



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

**Case Reference** : CHI/43UF/HMV/2023/0001

**Property** : Glenrose, 47 Horley Row, Horley, Surrey  
RH6 8BE

**Applicant** : Seraphim Accommodation Services Ltd

**Representative** :

**Respondent** : Reigate & Banstead Borough Council

**Representative** :

**Type of Application** : Appeal against a decision by the LHA to  
vary an HMO Licence (Schedule 5,  
paragraph 32(1) Housing Act 2004)

**Tribunal Members** : D Banfield FRICS (Chairman)  
B Bourne MRICS

**Date and place of  
hearing** : 2 November 2023 at Havant Justice Centre

**Date of Decision** : 30 November 2023

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**DECISION**

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## **Background**

1. On 24 April 2023 the Applicant submitted an application to appeal a decision dated 11 April 2023 made by the Respondent Council who sought to vary an HMO Licence in relation to the subject property. The Applicant states that he received the Notice on 13 April 2023.
2. The Applicant wishes to appeal the decision of the Council on the basis that “we have had strict room occupancy figures placed on us that are built around an ‘any-age’ occupancy interpretation. This conflicts with the National room sizing regulations that use a 10 year old as the threshold. In real terms, a newborn baby is given the same occupancy status as that of an adult male and to that end we are now in a position where we cannot offer the solutions that Local Authority Homelessness Departments urgently demand.”
3. Directions were issued on 3 August 2023 setting a timetable for the exchange of documents preparatory to a hearing on 10 October 2023 subsequently delayed until 17 October 2023 and then re-scheduled to 2 November 2023 due to the Applicant’s unavailability.
4. The Directions required the Applicant to submit a statement of case and supporting documents and for the Respondent to reply. The Applicant however did not comply and nothing was provided until receipt of the skeleton argument referred to below on the morning of the hearing.
5. Due to the lack of particularisation of the Applicant’s case the Respondent’s has had to anticipate the issues and cover what now appears to be matters which are agreed. The Tribunal has read all of the written material but will not refer to matters which have not been disputed by the Applicant.
6. On 30 October 2023 the Tribunal received a skeleton argument on behalf of the Respondent and on the day of the hearing one was received on behalf of the Applicant. We thank both Counsel. The Tribunal also had the Hearing Bundle prepared by the Applicant reference to page numbers in which are shown as [\*]
7. The hearing took place at Havant Justice Centre, Elmleigh Road, Havant, PO9 2AL and was attended by Mr Barry Cawsey of Counsel for the Applicant and Ms Pooni Patni of Counsel for the Respondent. Ms Nicole Clare Longley, Senior Environmental Health Officer with Reigate and Banstead Council was also in attendance and had submitted a witness statement.

## **History**

8. The Property is a large HMO which is arranged over 2 storeys. It comprises 5 self-contained rooms (3,4,5,7&8) and 3 rooms which share kitchen and bathroom facilities (1,2 &6). The Property was required to be licenced since the inclusion of 2-storey buildings within the licencing regime in October 2018.
9. On 21 December 2020, the Applicant was granted an HMO Licence (“December 2020 HMO Licence”) [112] subject to conditions regarding the use of the kitchen(s) and the layout of rooms 3 and 6. The licence was for 7 households and 11 occupants except when used to accommodate family households placed under the Housing Act 1996 on a temporary basis when the limit is raised to 15 occupiers. The Licence was not appealed.
10. Following re-inspections and re-measuring the Council served a Notice on 7 March 2023 that it proposed to vary the licence and sought representations. On 11 April 2023 the Council varied the Notice raising the occupancy to 8 households with 12 occupants and 17 on a temporary basis.[216]

### **The Hearing**

11. Ms Patni said that until the Applicant’s skeleton had been received the Respondent was unaware of the challenge it had to answer. The application form refers to the Council adopting an “any-age” occupancy interpretation although other issues have now emerged.
12. Mr Cawsey said that the appeal was in respect of the occupancy limit of 17 for temporary occupiers, the occupancy limits for rooms 3,4, 5 & 7 and how occupiers under 10 should be counted.

### **The Respondent’s case**

13. The floorplans and room measurements provided by the Applicant in support of the 2020 HMO Licence application were inaccurate at the time of inspection. [85] At page 147 is a table showing the terms of the approved licence as against the revised figures provided by the Applicant and as against a final set of measurements taken by the Respondent.
14. The Applicant has been aware since at least 2020, that room occupancy under mandatory licensing regulations is by reference to persons of “any age”. This is clear from the correspondence between Ms Lade (on behalf of the Respondent) and Mr Wilson in November 2020.[93]
15. On 4 December 2020, the Respondent agreed to an increased occupancy where a room is being used to accommodate family households placed under Part 7 of the Housing Act 1996 (as

amended – homelessness provisions) on an emergency or temporary basis – which is based entirely on the Respondent’s discretion. [98]

16. The occupancy levels for each room were determined by a detailed consideration of the overlapping housing standards regimes. By way of for example, if Room 3 were used to accommodate an occupancy level of more than 1 person of any age, the Respondent would simultaneously be required to serve a hazard notice, whether that it be a prohibition notice or improvement notice.
17. The likelihood of hazards reduces when the permitted occupancy is as per the Varied HMO Licence issued on 11 April 2023.
18. The table at [147] has the new room sizes and compares them to the minimum bedroom sizes in Schedule 4 the Housing Act 2004.[147]
19. Also noted on this table are the rooms which include a kitchen which are treated as self-contained bedsitting rooms and as such the minimum bedroom sizes would be insufficient for these rooms as they would also be used for cooking. (see DASH guidance [149-152] for rooms which contain kitchens.)
20. When the licence was originally issued it took account of persons placed in the property under the Housing Act 1996. The licence stated the maximum numbers for persons on an assured shorthold tenancy and then followed that number with a number in brackets () which indicated the maximum number of persons that could be accommodated in that room when placed under homelessness duty for a maximum of 6 weeks.
21. The occupancies of the new licence were broadly the same as the 2020 licence except for the former lounge, which could now be slept in with a maximum occupancy of 1 and an increase in the maximum occupancy of Room 8 to allow 2 persons when the placement was under the Housing Act 1996 i.e., of less than 6 weeks duration.
22. A notice of proposed variation was sent on 31 January 2023.[154] and representations received on 10 and 20 February 2023 some of which were accepted and a revised Notice sent on 8 March 2023.
23. Further representations were received and on 11 April 2023 the final varied licence was issued.
24. The method of calculation of occupancy rates was explained as;  

The starting point is schedule 4 para 1A, of the Housing Act 2004 (as amended by The Licensing of Houses in Multiple Occupation (Mandatory Conditions of Licences) (England)

Regulations 2018 (S.I. 2018/616) which sets out the mandatory conditions relating to the minimum sizes of bedrooms allowed in a House in Multiple Occupation.

These are summarised as follows:

a. Under section 1A(1)(2)(a) the legislation states that a room must be a minimum of 6.51 m<sup>2</sup> to be occupied by a person over 10 years old.

b. Under section 1A(1)(2)(b) the legislation states that a room must be a minimum of 10.22 m<sup>2</sup> to be occupied by 2 persons over 10 years old.

c. Under section 1A(1)(2)(c) the legislation states that a room must be a minimum of 4.64 m<sup>2</sup> to be occupied by a person under 10 years old.

d. Under section 1A(1)(2)(d) the legislation states that a room which is less than of 4.64 m<sup>2</sup> cannot be used as a sleeping room for a person of any age.

25. RBBC interpret these provisions to say that a room of 6.51 m<sup>2</sup> can be occupied by either one person over 10 years of age, or one person under the age of 10 as this room meets the minimum of 4.64 Therefore, it is concluded that a room of 10.22 m<sup>2</sup> can be occupied by either 2 persons over 10 years of age, or One person over 10 years of age and one person under 10 years of age.
26. In addition to these minimum standards, other factors which will be further explained below on a room-by-room basis, have also been considered in arriving at the occupancy levels in the licence.
27. Under the Housing Act 2004 Reigate and Banstead have a duty to licence HMO properties which are of the prescribed description. They are required to include the mandatory conditions set out in Schedule 4. They must also, in accordance with section 64, only grant a licence where the house is reasonably suitable for occupation by not more than the maximum number of households or persons mentioned in subsection 4 or where it can be made so suitable by the imposition of conditions under section 67. Subsection 4 says that this number can be the maximum number specified in the application or some other number specified by the Authority.
28. Additionally in accordance with section 67, they are permitted to include in their licences  
(1) ...such conditions as the Local Authority consider appropriate for regulating all or any of the following-(a) the management, use and occupation of the house concerned.
29. Therefore, an inadequacy or defect in a house can be dealt with by licence condition (subsection 4).
30. The hazards which they considered as part of the thought processes below were not present at the occupation levels which

were set out in the original and nor are they present at the levels set out in the varied licence. RBBC therefore believe it is not therefore appropriate to act under Part 1 of the Housing Act 2004.

31. **Room 3**  
Room 3 is measured to be 11.49 From the plan we can see that this is comprised of an entrance hall measuring 2.01m x 0.87m = 1.74m<sup>2</sup> together with a main room size of 3.01m x 3.24m = 9.75m<sup>2</sup> The sum of these areas being 11.49m<sup>2</sup>. Based on this, it is accepted that the minimum sizes set out in the mandatory conditions would be satisfied and this room meets the standard for an occupancy of 2 persons over 10 years of age. However, RBBC have also considered that this room includes a kitchen. The kitchen is located on the wall shared between the main room and the bathroom. The presence of this kitchen is indicated on the licence using (K) as a label. This kitchen includes a base unit with a length of work surface over it, into which has been fitted a sink. The work surface provides a space for the tabletop cooker as well as a space for food preparation. There is also a fridge. These facilities take up the length of this wall to a depth of around 600mm. This equates to an area of approximately 1.4m<sup>2</sup>.
32. To safely use these facilities, it is necessary for there to be clear floorspace beside these facilities. RBBC consider that a strip of floor of another 600mm depth is reasonable for this purpose. This means that the space taken up by the kitchen facilities and associated floorspace is approximately 2.8m<sup>2</sup> This leaves just 6.95 m<sup>2</sup> (9.75m<sup>2</sup> -2.8m<sup>2</sup>) within which to site the bed.
33. The Housing Health and Safety Rating System [229] is statutory guidance issued under the Housing Act 2004 to rate and address hazards which are found in accommodation. When describing the health effects of the hazard of Hot Surfaces and Materials the guidance states that “Around half the injuries (resulting from the hazard), are to children under the age of 5 years of age. Their risk level is 6 or 7 times greater than the average level for the population as a whole, with boys at slightly higher risk than girls.”
34. Under the heading “Preventative Measures and the Ideal”, in relation to the hazard of Hot Surfaces and Materials, the guidance says, “Kitchens should be of adequate size and of such a layout so as to ensure that cookers and worktops are safety sited away from doors, thoroughfares and other potentially hazardous areas.”
35. In “Relevant matters affecting likelihood and harm outcome”, kitchen layout is included as a relevant factor.
36. When describing the health effects of the hazard of Crowding the guidance states that lack of space and overcrowded conditions have been linked to a number of health outcomes...including mental disorders.... associated with child development.

37. Under the heading “Causes”, in relation to the hazard of Crowding, the guidance states that “deficiencies with space and crowding can increase the risks associated with a number of other hazards. The risk of domestic accidents is greater where there is insufficient space for the occupants. Small kitchens also increase the risk of accidents. Where people and their belongings are furniture are crowded together it may not be possible to keep circulation space or functional space around appliance clear.”
38. Based on their assessment of the size of the room and its combined functions and useable space the Respondents have concluded that a licence for an occupancy of 2 persons over the age of 10 would unacceptably increase the risks of these hazards.
39. The Respondents therefore conclude that this room is only suitable for a maximum occupancy of 1 person of any age and issued the licence to reflect this.

#### Room 4

40. Room 4 is a set of rooms on the ground floor rear right of the premises. This accommodation includes a combined bedroom/entrance hall, a kitchen, and a bathroom. The bedroom/entrance hall is measured to be more than 10.22m<sup>2</sup> It has therefore been granted an occupancy of 2 persons either over or under 10 or a combination of each, which is in accordance with the stated standards.
41. A kitchen is not considered to be a habitable room. Non habitable rooms are not normally designated for sleeping.
42. Additionally, in this case, the kitchen is an inner room. This means that it is a room where the only escape route is through another room. In this case the escape route is through the combined bedroom/entrance hall. An inner room poses a risk to its occupier if a fire starts unnoticed in the outer room. LACORS Housing – Fire Safety Guidance,[415] which is used to assess a fire hazard under the health and safety rating system says “This arrangement (referring to the presence of inner rooms), should be avoided wherever possible. It may be accepted where the inner room is a kitchen, laundry or utility room, a dressing room, bathroom, WC, or shower room.”
43. RBBC have issued the licence to reflect this. No one is permitted to use the kitchen for sleeping when occupying under a tenancy agreement. That is for long term occupation.
44. RBBC have however agreed that the kitchen can be used for sleeping where the occupant has been placed in the room for a maximum of 6 weeks, under the Housing Act 1996 (homelessness duty), as the kitchen can accommodate a temporary bed without

increasing the risks from Hot Surfaces and Materials as described above for Room 3.

#### Room 5

45. Room 5 is a set of rooms on the first-floor front. The accommodation comprises, a combined bedsitting room/ kitchen, an inner room with a reduced ceiling height and a bathroom.
46. The combined bedsitting room/ kitchen measures 13.82m<sup>2</sup> It meets the standard of 10.22 m<sup>2</sup> although like Room 3 it also includes a kitchen.
47. The reduced ceiling height inner room is not suitable for sleeping as explained for room 4.
48. RBBC have issued the licence to reflect this. No one is permitted to use this inner room for sleeping when occupying under a tenancy agreement. That is for long term occupation.
49. The reduced ceiling height inner room provides a storage space which is absent in other lettings, freeing up space in the main room. Additionally, the main room is provided with a pair of bunk beds which also have the effect of freeing up floor space. This means that there is enough space to use the kitchen without increasing the risks of the hazard of Hot Surfaces and Materials as described above for Room 3.
50. It is for these reasons that RBBC allowed the main room to have an occupation of 2 even though when compared to the DASH standards exhibited at NCL11 it does not meet the suggested space standard. RBBC have taken account of the reduced height area which provides 6.48m<sup>2</sup> of extra living space.
51. Additionally, the Respondent has also allowed the use of the inner room for sleeping where the occupant has been placed in the room for a maximum of 6 weeks, under the Housing Act 1996 (homelessness duty).

#### Room 7

52. Room 7 is a set of rooms on the first floor left of the premises. This accommodation includes a bedroom, a kitchen, and a bathroom.
53. The bedroom is measured as 12.61m<sup>2</sup> As stated above the standards set of for licenced HMOs do not permit more than 2 persons in a room and RBBC have agreed that the maximum occupancy for this room should be 2 persons either over or under



10 or a combination of each, which is in accordance with the stated standards.

54. The kitchen is not a habitable room and is not normally designated a sleeping room. RBBC have issued the licence to reflect this. No one is permitted to use this room sleeping when occupying under a tenancy agreement. That is for long term occupation.
55. Additionally in this case, the kitchen is an inner room as described for Room 4.
56. RBBC are aware that homeless households are placed in this accommodation for a maximum of 6 weeks under the Council's homelessness duties, and have therefore agreed that this kitchen can be used for sleeping under these circumstances, owing to the short duration of the occupation i.e. not more than 6 weeks, the L shaped nature of the room and the fact that the bed can be reasonably separated from the food preparation area without increasing the risks of Hot Surfaces and Materials as described above.

#### Room 8

57. Room 8 is a unit which is accessed from the rear, which is located on the ground floor right of the property. The main room, which includes a kitchen measures This area is made up of a small lobby beside the entrance door of 2.06m<sup>2</sup> together with the area of the main room 12.74m<sup>2</sup> (4.81m x 2.65m).
58. RBBC agrees that based on the minimum sizes set out in the mandatory conditions, that this room meets the standard for an occupancy of 2 persons over 10 years of age.
59. However, RBBC have also considered that this room includes a kitchen. The kitchen provides the same facilities as described for Room 3 and is located on the party wall shared with Room 4.
60. As with Room 3, RBBC have considered potential hazards of Crowding and of Hot Surfaces and Materials. They have concluded that they are unwilling to issue a licence for an occupancy of 2 persons over the age of 10 because in their opinion that would unacceptably increase the risks of those hazards. RBBC therefore conclude that this room is only suitable for a maximum occupancy of 1 person of any age and have issued the licence to reflect this.
61. Case Law in support was;

- *Sinnathurai Paramguru v London Borough of Ealing* [2018] EWHC 373 (Admin) where Mr Justice Supperstone said “it follows that a child of whatever age is to be treated as one person” in the context of the 2004 Act.
- *Rowe v Haringey LBC* [2022] EWCA Civ 1370 where it was determined that Ms Rowe and her two children under the age of 10 was statutory overcrowded.

## The Applicant

62. Mr Cawsey said the issue was whether children below 10 could be accommodated in rooms 3,4,5 and 7 (the subject rooms) in addition to the permitted occupancy level and whether Room 3 should be permitted to have 2 rather than 1 occupant.
63. The Applicant had sought permission [203] for a travel cot or small bed to be located in the subject rooms for “sub-10yr old infants” so allowing homeless families with small children to be accommodated but permission was refused on the grounds that “We cannot reconcile that a new born baby and a 9 year old are “the same”.”. Mr Cawsey said that the result of this decision was that if a lawful occupier of a one occupier room gave birth and returned to the accommodation a breach of the licence conditions would occur rendering the Applicant liable for prosecution.
64. Whilst the Housing Authority may decide not to prosecute in such cases the Applicant should not have to take such a chance.
65. With regard to Room 3 Mr Casey says that there is no requirement under Sch.4 to reduce the floor area due to the kitchen space or hall. With an area of 11.49m<sup>2</sup> the room is suitable for 2 occupiers over the age of 10.
66. There is no evidence of a HHSRS risk assessment identifying the kitchen as a hazard as it is only a risk if the occupant allows it to be so. Reference to “Crowding” is misguided as the room meets the minimum standard for 2 people which should be allowed for temporary use.
67. Mr Cawsey points out that the Guidance for Local Housing Authorities (updated 9 October 2021) [63 of Respondent’s Skeleton & Authorities bundle] section 3.5 of which states “*For the purpose of calculating the minimum room sizes and the maximum number of occupants under the new Regulations, we would expect local authorities not to count any infant occupants under the age of one*” This guidance is consistent with the Applicant’s case.

68. Mr Cawsey also says that given that occupation is on a temporary basis the addition of a small collapsible bed for children between 1 and 9 should also be permitted although he accepted that there was no clear authority on the subject.

## The Law

### Housing Act 2004

69. Part 2 of the Housing Act 2004 (“the 2004 Act”) concerns the licencing of HMO properties.

#### Section 67 Licence Conditions

*(1) A licence may include such conditions as the local housing authority consider appropriate for regulating all or any of the following –*

- (a) the management, use and occupation of the house concerned, and*
- (b) its condition and contents.*

*(2) ...*

*(3) A licence must include the conditions required by Schedule 4.*

*(4) As regards the relationship between the authority’s power to impose conditions under this*

*section and functions exercisable by them under or for the purposes of Part 1 (“Part 1 functions”)—*

*(a) the authority must proceed on the basis that, in general, they should seek to identify, remove or reduce category 1 or category 2 hazards in the house by the exercise of Part 1 functions and not by means of licence conditions;*

*(b) ..*

*(c) ...*

#### Section 264 Calculation of numbers

*(1) The appropriate national authority may prescribe rules with respect to the calculation of*

*numbers of persons for the purposes of—*

- (a) any provision made by or under this Act which is specified in the rules, or*
- (b) any order or licence made or granted under this Act of any description which is so specified.*

*(2) The rules may provide—*

*(a) for persons under a particular age to be disregarded for the purposes of any such calculation;*

*(b) for persons under a particular age to be treated as constituting a fraction of a person for the purposes of any such calculation.*

*(3) The rules may be prescribed by order or regulations.*

Schedule 4 (1A) as amended by The Licensing of Houses in Multiple Occupation (Mandatory Conditions of Licences) (England) Regulations 2018 (S.I. 2018/616):

*(1) Where the HMO is in England, a licence under Part 2 must include the following conditions.*

*(2) Conditions requiring the licence holder—*

*(a) to ensure that the floor area of any room in the HMO used as sleeping accommodation by one person aged over 10 years is not less than 6.51 square metres;*

*(b) to ensure that the floor area of any room in the HMO used as sleeping accommodation by two persons aged over 10 years is not less than 10.22 square metres;*

*(c) to ensure that the floor area of any room in the HMO used as sleeping accommodation by one person aged under 10 years is not less than 4.64 square metres;*

*(d) to ensure that any room in the HMO with a floor area of less than 4.64 square metres is not used as sleeping accommodation.*

*(3) Conditions requiring the licence holder to ensure that—*

*(a) where any room in the HMO is used as sleeping accommodation by persons aged over 10 years only, it is not used as such by more than the maximum number of persons aged over 10 years specified in the licence;*

*(b) where any room in the HMO is used as sleeping accommodation by persons aged under 10 years only, it is not used as such by more than the maximum number of persons aged under 10 years specified in the licence;*

*(c) where any room in the HMO is used as sleeping accommodation by persons aged over 10 years and persons aged under 10 years, it is not used as such by more than the maximum number of persons aged over 10 years specified in the licence and the maximum number of persons aged under 10 years so specified.*

*[...]*

*(7) In this paragraph a reference to a number of persons using a room in an HMO as sleeping accommodation does not include a person doing so as a visitor of an occupier of the HMO.*

*(8) For the purposes of this paragraph a room is used as sleeping accommodation if it is normally used as a bedroom, whether or not it is also used for other purposes.*

*(9) Any part of the floor area of a room in relation to which the height of the ceiling is less than 1.5 metres is not to be taken into account in determining the floor area of that room for the purposes of this paragraph. [...]*

## **The Housing Act 1985**

326 The space standard.

*(1) The space standard is contravened when the number of persons sleeping in a dwelling is in excess of the permitted number, having regard to the number and floor area of the rooms of the dwelling available as sleeping accommodation.*

- (2) For this purpose—
- (a) no account shall be taken of a child under the age of one and a child aged one or over but under ten shall be reckoned as one-half of a unit, and
  - (b) a room is available as sleeping accommodation if it is of a type normally used in the locality either as a living room or as a bedroom.
- (3) The permitted number of persons in relation to a dwelling is whichever is the less of—
- (a) the number specified in Table I in relation to the number of rooms in the dwelling available as sleeping accommodation, and
  - (b) the aggregate for all such rooms in the dwelling of the numbers specified in column 2 of Table II in relation to each room of the floor area specified in column ... [...]

328 Exception: children attaining age of 1 or 10.

- (1) Where a dwelling which would not otherwise be overcrowded becomes overcrowded by reason of a child attaining the age of one or ten, then if the occupier—
- (a) applies to the local housing authority for suitable alternative accommodation, or
  - (b) has so applied before the date when the child attained the age in question, he does not commit an offence under section 327 (occupier causing or permitting overcrowding), so long as the condition in subsection (2) is met and the occupier does not fail to take action in the circumstances specified in subsection (3).
- (2) The condition is that all the persons sleeping in the dwelling are persons who were living there when the child attained that age and thereafter continuously live there, or children born after that date of any of those persons.
- (3) The exception provided by this section ceases to apply if—
- (a) suitable alternative accommodation is offered to the occupier on or after the date on which the child attains that age, or, if he has applied before that date, is offered at any time after the application, and he fails to accept it, or
  - (b) the removal from the dwelling of some person not a member of the occupier's family is on that date or thereafter becomes reasonably practicable having regard to all the circumstances (including the availability of suitable alternative accommodation for that person and the occupier fails to require his removal.

## **Decision**

70. The powers of the tribunal hearing the appeal are set out in the Housing Act 2004, Sch. 6 section 34:

(1) This paragraph applies to appeals to the appropriate tribunal under paragraph 31 or 32.

(2) An appeal–

(a) is to be by way of a re-hearing, but

(b) may be determined having regard to matters of which the authority were unaware.

(3) The tribunal may confirm, reverse or vary the decision of the local housing authority.

(4) On an appeal under paragraph 31 the tribunal may direct the authority to grant a licence to the applicant for the licence on such terms as the tribunal may direct.

71. As stated by the Upper Tribunal (Martin Rodger QC) in *Clark v Manchester City Council*, in rehearing the matter the tribunal is not required to start with a blank sheet of paper but is entitled to have regard to the views of the local housing authority whose decision is under appeal. However, Martin Rodger QC then added that the recommendation by Buxton LJ in the Court of Appeal's decision in *London Borough of Brent v Reynolds (2001) EWCA Civ 1843* that a county court judge should be slow to disagree with the views of the authority did not seem to him to apply with the same force to a specialist tribunal.
72. In making its determination the Tribunal is considering three matters;
- Are infants aged one and under to be counted
  - Are children between 1 and 9 to be counted
  - Should Room 3 have 2 occupants permitted.
73. We start with the 2004 Act to see whether any distinction is made on the grounds of age and find that there is not. The term used throughout is "persons."
74. Section 264 refers to the calculation of numbers and Sub section 2 gives power for regulations to be made with regard to how children are counted. No such Regulation has been made such as contained in Section 326 (2) of the Housing Act 1985.
75. In support of this is Mr Justice Supperstone's judgment in *Sinnathurai Paramguru v London Borough of Ealing* when after examining the purpose of control of HMOs and the relevant case law he said "it follows that a child of whatever age is to be treated as one person" in the context of the 2004 Act.

76. Conversely Section 3.5 of the Guidance for Local Housing Authorities (updated 9 October 2019) includes” *For the purpose of calculating the minimum room sizes and the maximum number of occupants under the new Regulations, we would expect local authorities not to count any infant occupants under the age of one*”
77. The Tribunal prefers to be guided by statute and case law and as such determines that persons of any age must be counted when setting occupancy levels.
78. The Tribunal understands the Applicant’s concern over the potential for prosecution where the birth of a baby may lead to the occupancy limit being exceeded however, in view of the intention of the guidance and given that occupation is for a 6 week period it seems unlikely that a Housing Authority would, even if it wished to, commence proceedings.
79. Turning now to the occupancy of Room 3, the Tribunal agrees that Schedule 4 does not refer to areas that are to be disregarded in making calculations. However, the areas quoted are the minimum that the Housing Authority may agree and should not be the only determining factor when determining the occupancy level.
80. Whilst the provision of kitchen facilities within Room 3 are no doubt welcomed by the occupier it must follow that space is taken up by the fixed units and by the need to provide working space adjoining. On balance the Tribunal accepts the adjustment made by the Housing Authority leading to a permitted occupancy of 1.
81. In view of the above, the Tribunal dismisses the appeal and confirms the Notice dated 11 April 2023 raising the occupancy to 8 households with 12 occupants and 17 on a temporary basis

**D Banfield FRICS (Chairman  
B Bourne MRICS**

### **RIGHTS OF APPEAL**

1. 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 [rpsouthern@justice.gov.uk](mailto:rpsouthern@justice.gov.uk) to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.