



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case Reference** : **LON/OOBH/HNA/2018/0078**

**Property** : **6 Flempton Road, London E10 7NH**

**Appellant** : **Mr Huseyin Ustek**

**Representative  
Also in Attendance** : **In person  
Ms Arzu Sahan ( Interpreter)  
Ms Didar Sahin (witness)**

**Respondents** : **The London Borough of Waltham  
Forest**

**Representative  
Also in Attendance** : **Ms T O’Leary of Counsel  
David Beach Environmental Health  
Officer  
Julia Morris- Service Manager**

**Type of Application** : **Appeal under s.249A and schedule  
13A of the Housing Act 2004**

**Date of Hearing** : **22 March 2019, and on 23 April  
(Tribunal only for Decision)2019**

**Date of Decision** : **28 May 2019**

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**DECISION**

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## *Decision*

- 1. The appeal by Mr H Ustek against the imposition of a financial penalty by the London Borough of Waltham Forest on 23 October 2018 under section 249A and schedule 13A of the Housing Act 2004 is dismissed**  
**The decision by the London Borough of Waltham Forest to impose a financial penalty is upheld in the sum of £4,000**

## *Introduction*

1. This is an appeal by Mr Ustek against the imposition of a financial penalty by the London Borough of Waltham Forest under section 249A and schedule 13A of the Housing Act 2004. The Financial Penalty Notice from the council is dated 23 October 2018 and is in the sum of £12,000.

## *The Hearing*

2. The appeal was set down for hearing on 22 March 2019 when Waltham Forest was represented by Ms O’Leary of Counsel together with Mr Beach and Ms Morris. Mr Ustek appeared in person, and was assisted by a tribunal appointed Turkish interpreter Ms Sahan. Also present on the Appellant’s behalf was Didar Sahin.
3. Ms O’Leary in her opening remarks stated that there were two witness statements, Julia Morris, and David Beach. The issues for the Tribunal were:- (a) was the property licensable during the period in issue? (September 2015 to 15 September 2018) (b) Was the premises occupied by a tenant during the period in issue? (c) Counsel noted that it was accepted by the Appellant, Mr Ustek that the property was not licensed, therefore the Tribunal had to consider whether there was a reasonable excuse for the failure to licence, and finally should the notice be upheld, and if the Tribunal decided to uphold the notice (not allow the appeal) was the level of fine appropriate.
4. The Respondent called Ms Morris to give evidence.

## *Background*

5. The background to the imposition of the penalty was primarily set out in a witness statement of Ms Julia Morris dated 12<sup>th</sup> January 2018, who is a Service Manager in the Private Sector Housing and Licensing Team with the Respondent. Ms Morris manages a team of enforcement officers, including Licensing Officers who are responsible for administering and enforcing the provisions relating to the selective

licensing of residential accommodation under Part 3 of the Housing Act 2004.

6. Ms Morris in her statement set out that on 24 June 2014 Waltham Forest Council determined to designate the whole of its area as a Selective Licensing Area under the provisions of Section 80 of Housing Act 2004. The scheme was to come into effect on 1 April 2015. The council offered a discount for early licensing.
7. Since the extension of the Licensing area £27,000 licence applications were made to the council.
8. In her statement Ms Morris stated:- “Prior to the decision to introduce selective licensing Waltham Forest undertook an extensive consultation exercise with landlords, tenants and groups representing landlords or tenants regarding the proposed introduction of the licensing regime. . Landlords were consulted both in respect of the proposal to introduce borough wide Selective Licensing in Waltham Forest and the nature of the standard conditions that would apply to each grant of licence.”
9. In her statement Ms Morris set out that the consultation took place between 8 November 2013 and 24 January 2014. This included the proposal and draft papers being made available on the council website. Emails being sent to landlord’s in direct receipt of housing benefit, and discussions at accredited landlord forums and also a face book campaign.
10. Ms Morris in her statement said that the scheme had been widely published. In addition to the publication of the scheme, in paragraph 16. of her statement Ms Morris stated: “Immediately prior to the Selective Licensing scheme coming into force in Waltham Forest licensing officers visited over 100 local/letting/managing agents in the borough. These visits undertaken to ensure that agents were aware of the licensing scheme. Agents also took part in the testing of the on-line applications during the early bird period.”
11. Ms O’Leary asked Ms Morris why she thought the offence was committed. She stated that in February 2017 she identified the property as one which was believed to be rented out, which remained unlicensed. Officers then visited 6 Flempton Road, Leyton, the premises were not licensed, whilst visiting the premises they saw a Mrs Wang at the premises, she stated that she was renting the premises, she provided a statement setting out how much she paid for rent (£1420.00 PCM), and confirming that Mr Ustek was in receipt of rent for the premises.
12. The Tribunal was referred to a copy of the statement of Mrs Wang, and a copy of the tenancy agreement between Mr Ustek and Mrs Wang.

13. Mr Brown the Licensing Enforcement Officer, prepared a section 9 statement dated 23 August 2018. In his statement he detailed the steps taken by the council to publicise its selective license scheme. He stated in paragraph 6. of his statement: "...On 9<sup>th</sup> February 2017, the Council wrote to Mr Huseyin Ustek in connection with the licensing of 6 Flempton Road... This letter requested that a licence application be submitted within 14 days of the date of the letter and also asked the owner to contact the Council if it was believed that the address was not required to be licensed."
14. Mr Gavin Brown considered a Civil Penalty should be imposed.
15. Ms Morris stated that the team leader considered the case, including the level of Penalty to be imposed. The Council considered its enforcement policy in relation to the penalty to be imposed. The matter was reviewed twice by the Team Manager.
16. In the Respondent's Statement of Case they set out how the Respondent had arrived at the decision to impose a financial penalty and the service of the notice.
17. In paragraph 4.14 of the Respondent's Statement of Case, it was stated that Julia Morris prepared a report confirming that she was satisfied both that the Applicant had committed an offence under section 95(1) of the 2004 Act and that in accordance with its Housing Enforcement Policy a financial penalty should be imposed on the Applicant. Ms Morris reviewed the Respondent's records for the details of previous property licensing applications and cases involving the Applicant.
18. In paragraph 4.14.1 of the Statement of Case it was set out that the Applicant had previously applied for a Mandatory HMO Licence under Part 2 of the Housing Act 2004 for the Property 6 Flempton Road. His contact address had been given as 175 Lea Bridge Road. Paragraph 4.14.2. Set out that the Applicant had previously made an application for a Selective Licence under part 3 of the Housing Act 2004 for another of his properties at 175 Lea Bridge Road E10 7PN on 18 March 2016 and again gave his contact address as 175 Lea Bridge Road. In 4.12.3, it was stated that the Applicant had also made an application for a Selective Licence for his property at 173a Lea Bridge Road on 27 February 2018, for the first time; in his licensing Application he gave 10 Mapleton Road Enfield as his address.
19. The Respondent in paragraph 4.15 stated:- "Given the Applicant's evident knowledge and awareness of property licensing in the Borough and the number of other properties he manages, Ms Morris considered that this was a serious Band 4 offence for which a £15,000 penalty was appropriate."
20. The outcome of Ms Morris's review was that on 11.9. 18 a *Notice of Intent to impose a financial penalty Address 6 Flempton Road Leyton*

*London E10 7NH.* In section c) of the letter it was stated that the Applicant had the right to make representations within 28 days. No Representations were received.

21. A Financial Penalty Notice was served on 23 October 2018. The Notice set a financial penalty of £12,000. The Notice stated -: “... *The imposed financial penalty specified above has been reduced by 20% from the amount set out in the Notice of Intent on the basis that the identified breach was compiled with during the representation period.*” This referred to the fact that the Applicant had applied for a licence by this stage. The Council was also prepared to offer a further discount of 20% on the basis that the penalty was paid within 28 days.
22. The Tribunal was informed that this notice was suspended whilst the matter was subject to appeal.
23. The Tribunal asked for further information about the scheme and the policy used by the council to set the penalty notice.
24. The Tribunal was informed that the decision was taken to implement a scheme of financial penalties under the Housing and Planning Act 2016 in place of prosecutions under the 2004 Act at a Cabinet Meeting on 25 April 2017. A policy was approved by Cabinet on 23 March 2018. The aim of the policy was described to protect public health, reduce antisocial behaviour and safeguard housing standards by ensuring compliance with the relevant legislation whilst recognising the needs of local businesses”
25. The Statutory Guidance set out in Schedule 9 was that the Local authorities must have regard to this guidance in the exercise of their functions. Paragraph 3.5 required that “the actual amount levied in any particular case should reflect the severity of the offence, as well as taking account of, the landlord’s previous record of offending.” The factors that should be taken into account were the (a) Severity of the Offence (b) Culpability and track record of the offender. (c) The harm caused to the tenant and the deterrence of the offender and others, it should also remove the financial benefit the offender may have had of committing the offence.
26. However in respect of Punishment of the Offender, point (d) of the guidance noted that “ while the penalty should be proportionate and reflect both the severity of the offence and whether there is a pattern of previous offending.” The Civil Penalties Matrix had 6 bands. Bands 1-2 was moderate severity ( with a penalty of -£4999 for band 1 and up to £9999 for band 2), band 3-4 Serious ( with £10000 to £14999 for band3 and £15000 to £19999 for band 4) band 5-6 was severe with £20000 to £24999 for band 5 and £25000 to £30000 for band 6).
27. Ms Morris was asked how she had arrived at the penalty charge of £12,000. She stated that in respect of the assessment in this case the

range was considered to be a serious band 4 offence. The factors in terms of seriousness was that the property remained unlicensed, Mr Ustek was considered to be a non-professional landlord as he had less than 5 properties, however he had proven knowledge of the licensing scheme, he had also been in breach to improvement notices in relation to two other properties. There had also been no application for a license until a warning had been issued. Ms Morris stated that the council could have prosecuted Mr Ustek; however as prosecution was a criminal penalty they considered the issuing of a notice to be fairer.

28. The Respondent was asked about the information which had been sent to Mr Ustek, they confirmed that the notice would have also included the witness statements and exhibits. They acknowledged in answer to Tribunal questions that there had been no complaint or investigation of any hazard at the premises in issue.
29. In respect of questions concerning where the warning letters had been sent and how they would have come to Mr Ustek attention. The Tribunal was informed that the warning notice had been sent to his addresses at 173 and 175 Lea Bridge Road and as a result of a check of council tax records. Mr Ustek's address of 10 Mapleton Road had been noted and a letter had been sent to that address. The Respondent did not accept that the notices had not come to Mr Ustek's attention.
30. Ms Morris, in answer to questions, accepted that the information was not made available in Turkish. However she stated that details had been widely published in local papers and with community groups.
31. The Tribunal also heard from David Beach, The Respondent's Director of Regulatory service. He was the main author and had been involved in collaboration with a colleague in formulating the policy. He was called by the Respondent as a witness who could answer further questions concerning the Financial Penalties Policy.
32. He stated that selective licensing was introduced in Waltham Forest because of Anti-social behaviour. Part of the conditions imposed as part of the license was to ensure proper management and anti-social behaviour prevention. In answer to the Tribunal's questions concerning the state of the actual property. Mr Beach accepted that there was no disrepair at the property or hazard however he considered that the failure to license could still cause harm.
33. The Tribunal wanted to know why the level of fines went up so steeply from £5000 to £15,000.
34. Mr Beach went on to explain that the Council policy in respect of civil penalties incorporates a matrix approach to civil penalties in order to aid transparency and consistency in any imposed penalty. The matrix is divided into 6 different equal bands of £5,000 providing an indicative minimum "tariff" under the various offence categories with the final

level of the civil penalties being adjusted in each case to take into account other relevant or aggravating factors. The policy document breaks down the various categories for which a financial penalty can be imposed. For each offence category, a differentiation is made between an offender controlling a small number of properties and landlords/agents controlling a significant number of properties in setting the relevant minimum penalty.

35. In relation to the Applicant as he controlled five or less properties the policy provided that this should be regarded as a moderate band 2 offence, however, Mr Beach stated that the approach was to breakdown the different offences by offence type. In the case of non-licensing, this was considered to be a significant failing. In the Respondent's view, tenants living in unlicensed properties do not benefit from the same level of protection and given this an unlicensed property can have a significant impact on the wider neighbourhood.
36. The increase in the level of fine in this case was because Mr Ustek had knowledge and experience of licensing which was considered to be an aggravating factor.
37. In his witness statement at Paragraph 17, Mr David Beach stated:- "... With regard to aggravating features, the adopted policy confirms that any demonstrated evidence that the landlord/agent was familiar with their need to obtain a property licence (e.g. the fact that they were named licence holder or manager in respect of already licensed premises) would warrant a higher penalty. In this case, the Applicant had two other rented addresses in Waltham Forest for which he had made licence applications, providing demonstrable prior knowledge of the need to licence the property. As a result, the penalty, before available discounts, was set at £15,000..."
38. He was also asked about why an on-line only scheme of licensing had been introduced. He stated that this was because the local authority was expecting to deal with over 26,000 applications and on-line was the only way to deal with such a large number. He did not accept that this caused any additional difficulty as help was available and the system had been tested with local property agents. He stated that fundamentally landlords were operating a business and the licensing scheme was no different from any other regulation. Given this it was open to Mr Ustek to engage the services of relevant professionals.
39. The Respondent submitted that the penalty notice had been correctly served and there was no lawful excuse for Mr Ustek not complying with the notice.

## *The Appeal*

40. On Mr Ustek submitted an appeal against the Final Penalty Notice. The grounds of appeal were: That the premises had been rented out to Mrs Weng and her family for 4 years. His appeal stated:- “Previously at one stage the premises were occupied by four to five tenants and Mr Ustek was required to obtain a licence which he obtained. There is a licence dated 29/9/2010. Turkish is Mr Ustek’s first language and he does not read or write in English. He relies on others to deal with correspondence; it is accepted that in 2016 he applied for a licence in relation to 175 A Lea Bridge Road, however at the time he was prompted to do so by the Respondent, and he believes one of his sons completed the application. A license application was completed by his son Serdar in respect of 173A Lea Bridge Road. Of the premises he stated in his application for appeal that he was not aware that a new licence had to be obtained and that he did not receive any notification from when the licensing scheme was adopted in 2015. He believed that if a new licence was needed for Flempton Road. He would have been notified.
41. He was unaware of the visits by the council to Flempton Road on the 7 March 2017 and the revisit on 5 June 2018. He did not receive the correspondence dated 9 February and 24 February 2017 telling him that he needed to apply for a licence. In addition he was out of the country between 17 November 2017 and 18 February 2018.
42. He did however receive the letter dated 16 July 2018 which was sent to 10 Mapleton Road. In his Application he stated that “ ...when mail is sent to 173 and 175 Lea Bridge Road as 175 is a kebab shop and 173 is a café he does not always receive mail that is sent to these addresses. The address he does receive mail at is 10 Mapleton Road...”
43. He stated that he took steps to obtain a licence by asking his then café manager, Didar Sahin to assist him by filling out the on-line form. He was appealing against the penalty because he had not received the letters notifying him he had to obtain a licence, he was also appealing against the level of fine as it failed to take into account “...his relatively modest means”.
44. The Tribunal heard from Didar Sahin. She was an employee of the café next to the kebab shop. She stated that Mr Ustek had not been getting on well with his sons, and as a result he had been asking her to deal with his correspondence translating letters for Mr Ustek relating to the business and his houses.
45. In her statement, she stated -:8. “I know from my own personal knowledge that if an official document arrives addressed to the Applicant, he will have no understanding of it until the contents are translated for him.” She stated that until the letter dated 16 July 2018



she had not been given any document from the council by the applicant to translate.

46. She stated that she had been given the letter dated 16 July 2018, sometime in September 2018 as she had been on holiday in France in August 2018. She had been given the letter on her return. She set out in her evidence and in her statement that she realised the urgency of the letter because of the threat to impose a fine up to £30,000. She stated that she had tried without success to telephone the council. She had left two messages and not received a call back.
47. She stated that she had made numerous attempts, over a two week period to fill in the licensing form on-line. As she was not successful she again telephoned the council and told them about her attempts to complete the on-line form. She was advised to keep trying as the system often had problems. She stated that there were technical difficulties in uploading the documents. In her evidence she stated that she was not successful in submitting the Application and making payment until 15 September 2018 and that after that on 18 September she sent a copy of the Gas Safety Certificate. She was unaware of what had happened to the application afterwards.
48. Mr Ustek gave evidence through the Tribunal appointed interpreter. His evidence set out the matters relied upon in his application. He stated that he had rented the property to Ms Wang in 2013 and that unless there was a problem he did not go around to the house. He stated in answer to questions on how he communicated with her, that she would call his son who would relay the message, and that other than that he did not really communicate with his son.
49. He was asked about his application for a licence for 175 and who was the person whose email address had been given. Mr Ustek stated that he was unsure who this was. It was pointed out to him that a letter concerning licensing had been sent to his address at 10 Mapleton and that this gave him information that "... It became a legal requirement for most privately rented properties in Waltham Forest to hold a licence."
50. Mr Ustek continued to state that he had been unaware of the requirements until after the notice to impose a penalty.

### *Submissions*

51. On behalf of Waltham Forest Ms O' Leary referred to the evidence recited above and asked the Tribunal to uphold Waltham Forest's decision. She referred to the decided cases of *Clarke and Manchester*

[2015] UKUT 0129, in which Martin Rodger QC Deputy President of the Land's Tribunal stated that the Council's guidance was relevant material to which the F-tT should have regard and from which it should be slow to depart. In *Thanet DC v Grant 2015 WL* the Divisional Court found that a magistrates' court had been wrong to find that the obligation on a local housing authority under the Housing Act 2004 s85(4) to take all reasonable steps to secure that applications for licences were made in respect of houses in a designated additional licensing area was a duty owed to an individual landlord, and that a failure to comply with that duty gave rise to a reasonable excuse under s95(4) for his failing to obtain a licence.

52. Accordingly Mr Ustek could not rely on any alleged failing on behalf of the local authority as an excuse for his failure to licence.

53. Mr Ustek relied on his evidence and on the written submissions.

#### *Decision and Reasons*

54. The Tribunal has decided to uphold the Final Penalty Notice.

55. The Tribunal has decided the Financial Penalty in the sum of £12,000 is disproportionate and that the appropriate penalty is £4,000.00

56. Firstly, the Tribunal is satisfied that the Property was required to be licensed under the Council's Selective Licensing Scheme under section 95 of the Housing Act 2004. This was not disputed by Mr Ustek.

57. So far as the level of the financial penalty is concerned the Tribunal decides the following:

(a) The matrix used by Mr Beach is properly based on the DCLG guidance and the Tribunal considered that it worked effectively to distribute the weight of the allocated criteria across the range of possible fines up to £30,000, however the Tribunal has noted that there was considerable discretion in the assessment of the aggravating and mitigating factors which determined the level of the fine. In the council's policy it stated that "Under the Council's policy the civil penalty for a landlord controlling five or less dwellings, with no other relevant factors or aggravating features ...would be regarded as a **moderate** band 2 offence, attracting a civil penalty of £5000 in respect of a failure to obtain the necessary Selective Licence under part 3 Housing Act 2004. The Aggravating features/factors specific to non-licensing offences was the condition of the unlicensed property.

(b) The Tribunal noted that there was no evidence before it to suggest that the property was in a poor condition. In respect of demonstrated evidence that the landlord/agent was familiar with their need to obtain a property licence, the Tribunal consider that this is fact specific and should consider all of the circumstances in

this case and whether the evidence points to a landlord who is familiar with the licensing scheme in respect of an already licensed property.

- (c) The Tribunal noted that this property had been licensed and that as such the Respondent knew that as a HMO it needed to be licensed and that he had complied with the requirement, however when the property was let to a single family he allowed the license to lapse. Whilst the Tribunal accepts that his lack of knowledge of the scheme and indeed his lack of knowledge of English was not a reasonable excuse for the Applicant's failure to license the property, Mr Ustek, is a business man and although modest, along with his businesses he has a small property portfolio, in many ways his portfolio is secondary to his business. He has however chosen to let his properties and it is his responsibility to ensure he is able to understand the requirements of the business of a landlord and is complying with them.
- (d) Where he has difficulties in understanding English, this is his choice and with it there is a responsibility to run that business lawfully. He ought to have made arrangements to ensure that he was able to carry out his business and comply with regulatory requirements and as such this cannot be used as a reasonable excuse.
- (e) However the Respondent as a local authority does not in the Tribunal view have considered that there is a duty to promote equality and it cannot treat all landlords identically, although the scheme to license had been tested by letting agents and others the Tribunal accepted Ms Sahin's evidence that the online scheme was difficult to operate. The Tribunal accepted the authority's evidence that the scheme of selective licensing was well publicized however it would have helped to have campaigns specifically targeted for specific minority groups.
- (f) The Tribunal heard evidence from the Applicant and Ms Sahin and were satisfied that the warning letters did not come to the Applicant's attention. Although this cannot form the basis of a reasonable excuse it ought to be taken into account in determining the severity of the offence.
- (g) In deciding on the scores for each of the individual criterion, the officer concerned is required to apply their expertise to the circumstances and background to the offence to allocate appropriately. The Tribunal makes no criticism of the officer in the assessment that was made, however the Tribunal in re-hearing this matter has taken into account all of the factors that were not known to the Council when making its decision.
- (h) Having regard to the fact that no evidence was presented to the Tribunal that other than the failure to licence, the property was

poorly managed, the Tribunal is satisfied that a penalty ought to be assessed as a band 1 offence and that the sum of £4,000 is the appropriate and proportionate penalty:

1. The landlord controls five or less dwellings;
2. The Tribunal has determined that the Applicant's knowledge of the requirement to licence on the circumstances of this case is not of itself, an aggravating feature. The Tribunal in assessing the culpability of the Applicant has noted that he has had Improvement Notices served on him by the local authority in respect of other properties. However the Tribunal consider that these offences, although relating to properties managed by him, were different and have been the subject of discreet action by the local authority.

58. The Appeal against the service of the penalty notice is dismissed, the appeal against the sum of the penalty is upheld in part and the sum of the penalty is reduced to £4,000.00.

**Name:** Judge Daley

**Date:** 28 May 2019

### **Rights of appeal**

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

