FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference **HMCTS Code**	**:**	**CAM/38UC/HML/2020/0003** **P:PAPERREMOTE**
Property	**:**	**234 Headington Road, Oxford OX3 7PS**
Applicant	**:**	**M.S.Parvizi**
Representative	**:**	**John Shiri**
Respondent	**:**	**Oxford City Council**
Representative	**:**	**Katherine Coney, Principal Lead Officer**
Type of application	**:**	**Appeal against the refusal of an HMO licence – Section 64 and Part 3 of Schedule 5 to the Housing Act 2004**
Tribunal member(s)	**:**	**Regional Judge Wayte**
Date of decision	**:**	**14 August 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote hearing on the papers which has been consented to by the parties. A face-to-face hearing was not held because all issues within the jurisdiction of the tribunal could be determined in a remote hearing on paper. The documents that I was referred to are in three bundles, the contents of which I have noted. The order made is described below.

Decision of the tribunal

The tribunal confirms the respondent's decision to refuse an HMO licence on the basis that it is not suitable for use as an HMO as it does not have the required planning approval.

The application

1. This is an appeal against the decision by the Respondent to refuse to grant the applicant an HMO licence for 234 Headington Road, Oxford ("the Property"). The Notice of the Decision to Refuse to Grant a Licence for a House in Multiple Occupation is dated 28 February 2020 and gives two reasons: (1) The property is not suitable for use as an HMO as it does not have the required planning approval and (2) The house is not occupied as an HMO and therefore at this point of time an HMO licence is not required.

2. The application was made on 14 March 2020. The grounds of appeal challenged the need for planning permission on the basis that the Property had permitted development rights, having been occupied as an HMO prior to 24 February 2012, when those rights were restricted by the council. The application also stated that it was irrational to refuse a licence prior to the property being occupied as an HMO as that would suggest that an offence should be committed before applying for a licence.

3. Directions were given on 11 May 2020, with the council ordered to respond to the application and attached documents by 12 June 2020, the applicant to prepare their response, including any expanded statement of the reasons for the appeal by 3 July 2020 and giving the council the right to reply to that statement by 17 July 2020. Three bundles were duly filed and the enclosures have been taken into account.

4. Finally, on 19 July 2020, the applicant made an application to debar evidence at pages 139-144 of the second bundle filed by the council. This application is considered below.

The Law (an overview)

5. Part 2 of the Housing Act 2004 introduced a new scheme for the licensing of HMOs by local housing authorities. A licence authorises occupation of the HMO by not more than the maximum number of households or persons specified in it (section 61). That number is determined by reference to prescribed standards which usually refer to the number, type and quality of kitchens, bathrooms and laundry facilities (section 65). There is also provision for the licence to include such conditions as the local housing authority consider appropriate for regulating the management, use and occupation of the house concerned (section 67).

6. Where an application in respect of an HMO is made to the local authority it must either grant or refuse the licence (section 64). The duration is for a maximum of 5 years (section 68).

7. Any appeal against licence decisions is covered by the provisions in Schedule 5, Part 3. In particular, paragraph 34 states that the appeal is to be by way of a re-hearing, may be determined having regard to matters of which the authority

was unaware and the tribunal may confirm, reverse or vary the authority's decision.

The property and planning applications

8. Details of the property were included in the bundles filed by both parties. The applicant's bundle includes an inspection report said to have been updated on 30 June 2020 which describes the property as a two storey semi-detached house with a self-contained "annex", converted from a former garage. The house is described as having three bedrooms on the first floor and one on the ground floor, although it does not appear to be in dispute that one of the bedrooms on the first floor is below the minimum size for occupation introduced by the Licensing of Houses in Multiple Occupation (Mandatory Conditions of Licences) (England) Regulations 2018 and could therefore only be used as sleeping accommodation for a child of 10 or under. The council, having inspected the property, considered that it might be suitable for a total of 6 people from 3 households, on the basis of double occupancy of each of the other three bedrooms, although work would then be required to enlarge the kitchen amongst other conditions. It would appear that the applicant also wished to apply for permission for 6 people, with 5 in the main house and 1 in the annex.

9. Photographs and a plan showed that "the annex" is a separate building, described as a studio flat as it has its own kitchen and bathroom facilities. There is a front driveway with parking space for 2/3 cars and a sizeable garden to the rear. No request was made for an inspection of the property and the tribunal did not consider it was necessary to determine the application.

10. The applicant bought the property in 2004. It would appear that he originally occupied it as a family home. In 2005 the garage was converted into a "games room". In 2007, following an issue with the garage being used for sleeping accommodation, the council's Building Control Surveyor confirmed that the garage or annex could be used as an occasional bedroom, ancillary to the main dwelling by family members only (letter dated 21 March 2007). The letter clearly stated that "*If it is proposed to sell or let the building separately then further building control applications and planning consents must be sort*".

11. As stated above, although it is possible to covert a house from class C3: residential use by a single household to C4: small HMO by permitted development, Oxford had removed that right for properties within its jurisdiction with effect from 24 February 2012. This meant that while properties already in use as Class C4 prior to that date did not need planning permission to continue as an HMO, planning permission would be required from that date for any change. However, the Oxford City Council Sites and Housing Plan for 2011-2026, which was adopted in February 2013, confirmed that the council's policy HP7 "*states that planning permission will only be granted for the change of use of a dwelling in Use Class C3 to an HMO where the proportion of buildings used in full or part as an HMO within 100 metres of street length either side of the application site does not exceed 20%*."

12. Curiously, the applicant had previously been given an HMO licence for one year from 18 August 2015. This followed the refusal of planning permission on 3 August 2015 for change of use to Class C4 on the basis that a grant would be in breach of policy HP7 as it would result in HMOs comprising 33% of the properties within 100m of street length of the application site. It appears from a letter in the applicant's bundle (5 October 2015) that the council were under the impression that the property had been let as an HMO in December 2014 and the respondent confirmed in their response to the grounds of appeal dated 8 June 2020 that the licence was granted to allow the applicant to "regularise the planning position", although it is not clear that any appeal was made.

13. The respondent's bundle also contains confirmation of the adoption of an additional licensing scheme for HMOs in the relevant part of Oxford. This is dated 15 October 2015, came into force on 31 January 2017 and requires any HMO with three or four occupiers to be licensed.

14. The next development in planning terms was the refusal of a lawful development certificate for the annex on the basis that it had been used as residential accommodation for more than four years prior to the date of the application. It is not entirely clear when that was refused but confirmation appears in a letter from Oxford City Council dated 17 December 2018. The reason appears to be that the council did not accept that the annex had been occupied throughout the relevant period. It is not clear what, if anything, the applicant did to appeal the decision at the time.

14. The applicant's representative Mr Shiri made the current application for an HMO licence in October 2019, together with a further application to change the use of the property to Class C4. The application in relation to Class C4 was refused again, applying policy HP7, on 29 January 2020. Mr Shiri disputes the calculation of the proportion of HMOs within the 100m area of the property and has confirmed that this refusal is being appealed. As detailed above, Mr Shiri also claims that the applicant has permitted development rights to use the house and annex as an HMO on the basis that the property has been continuously occupied in that way since 2010, with one household in the house and an unrelated person in the annex. The respondent has rejected this argument on the basis that the house and annex are two separate buildings and not one "dwelling house" in planning terms. It is not clear whether there has been any formal application in this regard. However, it is clear that at the time of writing this decision, the applicant does not have confirmation from the respondent in planning terms that he can use the main house as an HMO or the annex as residential accommodation for a separate letting.

15. Although I have gone through the planning history as it is relevant to the appeal, this tribunal has no jurisdiction in relation to planning matters and therefore I will deal only with our jurisdiction under the Housing Act 2004 ("the 2004 Act") in this decision.

The issues

16. The majority of the argument from both parties revolves around the planning issues, rather than the relevant part of the 2004 Act. I consider the issues that can be decided by me are:

    (1) Can the house and annex properly be described as an HMO under the 2004 Act?
    (2) What flexibility does the respondent have to refuse an HMO under the 2004 Act?
    (3) Is the lack of planning permission a relevant consideration?
    (4) Is the fact that the property is not currently occupied as an HMO a relevant consideration?
    (5) Was the refusal properly authorised?
    (6) Is the refusal in breach of the applicant's rights contained in the European Convention on Human Rights: in particular, articles 6 and 8 and article 1 of protocol 1?

Can the house and annex be an HMO?

11. The definition of an HMO in the 2004 Act is contained in section 254 which refers to "a building or part of a building". That will meet the definition of an HMO is it consists of one or more units of living accommodation not consisting of self-contained flat or flats, occupied by persons who do not form a single household – known as "the standard test" in s254((1)(a) and (2). As described above, the annex is structurally detached from the house. It is also a self-contained flat as the occupant has their own cooking and washing facilities.

12. The applicant's statement of case dated 1 July 2020 has a number of paragraphs under a side heading "buildings or part of buildings". The principal argument appears to be that as both the annex and house are part of the same legal title in land terms, they should be considered to be one building. He therefore argues that a family of 5 in the house and a single person in the annex, together occupy the property known as 234 Headington Road as an HMO. With all due respect to Mr Shiri, he needs to apply the relevant statutory test to the issue at hand. The 2004 Act refers to buildings rather than land and as the garage or annex in this case is clearly in a separate building to the house, the fact that it is part of the same legal title is of no assistance.

13. In these circumstances, the house may be an HMO if occupied by persons who do not form a single household and will require a licence from Oxford in order to avoid contravention of the additional and/or mandatory licensing scheme once there are at least three occupants from more than one household. The annex is only physically capable of being occupied by a single household. The current arrangement of a family in occupation of the house and a separate individual in the annex does not meet the definition of an HMO under the 2004 Act either together or separately.

Power to grant/refuse a licence

14. This is contained in section 64, of which the relevant parts are (emphasis added):

*(1) Where an application in respect of an HMO is made to the local housing authority under section 63, the authority **must** either-*

(a) grant a licence in accordance with subsection (2), or

(b) refuse to grant a licence.

*(2) If the authority are satisfied as to the matters mentioned in subsection (3), they **may** grant a licence either-*

(a) to the applicant, or

(b) to some other person, if both he and the applicant agree.

(3) The matters are –

(a) that the house is reasonably suitable for occupation by not more than the maximum number of households or persons mentioned in subsection (4) or that it can be made so suitable by the imposition of conditions under section 67;

The tests as to suitability for multiple occupation are contained in section 65:

(1) The local housing authority cannot be satisfied for the purposes of section 64(3)(a) that the house is reasonably suitable for occupation by a particular maximum number of households or persons if they consider that it fails to meet prescribed standards for occupation by that number of households or persons.

*(2) But the authority **may** decide that the house is not reasonably suitable for occupation by a particular maximum number of households or persons even if it does meet prescribed standards for occupation by that number of households or persons.*

15. There is no dispute that the house meets or could meet the standards via the imposition of conditions or that the applicant is a fit and proper person to be the licence holder. The issue is whether the respondent has the flexibility within the Act to refuse to grant a licence for reasons which are not stated in the 2004 Act, namely planning concerns.

16. The applicant claims there is no such flexibility and states that the Supreme Court decision of *Nottingham City Council v Parr* [2018] UKSC 51 is authority for the proposition that section 65 contains the only relevant test. As the respondent has confirmed that the property is capable of passing that test, they must grant the licence.

17. The respondent points to the flexibility in the statute and in particular the use of the word "may" in section 64(2) and the even clearer discretion in 65(2), which confirms that the local authority is not compelled to issue a licence. They rely on the Upper Tribunal decision in *Waltham Forest v Khan* [2017] UKUT 153 (LC) to support their interpretation, although the applicant disputes its relevance.

18. I consider that the wording of the 2004 Act clearly gives the local housing authority a discretion to refuse to grant an HMO licence under section 64(2) and 65 (2). Obviously that discretion will need to be exercised reasonably and

applying general public law principals, including taking into account relevant considerations and disregarding irrelevant considerations. Under the 2004 Act, the tribunal may confirm, reverse or vary this decision.

19. The applicant only provided a limited extract of *Nottingham v Parr*, which is therefore of limited use, although the respondent provided the full report in their third bundle. The extract on which Mr Shiri relies is clearly part of the description of the 2004 Act, not a statement by the Supreme Court that only section 65 is relevant in terms of deciding suitability. In any event, this case was really about the imposition of conditions under section 67 and is therefore of little relevance to the issue of any discretion to refuse a licence.

20. By way of contrast, I consider that *Waltham Forest v Khan* is of direct relevance, certainly on the planning point below. It also supports my interpretation of the statutory language, albeit by reference to a different section (88(2)) but one which uses identical language to section 65(2) which the Upper Tribunal states at paragraph 15 means "*it is therefore clear that the authority has a discretion to refuse a licence even when the specified conditions are satisfied*." This leads us on to the next issue.

Is the lack of planning permission a relevant consideration?

21. The issue here is the apparent disconnect between the provisions for HMO licensing set out in the 2004 Act and planning law. As the applicant points out in his statement of case, the respondent's guide to landlords for HMOs states in Appendix 7, dealing with planning permission that "*Planning permission and HMO licensing are two separate and distinct legal requirements. Simply put, planning permission controls the quantity of HMOs in an area while HMO licensing controls the quality of the accommodation*."

22. The respondent's reply is that just because planning is a separate legal requirement, it does not mean it is irrelevant when considering whether the house in reasonably suitable for occupation as an HMO i.e. exercising its discretion in section 66(2). They rely on *Waltham Forest v Khan* as authority for the relevance of planning, quoting paragraph 46 and 47 of the Deputy President's decision which states: "*Planning control is directed in large measure at ensuring that new or additional uses of land do not have an unacceptably adverse impact on existing users…To that extent the concerns of planning control and the concerns of licensing under Part 3 of the 2004 Act overlap. It is therefore unnecessary and unrealistic, in my judgment, to regard planning control and Part 3 licensing as unconnected policy spheres in which local authorities should exercise their powers in blinkers. I am satisfied that it is legitimate for a local housing authority to have regard to the planning status of a house when deciding whether or not to grant a licence and when considering the terms of a licence.*"

23. The *Waltham Forest* case related to selective licensing under Part 3 of the 2004 Act as opposed to mandatory HMO licences under Part 2. Nevertheless, it is clearly of direct relevance to the point is issue, due to the identical wording of the Act in the key sections and the general principles, which apply with rather more force when considering the impact on the wider community of an HMO.

That is of course the justification for Oxford's policy to restrict the number of HMOs. It would be ludicrous to have policy HP7 on the one hand and be forced to licence additional HMOs on the other.

24. I recognise that the applicant considers he has already established C4 use but given my analysis of the meaning of HMOs within the 2004 Act, I do not accept that his argument that occupation of the house by one household and the annex by another meets the HMO test is credible. In the circumstances I consider the fact that Oxford have come to a reasonable conclusion that the applicant does not have permitted development rights to use the house as an HMO and have refused planning permission for change of use in reliance on policy HP7 is a justifiable reason for their refusal to grant the applicant an HMO licence. I therefore confirm their refusal on this ground. I recognise that Mr Shiri disputes the calculation of HMOs in the relevant area but that is a matter for the planning appeal.

Is the fact that the house is not currently occupied as an HMO relevant?

25. As stated in the refusal notice, the respondent also refused to grant the licence on the basis that as the property was not being occupied as an HMO currently, a licence was not required. The applicant describes this reason in his application form as "simply irrational" and I tend to agree. Given that it is an offence to let a property as an HMO without a licence, a reasonable housing authority should be encouraging landlords to make an application for a licence before they let it, not afterwards.

26. In any event, the respondent's statement of reasons dated 8 June 2020 make it clear that in truth the sole reason was the lack of planning permission (see paragraph 63) and, in the circumstances, I do not confirm the second reason for refusing the licence.

Was the refusal properly authorised?

27. This argument was put by Mr Shiri in very strong and to my mind inappropriate terms, particularly in the application to debar some of the respondent's evidence in response to his expanded grounds of appeal. I do not accept that the evidence has been amended and there is nothing to object to in the amendment of page numbers in the second bundle. I prefer the respondent's explanation that the scheme of delegation provided in their first bundle post-dated the notice and therefore they have now provided one which covers the actual date and confirmed that the necessary approval was sought. It is not necessary to have a statement from Ian Wright to determine this issue.

28. The application to debar is therefore dismissed and I confirm that the refusal was properly authorised through the council's scheme of delegation.

Is the refusal an infringement of the applicant's human rights?

29. The applicant's representative really asserts various breaches of the applicant's Convention rights without explaining his reasons. In particular, he states that the refusal of the licence was a breach of his right to a fair hearing under Article

6; cites *R(Daly) v SoS for the Home Department* [2001] 2AC 532 as the basis for claiming the decision was also in breach of the right to respect for his private and family life under Article 8 and that the decision interferes with his ability to enjoy his property under Article 1 of the First Protocol.

30. As the respondent states, this appeal provides the opportunity for him to challenge the refusal of the licence and satisfy his Article 6 rights to a fair hearing. I am not clear that Article 8 is engaged in this case as although the property was once the applicant's home, it is no longer occupied in that way. *Daly*, a case about the interference with privileged correspondence in prison and judicial review, has no relevance to a statutory appeal before a tribunal. I accept that of all the Convention Rights, the right in Protocol 1, Article 1 to enjoy property is restricted by the respondent's decision. That said, government restriction in terms of the use of that property is permissible where such action is lawful and necessary for the public interest. As the respondent states, the Housing Act 2004 and the requirement for HMO licensing satisfies that test. There is no infringement in seeking to regulate the provision of private rented accommodation in the general interest of the wider community. This ground also fails.

31. I recognise that the applicant may feel aggrieved by this decision. He would be advised to reflect on whether he really does have a case to argue permitted development rights or seek to continue to let the house to a single household, which is not caught by the current licensing regime in Oxford. Whether he also chooses to challenge the current prohibition for the use of the annex as residential accommodation is also a matter for him and outside this tribunal's jurisdiction.

32. In the circumstances, I confirm the respondent's decision to refuse an HMO licence on the basis that the property is not suitable for use as an HMO as it does not have the required planning approval.

Name: Judge Ruth Wayte **Date:** 14 August 2020

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