



**DECISION AND STATEMENT OF REASONS OF PETRA HENNIG MCFATRIDGE LEGAL
MEMBER OF THE FIRST-TIER TRIBUNAL WITH DELEGATED POWERS OF THE CHAMBER
PRESIDENT**

Under Rule 8 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules
of Procedure 2017 ("the Procedural Rules")

in connection with

15 Ardmillan Terrace Edinburgh EH11 2JW

Case Reference: FTS/HPC/CV/20/1291

Rev Yousouf Gooljary ("the applicant")

St Martins of Tours Scottish Episcopal Church ("the respondents")

1. On 15 June 2020 the First –tier Tribunal for Scotland, Housing and Property Chamber (the Tribunal) received an application made under Rule 111 of the Procedural Rules from the applicant. The application states in part 7c that the applicant was seeking an order for the Notice to Leave to be struck out, the ground of him ceasing to be an employee to be struck from the Notice to Leave and for the Tribunal to apply discretion in extending the notice period. The application was dated 29 February 2020. The application was accompanied only by a Notice to Leave dated 27 February 2020.
2. On 24 July 2020 the Tribunal wrote to the applicant as follows: *"It appears that your application is in fact a defense to any application of eviction brought against you by St Martin of Tours Scottish Episcopal Church, where the notice to leave was to be used.*

The legal member advises that, notices to leave are used to recover possession for tenancies created under the Private Housing (Tenancies) Scotland Act 2016. If a recovery action were to be brought against you under the 2016 Act and if it relied on the notice to leave, then you would get a copy of the application from the Tribunal and you would be entitled to set out your position at that time and to defend the case. At the present time however no action has been brought to the Tribunal seeking recovery of possession of the subjects against you. It also appears to the legal member, from looking at your recent email correspondence, that your landlord is no longer relying on the notice to leave. It also appears that any action to recover possession of the property will be brought in the sheriff court. The tribunal can only deal with matters where it has jurisdiction and it appears that the sheriff may have jurisdiction in your case. Given all of the above, please advise if you wish to withdraw your application. If you do not wish to withdraw your application, please explain why you consider that the tribunal has a) jurisdiction to hear your case, and b) what legal duty you think the landlord has breached and what Act of Parliament does this breach arise from.”

3. In his reply of 24 July 2020 the applicant states that his landlord had sent him “a Notice to Leave on 27/02/20 which specifies that the First Tier Tribunal is the forum to dispute the NTL. The landlord refuses to withdraw the NTL despite asserting that they hold I have a service occupancy. Under Part II of the Rent (Scotland) Act 1984 this amounts to harassment as they are relying on a legal document whilst holding another view.”
4. The applicant sent further additional information and emails explaining the context of his occupation of the property. All documents are referred to for their terms and held to be incorporated here in.
5. In an email of 8 August 2020 he attached a letter from Edinburgh Sheriff Court of 20 January 2020 stating that the Sheriff Court has no jurisdiction for an application for interdict and damages received by the court on 21 May 2020 against the Vestry of St Martins and the Diocese of Edinburgh Episcopal Church and referring the applicant to the private housing (tenancies) (Scotland) Act S 1.
6. The applicant in the email of 8 August 2020 sets out in detail his argument as to why the occupancy of the property is not a private residential tenancy and thus the Notice to Leave sent to him by the Vestry of St Martin is not a valid Notice. He states in particular: “I moved into the property on 13-7-2018” and “The NTL is unlawful because the respondent relied

on the *Private Housing (Tenancies) (Scotland) Act 2016*". The applicant sets out why the occupancy of the property is not a private residential tenancy and explains: *"The claimant's occupation of 15 Ardmillan Terrace is excluded from being a private residential tenancy under 'the Act' because he did not pay rent. An occupation at low rent is specifically excluded under schedule 1 of the Act. The claimant occupied the property owned by the defender free of rent."*

7. The applicant further states :*"my landlord is undertaking an illegal eviction"* and states *"Part II of the Rent (Scotland) Act 1984 makes harassment and unlawful eviction both criminal offences for which landlords can be prosecuted."*

DECISION

8. I considered the application in terms of Rule 8 of the Procedural Rules. That Rule provides:-

"Rejection of application

8.—(1) The Chamber President or another member of the First-tier Tribunal under the delegated powers of the Chamber President, must reject an application if –

(a) they consider that the application is frivolous or vexatious;

(b) the dispute to which the application relates has been resolved;

(c) they have good reason to believe that it would not be appropriate to accept the application;

(d) they consider that the application is being made for a purpose other than a purpose specified in the application; or

(e) the applicant has previously made an identical or substantially similar application and in the opinion of the Chamber President or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, there has been no significant change in any material considerations since the identical or substantially similar application was determined.

(2) Where the Chamber President, or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, makes a decision under paragraph (1) to reject an application the First-tier Tribunal must notify the applicant and the notification must state the reason for the decision."

9. After consideration of the application, the attachments and correspondence from the Applicant, I consider that the application should be rejected in terms of Rule 8 (c) of the Rules of Procedure on the basis as the Tribunal has good reason to believe that it would not be appropriate to accept the application.

RELEVANT LEGISLATION

Rule 111 of the Procedural Rules: Application for civil proceedings in relation to a private residential tenancy

111. Where a person makes any other application to the First-tier Tribunal by virtue of section 71(1) (First-tier Tribunal's jurisdiction) of the 2016 Act, the application must—

- (a) state—
 - (i) the name and address of the person;
 - (ii) the name and address of any other party; and
 - (iii) the reason for making the application;
- (b) be accompanied by—
 - (i) evidence to support the application; and
 - (ii) a copy of any relevant document; and
- (c) be signed and dated by the person.

The relevant provisions of the Private Housing (Tenancies) (Scotland) Act 2016 (the 2016 Act) are;

S71 First-tier Tribunal's jurisdiction

- (1) In relation to civil proceedings arising from a private residential tenancy—
 - (a) the First-tier Tribunal has whatever competence and jurisdiction a sheriff would have but for paragraph (b),
 - (b) a sheriff does not have competence or jurisdiction.
- (2) For the purposes of subsection (1), civil proceedings are any proceedings other than—
 - (a) the prosecution of a criminal offence,
 - (b) any proceedings related to such a prosecution.

S1 Meaning of private residential tenancy

- (1) A tenancy is a private residential tenancy where—

- (a) the tenancy is one under which a property is let to an individual (“the tenant”) as a separate dwelling,
 - (b) the tenant occupies the property (or any part of it) as the tenant’s only or principal home, and
 - (c) the tenancy is not one which schedule 1 states cannot be a private residential tenancy.
- (2) A tenancy which is a private residential tenancy does not cease to be one by reason only of the fact that subsection (1)(b) is no longer satisfied.

SCHEDULE 1 TENANCIES WHICH CANNOT BE PRIVATE RESIDENTIAL TENANCIES

(introduced by section 1)

Low rent

1(1) A tenancy cannot be a private residential tenancy if—

- (a) it is a tenancy under which rent of, or equivalent to, less than £6 a week is payable, and
 - (b) it has not previously acquired the status of a private residential tenancy or been an assured tenancy (including a statutory assured tenancy) within the meaning of the Housing (Scotland) Act 1988.
- (2) In determining the rent payable for the purpose of sub-paragraph (1), no account is to be taken of any amount paid by the tenant in respect of services, repairs, maintenance or insurance.

The relevant provision of the Housing Scotland Act 2014 is :

S16 Regulated and assured tenancies etc.

(1) The functions and jurisdiction of the sheriff in relation to actions arising from the following tenancies and occupancy agreements are transferred to the First-tier Tribunal—

- (a) a regulated tenancy (within the meaning of section 8 of the Rent (Scotland) Act [1984 \(c.58\)](#)),
- (b) a Part VII contract (within the meaning of section 63 of that Act),
- (c) an assured tenancy (within the meaning of section 12 of the Housing (Scotland) Act [1988 \(c.43\)](#)).

(2) But that does not include any function or jurisdiction relating to the prosecution of, or the imposition of a penalty for, a criminal offence.

(3) Part 1 of schedule 1 makes minor and consequential amendments.

REASONS FOR DECISION

1. The Application states that the applicant is made under Rule 111 of the Procedural Rules. This requires that the application relates to an application by virtue of S 71 of the 2016 Act, which in turn would have to be an application “In relation to civil proceedings arising from a private residential tenancy” (S71 (1) of the 2016 Act).

2. Rule 111 (b) (i) of the Procedural Rules states that such an application must be accompanied by evidence to support the application.
3. The applicant had been explicitly asked by the Tribunal to explain why he considers the Tribunal has jurisdiction to hear his case and what legal duty he thinks the landlord has breached and what Act of Parliament the breach arises from. In answer to these questions he stated that the Tribunal has jurisdiction because the Notice to Leave referred to the First –tier Tribunal but at the same time he argued that the Notice to Leave cannot be valid because the tenancy was not a private residential tenancy.
4. The applicant has stated unequivocally that whatever arrangement may regulate his occupancy of the property, he is not paying rent to the landlord. He has explained that he himself does not consider that the tenancy is a private residential tenancy for this very reason.
5. He referred the Tribunal to the definition of a private residential tenancy in s 1 of the 2016 Act and the exemption in schedule 1 paragraph 1 of the 2016 Act, which sets out that a tenancy cannot be a private residential tenancy if it is a "tenancy under which rent of, or equivalent to, less than £6 a week is payable." His statement to the Tribunal is that he is not paying any rent at all.
6. If the applicant wishes to raise proceedings in terms of S 71 of the 2016 Act under Rule 111 he has to provide evidence that a private residential tenancy exists between the applicant and the respondent. His evidence, however, is that there is no payment of rent. If there is no payment of rent the tenancy cannot be a private residential tenancy. Given the above I consider that the applicant has not provided evidence to support an application under Rule 111 as he does not argue that a private residential tenancy exists.

7. As the Tribunal already advised in the letter of 24 July 2020, the arguments raised by the applicant may well be relevant as a defence in any proceedings for eviction the landlord of the property may raise and in that context could be considered by the Tribunal. However, they do not provide a basis for an application under Rule 111 of the Procedural Rules.
8. It would not be appropriate for the Tribunal to accept an application that does not meet the lodging requirements of the Rule under which the application is being made.
9. The applicant had been explicitly asked by the Tribunal to explain why he considers the Tribunal has jurisdiction to hear his case and what legal duty he thinks the landlord has breached and what Act of Parliament the breach arises from. In answer to these questions he stated that the Tribunal has jurisdiction because the Notice to Leave referred to the First –tier Tribunal but at the same time he argued that the Notice to Leave cannot be valid because the tenancy was not a private residential tenancy. A Notice to Leave having been issued is not evidence that a private residential tenancy existed. Whether a tenancy is a private residential tenancy has to be determined in terms of S 1 of the 2016 Act.
10. The applicant states that the tenancy is not a private residential tenancy because he does not pay rent. Based on the evidence provided and the provisions of s1 and schedule 1 paragraph 1 of the 2016 Act, the Tribunal would not have jurisdiction under S 71 of the 2016 Act.
11. Furthermore, the applicant has not provided any explanation under which other Rule or legal provision the application could be considered.
12. His reference to Part II of the Rent (Scotland) Act 1984 is a reference to criminal proceedings for which the Tribunal has no jurisdiction and which would, in any event, not provide the remedy he is seeking in his application. S 16 (2) of the Housing (Scotland) Act 2014 explicitly “does not include any function or jurisdiction relating to the prosecution of, or the imposition of a penalty for, a criminal offence.”
13. The applicant states that he started occupation of the property on 13 July 2018. The start of occupancy after 1 December 2017 excludes the creation of an assured tenancy under the Housing (Scotland) Act 1988 in terms of S 12 (1A) of the Housing Scotland Act 1988.
14. In terms of s 2 of the Rent (Scotland) Act 1984 a tenancy where no rent is payable cannot be a protected tenancy under the Rent (Scotland) Act 1984.
15. Given the statements of the applicant as stated above it is not evident that the Tribunal could have jurisdiction in the matter under s 16 of the Housing (Scotland) Act 2014, which transfers jurisdiction from the Sheriff Court to the Tribunal for regulated and assured tenancies.
16. Based on the information provided in the application and the applicant’s further representations, no jurisdiction of the First-tier Tribunal Housing and Property Chamber is evident in this case. It would not be appropriate for the Tribunal to accept an application in circumstances where the information provided by the applicant does not support any jurisdiction of the Tribunal for the application.

What you should do now

If you accept the Legal Member's decision, there is no need to reply.

If you disagree with this decision:-

An applicant aggrieved by the decision of the Chamber President, or any Legal Member acting under delegated powers, may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them. Information about the appeal procedure can be forwarded to you on request.

P Hennig-McFatrige

Petra Hennig McFatrige

Legal Member

19 August 2020