

Upper Tribunal for Scotland



2025UT30

Ref: UTS/AP/24/0139

DECISION OF

Sheriff McCartney

ON AN APPLICATION TO APPEAL IN THE CASE OF

Mr A

Appellant

- and -

Shetland Islands Council

Respondent

FTS Case Reference: FTS/LTC/CT/24/00433

12 May 2025

Decision

[1] The appeal is upheld and the case remitted to the First-tier Tribunal for the appeal to be considered anew.



Introduction

[2] This is an appeal against the decision of 7 October 2024 of the First-tier Tribunal for Scotland (FTS). That appeal arose because Mr A was unhappy that Shetland Islands Council ('the Council') had deemed the property he and his wife own in Shetland as a second home and thus subject to a council tax premium. Mr A was unsuccessful before the FTS, and now appeals to the Upper Tribunal for Scotland.

[3] The issue arises because Mr A and his family are abroad due to Mr A's working arrangements. The decision is anonymised given the property is empty for at least part of the time, and thus identifying details of the property should not be published.

Grounds of appeal

[4] Mr A has a number of grounds of appeal. His application for permission to appeal refers to several points, including an error in general law, an error in the application of the law to the facts, an unfair procedure and that the FTS reached a decision that no reasonable tribunal could reach. He separately complained the FTS had taken information into account after the hearing which was unfair. His grounds of appeal did not specify the passages or parts of the FTS decision said to be in error, other than a general criticism of the FTS for its application of the caselaw to the facts.

[5] A different judge in the FTS (from the judge who considered the substantive hearing) determined Mr A's application for permission to appeal. That judge granted



permission to appeal. However, the permission to appeal did not deal with Mr A's ground of unfairness (in that the FTS was said to have taken information into account after the hearing). Parties agreed to take a pragmatic view and suggested that, if the FTS permission to appeal decision was read as a whole, the UTS should assume that permission to appeal had been granted on the fairness issue too. The UTS is grateful to the parties for that consensus, and is content to do so.

Factual background

[6] A summary of the factual background is that Mr A, his wife and their children spend most of their time abroad. That is because of Mr A's employment. It is agreed they purchased the property in Shetland on 5 November 2019. Mr & Mrs A's children attend school in the country where Mr A works. Some time is spent at the property during holiday periods. There is an intention for the family to live there full-time in due course, although the timescale for that may be a matter of dispute. Beyond that, the facts established by the FTS are unclear. For reasons explained below, this gives the UTS some difficulty in determining the appeal.

The statutory framework

[7] The Council Tax (Variation for Unoccupied Dwellings) (Scotland) Regulations 2013 permitted local authorities to vary council tax charged on properties that are second homes. Regulation 2 of The Council Tax (Variation for Unoccupied Dwellings) (Scotland).



Regulations 2013 define a second home as “a dwelling which is no one’s sole or main residence”. Several cases have considered what “sole or main residence means”, or similar phrases. That caselaw is considered further below.

The FTS decision

[8] The FTS held a hearing by Webex. It heard from Mr A and from Ms Johnston. The decision narrates each parties’ position, as provided to the FTS, in some detail. It made 7 findings in fact, all on formal and uncontroversial facts (such as on ownership of the property, details of the council tax payable including the premium and that the Council told Mr A of his right of appeal). The FTS’ reasons are given at paragraphs 37-39 in brief terms. It acknowledged the caselaw it considered, the evidence and to the documentary productions without further explaining what specific evidence or documents it relied upon. It considered Mr A worked and spent most of his time abroad.

The application for permission to appeal

[9] The ground of appeal as granted by the FTS is broad. It is captured by paragraph 25 of the decision on permission to appeal, reading:

“the question for the Upper Tribunal may be whether the First-tier Tribunal erred in its interpretation of the definition of second home contained within the regulations, its interpretation of the concept of ‘main residence’ and erred in its application of the facts as agreed being applied to that definition.”



[10] At paragraph 27 the FTS permission to appeal goes on to note “there may also be wider interests in obtaining guidance from the Upper Tribunal on the interpretation of the definition of ‘sole or main residence’ as contained in the regulations.”

[11] It is important that permission to appeal decisions are focused. An appellant should be able to point to specific points or passages of the FTS decision explaining why the FTS has made a legal error. The permission decision from the FTS or UTS should clearly identify the legal point arising. The permission decision from the FTS does not explain in what way the FTS erred in interpreting the definition of a second home, erred in its interpretation of what is a main residence or how the facts as agreed should be applied to that definition.

[12] Notwithstanding that broad approach, Mr A provided helpful written submissions to the UTS examining the caselaw in more detail.

Procedure before the UTS

[13] Due to Mr A working abroad, and for reasons beyond the UTS’s control, both parties were agreeable to the appeal being dealt with on the papers. However, that has caused other issues. The FTS, whilst providing a well-written decision, only made seven findings in fact.

[14] The importance of the range of findings in fact before the UTS arises because parties are agreed that the legal test that should be applied is as set out in *R (Williams) v Horsham District Council* [2004] 1 WLR 1137. That case concerned whether a teacher, who stayed in accommodation provided by his school, had his sole or main residence at that



accommodation or at a property he owned throughout the period of his employment (and to where he eventually returned to). The Court of Appeal considered it impossible to produce a definition of main residence in all circumstances (paragraph 26). It considered the test was what “a reasonable onlooker, with knowledge of the material facts, would regard as that person’s home at the material time”. The Court of Appeal acknowledged that would not always be an easy test to apply. But before such a test can be applied, there must be a clear understanding of the material facts.

Decision – whether there was an unfair process

[15] The issue of whether the FTS acted unfairly in accepting information after the hearing is easily dealt with, and I deal with that first.

[16] The Council were represented before the FTS by Mr Hay. Ms Siobhan Johnston gave evidence. Following the conclusion of the hearing, the Council sent a document to the FTS. That document contained the evidence and submissions read out by Ms Johnston.

[17] There is no merit in this ground. I am satisfied from the submissions before the UTS and from the FTS decision that what was submitted is nothing more than a written copy of the statement read out by Ms Johnston at the FTS hearing. The FTS decision makes it clear the document did not contain any new points but, in any event, the FTS relied on the oral evidence of Ms Johnston (and presumably its own notes of that hearing). The appellant has not been prejudiced in any way. This ground of appeal is refused.



Decision – whether the FTS otherwise erred

[18] I have noted the broad basis on which the FTS granted leave to appeal and propose to deal with all other matters under this heading.

[19] It is helpful to understand that although the Council had the power to vary council tax due on second homes (and on long term empty homes) the Council did not choose to impose that levy from the outset of the regulations coming into force. A decision was subsequently taken to add additional council tax on second homes from 1 April 2024. At the same time, the Council also made changes to the council tax payable on empty properties. Those changes also came into effect as of 1 April 2024.

[20] Mr A submits that there is no definition of a main residence. He also points out there is no prescriptive or absolute guidance on what “sole or main” residence means. In one sense he is correct, but there is a wealth of case law. The question of what is someone’s “main residence”, “sole or main residence” or similar phrases has arisen in cases concerning not just council tax, but also in other settings such as land taxes and landlord and tenant cases. The caselaw emphasises that what will be relevant may be wide ranging and will depend on the facts and circumstances of each case.

[21] Parties do not submit that the reasonable onlooker test is incorrect. Rather Mr A argues that the tribunal has erred in its application of this test to the facts of the FTS decision.

[22] This is where the UTS finds itself in difficulty. Both parties appear to have set out an extensive factual basis for why Mr A does or does not have his main home in Shetland.



The FTS decision records both sets of submissions between paragraphs 16 to 23 of its decision. Some of those submissions referred to legal matters, but in the main the submissions were on the factual position as to the property. The findings in fact do not help to explain what facts the FTS found. Other than a brief sentence in its reasons section referring to Mr A's evidence of working abroad, it has not set out the factual basis as to what material facts it is relying upon in reaching its decision.

[23] Parties were asked by the Upper Tribunal for Scotland whether it was possible now to agree the factual basis as to Mr A's use of the property. If not, parties were asked for further submissions on whether the appeal should be upheld on the basis of insufficient findings in fact. I am grateful to Mr A and the Council for responding to the UTS queries after being directed to particular parts of the FTS decision. Unfortunately it is clear from those responses that important matters of fact cannot be agreed.

[24] Despite having made comment on the permission to appeal decision by the FTS, I nonetheless grant this appeal. The ground for doing so is that the FTS have not made sufficient findings in fact on the surrounding circumstances as to the use of the property to then be able to apply the reasonable onlooker test. The appeal is upheld, and a further hearing is required before the FTS.

[25] As indicated, the question of whether a property is a main or sole residence is fact sensitive. It requires the decision maker to have a clear understanding of the relevant facts. In a case such as this, that will include matters such as periods of time which Mr A and his family reside at the property in Shetland over an annual period, or perhaps over a number



of years (although it is not simply a test as to which property more time is spent at); the nature of their ties to each property that is in Shetland and abroad, including matters as dentists, doctors, schooling, registration to vote, correspondence addresses for administration issues including banking and insurance; the whereabouts of personal belongings beyond which are needed for day to day work, which might be, for example, family photographs, heirlooms, items of sentimental value; their living arrangements abroad and the security of tenure at that other property; the details of the contract of employment that Mr A is subject to abroad, and his security in relation to that contract and to any visa arrangements that apply to him or family members.

[26] It goes without saying that in such a fact sensitive issue the UTS cannot give an exhaustive list. Each case turns on its own facts, and which facts are relevant will depend on the circumstances of each case. There is an argument that it is not just a question of time spent at each property. The FTS may wish to see documentation from both parties to verify their position and make appropriate case management directions as to what facts can be agreed, and what documentation should be lodged to allow other facts to be agreed or to assist to be proved. If Mr A wishes to rely upon the facts (or caselaw that might assist), he must put those squarely before the FTS. There is, for example, a dispute as to how many days of the year the appellant and his family are in occupation at the property in Shetland. There is a dispute as to previous documentation completed suggesting the property was unoccupied. There is a dispute about the nature of Mr A's employment; he complains the Council wrongly considered his contract of employment not to have a fixed end date and



did not attempt to engage with him as to whether that was factually correct. There may be a dispute as to the position regarding his right to work abroad. The Council and Mr A are encouraged to agree what facts they can. With documentation or vouching, for example, the facts Mr A sets out in his submissions to the UTS of 8 March 2025 on page 9 may be accepted by the Council.

[27] The appeal is allowed, the decision of the FTS is quashed. The case is remitted to a freshly constituted tribunal hearing.

*A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*

Sheriff McCartney
Member of the Upper Tribunal for Scotland