



Neutral Citation Number: [2020] EWCA Civ 1539

Case No: C3/2019/2997

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
THE HON MR JUSTICE HOLGATE AND JUDGE SIOBHAN McGRATH
[2019] UKUT 339 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/11/20

Before :

THE MASTER OF THE ROLLS
SIR TERENCE ETHERTON

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
and
LORD JUSTICE HICKINBOTTOM

Between :

- (1) NASIM HUSSAIN
- (2) FHCO LIMITED
- (3) FARINA HUSSAIN

Appellants

- and -

THE LONDON BOROUGH OF WALTHAM FOREST

Respondent

Justin Bates and Nick Grant (instructed by Anthony Gold Solicitors)
for the Appellants

Ashley Underwood QC and Riccardo Calzavara (instructed by London Borough of
Waltham Forest Governance and Law) for the Respondent

Hearing date: 12 November 2020

Approved Judgment

Lord Justice Hickinbottom :

Introduction

1. In deciding whether a person is a “fit and proper person” for the purposes of an application to be a licence holder or manager of a house regulated under the Housing Act 2004, is a local housing authority (and, on appeal, the First-tier Tribunal (Property Chamber)) (“the FtT”) entitled to take into account a person’s spent convictions and/or the conduct underlying such convictions?
2. In a judgment dated 11 July 2019 refusing the Appellants’ application to exclude evidence relating to the conduct underlying spent convictions in an appeal from the Respondent local housing authority’s refusal to grant them licences, a panel of the Upper Tribunal (Lands Chamber) (comprising the then President of that Chamber Holgate J, and the President of the FtT Judge Siobhan McGrath) (“the tribunal panel”) held that the authority and, on appeal, the FtT are entitled to take into account such conduct. In this appeal, the Appellants contend that they were wrong to do so.
3. Before us, Justin Bates and Nick Grant appeared for the Appellants, and Ashley Underwood QC and Riccardo Calzavara for the Respondent. I thank them all for their helpful submissions.

The Statutory Background

4. This appeal concerns the relationship between two statutory schemes: the Housing Act 2004, and the Rehabilitation of Offenders Act 1974.
5. In support of other provisions concerning the safety and condition of residential property, Part 2 of the Housing Act 2004 (“the 2004 Act”) introduced a regime for the licensing of houses in multiple occupation (“HMOs”) by the local housing authority. Part 3 enables an authority to introduce a similar scheme for all residential properties in any area it designates. I shall focus on the provisions of Part 2 as they relate to HMOs; but, for the purposes of this appeal, the provisions of Part 3, as they relate to other residential properties in a designated area, are identical.
6. Part 2 generally requires HMOs to be licensed (section 61). It is a criminal offence to control or manage properties subject to the regime without a licence (sections 61(1) and 72(1)).
7. Before granting a licence the authority must be satisfied that “the proposed licence holder... is a fit and proper person to be the licence holder” and that “the proposed manager of the house is a fit and proper person to be manager of the house” (section 64(2), (3)(b)(i) and (3)(d)). Section 66 provides, so far as relevant to this appeal, that:

“(1) In deciding... whether a person (‘P’) is a fit and proper person to be the licence holder or (as the case may be) the manager of the house, the local housing authority must have regard (among other things) to any evidence within subsection (2) or (3).

(2) Evidence is within this subsection if it shows that P has –

(a) committed any offence involving fraud or other dishonesty, or violence or drugs, or any offence listed in Schedule 3 to the Sexual Offences Act 2003...;

(b) practised unlawful discrimination on ground of sex, colour, race, ethnic or national origins or disability in, or in connection with, the carrying on of any business;

(c) contravened any provision of the law relating to housing or of landlord and tenant law; or

(d) acted otherwise than in accordance with any applicable code of practice....

(3) Evidence is within this subsection if –

(a) it shows that any person associated or formerly associated with P (whether on a personal, work or other basis) has done any of the things set out in subsection. (2)(a) to (d), and

(b) it appears to the authority that the evidence is relevant to the question whether P is a fit and proper person to be the licence holder or (as the case may be) the manager of the house....”

8. The form and content of applications is prescribed by the Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006 (SI 2006 No 373). Regulation 7 requires information set out in Schedule 2 to be provided with an application, including (i) for an application that is not a renewal, “a declaration that any gas appliances in the HMO or house meet any safety requirement contained in any enactment” (paragraph 2(f)(xiii)); and (ii), in any event, by paragraph 3 (which reflects section 66(2) of the 2004 Act):

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

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

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

Paragraph 4 requires applicants to make a declaration that the information is true to the best of their knowledge and that they understand that, amongst other things, it is a criminal offence knowingly or recklessly to rely on information which is false or misleading.

9. Section 258 of the 2004 Act makes it a criminal offence knowingly or recklessly to provide any false or misleading information to an authority in relation to its functions under Parts 2 and 3 of the Act, punishable on conviction by a fine up to level 5 on the standard scale.
10. The second statutory scheme is that under the Rehabilitation of Offenders Act 1974 (“the 1974 Act”). Prior to the Act, there was no process by which a person could be relieved of the consequences and stigma of a conviction (including, e.g., difficulties faced in obtaining employment, insurance or a fair hearing in later proceedings), irrespective of the nature and circumstances of, and time elapsed since, the offending. Previous convictions remained disclosable, and those who had committed crimes remained disadvantaged by them, indefinitely. The Act sought to address that mischief.
11. Section 8A of and Schedule 2 to the 1974 Act, inserted by the Criminal Justice Act 2008, introduced a parallel scheme for cautions in materially identical terms; but this appeal concerns only convictions, and I will consequently focus on the statutory provisions in relation to convictions.
12. Section 1(1) provides, so far as relevant to this appeal

“... [W]here an individual has been convicted, whether before or after the commencement of this Act, of any offence or offences, and the following conditions are satisfied, that is to say—

 - (a) he did not have imposed on him in respect of that conviction a sentence which is excluded from rehabilitation under this Act; and
 - (b) he has not had imposed on him in respect of a subsequent conviction during the rehabilitation period applicable to the first-mentioned conviction... a sentence which is excluded from rehabilitation under this Act;

then, after the end of the rehabilitation period so applicable..., that individual shall for the purposes of this Act be treated as a rehabilitated person in respect of the first-mentioned conviction and that conviction shall for those purposes be treated as spent.”
13. By sections 5 and 6, the rehabilitation period applicable to a conviction for which the sentence is limited to a fine is a period of 12 months beginning with the date of conviction for which the sentence was imposed.
14. As can be seen from section 1, under the Act rehabilitation is specifically related to convictions: it is a conviction which may become spent, and a person may become rehabilitated in respect of a conviction. As the tribunal panel indicated (at [28] of their judgment), the Act has no part to play where the individual has engaged in conduct

amounting to a criminal offence if it does not result in a prosecution and conviction for an offence. Such conduct can never be “spent”.

15. Under the heading “Effect of rehabilitation”, section 4 of the 1974 Act, the construction of which is at the heart of this appeal, deals with the consequences of a conviction becoming “spent”. It provides:

“(1) Subject to sections 7 and 8 below, a person who has become a rehabilitated person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction; and, notwithstanding the provisions of any other enactment or rule of law to the contrary, but subject as aforesaid—

(a) no evidence shall be admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in England and Wales to prove that any such person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction; and

(b) a person shall not, in any such proceedings, be asked, and, if asked, shall not be required to answer, any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary thereto.

(2) Subject to the provisions of any order made under subsection (4) below, where a question seeking information with respect to a person’s previous convictions, offences, conduct or circumstances is put to him or to any other person otherwise than in proceedings before a judicial authority—

(a) the question shall be treated as not relating to spent convictions or to any circumstances ancillary to spent convictions, and the answer thereto may be framed accordingly; and

(b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent conviction or any circumstances ancillary to a spent conviction in his answer to the question.

(3) Subject to the provisions of any order made under subsection (4) below—

(a) any obligation imposed on any person by any rule of law or by the provisions of any agreement or arrangement

to disclose any matters to any other person shall not extend to requiring him to disclose a spent conviction or any circumstances ancillary to a spent conviction (whether the conviction is his own or another's); and

(b) a conviction which has become spent or any circumstances ancillary thereto, or any failure to disclose a spent conviction or any such circumstances, shall not be a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him in any way in any occupation or employment.

(4) The Secretary of State may by order—

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

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

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

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

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

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

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

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

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

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

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

16. Although it clearly extends the protection given to a rehabilitated person beyond the simple fact of conviction, in line with section 1 the primary focus of section 4 is upon the relevant conviction(s). In its opening lines, section 4(1) provides a general statement (that “a person who has become a rehabilitated person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction”); which is followed by particular ways in which that is to be effected in proceedings before a judicial authority (sections 4(1)(a) and (b), and 4(3)(a)) and otherwise than before such an authority (sections 4(2), and 4(3)(a) and (b)).
17. Section 4(3)(b) is effectively a provision proscribing discrimination on grounds of spent convictions in an employment context. Sections 4(1)(b), 4(2) and 4(3)(a) concern the effect of rehabilitation of an offender on his or her obligation to disclose spent convictions for offences “or any circumstances ancillary thereto” which, by virtue of section 4(5), includes the conduct constituting those offences. Section 4(1) is conceptually different. It does not concern disclosure, but rather admissibility of evidence: before a judicial authority, it makes evidence “to prove that a person has committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of [the spent] conviction” inadmissible. That is a mandatory proscription, subject only to:
 - i) The exclusions set out in section 7(1) and (2), and section 8, which concern identified proceedings (e.g. criminal, service regulatory, defamation and certain family proceedings) or other circumstances (e.g. the exercise of the Royal Prerogative or the enforcement of a fine or other sums to be paid under orders relating to a spent conviction), none of which is relevant to this appeal.
 - ii) The powers given to the Secretary of State under section 7(4) to exclude the application of section 4(1), or under section 4(4) to exclude or modify the effect of section 4(2) or (3). Under those powers, the Secretary of State has made the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975 No 1023) (“the 1975 Order”). Paragraph 5 and Schedule 3 exclude section 4(1) from various proceedings not covered by the Act itself including several forms of disciplinary proceedings and, by paragraph 16, “Proceedings relating to a taxi driver licence”. Paragraph 3 excludes section 4(2) in relation to any person when asking questions in respect of the suitability of another in respect of the offices and employment identified in Schedule 1 or in respect of holding a licence as listed in Schedule 2 (including, by paragraph 4, a taxi driver licence). Paragraph 4 excludes section 4(3) in various circumstances, including those of employment and occupations but none in relation to licences.
 - iii) The power of a “judicial authority”, as defined in section 4(6) (quoted at paragraph 52 below), to admit or require evidence relating to a person’s spent

convictions or to circumstances ancillary thereto under section 7(3). That subsection provides:

“If at any stage in any proceedings before a judicial authority in England and Wales (not being proceedings to which, by virtue of any of paragraphs (a) to (e) of subsection (2) above or of any order for the time being in force under subsection (4) below, section 4(1) above has no application, or proceedings to which section 8 below applies) the authority is satisfied, in the light of any considerations which appear to it to be relevant (including any evidence which has been or may thereafter be put before it), that justice cannot be done in the case except by admitting or requiring evidence relating to a person’s spent convictions or to circumstances ancillary thereto, that authority may admit or, as the case may be, require the evidence in question notwithstanding the provisions of subsection (1) of section 4 above, and may determine any issue to which the evidence relates in disregard, so far as necessary, of those provisions.”

Mr Bates submitted that section 7(3) acts as a “safety valve” to prevent injustice arising if section 4(1) is applied as it otherwise would be, as illustrated by the unreported judgment of this court in Dickinson v Yates (1986) 1986 WL 406872 (27 November 1986).

The Factual Background

18. The factual background is set out in detail in the tribunal panel’s judgment at [4]-[16]. For the purposes of the appeal, I can be brief.
19. The First Appellant (“Mrs Hussain”) is the mother of the Third Appellant (“Miss Hussain”) who is the sole director of the Second Appellant. The Appellants and Mrs Hussain’s husband (“Mr Hussain”) own and manage residential properties which they rent out. Most of the properties are HMOs and required to be licensed under Part 2 of the 2004 Act; but the Respondent local housing authority (“the Council”) has designated the whole of its area under Part 3 of the Act so that all of the Appellant’s rental properties are required to be licensed.
20. In May 2016, Mrs Hussain submitted licence applications for seven properties, asserting that they did not have any gas appliances. That was untrue: four of the properties did have such appliances and so required gas safety certificates. It was not the first time Mrs Hussain had made such a false assertion: in 2015, she made 21 licence applications in which she falsely stated there were no gas appliances in the relevant properties, and provided certificates only when the Council discovered that not to be true. However, those licences were granted in 2015, and no further action taken. On being challenged by the Council in respect of the 2016 applications, gas certificates dated May 2016 were provided for the four properties, but these were discovered to be backdated forgeries.

21. In respect of those certificates, Mr Hussain was prosecuted for four offences under section 1 of the Forgery and Counterfeiting Act 1981, to which he pleaded guilty and was sentenced to a fine of £1,000. Those convictions became spent on 29 June 2019. Further, Mrs Hussain was prosecuted for four offences of knowingly or recklessly supplying false information, to which she pleaded guilty and was sentenced to a fine of £40,000. Under the 1974 Act those convictions became spent on 12 May 2018.
22. On 23 November 2018, the Council refused all of the 2016 applications, and revoked the other 29 licences held by the Appellants. In doing so, the Council relied upon (amongst other things) Mr and Mrs Hussain’s convictions to which I have referred.
23. The Appellants appealed to the FtT against the decision to refuse and revoke their licenses; and, relying on the judgment of Peter Marquand QC sitting as a Deputy High Court Judge (“the Deputy Judge”) in R (YA) v London Borough of Hammersmith and Fulham [2016] EWHC 1850 (Admin); [2016] HLR 36 (“YA”), they applied to strike out “all those parts of the [Council’s] statement of case, witness statement and exhibits filed by the [Council] which contravene the [1974 Act]...”. Because the FtT would have been bound by YA which the Council contended was wrong, the application was transferred to the Upper Tribunal (Lands Chamber) (“the UT”) under rule 25 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013 No 1169). For these purposes, the UT has status equal to that of the High Court, and is not required to follow a judgment of the High Court if it considers it to be wrong.

The Issues

24. In the strike out application, the primary issue which arose before the tribunal panel was this: does section 4(1)(a) proscribe the admission of evidence of only the conviction and the process which gave rise to it (including the fact that an offence was committed, but not the conduct that underlies it), as the Council contended; or does it, in addition, render inadmissible evidence of the conduct constituting the offence, as was submitted on behalf of the Appellants? A second issue, which did not arise on the facts of this case, was debated before the tribunal panel: for the purposes of the power in section 7(3) to admit evidence otherwise inadmissible under section 4(1), in determining a licence application under the 2004 Act, is a local housing authority a “judicial authority”?
25. On the main issue, the tribunal panel held that section 4(1)(a) drew a distinction between a spent conviction and the underlying conduct, and applied only to the former: it rendered inadmissible evidence as to whether a person has committed or been charged with or prosecuted for or convicted of an offence, but that did not include evidence of a person’s conduct constituting that offence. The controversial evidence in this case was therefore admissible, and the application to strike out was refused.
26. On the second issue, they considered that “judicial authority” as defined in section 4(6) included a local housing authority when performing its functions relating to licensing under Parts 2 and 3 of the 2004 Act, so that such an authority had the power to override the restrictions in section 4(1)(a) and (b).
27. Those two issues are now before this court.

Issue 1: The Scope of Section 4(1) of the 1974 Act

28. It is common ground that this appeal turns on the proper construction of section 4(1)(a); and, notably, whether the tribunal panel were correct in holding that that provision does not render inadmissible evidence as to the conduct constituting an offence in respect of which there is a spent conviction.
29. Mr Bates submitted that, before a judicial authority such as the FtT, section 4(1)(a) of the 1974 Act makes inadmissible evidence that a person has not only been convicted of, but has committed, an offence. Properly construed, that includes evidence of the conduct which comprised the committing of the offence. Therefore, although differently formulated, section 4(1)(a) and (b) have a similar scope, in that they each apply, not only to any spent conviction, but also to the underlying conduct: section 4(1)(a) does this by the reference to evidence that the “person has committed” an offence, whilst (b) does so by its reference to “conviction or any circumstances ancillary thereto” as defined in section 4(5) to include the conduct constituting the offence. Therefore, evidence of the conduct underlying any spent convictions is not admissible in any proceedings before a judicial authority unless the subject of an exception. There is no applicable exception in the circumstances of this case. Any other construction, Mr Bates submitted, would undermine the whole purpose of the legislation because, generally, evidence as to the conduct constituting the offence will be evidence of such an offence having been committed.
30. Mr Bates also relied upon two further provisions which, he submitted, cast light upon the true construction of section 4(1)(a).
31. First, he submitted that, if evidence as to underlying conduct is not rendered inadmissible by section 4(1)(a), it would be unnecessary to give a judicial authority the power to admit such evidence; but section 7(3) does give a power to admit evidence in respect of “a person’s spent convictions *or to circumstances ancillary thereto*” (emphasis added). The construction put forward by the Council, and favoured by the tribunal panel, renders the words “or to circumstances thereto” otiose; and it is a tenet of construction that Parliament does not intend statutory words to be empty.
32. I pause to note that Mr Bates submitted that, insofar as the FtT had power under section 7(3) to disapply section 4(1), the tribunal should not use that power in the circumstances of this case; but, in any event, that would be a matter for the FtT in due course. It was not something which affected the construction of section 4(1)(a).
33. Second, Mr Bates relied upon the powers given to the Secretary of State by sections 4(4) and 7(4) to exclude the application of section 4(1), (2) and (3), as it has been used in the 1975 Order (see paragraph 17(ii) above). As I understood his submission, he particularly relied upon paragraph 5 of the Order, which, under the power in section 7(4), excludes the application of section 4(1) in relation to proceedings specified in the Order, including the various disciplinary proceedings there listed and “proceedings relating to taxi licences”. On the basis of the construction of section 4(1) as adopted by the tribunal panel, that exclusion would again be unnecessary; and evidence of the relevant conduct would be admissible in any event under section 4(1).
34. Finally, Mr Bates relied upon the judgment in YA, in which the Deputy Judge effectively accepted the arguments upon which he now relies. For example, on the narrow question of construction of section 4(1)(a), the Deputy Judge said (at [39]):

“Section 4(1)(a)... refers to the prohibition relating to a person who has ‘committed or been charged with or prosecuted for or convicted of or sentenced for any offence...’. In contrast section 4(1)(b) refers to ‘spent conviction or spent convictions’ and includes the phrase ‘or any circumstances ancillary thereto’. It is necessary in section 4(1)(b) to refer to ‘any circumstances ancillary thereto’ because the drafting of the section only uses the word ‘conviction’ and this makes it clear that the prohibition is wider than just the conviction itself. This is not necessary in the rest of section 4 as the drafting is wider and includes circumstances that are ancillary to the conviction, such as committing the offence and sentencing...”

The Deputy Judge considered the relative consistency of the opposing interpretations with the purpose of the legislation at [38]:

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

In short, on the issue of construction of section 4(1), Mr Bates submitted that the Deputy Judge was right; and the tribunal panel were wrong.

35. Therefore, applying that to this case, Mr Bates submitted that, by virtue of section 4(1)(a) of the 1974 Act, evidence of the conduct underlying Mr and Mrs Hussain’s

spent convictions is inadmissible before the FtT; there is no relevant exception; and references to that conduct should be struck out.

36. However, I am unable to accept the construction of section 4(1)(a) for which Mr Bates contends. In my view, for the reasons they gave, the tribunal panel were correct in their conclusion that section 4(1)(a) is, unlike section 4(1)(b), restricted in its scope, and does not include any proscription with regard to evidence of conduct constituting any spent convictions.
37. The issue is one of statutory construction and the starting point is therefore the words that Parliament has used. In my view, the words are clear.
38. Section 4(1)(a) concerns the admissibility of evidence and is in mandatory terms, rendering inadmissible in relevant proceedings before a judicial authority any evidence “to prove that any [rehabilitated] person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction”. If, as Mr Bates contends, that includes the conduct constituting the offence for which he was convicted, then section 4(1)(b) would be otiose: indeed, the two provisions, (a) and (b), would be inconsistent. Where evidence is inadmissible, it is unnecessary to have a distinct provision to the effect that questions seeking to elicit such evidence should not be asked; and it cannot be open for an individual to have a choice as to whether or not to give that (inadmissible) evidence in answer to questions.
39. Mr Bates’ answer to that point was that, by virtue of section 7(3), a judicial authority could admit evidence otherwise inadmissible by virtue of section 4(1)(a); and, in those circumstances, section 4(1)(b) may have some substance. He gave, as an example, a situation where the judicial authority admitted evidence of a conviction but not of the conduct underlying it: that would, he submitted, allow the rehabilitated person to answer question in relation to that conduct, if he wished. However, that is not the case: in those circumstances, he or she would still be unable to give evidence as to the conduct, because, unless and until the authority had exercised its discretion to admit evidence of conduct (as opposed to merely the fact of conviction), that evidence would remain inadmissible.
40. In my view, the wording of section 4(1)(a) and (b) is unambiguous: whilst, in proceedings before a judicial authority, (a) provides that evidence of the conviction and what might be termed “the prosecution process” is inadmissible, (b) concerns disclosure, extending that protection so that a rehabilitated person cannot be asked (nor is he or she required to answer) questions about the conviction *or circumstances ancillary thereto including conduct constituting the offence for which he or she has been convicted*. Whilst, of course, it is open to the Parliamentary drafter to express a single concept – here, the concept of the conviction of an offence and the conduct constituting that offence taken together – in two distinct ways, section 4(1)(a) and (b) are adjacent provisions within the same subsection, which makes it unlikely in the extreme that that was the intention here. The unlikelihood is compounded by the fact that the drafter thought fit and necessary expressly to define the relevant phrase used in section 4(1)(b) (“... or in circumstances ancillary [to a conviction]”...) in section 4(5). In my view it is clear that the different words used in section 4(1)(a) and (b) were intended to have different effects so far as scope of the provisions is concerned: the admissibility prohibition in the former is deliberately drafted not to include evidence of conduct constituting the relevant offence(s).

41. The unambiguity of the wording of section 4(1)(a) is, in my view, sufficient to dispose of the appeal by dismissing it. However, it comes as some comfort that other markers point in the same direction as the construction I favour.
42. First, whilst of course the 1974 Act seeks to balance (i) the policy intention to alleviate the legal and practical burden of past convictions of some age and (ii) the requirement to ensure that the public are protected from the risk of repeat criminal conduct, as section 1 makes clear, the focus of the 1974 Act is rehabilitation in respect of convictions. I do not consider that the report of the committee set up by various organisations including JUSTICE under the chairmanship of Lord Gardiner, “Living it Down: The Problem of Old Convictions”, to which Mr Bates referred, which appears to have prompted the Parliamentary activity which resulted in the 1974 Act, is of any assistance in construing section 4; but, in my view, like the Act itself, it too generally focuses on rehabilitation so far as convictions are concerned.
43. Second, as Mr Underwood emphasised, it is noteworthy both that (i) criminal conduct that does not give rise to a conviction for an offence cannot be the subject of rehabilitation or “spent” under the Act, and that (ii) conduct that is criminal may also give rise to civil or administrative claims. On the basis of Mr Bates’ construction, if a criminal conviction based on conduct is spent, that would generally prohibit that same conduct being used to found a civil claim or further administrative action such as further enforcement action. Mr Underwood submitted, with some force, that Parliament could not possibly have intended such a consequence, which would be devastating for both civil claimants and regulators; in circumstances in which, had there been no conviction, evidence of that conduct could have been relied upon in the later proceedings.
44. In response, Mr Bates acknowledged the public policy argument; but submitted that, where Parliament or the executive wished to ameliorate the position as set out in section 4(1), they had the powers to do so. For example, the position of civil claimants is dealt with by section 11 of the Civil Evidence Act 1968; and, in various specific provisions, Parliament (see, e.g., section 125 of the Gambling Act) or the Secretary of State (see, e.g., his use of the power under section 7(4) of the 1974 Act in respect of taxi driver licences, referred to above at paragraph 17(ii)) have intervened. Furthermore, in section 7(3), judicial authorities have the power to admit such evidence.
45. I am unpersuaded, however, that these submissions provide an answer to Mr Underwood’s point.
46. At common law, the fact of conviction was not evidence of the underlying facts of the offence; but misconduct which had founded a criminal charge and conviction was admissible in later civil proceedings. Section 11(1) and (2) of the Civil Evidence Act 1968 merely allowed the fact of conviction (which, as Mr Bates submitted, had been capable of proof by way of certification by the relevant court since the Criminal Act 1865) to be admissible in civil proceedings as proof that the relevant person committed the offence (section 11(2)(a)), and allowed the contents of various documents related to the criminal proceedings (such as the complaint and information) to be used as evidence of “the facts upon which the conviction is based” (section 11(2)(b)). However, whilst the 1974 Act may have reversed the extension provided by the 1968 Act so far as spent convictions are concerned, there is nothing to suggest that it intended to reverse the common law position by which evidence of misconduct that had founded a criminal charge and conviction was admissible in later civil proceedings. Where (as

is now often the case) a statutory scheme gives a regulator power to pursue both criminal and non-criminal enforcement steps, such a reversal would require regulators to elect which to take, often having to forego criminal proceedings if they wished to take other regulatory action on the licence. I consider it inconceivable that Parliament intended such a consequence: certainly, had that been the intention, it could and would have used clear words to do so, which the 1974 Act does not.

47. Nor did I think that the fact that Parliament and the Secretary of State have the power to exclude circumstances from the effects of section 4 to be of any force. On the construction which I favour, the 1975 Order and statutory provisions such as section 125 of the Gambling Act 2005 have substance: for example, they render section 4(1)(a) inapplicable, thereby admitting evidence of a conviction itself. In relation to the “safety valve” of section 7(3), in my view, that does not in any way undermine a construction of section 4(1) which, in some circumstances, renders such a safety valve unnecessary.
48. For those reasons, on this issue, I consider that the Deputy Judge in YA was wrong; and the tribunal panel in this case were correct, both in their conclusion with regard to the true construction of section 4(1) and their analysis that led to it.

Issue 2: “Judicial Authority”

49. As I have already indicated, the second issue – in determining a licence application under the 2004 Act, is a local housing authority a “judicial authority” (and so is able to avail itself of section 7(3) to allow in evidence of a relevant spent conviction if the interests of justice require it) – does not arise on the facts of this case; because we are concerned with the position before the UT in the shoes of the FtT on appeal from the Council, and it is rightly common ground that the FtT is a judicial body for these purposes. However, the issue is an important one in practice, the tribunal panel expressed a view upon it, and it was fully debated before us. In the circumstances, although of course any observations will be *obiter* (as were those of the tribunal panel below), I propose giving my view upon it.
50. The tribunal panel considered that “judicial authority” for these purposes included a local housing authority exercising its licensing functions under Parts 2 and 3 of the 2004 Act. In short, again, I consider both that conclusion, and the analysis that led the tribunal panel to it, to be correct.
51. Mr Bates, once more relying on the Deputy Judge’s judgment in YA at [44(e)], submitted that a housing authority in these circumstances is not a “judicial authority” because it is not adjudicating on rights as between third parties or rights conferring any form of status on third parties. If it were otherwise, he submits, it would require an authority in the position of the Council when considering the grant or revocation of a licence under Part 2 or 3 of the 2004 Act, in effect to apply to itself for the disapplication of section 4(1) under section 7(3).
52. However, for the purposes of sections 4 and 7 of the 2004 Act, “proceedings before a judicial authority” is defined in section 4(6) to include:

... in addition to any of the ordinary courts of law, proceedings before any tribunal, body or person having power—

- (a) by virtue of any enactment, law, custom or practice;
- (b) under the rules governing any association, institution, profession, occupation or employment; or
- (c) under any provision of an agreement providing for arbitration with respect to questions thereunder;

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

53. With respect to the Deputy Judge’s contrary view (and in agreement with the tribunal panel: see [143]), in my view it is clear that this wide definition extends beyond those who exercise the function of adjudicating between third parties. It extends to those persons and bodies who have the power under any enactment to “determine any question affecting the rights, privileges, obligations or liabilities of any person, or to receive evidence affecting the determination of any such question”; which I consider unambiguously to include an authority empowered by statute to determine the grant, refusal and revocation of licenses which give the holder the right to control and manage property which is subject to the 2004 Act licensing regime. Such a licence gives the holder a right of real value: without it, individuals are unable to manage or control relevant properties, and commit a criminal offence if they do so. I see no difficulty arising from this construction with regard to section 7(3) which simply allows the authority to disapply section 4(1): it does not suggest that there must be some form of application by a party for such disapplication, precisely because it does not envisage section 7(3) only being used in the context of traditional court proceedings.

Conclusion

54. For the reasons I have given, in my view:
- i) Section 4(1)(a) of the 1974 Act does not include any proscription with regard to evidence of conduct constituting any spent convictions. On that basis, subject to the agreement of my Lords, I would refuse the appeal.
 - ii) A local housing authority’s consideration and determination of a grant or revocation of a licence under Part 2 or 3 of the 2004 Act involve “proceedings before a judicial authority” for the purposes of sections 4 and 7 of 1974 Act; so that such an authority has the power under section 7(3) to disapply section 4(1) and admit evidence of a spent conviction if it is satisfied that justice cannot be done without admitting that evidence.

Lord Justice Fulford :

55. I agree.

Sir Terence Etherton MR :

56. I also agree.