FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/00MG/HMD/2022/0001**
HMCTS Code	**:**	**F2F**
Property	**:**	**MK Hotel, Buckingham Road, Deanshanger, Milton Keynes, MK19 6JU**
Applicant	**:**	**Shires Investments Limited**
Respondent	**:**	**West Northamptonshire Council**
Type of application	**:**	**Appeal against a decision to serve a HMO declaration – Section 255(9) Housing Act 2004**
Tribunal member(s)	**:**	**Regional Judge Wayte** **Regional Surveyor Hardman FRICS**
Date and venue of hearing	**:**	**18 October 2022 at Jury's Inn, Milton Keynes**
Date of decision	**:**	**1 November 2022**

DECISION

Decision of the tribunal

(1) The tribunal revokes the HMO declaration served under s255 of the Housing Act 2004 on 8 April 2022.

(2) The tribunal orders the respondent to pay the applicant £300 in respect of the application and hearing fees pursuant to rule 13(2) of the Tribunal Procedure (first-tier Tribunal) (Property Chamber) Rules 2013, payment to be made by 30 November 2022.

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The application

1. The deceptively simple question for the tribunal is whether the operation of the property to house asylum seekers awaiting a preliminary decision on their claim, converted the hotel into a house in multiple occupation ("HMO"). West Northamptonshire Council made such a declaration on 8 April 2022, following their inspection on 29 March 2022.

2. On 9 May 2022 Shires Investments Limited, the owners of the property, made an application to the tribunal to appeal the declaration. Directions were issued on 23 June 2022 and both parties provided a hearing bundle in accordance with those directions.

3. The hearing took place on 18 October 2022 at a central Milton Keynes hotel. The applicant was represented by counsel Mark Diggle and their director, Shameel Hemani. The respondent was represented by their in-house solicitor James Chadwick and Chris Stopford, the Interim Head of Private Sector Housing for the council.

The Law

4. Under section 255 of the Housing Act 2004 "the 2004 Act") a local housing authority may serve an HMO declaration in respect of a building or part of a building if they are satisfied that it satisfies one of the three tests for HMOs set out in section 254. The relevant test in this case is the standard test at section 254(2) which states that:

   A building or a part of a building meets the standard test if-
   (a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;
   (b) the living accommodation is occupied by persons who do not form a single household;
   (c) the living accommodation is occupied by persons as their only or main residence or they are to be treated as so occupying it;
   (d) their occupation of the living accommodation constitutes the only use of that accommodation;
   (e) rents are payable or other consideration is to be provided in respect of at least one of those person's occupation of the living accommodation; and
   (f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.

   For the purposes of section 255, the sole use condition in (d) above is disapplied and replaced with significant use of the accommodation.

5. Provided an appeal is made in time, the notice does not come into effect until a decision is given on the appeal. Such an appeal is to be by way of a re-hearing but may be determined having regard to matters of which the authority were unaware (section 55(10)). The tribunal may confirm or reverse the decision of the authority and, if it reverses the decision, revoke the HMO declaration (section 55(11)).

6. The applicant submitted that neither (c), (e) or (f) were made out in this case and therefore the declaration should be revoked.

<u>Occupation as only or main residence</u>

7. As stated above, in order to issue the HMO declaration, the council needed to be satisfied that the living accommodation was occupied by persons as their only or main residence or they are to be treated as so occupying it.

8. Christopher Stopford gave evidence for the council, confirming the contents of his witness statement dated 21 July 2022. That statement confirmed that on or around 10 March 2022, the council had received information suggesting that MK Hotel was operating as an asylum hotel under contract with the Home Office. On 25 March 2022, Mr Stopford issued a Notice of Intended Entry to Premises under section 239(5) of the 2004 Act, which stated that he would visit the property on 29 March 2022.

9. On 29 March 2022 Mr Stopford met an employee of Finefair Limited, who advised him that Finefair held a contract with Clearsprings Ready Homes Limited for the provision of asylum seeker accommodation and support at MK Hotel. During the inspection he stated that he was advised that the property consisted of 52 ensuite bedrooms and that Finefair had an agreement for 44 of those bedrooms. At the time of the inspection, there were 52 single male occupants, including unrelated men sharing twin rooms. The occupants had access to the communal spaces in the hotel. Mr Stopford's statement indicated that this included access to the kitchen but that was disputed by the applicant, together with the number of bedrooms.

10. Mr Stopford saw one of the twin rooms, which was occupied by two men at the time of the inspection. He stated that he spoke to the occupants briefly but as he had not taken a translator with him, he could not have any meaningful conversation and took no details of any of the occupants' individual circumstances.

11. On returning to the office, Mr Stopford confirmed that the hotel did not have an HMO licence (nor had made an application for one) and therefore went on to consider whether the standard test was made out for an HMO under section 254.

12. On consideration of whether section 254(2)(c) was met, Mr Stopford considered section 259 of the 2004 Act which provides details of persons treated as occupying premises as their only or main residence, including section 259(2)(c) which provides for regulations to that effect. In particular, Regulation 5 of the Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions)(England) Regulations 2006 ("the Licensing and Management Regulations 2006") states that a person is to be treated as occupying a building as his only or main residence for the purposes of section 254 if he is asylum seeker or the dependent of an asylum seeker who has been provided with accommodation under section 95 of the Immigration and Asylum Act 1999 and which is funded partly or wholly by the National Asylum Support Service, a department within the Home Office.

13. The applicant argued that the asylum seekers were in fact occupying the accommodation under section 98 of the 1999 Act rather than section 95. Mr Stopford confirmed that he had asked Finefair for further particulars at the time but they said they didn't know. After the inspection he had requested copies of the various contracts which he found unclear. He didn't make any other specific enquiries or contact the applicant before issuing the declaration. He relied on the fact of occupation at his inspection and the fact that these occupants had no other accommodation in the UK.

14. On 6 October 2022 Finefair Limited had written to the council to "*confirm that the MK Hotel is being used to house section 98 asylum seekers for initial contingency accommodation*". The letter stated that the above can be verified by the Operations Director of Clearsprings who the council confirmed are the holders of the main Home Office contract for the South of England. Mr Chadwick for the council referred to the letter as "*third hand hearsay*" but neither he nor Mr Stopford challenged its accuracy.

15. Shameel Hemani gave evidence for the applicant and confirmed his witness statement dated 17 August 2022. He also confirmed that the hotel has 46 rooms not 52 and that there were no kitchen facilities on site for the use of the guests, although nothing turns on either of those points. In terms of the status of the occupants, his understanding was that they were waiting to be processed by Migrant Help and were staying there as their "first port of call". He was keen to ensure that there would be no trouble from the occupants and considered that people would be "on their best behaviour" at this stage of their application, compared to people who were awaiting deportation.

16. Mr Diggle for the applicant submitted that the burden of proof rested with the council to show that section 254(c) was satisfied. This required occupation as a "residence". That term was not defined in the 2004 Act but the applicant relied on the Court of Appeal's decision in *Fox v Stirk* [1970] 2 QB 463 as authority that the term implies a degree of permanence, in particular Lord Justice Widgery at 477 held:

"*In the words of the Oxford English Dictionary, it is concerned with something which will go on for a considerable time. Consequently a person is not entitled to claim to be a resident at a given town merely because he pays a short, temporary visit. Some assumption of permanence, some degree of continuity, some expectation of continuity is a vital factor which turns simple occupation into residence.*"

This case was about the meaning of "resident" for the purposes of electoral registration of students but the applicant argued that it was of equal relevance in this case.

17. Mr Diggle accepted that the 2004 Act sets out circumstances where people are treated as if they were occupying property as their residence but submitted that none of those circumstances applied here. In particular, regulation 5 of the Licensing and Management Regulations 2006 specifically referred to accommodation under section 95 of the Immigration and Asylum Act 1999. That was only one of a number of powers under which asylum seekers may be provided with support or accommodation. Finefair Limited have confirmed that the asylum seekers in this case are being provided with temporary support under section 98, which is to be provided only until the Secretary of State is able to determine whether support may be provided under section 95. In the circumstances the council have failed to establish that section 254(2)(c) is satisfied. If the council fail on this ground, the appeal succeeds and the tribunal should revoke the declaration.

The tribunal's decision

18. The tribunal agrees with the applicant that the council have failed to establish that the asylum seekers were occupying the hotel as their only or main residence. In particular, the tribunal agrees that "residence" requires more than mere occupation.

19. As set out in paragraph 12 of *Herefordshire Council v Martin Rohde* [2016] UKUT 39, the tribunal must look at the local authority's decision at the time it issued the declaration but can also take into account new evidence of which the local authority was unaware. Mr Stopford stated that at the time he issued the declaration, he was unclear as to the statutory basis on which the asylum seekers occupied the hotel but considered that on a balance of probabilities it was likely that at least 5 of them were occupying the property under section 95 of the 1999 Act. It has now been clarified by Finefair Limited that all of the asylum seekers were occupying the property under section 98 of the 1999 Act and the accuracy of their letter dated 6 October 2022 is not disputed by the council. In those circumstances the Licensing and Management Regulations 1999 do not apply and the asylum seekers are not to be treated as occupying the property as their main or sole residence.

20. As stated above, section 98 accommodation is defined in the 1999 Act as "temporary support". The tribunal also notes that the Hotel Booking Contract included in the council's bundle refers to the permitted use as the "*provision of emergency short-term accommodation to the Guests*". In those circumstances the tribunal is satisfied that the use of the hotel under that contract did not provide the degree of permanence required for the occupants to pass the test in section 254(2)(c) and that the new evidence provides further confirmation that the test was not met at the time the declaration was issued or currently. As mentioned above, if the council fail on this point, there is no need to consider the tests under section 254(e) and (f).

21. The tribunal will therefore reverse the decision of the council to issue the HMO declaration and revoke that declaration.

Reimbursement of tribunal fees

22. In the event that the appeal was successful, Mr Diggle made an application for the reimbursement of the fees paid by the applicant under Rule 13(2) of the 2013 Rules. Mr Chadwick declined to make any representations about that application "at this stage", although the tribunal pointed out its discretion to make such an order in all the circumstances of the case.

23. The tribunal does consider it is appropriate to order the council to reimburse the fees. In this case, the council were too hasty to issue the declaration. If they had focused more clearly on the requirements of the Act in the context of the status of asylum seekers, they should have appreciated at the outset that the residence requirement was in doubt. They should therefore have taken more time to make further enquiries, including of the applicant. That failure led to the successful appeal and, in those circumstances, it is appropriate that they reimburse the applicant's tribunal fees of £300.

Name: Judge Ruth Wayte **Date:** 1 November 2022

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).