



**First-tier Tribunal
Property Chamber
(Residential Property)**

Case reference : **LON/00BK/HMF/2022/0016**

Property : **81 Marne Street, Westminster, London W10 4JF**

Applicants : **(1) Rima Koley
(2) Arka Chakraborty**

Represented by : **Cameron Neilson (Justice for Tenants – lay)**

Respondent : **David Ambrose Baird**

Application : **Applications by tenants for Rent Repayment Orders following an alleged offence committed by the Respondent for having control or management of an unlicensed House in Multiple Occupation (“HMO”) – Section 43 of the Housing and Planning Act 2016 (“the 2016 Act”)**

Date of application : **12th January 2022**

Tribunal : **Judge Bruce Edgington
Louise Crane MCIEH**

Date & place of hearing: **15th September 2022 as a video hearing from 10 Alfred Place, London WC1E 7LR in view of COVID pandemic restrictions**

DECISION

Crown Copyright ©

1. Tribunal refuses to make Rent Repayment Orders against the Respondent as it is not satisfied, beyond a reasonable doubt, that an offence has been committed as alleged.
2. No order as to repayment of Tribunal fees.

Reasons

Introduction

3. Rent Repayments Orders (“RROs”) require landlords and/or other people managing and/or in control of properties who have broken certain laws to repay rent paid either by tenants or by local authorities and are intended to act as a deterrent to prevent offending landlords profiting from breaking such laws.

4. The orders were originally made pursuant to the **Housing Act 2004** (“the 2004 Act”) but this application is made under the later provisions contained in the 2016 Act. Section 41(1) of the 2016 Act says that “*A tenant.....may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies*”.
5. Section 40 of the 2016 Act sets out the offences and prefaces the definition by saying “*an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let by that landlord*”. One of those offences described is under section 72(1) of the 2004 Act i.e. “*control or management of unlicensed HMO*” i.e. a House in Multiple Occupation (“HMO”), and this is the offence relied upon by these Applicants.
6. It should be made clear that the property is an HMO under part 2 of the 2004 Act if it has 5 or more occupiers with certain other conditions about occupiers not being part of the same household. The Respondent states that he knows what an HMO is but he had only given permission for 4 people to occupy the 4 bedrooms and was completely unaware of a 5th person being there.
7. The Applicants’ position with regard to rent paid is that they both claim £2,636.71 from the 29th September 2020 until the 12th March 2021 (pages 63 and 64) and the fact that such rent was paid is not challenged by the Respondent. The Respondent has not applied for a licence and says that the property is presently occupied by a single family.

Inspection

8. It was not considered that a physical inspection of the property was necessary and none has been requested. There is a picture of the front of the property on page 117 of the bundle and it is described by the parties as being a 3 storey, 4 bed-roomed property which is clearly a mid-terraced house.

The Hearing

9. Just before the hearing date, the Respondent’s Darren Baird who has represented the Respondent throughout, contacted the Tribunal office to say that a boiler had to be replaced as a matter of urgency in another of their properties on the day of the hearing and he asked what he should do. He was told that he needed to make a decision about whether the Respondent would want an adjournment.
10. He sent an e-mail to the Tribunal office at 9.14 pm on the 14th September saying “*as I a (sic) quite happy for hearing to proceed without me as I say you have all my paperwork and evidence. The rehire (sic) I wouldn’t ask for adjournments as don’t see any need for this*”. The Applicants and their representative were notified of this and it was agreed that the Tribunal would proceed with the hearing.
11. Those attending the hearing were the Applicants and their representative, Cameron Neilson. The Tribunal chair introduced himself and the other Tribunal member. He then said that he had some questions to raise on the papers filed. He would do that and the Applicants could then present with their cases. The other Tribunal member would ask any questions she had as and when she needed to. That was how the hearing proceeded.

12. Mr. Neilson agreed that the task of the Tribunal was to consider (a) whether an offence had been committed, (b) if so, whether the 'reasonable excuse' defence under section 72(5) of the 2004 Act applied and (c) if the answers to those two questions was 'yes' and 'no' respectively, what rent repayment order should be made. The Tribunal chair then asked one or two questions arising from an examination of the papers filed and it was agreed that Mr. Neilson would deal with these when the Applicants gave their evidence.
13. Mr. Chakraborty gave his evidence first. He confirmed that his written statement in the bundle was still correct. He confirmed that he started living at the property on the 17th September 2020 and that Saddam Hakim was a tenant. He and his brother, Aminullah Hamidi, were in one of the bedrooms. He also confirmed that Mr. Hamidi was a masters student studying at Edinburgh Napier University and had travelled from Scotland to stay with his brother "*for a couple of weeks*". However, Mr. Hamidi was still living there in January 2021 when Mr. Chakraborty returned to live in India. He accepted that he had never signed the draft tenancy agreement presented to him as one of the tenants named had moved out.
14. Ms. Koley then gave evidence and also confirmed that her written statement was correct. Her occupancy of the property started on the 27th September 2020 and she confirmed that Saddam Hakim was living there with Aminullah Khan. Although this person had a different name to that known by Mr. Chakraborty, he was the same person described by him as being Mr. Hakim's brother and he will be entitled Aminullah hereafter. The witness confirmed that Aminullah stayed there until she left on the 27th May 2021 (page 63 in the bundle). Oddly, she described Aminullah as being a "*non-consensual guest*".
15. Both witnesses confirmed that Aminullah appeared to have employment in a restaurant and, possibly, with Deliveroo. He had a bicycle which was at the property. In their bedroom, Mr. Hakim slept in the bed and Aminullah slept on a mattress. Mr. Baird called at the property each month to collect the rent which was always left in an envelope for him in a cupboard. They agreed that generally there were 4 tenants at the property plus Aminullah although some tenants left from time to time and were replaced when that was possible. Finally, neither witness could say what conversations had taken place between the Respondent and his son on the one hand and Mr. Hakim and Aminullah on the other hand about whether Aminullah was living at the property and, if so, for how long.
16. The witnesses also gave evidence about how the Respondent accepted his responsibilities as a landlord but, in view of the decision reached by the Tribunal it is not necessary to set out such evidence in this decision.

Discussion – has an offence been committed?

17. The jurisdiction of the Tribunal including the power to order re-payment of rent for the period claimed is not in dispute. It is also not disputed that the Respondent was, at the relevant time, the person having control or management of the property even though he has clearly been using his son to, as it were, deal with the 'leg work'. The first task of the Tribunal is therefore to consider whether it is satisfied, beyond a reasonable doubt, that an offence was being committed during the period for which rent is being claimed.

18. If, as is said by the Respondent, a 5th person had no consent to live at the property and, as far as he was concerned, there was no 5th person in occupation, then this raises doubts about liability. The Tribunal has to be satisfied, beyond a reasonable doubt, that five people were living at the property. The relevant wording in the **Licensing of House in Multiple Occupation (Prescribed Descriptions) (England) Order 2006** (“the 2006 Regulations”) says, in regulation 3(2), that an HMO has to be “*occupied by five or more persons and ... occupied by persons living in two or more single households*”.
19. In other words, the task of this Tribunal is to determine whether five or more people were living in the accommodation. In all other relevant respects the property was an HMO because it did have more than 2 households and the kitchen and bathroom were being shared by everyone there.
20. The evidence is that when Mr. Chakraborty moved in on the 17th September 2020, it was explained that Aminullah was staying with his brother for a couple of weeks and was at university in Edinburgh. Ms. Koley described him as a ‘non-consensual guest’ and said that he continued to stay with his brother until 27th May 2021. Both also said that the numbers fell below 5 during the period in question when tenants left. Finally, Mr. Chakraborty moved back to India in January 2021. He clearly continued to pay rent and could come back and claim occupation, but the plain fact is that after January 2021, he was no longer living at the property.
21. Accordingly, the evidence shows that Aminullah was initially staying with his brother as a guest for a short time and, by inference, had living accommodation in Edinburgh. Thus, at that time, he was not living at the property. In this Tribunal’s view, a person visiting a relative as a guest for a short time cannot be described as living at the property as part of a household.
22. Thereafter, the evidence is sketchy, to say the least. Aminullah’s living arrangements appear to have changed during the 4 months up to January 2021, after which there were certainly no more than 4 people living in the property, but there is no evidence as to when such living arrangements did change. Furthermore, the evidence as to whether there were 4 or 5 people actually living there at any one time after the initial period referred to above is impossible to ascertain from the evidence.
23. The decision of the Tribunal based on the evidence before it is that it is possible, on the balance of probabilities, that during the period from the end of September 2020 until January 2021, there were 5 people living at the property. However, that is not the relevant standard of proof. The Tribunal is not satisfied beyond reasonable doubt that this happened and therefore it is not satisfied beyond reasonable doubt that the property became an HMO. In those circumstances it cannot find, to the criminal standard of proof, that an offence has been committed.
24. As far as the Tribunal fees of £300 are concerned, the Applicants have asked that these be reimbursed by the Respondent. In view of the Tribunal’s decision, such an order is refused.

25. As a final comment, Justice for Tenants should be commended for their thorough preparation for this hearing. They produced all the relevant case law and made complex submissions on the other 2 questions i.e. whether the defence under section 7(5) of the 2004 Act was relevant and the level of any rent repayment order. On the latter issue, the Upper Tribunal has clearly changed its approach since **Vadamalayan v Stewart** [2020] UKUT 183 (LC) with what some would describe as differing guidance in several cases. The written submissions explored the matter thoroughly and the Tribunal is grateful.



.....
Judge Bruce Edgington
16th September 2022

ANNEX - RIGHTS OF APPEAL

- i. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to London.RAP@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.
- ii. 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.
- iii. 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.
- iv. 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.