianos* [2019] EWCA Civ 932, after reviewing a series of decisions of the Court of Appeal and Supreme Court, the proper approach was stated by the Court of Appeal to be that:

"... on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion".

53. I am satisfied that the FTT's conclusion that the appellant had committed the offence of being in control of an unlicensed HMO, contrary to section 72(1), 2004 Act, was wrong because of its omission properly to consider the statutory defence of reasonable excuse and to make relevant findings concerning the whole of the period when the offence was said to have been committed. For that reason, which I base only on the material to which the FTT had access and on its decision, the appeal must be allowed.
54. Although it is strictly unnecessary to do so, I will now consider Mr Bates' alternative submission that the Tribunal ought to admit the HESC decision in evidence in order to obtain a more comprehensive account of the progress of the appellant's illness and how his paranoid delusions had affected his behaviour.
55. In support of his application that the Tribunal permit reference to the HESC decision Mr Bates referred to the well-known decision of the Court of Appeal in *Ladd v Marshall* [1954] 1 WLR 1489 which identified three matters which a court should take into account when considering whether to admit new evidence on an appeal. Those were: first, that the evidence could not have been obtained with reasonable diligence for use at the original hearing; secondly, that it must be such that it would probably have had an important influence on the result of the case if it had been considered by the original court, although it need not be decisive; and thirdly, the evidence must be apparently creditable, though it need not be incontrovertible.
56. Mr Bates also referred to a decision of the Upper Tribunal (Tax and Chancery Chamber) (Judge Cooke) in *Davis v Wiggett* [2016] UKUT 358 (TCC) in which authorities since *Ladd v Marshall* on the admission of new evidence on an appeal were reviewed. In *Singh v Habib* [2011] EWCA Civ 599 fresh evidence had been admitted by the Court of Appeal on public interest grounds in an appeal in a fraudulent road traffic claim notwithstanding that, as in *Ladd v Marshall*, it was the evidence of a witness at the trial who wished now to contradict her original testimony. In *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318, 2325 Hale LJ had explained that an appeal court's discretion "must be exercised in accordance with the overriding objective of doing justice" and that the factors identified in *Ladd v Marshall* were matters which it was necessary for a court to consider being exercising that discretion. That approach was endorsed in *Hamilton v Al Fayed* [2001] EWCA Civ 3012 by the Court of Appeal, where Lord Phillips MR said this:
- "We consider that under the new, as under the old, procedure special grounds must be shown to justify the introduction of fresh evidence on appeal. In a case such as this, which is governed by the transitional provisions, we do not consider that we are placed in the straitjacket of previous authority when considering whether such special grounds have been demonstrated. That question must be considered in the light of the overriding objective of the new CPR. The old cases will, nonetheless remain powerful persuasive authority, for they illustrate the attempts of the courts to strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result. That task is one which accords with the overriding objective."
57. For the respondents, Miss Sherratt submitted that, of the *Ladd v Marshall* factors, only the third was satisfied in this case. In particular she suggested that there was no reason to think

that consideration of the HESC decision would have been likely to have influenced the outcome of the case. The FTT had had Dr Pickup's letter and the appellant's GP notes, which covered the same ground. It was apparent from the decision that the FTT had examined the evidence to see if there was any causal link between the appellant's poor mental health and his failure to obtain a licence and had found none; nor would they have found any in the HESC decision. Even taking the HESC decision into account the appellant's case lacked the "cogent psychiatric evidence about the specific relevant aspects of the defendant's mental state throughout his alleged course of conduct" which the Court in *Loake* had said was necessary to establish a defence of insanity. The reference to a course of conduct reflected the particular offence under consideration in *Loake* (harassment) but the general proposition that cogent psychiatric evidence was required before a person would be excused the consequences of their own actions on the grounds of insanity was of general application.

58. Mr Bates submitted that each of the *Ladd v Marshall* considerations was satisfied in this case. The first condition was satisfied because the HESC report was not left out of consideration because of any lack of diligence on the part of the appellant; on the contrary, he had thought that the evidence would be considered by the FTT because it had been referred to in the decision of the section 249A FTT and because the procedural Judge had intended that the outcome of the appeal would influence the rent repayment decision and had given directions for the hearings to take place in sequence. As for the other requirements, the HESC report was likely to have an important effect on the outcome of the case. It recorded that the appellant did not agree with his medical practitioners that he suffered from a mental disorder and that he had not been prepared to take medication or engage with his social worker in any meaningful way, which was relevant to both the common law and statutory defences. His symptoms had escalated since October 2018, as could be seen by the incident in May 2019 when he had barricaded himself inside the flat and believed that environmental health officers were trying to kill him and by July 2019 his social worker had considered that the threshold for compulsory detention under the Mental Health Act had been met. Finally, being the decision of a tribunal recording evidence which it had accepted, the evidence was obviously credible.
59. Had it been necessary to do so, I would have been prepared to admit the evidence of the HESC decision. I can state my reasons briefly.
60. First, the HESC decision had already been considered by the section 249A FTT which concluded that it raised issues of sufficient concern that that hearing needed to be adjourned so that the impact of the appellant's mental health on his capacity and on his capability and the availability of the defence of reasonable excuse could be further investigated. The procedural Judge had intended that the hearing of two appeals would be coordinated and it was not unreasonable for the appellant to believe, as he has confirmed he did by signing a statement of truth affirming the contents of the grounds of appeal, that the FTT would take the same material into consideration at the hearing of the rent repayment order application. The appellant could, no doubt, have provided Mr Bates with a copy of the HESC decision, but he did not do so. In the circumstances I do not attribute that failure (which might or might not be a consequence of the appellant's illness) to an absence of proper diligence on his part. The course of events seems to me to be closer to the sort of procedural irregularity or mishap which entitles a tribunal to set aside its decision and re-make it, if it considers it

is in the interests of justice for it to do so, under rule 51, Tribunal Procedure (first-tier Tribunal) (Property Chamber) Rules 2013.

61. Secondly, the evidence comprises the conclusions of an expert Tribunal on issues concerning the appellant's mental health which fall outside the usual experience of the FTT. It includes an account of the evidence of the appellant's social worker about the events in May 2019 which did not feature in the evidence before the FTT at all. It fills important gaps on matters which the FTT clearly considered were relevant to the decision it had to make about the effect of the appellant's poor mental health. The FTT referred in particular to its inability to conclude that the appellant's condition "amounted to insanity throughout the relevant period". The HESC decision included an assessment of the totality of the evidence and a conclusion that the appellant's condition had not improved over the last year but rather had escalated. The FTT made a point of noting that Dr Pickup had not referred to the London Borough of Camden as one of the agency's which the appellant believed were persecuting him, yet HESC found that when Camden's officers attended at the appellant's flat in May 2019 he had barricaded himself in and believed that they had come to do him harm, and that in September 2019 when they attended for a second time he had put his safety at risk by climbing out the flat using electricity cables.
62. Thirdly, as the respondents acknowledge, the evidence contained in the HESC decision is credible, having already been accepted by that tribunal.
63. The admission of the evidence recorded in HESC's decision and accepted by it which was not available to the FTT would not have made any difference to my primary conclusion that the FTT's decision was flawed for the reasons I have already explained.

Disposal

64. I therefore allow the appeal. Further consideration is required of the appellant's defence of reasonable excuse and I therefore remit the proceedings to the FTT to enable it to take place. There is no reason why the judges or tribunal members who sat on the panels which considered the application at the previous hearing or which considered the section 249A appeal should not be involved in redetermining the matter.

Martin Rodger QC,
Deputy Chamber President

5 November 2021

Right of appeal

Any party to this case has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is

received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.