UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – SELECTIVE LICENSING – ***Part 3, Housing Act 2004 – landlord convicted of failure to apply for licence but held to be "a fit and proper person" within the Act – whether convictions relevant to decision on length of licence granted – appeals dismissed.***

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL PROPERTY CHAMBER UNDER S.11 OF THE TRIBUNALS COURTS AND ENFORCEMENT ACT 2007.

BETWEEN:

LONDON BOROUGH OF WALTHAM FOREST — **Appellant**

and

DAVID REID — **Respondent**

Re: Flats 102, 670 Forest Road, E17 3ED,
1-4, 672 Forest Road, E17 3ED,
674b Forest Road E17 3ED,
678 Forest Road E17 3ED
23 Southerland Road E17 6BJ

Before: His Honour John Behrens

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
3 October 2017

Ashley Underwood Q.C (instructed by the inhouse legal department of the London Borough of Waltham Forest) for the Appellant.
Patrick McMorrow (instructed by Sternberg Reed) for the Respondent.

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The following cases are referred to in this decision:

LB Waltham Forest v Khan [2017] UKUT 153(LC)
London Borough of Brent v Reynolds [2001] EWCA Civ 1843
Sagnata Investments Ltd v Norwich Corporation [1971] 2 QB 614
London Borough of Waltham Forest v Power – 1 Sep 2017; MR/LON/00BH/HMV/2017/0004

DECISION

Introduction

1. This is an appeal by the London Borough of Waltham Forest ("the Council") against the decision of the First-tier Tribunal ("the Ft-T") made on 9 February 2017. The case concerned the grant of private rented property licences pursuant to s 85 and Part 3 of Schedule 5 of the Housing Act 2004.

2. Mr Reid is the freehold owner of all the properties forming the subject matter of this appeal save for 678 Forest Road. He lives at 676 Forest Road. The properties are let to residential tenants. With effect from 1 April 2015 the whole of the London Borough of Waltham Forest was designated by the Council as a selective licensing area. Unless renewed the designation will end on 31 March 2020. However, Mr Reid failed to apply for the necessary licences despite two letters sent to him by the Council in August and November 2015. Following visits to a number of his properties by officers of the Council Mr Reid was prosecuted.

3. In December 2015 Mr Reid applied for Temporary Extension Notices ("TENs") in respect of 3 of the properties on the grounds that he was in talks regarding their sale. The application was refused and the subject of an appeal to the Ft-T which was withdrawn in April 2016.

4. In March 2016 summonses in respect of Mr Reid's failure to licence 5 of his properties were served on him. Shortly afterwards he applied for licences for his flats in Forest Road. In June 2016 Mr Reid pleaded guilty to failing to licence 5 of his properties. He was fined £10,000 plus costs.

5. On 14 September 2016 the Council granted Mr Reid a licence for one year in respect of the 8 flats in Forest Road. On 20 September 2016 the Council reduced the term of the licence in respect of 23 Sutherland Road to one year.

6. Mr Reid appealed to the Ft-T against the nine decisions made by the Council. The appeals related solely to the length of the licences. It was Mr Reid's case that the licences should have been granted until 31 March 2020 and that the licence in respect of 23 Sutherland Road should not have been reduced from its 5 year term.

7. By its decision dated 9 February 2017 the Ft-T allowed Mr Reid's appeal and extended the licence in respect of each property so that each licence expired on 31 March 2020. With the permission of the Deputy President the Council seek to challenge that decision in this appeal.

The statutory provisions

8. There is a full explanation of the relevant statutory provisions in paras 4 – 22 of the decision of the Deputy President in *LB Waltham Forest v Khan* [2017] UKUT 153(LC). I shall not therefore set them out in full. Paras 13 – 15 and 20 – 22 seem particularly relevant to this appeal. I set them out for convenience. The Deputy President's references are, of course, to the Housing Act 2004.

> 13. Section 87 to 90 deal with applications for licences, the granting or refusal of licences and the imposition of licence conditions. Application must be made to the local housing authority, which may charge a fee (section 87(1), (3)). The fee charged by Waltham Forest was originally £500 for each house but has subsequently been increased to £650.
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> 14. Where an application is made to an authority under section 87 the authority must either grant or refuse a licence. Amongst other matters specified in section 87(3) of which the authority must first be satisfied before it grants a licence is that the proposed licence holder is a fit and proper person to hold the licence and that the proposed management arrangements are satisfactory. When deciding whether a person is fit and proper the authority must have regard to evidence including any evidence that the person has "contravened any provision of the law relating to housing or of landlord and tenant law" (section 89(2)). No mention is made of the relevance of any contravention of planning law.
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> 15. If it is satisfied that the conditions in section 87(3) are met the authority "may grant a licence" (section 87(2)); it is therefore clear that the authority has a discretion to refuse a licence even when the specified conditions are satisfied. In this appeal the appellant has not suggested that Mr Khan is not a fit and proper person and has withdrawn any previous suggestion to that effect which may have been made to the FTT; nor does it suggest that there are any problems concerning the management arrangements at the houses in question.
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> 20. A right of appeal is available to the first-tier tribunal against a decision to grant a licence and the appeal may 'in particular, relate to any of the terms of the licence' (paragraph 31(2) of Schedule 5). In accordance with paragraph 34 of Schedule 5 such appeals are determined "by way of rehearing" but the FTT may have regard to matters of which the authority was unaware when it made its own decision.
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> 21. The reference in paragraph 34 of Schedule 5 to a "re-hearing" requires some explanation, since the decision to refuse a licence or to grant one on terms with which the applicant is dissatisfied was an administrative decision which is unlikely to have been made at a hearing of any sort. In this context the direction that an appeal against such a decision is to be by way of re-hearing means that the FTT must make its own decision on the application for a licence, and is not simply to ask itself whether the decision made by the local housing authority was open to on the material it considered. The FTT must therefore exercise its own discretion whether to grant a licence and on what terms. Having undertaken that exercise the FTT is then empowered by paragraph 34 to 'confirm, reverse or vary the decision of the local housing authority.'
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> 22. A further appeal lies to this Tribunal under section 11, Tribunals Courts and Enforcement Act 2007 against a decision of the FTT under paragraph 34 of Schedule 5 to the 2004 Act. Such an appeal is an appeal on a point of law only and is conducted on a different basis from the re-hearing to be undertaken by the FTT. Since the decision in question concerns the exercise of a statutory discretion over the terms of a licence, the issue for this Tribunal is whether the decision making tribunal, properly directing itself on the law and taking proper account of the relevant

facts, and ignoring irrelevant facts, could have exercised its discretion in the manner in which it has done.

Mr Reid's case before the Ft-T

9. Mr Reid asserted that he was a "fit and proper landlord". He had been renting properties since 1990 without any complaints from his tenants or the Council (save for a complaint about noise from one of his tenants in 2015 which he had resolved). Prior to the offences for which he was convicted in June 2016 he was of good character.

10. The first time he was aware that the selective licensing scheme was in force was when he received the Council's letter in November 2015. He did not receive the letter of August 2015. He assumed that the Council would write to him to inform him what he needed to do before the scheme came into force.

11. Following the letter of 9 November 2015, he attended the Council's inspection of the flats in Forest Road. He applied for TENs at a time when he was negotiating the sale of the Forest Road flats to a cash buyer. He lodged an appeal when the applications were refused. He withdrew the appeal when the cash sale fell through as the buyer was unwilling to pay the price Mr Reid was seeking.

12. It was submitted that the Council must have accepted that he was a fit and proper person as it granted him a licence. The effect of the Council's decision amounted to a further penalty of more than £6,000 which might be repeated if any further licence was granted for less than 5 years. It was accepted that the Council was bound to take the convictions into account but submitted that it failed to have regard to Mr Reid's standing as a landlord.

The Council's case before the Ft-T

13. The Council relied on the chronology which has been summarised in the Introduction. It had given extensive publicity to the introduction of the scheme and submitted that Mr Reid ought to have been aware of it. It pointed out that Mr Reid had ignored two warning letters and had only applied for a licence when he had been served with the summonses. It considered that the application for the TENs (which was unsupported by any documentary evidence of the proposed sales) was an attempt by Mr Reid to delay licensing the properties and to frustrate the Council's attempt to bring them under regulatory control.

14. It accepted that it was the Council's normal policy in the absence of concerns about an applicant to grant a licence until the end of the scheme. However, if it determined that a full-term licence was not appropriate it would normally grant a licence for a reduced term of a year or vary an existing licence to a year. That enabled the applicant to rent out the property and would allow the applicant to remedy the issue that gave rise to the shorter notice or allow for the relevant conviction to be spent.

15. The Council was bound to have regard to the fact Mr Reid was convicted of five offences of failing to licence relevant property; in those circumstances, it would have been inappropriate to grant a full-term licence. The Council considered that the convictions were sufficiently serious to justify the refusal of the licence on the basis that he was not a fit and proper person. However, the inspections had not revealed any significant disrepair or other concerns and thus on balance the grant of a one-year licence was appropriate.

The decision of the Ft-T

16. As already noted the Ft-T allowed the appeal. Its reasoning is contained in paras 30 – 42 of the decision. In summary:

1. Whilst it regarded the convictions as a serious failing on Mr Reid's part it did not consider them as determinative of whether he was a "fit and proper person". It considered that he was. It pointed out that the convictions related to a single failing and that there was no other evidence that he was not "fit and proper". There was no evidence that he had failed to comply with other regulatory requirements or that there was any significant disrepair.

2. It accepted Mr Reid as a credible witness; it accepted that he did not receive the August letter from the Council and was not critical of Mr Reid for applying for the TENs when he did. It accepted that Mr Reid was unaware of the licensing system until he received the November letter.

3. It recorded the Council's policy in relation to the grant of licences. In the absence of contra-indications, the Council would normally grant a licence for 'the full term'. The policy in respect of shorter licences was explained as follows:

   > 'The grant of a shorter licence … will in all cases reflect concern that the Council has regarding a "person" and/or a property to the extent that a full-term licence is not appropriate. The shorter licence period will penalise the landlord since a new licence application will need to be made at its expiry after one year. However, the grant of a licence will enable the address to be legally rented, allowing the landlord to remedy the issue that gave rise to the reduced-term licence or for a relevant conviction to become spent.'

4. It did not accept that the conviction was relevant to the length of the licence. In its view, the conviction was only relevant to the question whether Mr Reid was a "fit and proper person".

5. Whilst the Council has a discretion as to the length of the licence the Ft-T could see no reason to limit the duration of the licence. The properties were not in disrepair and there were no issues relating to them. It did not accept that it was appropriate to grant a reduced term licence simply to allow "a relevant conviction to become spent". In its view this was the only justification under the Council's policy for the grant of a one-year licence and in its view the policy was unreasonable.

The appeal.

17. In its notice of appeal, the Council submitted ("the first ground") that the Ft-T had made an error of law in concluding that its policy for determining licence applications was unreasonable. It submitted that if a housing authority has reservations about an applicant (even though he is a "fit and proper person") it was entitled to take them into account when determining the length of the licence. It also submitted ("the second ground") that the Ft-T made an error in accepting Mr Reid's account and explanations. In a letter dated 19 May 2017 at the invitation of this Tribunal it amplified its grounds by submitting that the Ft-T should have given more weight to its policy. It referred to the decision in *Khan* and also to the observations of Buxton LJ in *London Borough of Brent v Reynolds* [2001] EWCA Civ 1843:

> "… the appeal was a complete rehearing. Accordingly, the judge hears evidence and makes up his own mind on the facts; and his task is to make his own decision on the application, in place of that made by the LHA, and not merely to act as a court of review of that LHA decision. That said, however, the county court's jurisdiction is subject to the very significant condition that the court should pay great attention to any views expressed by the LHA, and should be slow to disagree with it. That principle is to be found in the judgments of the majority of this court in *Sagnata Investments Ltd v Norwich Corporation* [1971] 2 QB 614 …"

18. On 23 March 2017 the Ft-T refused permission to appeal. In doing so it took the opportunity to amplify and explain its decision. Its points can be summarised:

1. The decision that Mr Reid's convictions were not relevant to the length of the licence was based on the evidence before the Ft-T. On that evidence there was no good reason to limit the length of the licence to be granted to him.

2. It did not decide that the provisions of the 2004 Act prevented the Council from limiting the length of the licence when it had reservations about an applicant. Its decision was a decision on the facts of the case and one which it was entitled to reach on those facts. It had regard to the views of the Council but did not agree with them. In particular it did not agree that it was appropriate to grant a reduced term licence solely because a relevant conviction had not become spent.

19. On 5 June 2017 the Deputy President granted the Council permission to appeal. In granting permission, he made the following comment:

> The proposed appeal raises an issue of principle which has begun to arise regularly in cases involving selective licensing under Part III Housing Act 2004, namely the extent to which matters relevant to the question whether a landlord is a fit and proper person to be granted a licence may also be taken into account when determining the duration of such licence. It is the applicant's policy to have regard to such matters as previous convictions for housing offences, the Ft-T concluded that, once it was satisfied that the applicant was fit and proper his recent history of convictions was irrelevant. In *LB Waltham Forest v Khan* [2017] UKUT 153(LC) the Tribunal considered whether the planning status of the relevant premises was relevant to the duration of the licence and the proposed appeal raises a similar issue. The applicant's case is arguable with a realistic prospect of success.

20. It is apparent therefore that the Deputy President had the first ground of appeal in mind when granting permission. However, he did not limit the appeal to the first ground. However, although Mr Underwood QC made submissions in support of the second ground in his skeleton argument he abandoned those submissions at the oral hearing and I need say no more about the second ground of appeal.

21. In his Respondent's Notice Mr Reid submitted that the Ft-T was entitled to make the factual findings that it did. He submitted that the decision in *Khan* was distinguishable on its facts. In that case the relevant properties had been converted without planning permission. This was directly relevant to the policy behind the scheme for selective housing. In this case the only default was the failure to apply for a licence. Thus, there was no continuing default for Mr Reid to remedy. Mr Reid also sought to uphold the decision of the Ft-T on two additional grounds. The first was technical and concerned the question whether summonses should have been issued when the appeal against the refusal of the TENs was live. Although this ground was pursued in Mr McMorrow's skeleton argument it, too, was abandoned at the oral hearing and thus I need not say any more about it.

22. The second additional ground went to the merits. Mr Reid submitted that it was unnecessary to decide that the policy of the Council was unreasonable. It was open to the Ft-T to come to the same decision within the terms of the existing policy.

The decision in *Khan*

23. Mr Khan's appeals concerned converted flats created without the benefit of planning permission by Mr Khan, who subsequently applied to the local housing authority for a Part 3 licence for those flats. In each case the Council granted a licence for a period of 1 year only with the intention that during that period the planning status of the flats should be regularised. In each case on appeal to the Ft-T the period of the licence was increased to 5 years on the grounds that Mr Khan's compliance with planning requirements was irrelevant to the question of licensing.

24. This Tribunal allowed the appeals and simply extended the licences for 2 months to allow Mr Khan to make a further application to the Council for a licence. That would allow the Council to make a decision with all the information then at its disposal.

25. In his decision the Deputy President considered in detail the question whether the lack of planning consent was relevant to licensing under Part 3 of the 2004 Act. In his view (for the reasons set out in paras 46 and 47 of the decision) it was. His conclusion was expressed in para 47:

> 47 It is therefore unnecessary and unrealistic, in my judgment, to regard planning control and Part 3 licensing as unconnected policy spheres in which local authorities should exercise their powers in blinkers. I am satisfied that it is legitimate for a local housing authority to have regard to the planning status of a house when deciding whether or not to grant a licence and when considering the terms of a licence. It would be permissible for an authority to refuse to determine an application until it was satisfied that planning permission had been granted or could no longer be

> required. It would be equally permissible, where an authority was satisfied that enforcement action was appropriate, for it to refuse to grant a Part 3 licence, but as Waltham Forest points out that would make it difficult for a landlord to recover possession of the house and would expose him to prosecution for an offence which he would be unable to avoid by his own actions. The solution adopted by Waltham Forest of granting a licence for a short period to allow the planning status of the house to be resolved was, in those circumstances, a rational and pragmatic course which I accept was well within its powers.

26. In para 54 he drew attention to the need to have regard to Waltham Forest's policy on the duration of licences, not because the Tribunal would be bound to give effect to it but because the authority has much greater knowledge and experience of housing conditions in its area than the Tribunal and because its judgment therefore merits proper consideration. He cited the passage from the judgment of Buxton LJ in *Reynolds* referred to above but added:

> That principle still applies, although as the FTT has its own special expertise in this field, it is justified in feeling more confident than the county court in reaching a conclusion which differs from that of the local housing authority, despite giving appropriate weight to its views.

The oral submissions

27. Mr Underwood QC made it clear that the Council's major concern was the suggestion (in para 40 of the decision) that its policy was unreasonable. He pointed out that although the Ft-T had set out part of the policy (para 1.4 of the policy document) it had omitted any reference to para 2.29 b) which sets out when a reduced term licence should be issued:

> The Council has confirmed some significant issues that are not consistent with a 'clean' fit and proper judgment but that these issues are not considered sufficient in their own right to warrant the refusal of a licence. However, a shorter licence period of one year should be given. Sufficient detail should be provided in order that the decision notice is able to confirm the grounds relied upon for the shorter licence period granted. Licenses issued in accordance with this subparagraph would highlight 'landlords of concern'.

28. Mr Underwood QC made the point that this paragraph made no mention of spent convictions. He criticised paras 39 and 40 of the decision which, he submitted, amounted to a proposition that once any applicant has passed the fit and proper person test any convictions are necessarily irrelevant to the question of the length of the licence. He submitted that that was an error of law. He submitted that the Council's policy especially as enunciated in para 2.29 b) was perfectly rational and reasonable. He pointed out that Mr Beach (the Council's main witness) had pointed out that a one-year licence would allow the Council to monitor conditions in Mr Reid's properties to see if he had been complying with the regulations.

29. Finally, he referred me to a very recent decision where a differently constituted Ft-T (who were not, it appears, referred to this decision) reached an opposite conclusion on facts which were similar but not identical – See *London Borough of Waltham Forest v Power – 1 Sep 2017; MR/LON/00BH/HMV/2017/0004*. In that case Mr Power was an actor who owned one property which was subject to the selective licensing scheme. He became aware of the scheme in June 2016. He complained about the scheme via his MP but was told it was too late to object. He

asked to pay by instalments but this was refused. He said he was unable to pay. He then began a formal complaint but before it was resolved he was prosecuted. He pleaded guilty to not having a licence and received a fine of £500 and reduced costs. The Council subsequently granted Mr Power a licence for one year only. Mr Power's appeal to the Ft-T was dismissed. In its view the decision to grant a one-year licence was reasonable. In its view it was unfortunate that Mr Power devoted his time to complaining when the property needed to be licensed. Mr Power had been aware of the scheme for 4½ months before the summons was issued.

30. Mr McMorrow submitted that the Ft-T reached a decision open to it on the evidence and that I should accordingly not interfere with its conclusion. He drew my attention to the additional reasons given when the Ft-T refused permission to appeal. Whilst he accepted that the Ft-T made no express reference to para 2.29 b) of the policy he drew my attention to Mr Beach's answer (noted at para 37 of the decision) that the convictions were the sole reason to limit the licences to one year. He submitted that both *Khan* and *Power* were distinguishable on their facts.

Discussion

Relevance of Matters relating to "fit and proper person"

31. To my mind the Council is plainly entitled to consider matters relevant to the question whether a landlord is a fit and proper person when determining the duration of such licence. However, the extent to which such matters are relevant to that question is fact sensitive. In other words, it will depend on the facts of the individual case. There will be some cases where the matters will be highly relevant and others where the relevance is marginal or even irrelevant.

32. A good example of a case where the matters would be relevant would be where there is a continuing breach of housing law or a realistic risk of a repeated breach. Such matters would plainly be relevant to the length of the licence as the Council might well wish to ensure that the breach had been discontinued and not repeated. Thus, the decision in *Khan* is fully justified and explicable. The Council was entitled to grant a short licence to ensure that the breaches of planning control were rectified. That is well in accordance with the policy in para 1.4.

33. It is true that on one reading of para 39 of the decision the Ft-T appeared to go further than this and appeared to suggest that the convictions could never be relevant. However, that is not the only possible interpretation of para 39 and the Ft-T explained its position when it refused permission to appeal. In refusing permission it recognised that there was a discretion to grant a shorter licence than the full term. It expressly stated that the decision was a decision on the facts of the case and the evidence before it. In other words, the Ft-T was not in my view saying any more than that the convictions were irrelevant on the facts of this case.

Policy

34. As already noted the Ft-T did have regard to the Council's policy. I have set it out above and shall not repeat it. As noted the policy in para 1.4 gives two justifications for the reduced term:

1. It allows the landlord to remedy the issue that gave rise to the reduced-term licence or

2. for a relevant conviction to become spent.

35. It is difficult to see how the first justification can have any relevance to this case. On the facts found by the Ft-T Mr Reid. was unaware of the need to licence the properties until November 2015. He was entitled to apply for a TENS when he did. He applied for licences promptly on withdrawing his appeal against the refusal of the TENs. Although there were 5 offences there was in reality only one omission. This is not a case of a continuing breach. It is thus distinguishable from *Khan*. It is also distinguishable from *Power* in that Mr Power was aware of the need to licence for a full 4½ months before he applied for a licence. During that time, he spent his time pursuing objections and complaints about the scheme. The fact that Mr Reid was unaware of the scheme shows that it was not a deliberate or continuing breach. The highest the matter can be put is that Mr Reid, as an experienced landlord, ought to have been aware of the scheme. However the Ft-T made no finding to this effect.

36. Under the Rehabilitation of Offenders Act 2004 a fine becomes a spent conviction 1 year after the date of imposition. Thus, I can see that the grant of a licence for 1 year would mean that when Mr Reid re-applied the conviction would be "spent" within the meaning of the Act. My difficulty lies in seeing why the fact that the conviction is not "spent" is relevant to the length of the licence to be granted to Mr Reid. That was plainly the view of the Ft-T. In refusing permission to appeal the Ft-T specifically said:

> "We did not accept the proposition, reflected in the Council's policy … that it was appropriate to grant a reduced term licence for the sole reason of allowing a relevant conviction to become spent"

37. I accept that the Council may have greater knowledge of housing conditions in its area than the Ft-T. However, it is difficult to see how the policy of granting a reduced term solely to allow conviction to be spent has anything to do with local conditions. Furthermore, as the Deputy President pointed out the Ft-T is a specialist tribunal and thus more justified in disagreeing with the Council than a county court.

38. In his submissions Mr Underwood QC did not place great reliance on the fact that Mr Reid's convictions were not spent. Instead he relied on the policy in para 2.29 b) and submitted that that policy was perfectly reasonable and rational. He also referred to the ability of the Council to monitor where there is a one-year licence. There are two difficulties with that approach. First, as Mr Beach agreed, the decision in this case was based solely on the convictions; thus, whether the matter is put under para 1.4 or 2.29 b) the issue is the same – whether on the facts of this case the convictions were relevant to the length of the licence. This

appeal was a rehearing. The Ft-T plainly had regard to the policy of the Council. In my view it was entitled to conclude that the convictions were not relevant on the facts of the case. Thus, there was no error of law.

39. Second, as the Ft-T pointed out in para 41 there is no reason why the Council should not monitor Mr Reid's properties even though he has a full-term licence. If in the future there are problems this would be a ground to vary the term of the licence. I stress however there is at present no evidence to suggest the existence of such problems.

40. In my view the policy of the Council in relation to the grant of licences is perfectly reasonable save for the references (in para 1.4) to the convictions becoming spent. Depending on the facts of an individual case the existence of the convictions may or may not be relevant to the length of a licence. However, it is difficult to see why the question whether they are spent is so relevant. Convictions resulting in a fine are spent after one year. Thus, the reference to spent convictions in the policy appears to lead to conclusion that any conviction however relevant will automatically lead (if the applicant is deemed to be fit and proper) to a reduced licence of one year. I respectfully agree with the Ft-T that such a policy is unreasonable.

Conclusion

41. For these reasons I have come to the conclusion that the Ft-T made no error of law and reached a conclusion that was open to it on the evidence. It follows that the appeal must be dismissed.

Dated: 12 October 2017

John Behrens

His Honour Judge Behrens