OUTER HOUSE, COURT OF SESSION

[2023] CSOH 40

P1020/21

OPINION OF LADY CARMICHAEL

in Petition of

ANU SHARMA

Petitioner

for

Judicial Review of a decision of the Upper Tribunal of Scotland

Respondent

Petitioner: Byrne; Harper McLeod
Respondent (Renfrewshire Council): Blair; Ledingham Chalmers

27 June 2023

Introduction

[1] On 13 March 2019 Renfrewshire Council removed Ms Sharma from its register of private landlords. It did so because it considered that Ms Sharma was not a fit and proper person. The statutory scheme for registration and removal from the register is contained in Part 8 of the Antisocial Behaviour (etc) Scotland Act 2004.

[2] Ms Sharma appealed, unsuccessfully, to the First-tier Tribunal (FT), under section 92(2), and to the Upper Tribunal (UT) under section 92(5) of the 2004 Act. The UT informed Ms Sharma by letter of 23 September 2021 that a right of appeal lay to the Court of Session under the Tribunals (Scotland) Act 2014. It was, however, common ground by the

time of the substantive hearing that there was no appeal to the Court of Session, and that a challenge to the decision of the UT must be by judicial review. Section 92(6) of the 2004 Act provides that the decision of the UT on an appeal under section 92 shall be final.

[3] On 15 January 2020 the UT granted, in part, Ms Sharma's application for permission to appeal to the UT from the FT. There then followed a rather complicated procedural history in the UT itself. It is not necessary to narrate the detail of that. There came to be an unopposed application by Ms Sharma to amend her grounds of appeal. She sought to add a second ground of appeal relating to the proper scope of the appeal to the FT. The UT judge refused the application to amend on 2 July 2021, although his decision is expressed as a decision to refuse permission to appeal on the (proposed) ground 2. The UT considered the appeal on those grounds for which permission had been granted, and refused it on 17 September 2021. It went on to entertain and determine an application for permission to appeal to the Court of Session, although for the reasons set out above, there is no right to appeal to the Court of Session in a case of this sort.

Preliminary issues

[4] There was a preliminary issue between the parties as to whether the question of time-bar remained a live issue at the time of the substantive hearing. The respondent's point related to the challenge to the decision of the UT judge to refuse permission to amend the grounds of appeal. In the interests of efficiency I did not determine the question in the course of the hearing, but permitted brief, time-limited, submissions on (a) whether the issue remained for my determination and (b) if it did, what factor should inform my view of the issue on its merits.

[5] The Lord Ordinary who dealt with permission appointed an oral hearing. The note attached to the interlocutor setting the oral hearing read: "The court requires to be addressed on the respondent's first plea in law confined to the issue of time bar." The interlocutor granting permission did not explicitly dispose of the respondent's time-bar plea. It did record satisfaction that the test in section 27B(3)(a) and (b) of the Court of Session Act 1988 had been met, and that the petition would raise an important point of principle or practice. I was told that the discussion at the oral hearing on permission ranged more widely than simply the issue of time-bar. I have seen the respondent's note of argument for the permission hearing, and it is not confined to the question of time-bar. It is not clear why it was drafted in that way, as the issue of time-bar was the only one on which the Lord Ordinary required submissions. As Practice Note No 3 of 2017 explains, the Lord Ordinary will ordinarily order an oral hearing if refusing permission. In that event the Lord Ordinary will normally produce a brief note that sets out the concerns which are to be addressed at the hearing. This will assist parties and the court in ensuring that hearings do not exceed 30 minutes. It is implicit in that guidance that parties should expect the hearing to relate to the concern specified in the Lord Ordinary's note.

[6] I am satisfied that the interlocutor granting permission did dispose of the time-bar plea in Ms Sharma's favour. Issues of time bar are generally to be disposed of at the permission stage: *O'Neill and Lauchlan* v *Scottish Ministers* [2021] CSIH 66, paragraph 18, and it is clear that disposal of that plea was at the forefront of the Lord Ordinary's mind when he appointed a hearing on permission. There is nothing in this case that would have rendered the question of time-bar incapable of resolution at permission stage: cf *Avaaz Foundation* v *Scottish Ministers* 2021 SLT 1063. I concluded that there was no live issue of time-bar for my consideration.

[7] In case I am wrong about that, I record my opinion on the application of section 27A of the 1988 Act. The grounds for review so far as the decision to refuse amendment of the grounds of appeal is concerned first arose on 2 July 2021. The refusal to allow amendment was not challenged by judicial review within three months of that date. I would have exercised my discretion to extend time, taking account of the following factors. It was reasonable for Ms Sharma to pursue the appeal to the UT in the way that she did. Had she been successful on the grounds that the UT considered in its 17 September 2021 decision, then challenge to the decision on amendment would have been otiose. She sought judicial review timeously at the conclusion of proceedings in the UT. Both parties represented to the UT judge that the issue of the proper scope of an appeal to the sheriff was a point of general importance on which both of them desired a judicial determination.

[8] There was a subsidiary question as to whether a case added by Ms Sharma by adjustment after the petition was raised was time-barred. It related to an alleged interference with her Convention rights under Article 1 of the First Protocol. The point as it came to be presented was simply to bolster Ms Sharma's case as to the correct construction of the "fit and proper person" test. I do not consider that it represented a separate ground of challenge. Had I been considering whether to grant permission in relation to this line of argument at the outset, I would have done so.

[9] Parties drew to my attention that by the time of the substantive hearing Ms Sharma's registration would have expired by virtue of the passage of time, had her name not been removed from the register. The council did not, however, seek to persuade me that Ms Sharma no longer had standing, that the subject matter of the petition was academic, or that I should not consider the petition on its merits. Ms Sharma retains an interest in the lawfulness of a decision made regarding her position as a registered landlord. Both of the

issues in this case relate to real differences between the parties as to matters of law which arise in other cases. In situations of that sort the absence of a practical result for the individual petitioner will not necessarily prevent the court from providing a ruling: see eg *Napier* v *Scottish Ministers* 2005 1 SC 307.

The issues

[10] Ms Sharma advanced two propositions. The first is that the fit and proper person test contains a forward looking element. The second is that the jurisdiction of the FT on an appeal to it under section 92(2) of the 2004 Act is by way of rehearing and is not confined to a *Wednesbury* review.

The fit and proper person test

The statutory provisions

[11] Section 82 of the 2004 Act provides that each local authority shall prepare and maintain a register for the purposes of part 8 of the Act. Section 83 makes provision for applications for registration, and to exempt certain uses of houses from the requirements of the Act. The Scottish Ministers have made regulations under section 83(1)(d) prescribing information that must be provided in an application for registration: The Private Landlord Registration (Information and Fees) Scotland Regulations 2005 (SSI 2005/558), and The Private Landlord Registration (Information) Scotland Regulations 2019 (SSI 2019/195). The information required includes information that is relevant to the matters to which the local authority must have regard in terms of section 85.

[12] Section 84 relates to registration and provides, so far as material:

84 Registration

(1) This section applies where a relevant person makes an application to a local authority in accordance with section 83.

(2) Where (subject to subsections (7) and (8)) , having considered the application –

(a) the local authority is satisfied that subsection (3) or (4) applies, the authority shall enter the relevant person in the register maintained by the authority under section 82(1);

(b) the authority is not satisfied that either of those subsections applies, the authority shall refuse to enter the relevant person in the register.

(3) This subsection applies where–

(a) under paragraph (b) of section 83(1), the application– (i) does not specify a house; or (ii) specifies a house (or two or more houses);

(b) under paragraph (c) of that section, the application does not specify the name and address of a person; and

(c) the relevant person is a fit and proper person to act as landlord under– (i) a lease; or (ii) an occupancy arrangement, by virtue of which an unconnected person may use a house as a dwelling.

(4) This subsection applies where–

(a) under paragraph (b) of section 83(1), the application specifies at least one house;

(b) under paragraph (c) of that section, the application specifies the name and address of a person;

(c) subsection (3)(c) applies; and

(d) either— (i) the person is a registered letting agent, or (ii) in the case of a person who is not a registered letting agent, the person is a fit and proper person to act for the landlord such as is mentioned in subsection (3)(c) in relation to the lease or, as the case may be, arrangement.

[13] The local authority is to enter the applicant in the register if satisfied as to various matters. Read shortly, one of the matters as to which the local authority must be satisfied is that the person is a fit and proper person to act as a landlord under a lease or occupancy

agreement. Section 85 sets out a list of matters to which the local authority must have regard in deciding for the purposes of section 84(3) or (4) whether someone is a fit and proper person. None of the considerations, which include convictions for offences involving fraud, firearms, violence, drugs, and convictions or sexual offences, is expressed as an absolute bar to registration.

[14] The local authority may refuse to enter a person on the register, and if it does so it must give notice of that to the person: section 86(1). Section 89 makes provision for removal from the register:

> 89 Removal from register
>
> (1) Where –
>
> (a) a person is registered by a local authority; and
>
> (b) subsection (2) or (3) applies, the authority shall remove the person from its register.
>
> (2) This subsection applies where–
>
> (a) the person was registered by virtue of section 84(3); and
>
> (b) paragraph (c) of that section no longer applies.
>
> (3) This subsection applies where–
>
> (a) the person was registered by virtue of section 84(4); and
>
> (b) paragraph (c) or (d)(ii) of that section no longer applies.

[15] Section 92 provides:

> 92 Appeal against refusal to register or removal from register
>
> (1) Subsection (2) applies where–
>
> (a) under section 84(2)(b), (7) or (8) a local authority refuses to enter a person in the register maintained by it under section 82(1); or

(b) under section 88(8) or 89(1), (3A) or (4) an authority removes a person from the register.

(2) The First-tier Tribunal may, on the application of the person, make an order–

(a) requiring the authority to enter the person in the register; and

(b) specifying whether the entry shall be deemed to be made by virtue of subsection (3) or (4) of section 84.

(3) Where by virtue of subsection (2) a local authority enters a person in the register maintained by it under section 82(1),the entry shall be deemed to have been made under subsection (2)(a) of section 84 by virtue of the subsection specified in the order.

(5) An appeal against the decision of a First-tier Tribunal granting or refusing an application under subsection (2) shall be made within the period of 21 days beginning with the day on which the decision appealed against was made.

(6) The decision of the Upper Tribunal on an appeal under this section shall be final.

[16] Section 92 came into force on 30 April 2006, and initially made provision for application to the sheriff by summary application, with appeal to the Sheriff Principal, whose decision on appeal would be final. References to the FT and the UT were substituted with effect from 1 December 2017 by the Housing (Scotland) Act 2014.

The decisions of the council, the FT and the UT

[17] The decision of the council was taken by its Regulatory Functions Board. Its written decision records that

> "The Board, in reaching its decision, considered Mr A Hunter's submission that any action must be forward looking. The Board considered this not to be the appropriate test as set out in the legislation. Section 89 of the Act provides that the Local Authority shall remove a landlord found to be no longer fit and proper subject to the requirement to provide advice as set out above"

[18] The FT's decision includes the following passages at paragraphs 59 and 60:

> "the Tribunal did not accept the forward looking test was the correct test to be applied in the context of the 2004 Act."
>
> and
>
> "…[the FT] was not persuaded that the decision taken by the Board was one which no reasonable Board would have taken."

[19] The reasoning of the UT appears at paragraphs 21, 25 and 42 of the decision of 17 September 2021:

> "Counsel for the appellant founded strongly upon the concession that the scheme had public protection as one of its purposes. Mr Byrne said that *Meadows* and *Lidl* were now directly in point. If there was a protective purpose, this as an objective led inexorably to a forward looking approach".
>
> […]
>
> "Looking to the statute governing the Board's decision there is little to support the submission that it ought to be imbued with a prospective approach. The section expresses itself in the present tense. Is the landlord a fit and proper person? The sub-section asks this in the context of whether that "no longer applies". That suggests an application at the particular point in time, if anything looking to the past and not the future."
>
> […]
>
> "Despite being bolstered by the statutory duty to have regard to it and the requirement for consultation before publication, the Guidance, does not in my view support the proposition that the 'forward looking' test is what the statute enjoins the local authority to employ."

Construction of the statutory provisions

[20] It is evident from the passages just quoted that all three decision-makers rejected the proposition that there should be a "forward looking approach" involved in applying the statutory test. That begs the question of what that means.

Submissions

Petitioner

[21] Mr Byrne submitted that the test ought to contain a forward looking element because the purpose of the statutory scheme was one of public protection. It was not intended to be a regime to punish bad landlords. The court should give primacy to the ordinary meaning of the words: *Barratt Scotland Ltd* v *Keith* 1993 SC 141, p148A-B. The court should adopt a purposive approach, having regard to the mischief at which the statutory provisions were aimed: *Bloomsbury International Limited* v *Department for Environment, Food and Rural Affairs* [2011] 1 WLR 1546, paragraph 10; *R (Electoral Commission)* v *Westminster Magistrates Court* [2011] 1 AC 468, paragraphs 15, 103, 110; *Pepper (Inspector of Taxes)* v *Hart* [1993] AC 593, p617 E-F; *Nokes* v *Doncaster Amalgamated Collieries Ltd* [1940] A.C. 1014, p1022.

[22] All statutory schemes for regulation aimed to protect the public, and regulatory bodies were not penal bodies: *Meadow* v *GMC* [2007] QB 462, paragraphs 30, 31 and 32; *Re Lo-Line Electric Motors Ltd and others* [1988] 1 Ch 477, page 485H. Alcohol licensing decisions were forward looking, as the licensing objectives under section 4(1) of the Licensing (Scotland) Act 2005 were related to public protection: *Lidl UK GmbH* v *Glasgow Licensing Board* 2013 SC 422, paragraph 35. The statutory context would determine whether a scheme was regulatory or penal: *R (Davies)* v *Financial Services Authority* [2004] 1 WLR 185, paragraph 27.

[23] Counsel referred also to Scottish Government guidance on the application, namely *General Guidance for Local Authorities to administer and manage the Private letting registration Scheme*, dated April 2009, and *Landlord Registration: Statutory Guidance for Local Authorities*, dated August 2017. The former in particular, at paragraph 3.4, supported the construction for which he contended:

> "In considering past actions of the applicant and the conviction, the local authority should consider whether any problems are likely to occur again and whether they are likely to affect the applicant's letting activity.
>
> …
>
> An assessment should be made on the risk that the applicant may fail to act properly in relation to future letting activity and the local authority must judge to what extent problems from the past are likely to recur."

[24] Regulation 3 of the Private Landlord Registration (Advice and Assistance) (Scotland) Regulations 2005 (SSI 2005/557) provided that if a local authority proposed to refuse an application for registration under section 84(2)(b) or to remove a registered person from the register in terms of section 89(1), it must, if it considered that the person could, or might be able to, take action to avert the proposed refusal or removal give the person advice on the appropriate action to take. That tended to support the proposition that the decision was one which was forward looking.

[25] If there were an ambiguity, I could derive assistance from a statement made in Parliament at Stage 2 of the Bill's passage in relation to amendment 359: Communities Committee, Thursday 13 May 2004, Col 1051.

[26] The statute should be construed in a manner consistent with the need to assess the proportionality of an interference with Ms Sharma's registration, which was of the nature of a licence to act as a landlord, and was a possession for the purposes of A1P1: *Tre Traktörer Aktiebolag* v *Sweden* (1989) 13 EHRR 309, paragraph 53. The correct approach to proportionality was that detailed in *Bank Mellat* v *HM Treasury* [2014] AC 700, at paragraph 74.

Respondent

[27] Whether a person was not a fit and proper person for registration purposes was a question of judgment for the local authority. Once it had made a judgment adverse to a landlord, section 89 required removal from the register. The 2004 Act provided for an initial assessment of fitness and a system of review to see whether the landlord continued to meet the conditions for registration. The proper question for the council had been whether at the time of consideration the landlord still met the conditions for registration. The expression "no longer applies" was in the present tense, not the future tense. The jurisprudence on which Ms Sharma relied arose from a variety of different statutory schemes, none of which was precisely similar to the 2004 Act. Some of those schemes allowed for a range of outcomes, whereas the 2004 Act scheme only allowed for a person to be registered or to be removed from the register.

[28] "Fit and proper person" was a portmanteau expression which took its colour from the context in which it was used: *R* v *Crown Court at Warrington, ex p RBNB* [2002] 1 WLR 1954, p1960. It related to present character, and related to the character, attitude and aptitude of the individual concerned assessed against an established regulatory history: *Muir* v *Chief Constable of Edinburgh* 1961 SLT 41, p42; *R* v *Hyde Justices (or Cooke) ex p Atherton* [1912] 1 KB 645; *Glasgow City Council* v *Bimendi* 2016 SLT 1063, paragraph 28; *Hughes* v *Hamilton District Council* 1991 SC 251, pp256-257. All of the considerations listed in section 85 were expressed as relating to states of affairs existing at the time of the relevant decision.

[29] Registration was not a possession: *Tre Traktörer*, paragraph 53. A1P1 was directed to protecting assets with a monetary, rather than simply an economic, value: *R (On the application of Nicholds and others)* v *Security Industry Authority* [2007] 1 WLR 2607,

paragraphs 73-75; *R(on the application of Countryside Alliance and Others)* v *Attorney General* [2007] UKHL 52, paragraph 21 Registration was personal to Ms Sharma.

Decision

[30] During the course of oral submissions it was at times difficult to identify the point of difference between the parties. Both accepted that the decision maker required to look at matters in the round on the basis of all the information available at the time of the decision. Both accepted that there was no limit, subject to the requirements of relevance and reasonableness, to the considerations that might inform the decision. The council's real concern, was that to categorise the decision as forward looking might be thought to impose on a decision a requirement to approach decisions in two stages. The concern arose from Ms Sharma's reliance on *Lidl*, and also from an apprehension that there might be an attempt to characterise the course open to a local authority under regulation 3 of the Private Landlord Registration (Advice and Assistance) (Scotland) Regulations 2005 as a step that must be taken in every case. I regard the concern as misplaced.

[31] *Lidl* involves a different statutory scheme. The decision complained of was that grounds had been established in terms of section 39(1) of the Licensing (Scotland) Act 2005 for reviewing Lidl's premises licence to sell alcohol, and that it was necessary and appropriate to suspend that licence for five days. The context was a failure to ask for proof of age from a young person who had been authorised to make a test purchase. The question for the decision-maker was first whether a ground for review was established, and, if it was, whether to take one of four steps, ranging from a written warning to licence revocation. The decision-maker had to consider whether any of those steps was necessary and proportionate for the purposes of the licensing objectives. That the statutory process was of that nature

does not detract from the applicability of the reasoning at paragraph 35 about the forward looking nature of the process so far as other broadly cognate regulatory contexts are concerned. The forward looking nature of the process does not depend on a staged approach.

[32] Decisions about registration generally look to the future. Registration under section 82(2) lasts for three years: section 82(6). The local authority must be satisfied at the time of the registration that the person is a fit and proper person to act as a landlord or to act for the landlord: section 84(2), (3), (4). The local authority must be satisfied at the point of registration. In removing a person from the register, a decision maker is determining that they are not a fit and proper person to remain on it at the moment when the decision is made. It is a decision that affects the future position of the individual. The individual may be guilty of an offence if he or she acts as a landlord without registration: section 93.

[33] That a person is a fit and proper person to act as a landlord under a lease or occupancy arrangement involves an assessment of their ability so to act during the term of registration on the basis of the facts and circumstances known to the decision maker at the point of registration. The words of the Master of the Rolls in *Meadow* at paragraph 32, in the context of GMC fitness to practise proceedings, are equally apt in the context of landlords' registration. The decision maker is looking forward, but in order to form a view as to whether a person is a fit and proper person to be a landlord today, the decision maker will have to take account of the way in which the person concerned has acted or failed to act in the past.

[34] The assessment that the decision maker has to carry out involves a very wide range of matters, considered in the round. Proved past conduct is a matter of historical fact. It is plainly of potential relevance to the assessment of how someone may behave in the future.

It may be of such a nature as to be determinative. It may not be. In an appropriate case a decision maker may take the view that in the light of other facts and circumstances the person is nonetheless a fit and proper person to be a landlord. There may be things that the individual has changed, or could change, which have a bearing on the decision-maker's assessment. Examples might include situations in which the decision maker is satisfied that the individual has put in place structural safeguards such as the engagement of a reputable letting agency as intermediary. Factors which have the capacity to mitigate risk in the future may or may not include action about which advice has been provided under the Private Landlord Registration (Advice and Assistance) (Scotland) Regulations 2005.

[35] I am satisfied that in holding that the "fit and proper person" test did not look to the future, the UT judge erred in law. I have reached that conclusion without reference to the guidance or Parliamentary materials on which Ms Sharma relied, and without needing to decide whether A1P1 was engaged as she contended.

The scope of the jurisdiction of the FT

Proceedings in the FT

[36] Parties proceeded in the FT on the basis that the jurisdiction of the FT was restricted to reviewing the decision of the local authority on *Wednesbury* grounds. The FT was not asked to make any decision about that matter.

The decision of the UT judge

[37] The relevant part of the decision of 2 July 2021 was this:

> "[16] The appellant sought to invoke rule 7(3)(d) of the 2016 Rules as a basis for seeking to amend her grounds of appeal. There are significant doubts as to the competence of the procedural route followed by the appellant in this case. Rule 3 of

the 2016 Rules provides the procedural requirements for an appeal to the UT from the FtT. A notice of appeal is required, identifying the decision of the FtT and the errors of law in the decision – rule 3(2). With that notice must be produced the permission of the FtT to appeal or notice of the refusal of such permission – rule 3(3)(c). Thus, where permission to appeal is sought from the UT, the FtT will have refused permission – rule 3(6). For an appeal to proceed before the UT either the FtT grants permission to appeal or, if it refuses such permission, the UT will have granted permission to appeal (section 46(3)(b) of the 2014 Act). There are procedural requirements that follow from the nature of the hearing regarding permission and appeals therefrom – rules 3(7) and 3(8).

[17] If the application to the UT for permission to appeal is lodged outwith the applicable time limit ("within 30 days after the day of receipt .. of the notice of permission or refusal of permission to appeal", see rule3(9)) then a notice of appeal must seek an extension of time (rule 3(5)(a)(i)) together with an explanation for the failure to lodge the appeal timeously (rule 3(5)(a)(ii)) and a statement as to why it is said to be in the interests of justice that the time limit be extended (rule 3(5)(a)(iii)).

[18] In submission these considerations were simply elided by the invoking of rule 7 of the 2016 rules, it being contended that the UT could regulate its own procedure in a manner wholly unfettered.

[19] I am left in some doubt that there exists a power for application to be made to the UT to amend an existing notice of appeal and for permission to appeal out of time after it has made a decision on an application for permission to appeal. There is no rule that provides for such a power expressly. However, in the absence of submissions on this point, I am prepared to assume without deciding that there exists a power to allow such applications to be made. That may be found in rule 7(3)(d) (though what it ought to apply to is the notice of appeal – rule 3(1)). I was not addressed on the factors that may inform the UT in deciding upon such an application. If the material in the application to amend had been submitted in a procedurally proper manner, though late, then the application would have to address the matters contained in rule 3(5).

[20] Much was made by parties of the importance of a decision on this issue to future practice and procedure in the FtT. The significance for the future practice and procedure in the FtT of this proposed ground of appeal is not a matter on which the UT can authoritatively comment. In the event that this matter is worthy of consideration by the UT, on the basis that it affected a significant number of cases proceeding before the FtT, it is reasonable to expect that the issue would be the subject of proper focus and argument before the FtT in order that the UT can have the benefit of the FtT's view on the operation of the proposed approach. This is an important omission and one that arises because parties were at one before the FtT in relation to its approach. Similarly, if this is an area of doubt that affects a number of cases then the point can be taken properly in one of those cases. If parties are correct on its application to a large number of cases then the UT can expect to receive, with

relative ease and speed, an application where that issue is competently and timeously focussed.

[21] In assessing whether the UT should exercise its discretion in the appellant's favour, the significant time delay between the original appeal (31 October 2019) and the proposed amendment calls for an explanation. The application to amend the grounds of appeal (more properly "notice of appeal") comes some 18 months after the decision of the FtT (and some two years after parties agreed the position at a CMD before the FtT). All that was placed before the UT by way of explanation for that delay at the hearing on 21 June 2021 was that a "fresh pair eyes" had approached the appeal differently. In my view that is not an adequate explanation for the considerable time lapse in bringing this matter now to the UT's attention.

[22] In relation to the purported error of the FtT as to the nature of its review, this issue was the subject of agreement between parties before the FtT (see paragraphs 5 and 50 of the FtT's decision of 10 October 2019). A change in position to such an extent – one which might be more accurately described as a volte face – calls for some explanation. As it was Mr Byrne was unable to provide the UT with any real assistance as to why the position adopted by his client before the FtT had now changed. This does not have the same flavour as a withdrawal of a concession in the course of a hearing (see, for example, *Promontoria (Henrico) Ltd.* v *Wilson* [2018] SAC (Civ) 21) but it does arise in the course of proceedings. The appellant does not seek authority to change horse mid race. Rather, after the race is complete and the horses have made their way to the winning enclosure, with the benefit perhaps of seeing how the race was run, and how her horse fared, the appellant wants to run the race afresh on a different track. An explanation for that change in position is a matter that would be expected to feature in any application for an extension of time as a factor which would inform the decision as to whether it is in the interests of justice to grant or refuse it – rule 3(5)(a)(iii).

[23] In Prior v Scottish Ministers [2020] CSIH 36; 2020 SC 528 the court was considering in an application to the supervisory jurisdiction of the Court of Session the failure to comply with the procedural rules which the court (and the respondent in the reclaiming motion) expected to be respected. It said this: […]

> "[37] The respondents take exception to the petitioners being able to advance a quite different argument from that which is contained in the pleadings and was argued before the Lord Ordinary. There is considerable force in this objection. Rules of procedure are an important element in the judicial system. It is not a question of efficiency or speed trumping fairness and justice. The need to determine cases expeditiously and to achieve finality is not a separate or subordinate consideration to the interests of justice. Expedition and finality are not opposed concepts to fairness and justice but are integral parts of them (see *Toal* v *HM Advocate* 2012 SCCR 735, LJC (Gill) at para [107]). As Honoré (About Law p 77) put it:

> 'One might think that, in contrast with content, requirements of form and procedure are not important. That would be a mistake. Forms and procedures are important for a number of reasons. They make for certainty, they encourage careful reflection, and they promote fairness.'"

[24] Likewise in tribunal proceedings compliance with the requirements of the procedural rules is important. If an appellant is to be allowed to amend a notice of appeal then the failure to do so timeously may reasonably be considered with reference to the rules that apply to appellants seeking to lodge a notice of appeal out of time. The appellant here has not expressly sought an extension of time to lodge her notice of appeal but that must be implied in her application to amend grounds of appeal. She has provided little by way of explanation in connection with the delay in bringing it before the UT before now. I also take into account the poor explanation for the change in position. I do not consider it would be in the interests of justice to allow the notice of appeal to be amended.

Conclusion

[25] In all the circumstances I am not persuaded that the factors prayed in aid by the appellant said to point to the grant of the proposed amendment and permission to appeal outweigh the doubts about competence of the application to amend, the defects and omissions in the application, the appellant's delay in bringing the matter before the UT, her failure to account for that delay and her failure to adequately explain the significant change of her position from that which was the subject of agreement before the FtT.

[26] For the two grounds of appeal for which permission to appeal is now sought, ground 1 was not insisted upon at the hearing of 21 June 2021. As for Ground 2, permission to appeal is refused. Permission to appeal grounds 4 and 5 of the original application has been granted by the UT."

Submissions

Petitioner

[38] Mr Byrne acknowledged that the decision of the UT judge to refuse to allow amendment was a discretionary one. He submitted that the judge had erred in that he had been of the view that the UT could not competently entertain an application to amend grounds of appeal before it. He had left out of account the submissions of both parties to him that the point was an important one affecting a number of cases and in relation to which

both parties wished to obtain a ruling, simply on the basis that he was not himself aware of other cases in which the point arose. He had left out of account that it was the role of the UT to resolve points of law affecting cases in the FT. It was necessary that the UT be astute to the need to determine points of law relating to matters of such fundamental importance as the scope of the jurisdiction of the FT. The importance of a point of law was a matter that militated in favour of a court's allowing it to be argued and determined: see eg *Wightman* v *Advocate General* [2018] CSIH 18. The judge had adopted an unduly formalistic approach, which was out of place in tribunal proceedings which are intended to be flexible, and avoid unnecessary formality and technicality: *MN* v *Secretary of State for the Home Department* 2014 SC (UKSC) 183, Lord Carnwath, paragraphs 22-24. To allow amendment would not have occasioned any additional delay in the case. The point that Ms Sharma sought to raise was one that went to jurisdiction, which was a matter that the FT and the UT were both obliged to note for themselves: *Cabot Financial UK Ltd* v *Gardner and Ors*, [2018] SAC (Civ) 12.

[39] Mr Byrne sought to persuade me that permission to proceed with this judicial review had been given on the basis that the scope of the FT's jurisdiction was an important point of principle or practice. He invited me to determine the merits of the proposition that he sought to advance about the jurisdiction of the FT. Where a statute used the language of "appeal" without more specification, that suggested a hearing of new, and not a review: *Michalak* v *General Medical Council* [2017] 1 WLR 4193, Lord Kerr, paragraph 20. Where a court could remake the decision and hear evidence, that indicated that the hearing was a hearing of new: Macphail on Sheriff Court Practice (4th Ed), 27.42. The remedy under section 92 was an order requiring entry in the register. It was not merely setting aside and remittal.

Respondent

[40] Mr Blair submitted that it was the "permission decision" of the UT judge that was properly before the court for judicial review, and the challenge was one to an exercise of discretion. The judge had given cogent reasons. There was no merit in the point of law that Ms Sharma had been seeking to pursue. The statutory scheme indicated that a judgment as to whether a person was or was not a fit and proper person was one for the local authority only. Existing case law supported the proposition that the jurisdiction was one of review only: *TH* v *Glasgow City Council*, unreported, Glasgow Sheriff Court, 21 September 2017, *Ossatian* v *Glasgow City Council* FTS/HPC/GL/18/2549; *Equi* v *South Lanarkshire Council* FTS/HPC/GL/18/3053.

[41] It was necessary to consider the nature of the decision and the relevant statutory provisions: *R(Begum)* v *Special Immigration Appeals Commission and Secretary of State for the Home Department* [2021] AC 765. In *Begum* the existence of a "condition precedent" was for the primary decision maker, in that case the Secretary of State, and the scope of the appellate tribunal's jurisdiction had been found to be one of review only. That was analogous to the present case, in which the question of whether someone was a fit and proper person was for the local authority. The power to make that assessment remained with the local authority alone, absent clear statutory provision to the contrary: *Begum*, paragraphs 68, 69. The "local" nature of the decision making suggested a wide margin of discretion for the local authority. Section 92 did not refer to an appeal, but to an application. *Michalak* provided no useful guidance in the context of a very different statutory scheme.

Decision

[42] The decision for review is the decision of the UT judge to refuse to allow amendment of the grounds of appeal. That is the decision identified in statement 11 of the petition as

being challenged, and Ms Sharma is correct to characterise the decision as one to refuse to allow amendment. The judge's decision is expressed in the introductory paragraph of the decision as a decision "to refuse permission to appeal proposed ground of appeal 2". In paragraph 26 the judge said he was refusing permission to appeal. It is however clear from paragraph 24 that he had not allowed amendment of the grounds of appeal to include the proposed ground 2. That being so it was not before him for consideration so far as permission was required.

[43] In considering the matters relevant to his decision to refuse to allow amendment, the judge took into account a number of matters that are unexceptionable. He was entitled to take into account the timing of the proposed amendment and the explanation or lack of it for a change of position, and as to the timing of the change or position. He took into account, but did not attribute weight to, the joint position of parties that the issue was an important one. He gave reasons for doing so. Other judges might conceivably have taken a different view: that a point may affect a number of first instance cases will not necessarily lead to numerous appeals, as parties may recognise that their case is poor on the merits regardless of the nature of the appellate jurisdiction. The judge's approach on this point cannot, however, be characterised as unreasonable or otherwise unlawful. He was entitled to take into account the importance of adherence to rules of procedure in achieving fairness and finality, although, as in *Prior*, an appellate court or tribunal may still determine to consider arguments not advanced at first instance in appropriate cases.

[44] What is unclear from the decision is what the judge made of the competency of the application to amend. At paragraph 19 of his decision he indicated that he was proceeding on the assumption, without deciding, that there was a power to allow applications to be made to amend the grounds of appeal. At paragraph 25, however, he says that in making

his decision he has brought his doubts about the competence of the application into the balance in determining how to proceed. This apparent contradiction makes it impossible to be sure that he did not take those doubts into account, and vitiates his decision. The judge's doubts were misplaced, as they were based on an error of law and should have formed no part of his reasoning. The Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 provide that the UT may permit or require a party to amend a document: rule 7(3)(d). There is no reason to exclude from that provision a notice of appeal. It would be unusual for a court or tribunal not to have a power to allow amendment of a document such as a notice of appeal.

[45] The judge was correct to identify that amendment could and should not be a means for a party to avoid the requirements for permission to appeal. Where a procedure requires a grant of permission, any application to amend will require consideration of the test for permission that would usually apply in that procedure. The situation is analogous to that identified in *MIAB* v *Secretary of State for the Home Department* 2016 SC 871. That case related to judicial review, the requirement for permission under section 27B of the Court of Session Act 1988, and the test for permission in that provision. The Lord President (Carloway) said this at paragraph 64:

> "Where the court is considering a minute of amendment in proceedings raised after the introduction of sec 27B, it ought to be asked to grant or refuse permission to proceed on any new grounds advanced, at least at the stage of allowing any amendment. It would be most unusual for the court in a judicial review to allow an amendment to introduce averments containing an argument which has no 'real prospects of success'. Other than in exceptional circumstances, the existence of such prospects should be regarded as a minimum requirement before an amendment containing new grounds would be allowed. Even if that low hurdle were crossed, it would not follow that the amendment should be allowed having regard to other factors in the interests of justice equation."

[46] Where an appeal is brought timeously, but there is an attempt to add a new ground of appeal after permission has been granted on other grounds, it will be a matter for the discretion of the tribunal whether to allow that. The tribunal will require to consider whether the new ground satisfies the test for permission to appeal. Applications to amend are not subject to rule 3 of the 2016 Rules. The reason why the amendment comes at the point that it does is a factor that goes to the exercise of discretion by the tribunal, not to the competency of the application to amend.

[47] Although the judge erred in law in reaching his decision regarding amendment, that error would be immaterial if the point of law underlying the proposed ground of appeal were of no merit. I therefore go on to consider the substance of the point that Ms Sharma sought to raise before the UT.

[48] The local authority drew to my attention three cases in which a *Wednesbury* approach was applied in an application under section 92(2); one from the sheriff court, and two from the FT. None involved any developed discussion of the point. *TH* was decided on the basis of a concession, albeit one that Sheriff Deutsch considered had been made correctly: paragraphs 9 and 10. In *Ossatian* parties agreed before the FT that the approach should be that adopted by Sheriff Deutsch in *TH*. The same is true of *Equi*.

[49] In *Begum* one of the issues before the Supreme Court was the nature of the jurisdiction of the Special Immigration Appeals Commission (SIAC) under section 2B of the Special Immigration Appeals Commission Act 1997. There had never been any statutory provision relating to the grounds on which an appeal under that section might be brought, or how the appeal was to be determined. Lord Reed, at paragraph 46, observed that the principles to be applied by an appellate body and the powers available to it were by no means uniform. He went on to review various authorities, and in particular *Secretary of*

State v *Rehman* [2003] 1 AC 153. The following points which are potentially of significance in this case emerge from that analysis. The circumstance that an appellate body has a jurisdiction to decide issues both of fact and law will not be decisive as to the nature of its jurisdiction in relation to a particular statutory provision permitting an appeal to be brought to it: paragraph 55. In determining the functions and powers of an appellate tribunal, it is necessary to examine the nature of the decision and any statutory provisions that throw light on the matter, and the appellate process must enable the procedural requirements of the ECHR to be satisfied: paragraphs 63, 64.

[50] It follows that ascertaining the nature and extent of the FT's jurisdiction under section 92 of the 2004 Act is an exercise of statutory construction. The question is this. Was it the intention of the legislature (a) that only the primary decision maker, namely the local authority, should decide the question of whether someone is a fit and proper person to be a landlord on the merits, or (b) that the appellate decision-maker should also be empowered to do so, as opposed merely to reviewing the lawfulness of the local authority's decision?

[51] The language used in section 92 is that of application, not appeal, and does not of itself provide any real assistance as to the nature or extent of the jurisdiction. The FT does have a power to find facts, but that is not decisive: *Begum*, paragraph 55.

[52] Part 8 of the 2004 Act was intended to secure that a person who was not a fit and proper person should not be included in the local authority register. Before a person can be registered, the local authority must be satisfied that he is a fit and proper person. If not so satisfied, the authority must refuse registration: section 84(2)(b). If paragraph 84(3)(c) or 84(d)(ii) as the case may be no longer applies, the authority must remove the person from the register. Read shortly, that arises when a person is no longer a fit and proper person.

[53] On an application under section 92 the FT may make an order requiring the authority to enter the person in the register. The FT may grant or refuse an application. If the role of the FT were only to review the decision of the local authority, it would be determining whether the local authority was entitled to reach the conclusion that the person was not, or was no longer, a fit and proper person. The appeal would be determined without anyone having positively determined that the individual was a fit and proper person, at a point when the local authority had not been satisfied that he was such a person.

[54] It cannot have been the intention of Parliament that a person's name should be included on the register on the basis that the FT (or, formerly, the sheriff) concluded that the local authority had not been entitled to reach the conclusion that it did. There is no presumption that a person is a fit and proper person unless there is a finding otherwise. On the contrary, he requires to provide information to show that he is a fit and proper person when he seeks registration. It would be contrary to the purpose of part 8 of the 2004 Act were the FT to be able to require a local authority to enter a person on the register where neither the local authority nor the FT had been satisfied that the person was a fit and proper person. Unless the FT is empowered to make a decision in substitution for that of the local authority, rather than just setting it aside, it cannot make a determination that a person is a fit and proper person. I therefore conclude that the jurisdiction of the FT in an application under section 92 is to consider the question of whether the person is a fit and proper person of new.

Conclusion

[55] I am satisfied that the UT judge construed the "fit and proper person" test wrongly. I cannot speculate as to the result he might have reached in relation to the appeal had he not

done that. It is not inevitable that he would have refused the appeal. A variety of options would have been open to him, including remaking the decision himself, applying the correct test, and remitting to the FT. So far as the decision on amendment is concerned, I cannot say the UT judge would necessarily have refused to allow the amendment had he not brought into account doubts as to the competency of amendment which were erroneous in law.

[56] In light of the circumstances set out at paragraph 9 of this Opinion, I am putting the case out by order for parties to address me as to what orders if any may be appropriate in light of my conclusions on the arguments presented at the substantive hearing. I reserve all questions of expenses meantime.