Upper Tribunal for Scotland

[2022]UT08

Ref: UTS/AP/19/0046

Sheriff Tony Kelly

IN APPEAL FROM
DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND
(HOUSING AND PROPERTY CHAMBER)
IN THE CASE OF

Mrs. Anu Sharma, 17 High Calside Street, Paisley, PA2 6BY
per c/o Harper MacLeod, Harper Macleod LLP,
45 Gordon Street, Glasgow, G1 3PE

Appellant

- and -

Renfrewshire Council, Renfrewshire House, Cotton Street, Paisley, PA1 1TT
per Renfrewshire Council, Litigation,
Cotton Street, Paisley, PA1 1TT

Respondent

Act: Byrne, Advocate
Alt: Blair, Advocate

FtT case reference FTS/HPC/GL/19/1023

17 September 2021

Decision

The Upper Tribunal refuses the appeal.

Introduction

[1] By virtue of a decision of 13 March 2019, the appellant was removed from Renfrewshire Council's Register of Private Landlords. The Regulatory Functions

Board of the Council ("the Board) had received reports of certain concerns featuring the appellant. A Council officer prepared a detailed report. At a hearing, where the appellant was represented, the Council decided to remove the appellant from the Register of Private Landlords in accordance with section 89 of the Antisocial Behaviour Etc (Scotland) Act 2004 ("the 2004 Act"). At that meeting of the Board, on the appellant's behalf it was contended that in arriving at a decision whether or not to remove an individual from the Register of Private Landlords, the Board was required to adopt a "forward looking" approach. This submission was rejected (see paragraph 68 of the Board's decision). This submission was renewed before the First Tier Tribunal ("FtT") and it too rejected it (see paragraph 59 of the FtT's decision).

Appeal

[2] There have been a number of procedural twists and turns in the hearing of this appeal. For present purposes it is sufficient to note that permission to appeal was granted in relation to two grounds of appeal. Ground of Appeal numbered 4 contended that the FtT (and the Respondent) had fallen into error in misconstruing certain dicta of Sheriff Deutsch in an unreported decision, *TH v Glasgow City Council*, 21 September 2017, Glasgow Sheriff Court. Ground of Appeal numbered 5 focussed on the failure to give effect to the submission advanced by the appellant that a "forward looking" approach was required to be adopted.

Appeal Hearing: 11 August 2021

[3] Both counsel produced in advance of the appeal hearing detailed notes of argument and supporting authorities. At the hearing they both spoke to the notes and supplemented where it was thought necessary. I do no more than provide a summary of the points raised by parties, the notes being available in the UT process.

Appellant

[4] The Board rejected the submission on behalf of the appellant that there was a forward looking aspect to the fit and proper person test. For Mr Byrne, on behalf of the appellant that necessarily implied that its approach was backward looking. The favourable aspects of the appellant's conduct pressed on the Board such as the appellant's time as landlord were enumerated. Before the FtT, the submissions made on behalf of the appellant on this issue - recorded at paragraphs 25 and 26 – were rejected, see paragraph 59.

[5] Counsel said that the legitimate aim pursued by the functions created by Part 8 of the 2004 Act was public protection, such as protection from errant landlords. Punishment may be the consequence but not the purpose of that Part of the legislation. The Board was entitled to have regard to the background facts, but in omitting to look to the prospective effect of its decision, it fell into error.

[6] Mr Byrne referred to *Meadow* v *General Medical Council* [2006] EWCA Civ 1390; [2007] 2 WLR 286 ("*Meadow*"). The functions of Part 8 the 2004 Act dealt with the regulation of landlords and premises. There was an element of public protection.

These were apt for inclusion as part of the list of professions and occupations enumerated by the court in para 28. The criminal courts dealt with punishment for transgressions.

[7] The statutory regime did not exist in a vacuum. Section 85 of the 2004 Act lists the considerations the local authority shall have regard to, with sub-section (2) providing what Mr Byrne described as "some colour". Mr Byrne referred to *R. v Warrington Crown Court, Ex p. RBNB* [2002] UKHL 24; [2002] 1 W.L.R. 1954 ("*Warrington*") and *Lidl UK GmbH v Glasgow Licensing Board* [2013] CSIH 25; 2013 SC 442 ("*Lidl*"). It was submitted that if public protection was an aspect of the purpose of the 2004 Act, then the observations of the Court in *Lidl* had application. There was a forward looking aspect in the assessment of risk that was precluded by the decisions of the Board and the FtT.

[8] Two separate guidance notes emanating from the Scottish Government were produced: (i) guidance to local authorities published in 2009; and (ii) guidance from 2017 issued under section 99A of the 2004 Act.

[9] The 2009 guidance issued by the Scottish Government was said by Mr Byrne to be "live on the Scottish Government website" and to provide a useful insight into how the Executive saw the operation of the 2004 Act. The UT should give that view some weight in accordance with the observations of Lloyd-Jones J in *Chief Constable of Cumbria v Wright* [2007] 1WLR 1407 ("*Wright*") at [22]. Parts of that guidance were said to provide some support for the view of the Scottish Government as to what the

fit and proper test consisted of. This expressly included future looking facets of registration: p.28. In arriving at a decision on a fit and proper person the Board were clearly involved in assessment of risk. It ought to have looked at whether the respondent could modify her behaviour. The risks were to potential tenants but, in taking such a restrictive approach to the fit and proper test and not looking to the future, the respondent was failing the public, tenants and the appellant. Mr Byrne touched upon the positive aspects of the appellant's record in this regard. Insofar as the guidance was clear about a risk based approach (e.g. at p.30), the approach of the Board was not in accordance with the guidance. It ought to have had regard to that. Its approach to decision making was neither robust or risk based.

Respondent

[10] Mr Blair on behalf of the respondent, noted that the appeal was against the decision of the FtT, not the decision of the Board. The FtT had accepted the argument of the respondent in rejecting the challenges on grounds of rationality and adequacy of reasons. Counsel then referred to the Board's reasons for its decision. It had considered matters in a balanced and appropriate manner. It approached its decision making with an open mind, and had looked at matters in the round with a view to establishing what had happened. There was no hint in the Board's reasoning that it was acting out of a desire to punish the appellant. The outcome - of removal from registration - was mandated after the Board reached its conclusion in connection with the issue of whether the appellant was a fit and proper person. This decision arose by

virtue of the nature of the regulatory system or scheme brought into force by the 2004 Act.

[11] Hardship was not a consideration in the application of the fit and proper test but a consequence – see *Rose v Falkirk District Council* unreported, 11 March 1994, an appeal under the Civic Government (Scotland) Act 1982 and *Hughes v Hamilton District Council* 1991 S.C. 251, where the court had observed that the assessment of a fit and proper person was a matter for the authority.

[12] The conclusion reached by the Board was careful, reasoned and balanced. The authority was clearly concerned about the appellant's attitude. It was not submitted on her behalf that the matters raised were trivial or baseless. The Board had taken into account the appellant's history as a landlady but had come to an overall view, a cumulative impression, that she was not a fit and proper person.

[13] Mr Blair said that the matters raised in the report by Ms Gray, a council official, placed a practical onus upon the appellant to deal with the allegations, and to work with the Board to see if there was a way of resolving the matter. When one looked at the report and the work carried out by Ms Gray, it was clear that there were a number of attempts to engage with the appellant. She responded, sometimes late in the day, sometimes not at all. There had been no evidence regarding the qualifications of the electrician who carried out an inspection. That was of obvious materiality. The Board concluded that the conduct of the appellant had "crossed the Rubicon". The appellant had failed to identify precisely what steps ought to have

been taken and what factors the Board ought to have had regard to in considering this "forward looking element".

[14] Counsel then moved on to look at the statutory provisions. When considering the Respondent's powers under section 89 of the 2004 Act, the landlord will already be registered and there will be a record of his or her operation "in the system". The review in terms of section 89 of the 2004 Act was to see whether that still applied at that point in time.

[15] The scheme sought to protect vulnerable tenants from bad landlords. The manner in which the statutory purpose was pursued was to ascertain whether the registered person remained a fit and proper person. If there were concerns, these were put to the authority with details, for example, of an alleged offence. A hearing was appointed with the appellant given an opportunity to put forward her position. In counsel's submission the appellant's behaviour over the period tells the Board something of her character as to whether she is (remains) a fit and proper person to be a landlord. The 2004 Act contained no additional features such as to suggest a prospective risk assessment. The fit and proper test fell to be applied at the point in time it arose for determination.

[16] There were a number of different regulatory regimes mentioned in *Meadows* but those all related to the regulation of professions. Those regimes in operation looked to separate matters: establishing wrongdoing and then moving on to decide upon the sanction to be imposed. The 2004 Act envisaged a global assessment of

character and aptitude based on what was known. That assessment was one conducted in the round, informed by the information available to the authority, to ascertain whether the person was no longer a fit and proper person.

The 2009 Guidance.

[17] The 2009 guidance was not statutory guidance. It provided guidance to authorities in administering the first cycle of registrations, after the coming into force of the scheme. The risk based approach referred to in the guidance made sense in that context. This guidance looked at the initial application process. This fell to be contrasted with a person already in the system who had developed a track record. There was an ability to look at that record in the system and to see whether the person remained a fit and proper person. There was no principle to be taken from the terms of this guidance such that there had always to be a forward looking element in the assessment of a fit and proper person. It simply enjoined officers to deal responsibly with applications.

The 2017 guidance

[18] The statutory guidance from 2017 clearly envisaged that the fit and proper person who had been registered, required to remain so throughout the term of the 3 year period and to be able to evidence that through his or her conduct and actions. It was not invoked before the FtT. The Scottish Regulators Strategic Code of Practice was referred to. It was not said that this was a factor not taken into account by the respondents. When one looked to the report compiled by Ms Gray, it had clearly

adopted a robust and evidence based approach. The Board had carefully sifted the information before it from its officer and others. All that the code of practice outlined was a list of expectations. These were not legal principles from which it could be deduced that a forward looking approach was required.

[19] There was an ongoing obligation in connection with the application of the fit and proper person test, for the person who had been registered and satisfied the authority in this regard, to show "each and every day" that they remained a fit and proper person. In the submission of counsel this was integral to being a landlord. The question of reviewing registration was about the assessment of risk "in the here and now" and not in the future. The risk based approach did not have equivalence to a forward looking assessment.

Reply

[20] In a brief reply Mr Byrne, on behalf of the appellant, returned to the test of materiality. Counsel took issue with the characterisation of the future looking test as being some form of crystal ball exercise. This was criticised as being pejorative. Such an approach was clearly well understood - see *Meadows* and *Lidl*. Counsel also took issue with the respondent's submission that there were two separate and distinct processes in play, one in relation to initial registration and the other in relation to continuing or review of registration. There was no basis for saying that there were two different tests to be applied. In counsel's submission such a scheme would be unworkable.

[21] 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.

Decision

Ground of appeal 5

[22] Ground of appeal 5 focuses upon the FtT's decision in this way:

> "It is submitted that the FTT erred in law in refusing to apply a forward looking test in determination of the application FTS/HPC/19/1023. Whilst paragraph 59 of the FTT Decision narrates the provisions of section 89 of the Antisocial Behaviour (Scotland) Act 2004, it discloses that the FTT erred in its understanding of the central submission of the Appellant in the application of a "forward looking" test for assessing the fitness of the Appellant."

[23] Although counsel touched upon the facts founded upon by the Board on 13 March 2019 they each acknowledged there was no basis for taking the court to the fact finding exegesis supplied in its reasons and, similarly, in the FtT's decision as to fact. The FtT's and the Board's fact based decision making does not feature for the purposes of this appeal. This is an appeal based upon what was said to be an error of law. This is crystallised in the Board's decision (para.68) and FtT's decision (para.59) by the rejection of the submission that the decision of the Board ought to have been forward looking.

[24] On 13 March 2019, the Board removed the appellant from its register of private landlords. It took that decision in pursuance of its powers under section 89 of the 2004 Act. This provides:

> **"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.
>
> (3A)Where—
>
> (a)a person is registered by the local authority by virtue of section 84(4), and
>
> (b)paragraph (d)(i) of that section no longer applies,
>
> the authority may remove the person from the register.
>
> (4) Where a registered person, without reasonable excuse, fails to comply with the duty imposed by section 92B(1) the authority may remove the person from the register.
>
> (5) Where—
>
> (a) a person is registered by a local authority; and
>
> (b)the person is disqualified from being registered by virtue of an order under section 93A(2),
>
> the authority shall remove the person from its register."

[25] The question before the Board in terms of section 89(2)(b), was whether section 84(3)(c) "no longer applies" — that is whether the landlord is a fit and proper

person no longer applies. 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 a particular point in time, if anything looking to the past and not the future.

[26] In *Warrington* the court noted the breadth of the fit and proper person test, Lord Bingham stating:

> …. some consideration must be given to the expression "fit and proper" person. This is a portmanteau expression, widely used in many contexts. It does not lend itself to semantic exegesis or paraphrase and takes its colour from the context in which it is used. It is an expression directed to ensuring that an applicant for permission to do something has the personal qualities and professional qualifications reasonably required of a person doing whatever it is that the applicant seeks permission to do.

[27] Appellate courts have been reticent to traduce upon assessments of local licensing committees. In *Middleton v Dundee City Council* 2001 SLT 287 the court said this:

> "[6] Parliament has left the decision on propriety and fitness to hold a taxi licence to local committees because they are considered to be best placed to assess the needs of, and the standards of service appropriate to their area and, to that end, to determine the calibre of individual who is to be entrusted with the provision of this important public service. In our view the court should be slow to lay down hard and fast rules of general application as to the matters which are relevant or irrelevant to the consideration of these questions by committees."

[28] In *Glasgow City Council v Bimendi* 2016 SLT 1063, the court said this of the familiar 'fit and proper person' test:

> [28] There are no provisions, either in statute or case law, limiting or defining the bases upon which a licensing authority may conclude that an applicant is not a "fit and proper person" to hold a licence. Such decisions are, of course, subject to the usual controls on administrative action: taking account of relevant considerations and avoiding irrelevant considerations; perversity; *Wednesbury* unreasonableness and the like. Beyond those controls, the authority enjoys a wide measure of discretion. It is not a necessary prerequisite that an applicant should have been convicted of a criminal offence (*Coyle v Glasgow City Council*). A licensing authority has a broad discretion when exercising their judgment. They are entitled to place weight on the nature and cumulative impression of a series of circumstances (*McKay v Banff and Buchan Western Division Licensing Board* at p.24G–H; *Hughes v Hamilton District Council*). They are also entitled to expect the applicant to provide information, explanations, or evidence in exculpation or mitigation of any alleged conduct or event which might suggest that he is not a fit and proper person. In this respect, there is a practical onus resting on the applicant (*Chief Constable of Strathclyde v North Lanarkshire Licensing Board* at p.314 (pp.1274–1275) para.23; *McAllister v East Dunbartonshire Licensing Board* at p.757G–H (pp.719–720); *Calderwood v Renfrewshire Council* at pp.700–701 (p.226) para.18).

[29] Mr Byrne, on behalf of the appellant, contended that to exclude from the assessment of the fit and proper person test a forward looking feature was an error when one looked at the regulatory functions and the purpose of the scheme of registration of private landlords.

[30] In *Meadow* the court was primarily concerned with the interplay between witness immunity and the use to which Dr Meadow's testimony at a criminal trial was put in fitness to practice proceedings. The decision of the Court of Appeal also looked at the purpose of the various schemes regarding the regulation of a number

of professions and occupations, see para.30. It cautioned against regulatory bodies pursuing a penal function and emphasised that the primary objective of the regulation of professions was protection of the public. The then Master of the Rolls based his view on a careful consideration of the various schemes under which fitness to practice panels operate and, in the particular circumstances of that case, whether it could consider expert witness testimony given by Dr Meadow in a criminal trial. The fact that punishment is not the order of the day in such proceedings is axiomatic, see *Ziderman v General Dental Council* [1976] 1 WLR 330. When there has been a criminal offence that is dealt with by the criminal law. The professional regulator, if dealing with a criminal offence, then looks to see, in light of what occurred, what it is to make of the risk attendant with such a professional in his or her future dealings with members of the public as patients. Here, however, the respondents are not a professional regulator. They compile a register of private landlords. There are provisions for being entered on the register and for review of that entry. The respondents administered the statutory scheme by deciding whether or not the appellant was a fit a proper person; and whether that label still applied to her. If it did not the statute directed removal – section 89(1) of the 2004 Act.

[31] I do not consider that the Board eschewed public protection by deciding that its construction of section 89 of the 2004 Act did not warrant a forward looking aspect. It was enjoined to ascertain whether the appellant remained a fit and proper person. It carried out a careful analysis of that issue. After arriving at the conclusion that the

appellant was no longer a fit and proper person, the Board had no discretion other than to remove the appellant from its register of private landlords. In doing so it sought to protect members of the public from contracting with those who do not meet the fit and proper test.

[32] The proposition that the appellant contended for, that once public protection is acknowledged to be a legitimate aim that may be pursued in the overall scheme of Part 8 of the 2004 Act, then, at once, it is required to cast an eye to the future, is not made out.

[33] In *Warrington,* where Lord Bingham explained the breadth of the fit and proper person test, the statutory scheme in play in that case is referred to at paragraph 10: section 8A(3) of the Licensing Act 1964. The assessment to be carried out by the licensing justices was to ascertain whether there is a "likelihood" that the applicant would be prevented from properly discharging his functions. In other words, the governing provision sanctioned a prospective assessment in looking to what was likely to happen in the event of a grant of a licence.

[34] In *Lidl* the licensing objectives were made express on the face of the Licensing (Scotland) Act 2005, section 4. The procedure for review is fully fleshed out in the Act. Where an application to review a licence is submitted it must specify the breach and the licensing objective to which the ground of review relates: section 36(5)(b). Lord Drummond Young concluded that the assessment to be carried out by the Licensing Board was forward looking. He did so with reference to the statutory

scheme and the factual background of the appeal – a single failed sale of alcohol, which in his view had led the licensing authority in error to a penal view of this conduct.

[35] There was no comparable statutory formula before the Board here. The terms of section 89 are clear, not only in the tense employed but in what is envisaged with removal. What the Board required to ascertain is whether the appellant remained a fit and proper person. If this was "no longer" the case then she was to be removed from the register.

Guidance

[36] The Scottish Government published general guidance for local authorities in April 2009 – *Registration of Private Landlords*. In *Wright*, the court stated observes that:

> "17. It is, of course, for the courts and not the executive to interpret legislation. However, in general, official statements by government departments administering an Act, or by any other authority concerned with an Act, may be taken into account as persuasive authority on the legal meaning of its provisions. That is the principle stated by Bennion, Statutory Interpretation, 4th ed (2002), section 232. In the present case we are concerned with guidance published by the Home Office, which is the government department which had responsibility for the enactment and operation of the legislation in question. In any given case, it may be helpful for a court to refer to the guidance in the interpretation of the legislation. It may be of some persuasive authority. However, to my mind that is the limit of its influence. It does not differ in that regard from a statement by an academic author in a textbook or an article. It does not enjoy any particular legal status. There seems to me to be no satisfactory basis for the submission that it gives rise to a presumption that the views it contains are correct and should be rejected only for good reason."

[37] I donot consider that this guidance bears the weight that Mr Byrne sought to place upon it. There is guidance about 'the fit and proper test' at para.3.4 and how the authority might view the initial applications for registration under what was then a new scheme. There is no statutory basis referenced in the 2009 guidance said to provide a basis for the view taken by Scottish Government officials. It may be that this was the way that the officials predicted how the scheme would operate or how they thought it ought to be administered by local authority officials. That is some distance from utilising the terms of the guidance as an aid to statutory interpretation, especially where the legislative provisions are plain. The guidance does not mandate a particular process to be followed, indeed much of what is said is qualified and tentative. It may be that this reflects the provisional view of how the scheme might operate in practice.

[38] In relation to the 2017 guidance – *Landlord Registration Statutory Guidance for Local Authorities* - Mr Byrne had a statutory basis for his submission. Section 99A of the 2004 Act enjoins the local authority to "have regard to any guidance issued by Scottish Ministers". That guidance may be promulgated only after a consultative process has been completed. In *Mavalon Care Ltd v Pembrokeshire Council* [2011] EWHC 3371 (Admin) Beatson J, as he then was, said that such guidance, though not mandatory, must be accorded great weight.

[39] However, this remains guidance from government officials - with the benefit of consultation - providing their view on how the scheme should operate. There is

no need to invoke it as an interpretative tool as there is no ambiguity in the terms of the statute in operation and the subject of detailed consideration by the Board on 13 March 2019 and the FtT on 10 October 2019.

[40] The Scottish Regulators' Strategic Code of Practice is cited within the 2017 guidance as having application to the "delivery of landlord registration functions". Whilst insisting that this Code did not provide a basis for any additional ground of appeal and expressly disavowing reliance upon any suggestion that there was a failure on the part of the respondents to take it into account, Mr Byrne nonetheless sought support from its suggestion that a "risk based approach to the fit and proper test" (see page 17 of the guidance) ought to be adopted as in some way being productive of a requirement on the authority to adopt a forward looking approach to applications for registration and decisions on review. Mr Byrne returned to his earlier submission that public protection (and not, by contrast, punishment) necessitated a prospective approach. I do not consider that the use of these terms necessarily entails the approach advocated on behalf of the appellant by Mr Byrne.

[41] There are parts of the guidance that do not support Mr Byrne's approach. For example, at p.14 of the guidance under the heading "The 'Fit and Proper Person' Test", it states:

> "The fit and proper person test is intended to provide a level of assurance that the landlord or agent is a suitable person to let privately rented property. It is a standard that all private landlords are required to uphold throughout the time that they operate as a private landlord."

[42] 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.

Ground of Appeal 4

[43] Ground of appeal 4 focuses upon the FtT's reference to the decision of Sheriff Deutsch in the case of *TH* v *Glasgow City Council*, unreported, 21 September 2017 in the following way:

> "Firstly the FTT failed to reflect in the FTT Decision that Sheriff Deutsch goes on to say "Perhaps there is an argument to be had about that on another occasion" in respect of this doubt. No such discussion took place before the FTT in this case. The comments of Sheriff Deutsch can only be considered obiter.
>
> Secondly, the FTT Decision at paragraph goes on to state that they accepted the Respondent's submission that the Appellant's conduct as a whole "outweighed that there had been no complaints relating to other properties". This finding is perverse and wholly inconsistent with their finding at paragraph 55 that there was no evidence that the other properties were operating normally. This clear contradiction leaves the Appellant in real and substantial doubt as to what the FTT findings were as regarding the operation of her other premises and how that then applies to the giving of time to submit electrical certification in order to preserve her fitness."

[44] Mr Byrne on behalf of the appellant referred to his written note of argument in respect of ground 4 and submitted that it required little further elaboration.

[45] It is important to record at paragraph 58 of its decision the FtT stated:

> "Further the Tribunal did not accept the Applicant's submissions that the Board could have allowed the Applicant to continue to be registered as landlord of her other properties which were of no concern to the Board, with letters of support from her tenants. The Board had no evidence the other properties were operating "normally" as they had no electrical certification carried out by a properly qualified person capable of producing and signing an EICR as

> required by regulations. The Tribunal accepted the Board were aware the Applicant had removed the two properties from the register. The Board however preferred the Respondent's submission that the Respondent had no control over what properties were included in the register if she were found to be fit and proper and only had power to control persons on the register. The Tribunal noted the decision of Sheriff Deutsch in TH v Glasgow City Council at paragraph 19 that it was doubtful that it was open to a local authority to determine that an applicant is unfit to be a landlord of some properties and not of others. The Tribunal accepted the Respondent's submission therefore that it was appropriate to assess the conduct of the Applicant as a whole and to find that this outweighed that there had been no complaints relating to the other properties."

[46] It is important also to note that all that the FtT did was to narrate the observations of Sheriff Deutsch. This was not the sheriff's concluded view on the matter, he expressed a tentative view making it clear that he was not deciding the point. The answer is to be found in the statute. The outcome is related to the individual who is on the Register of Private Landlords. If that person is no longer a fit and proper person she is to be removed from the register. The statute does not admit of any other outcome. The observations of the sheriff do not appear to be the reason why the FtT rejected the applicant's submission on this point. Rather, if one looks at the treatment of the issue in paragraph 58 of the FtT decision, it is clear that the Board took into account the appellant's removal of properties from the scope of registration.

[47] It is not unreasonable to assume that in noting the observations of Sheriff Deutsch in *TH*, the FtT had regard to what followed - that perhaps the resolution of the issue identified by him was for another day. The sheriff was clearly raising the

issue without deciding it. The matter does not appear to have been argued before him. A decision on the issue was not required in that case. He clearly recognised this and made express the provisional nature of his observation. The FtT did not fall into error in noting the observations of Sheriff Deutsch. I reject this ground of appeal.

Proportionality

[48] Somewhat in the abstract and not focused in a ground of appeal, Mr Byrne endeavoured to raise an argument about the proportionality of the respondent's approach. The route to raising this issue was less than clear. Mr Byrne sought to invoke the approach to proportionality as set out in the case of *Bank Mellat v Her Majesty's Treasury (No. 2)* [2013] UKSC 39, [2014] AC 700 in the four stage test propounded by Lord Reed at paras 69 - 76. It was said that Article 1 of the First Protocol of the European Convention on Human Rights had application. This was disputed by the respondent on the basis that registration was not possession.

[49] It was not contended on behalf of the appellant in considering the statutory scheme that its terms required to be read down in terms of section 3 of the Human Rights Act 1998. It was not contended that such an exercise produced an incompatibility with Convention rights such that the statutory scheme was incompatible with those rights. The Upper Tribunal was not asked to pronounce a declarator of incompatibility. The Board's decision was a culmination of a process which could be said to encompass elements of proportionality such that the test as laid down in *Bank Mellat* was satisfied. The process of initial registration had taken

place. There would have been engagement between the appellant and the local authority at that juncture. In its continuing investigations there were communications between the appellant and Council officials. Concerns were brought to the attention of the appellant in advance of the report prepared by Council officials. Advice and assistance was proffered to the appellant in terms of regulation 3 of the Private Landlord Registration (Advice and Assistance)(Scotland) Regulations 2005. When the Board came to deliberate upon the various concerns of Council officials and others they did so in an open, transparent and public manner. The issues were ventilated at a public hearing where the appellant was represented. The Board's decision came at the end of that process, applying its mind to the statutory provision in operation at that time: section 89 of the 2004 Act. I reject this separate challenge.

Conclusion

[50] The Upper Tribunal refuses the appeal.