# The Use of Banning Orders Against Private Landlords

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## Introduction

In April 2018 the Government in England brought into effect the ‘rogue landlord’ provisions of the Housing and Planning 2016 (‘the 2016 Act’) – banning orders for serious offenders and a database of rogue landlords and property agents against whom a banning order has been made.[[1]](#footnote-1) In its foreword to the Guidance for Local Housing Authorities on banning orders, the Government explained the purpose of these (and other measures from the 2016 Act already implemented) thus:

The Government is clear that the small minority of rogue landlords and property agents who knowingly flout their legal obligations, rent out accommodation which is substandard and harass their tenants should be prevented from managing or letting housing.[[2]](#footnote-2)

An article in the Guardian[[3]](#footnote-3) on the third anniversary of banning orders reported that a freedom of information request that found only 39 entries from 25 local authorities had been made to the database of rogue landlords. The article suggested that meant 39 landlords had received banning orders. In fact landlords can be put on the database without a banning order (see below). It is clear that the numbers on the database of rogue landlords is more than the actual case number of banning orders.

A local authority in England can apply to the First-Tier Tribunal for a banning order. It is the Tribunal that makes the order. In this article we look closely at the decisions on applications for banning orders that have been made by the First-Tier Tribunal that are on the Tribunal website of decisions.[[4]](#footnote-4) There are only eleven of them and in the article we analyse issues and trends from the cases. First, we set out the relevant sections in the 2016 Act.

## The Statutory Structure

The banning order prevents a person from letting housing as well as acting as a letting agent or managing property.[[5]](#footnote-5) Local authorities can apply for an order, but must give notice of the intended proceedings and consider any representations received.[[6]](#footnote-6) The Tribunal may make the order if the person has been convicted of a ‘banning order offence’ and was a ‘residential landlord or property agent at the time the offence was committed’.[[7]](#footnote-7) In deciding to make the order the Tribunal must consider:

(a) the seriousness of the offence of which the person has been convicted,

(b) any previous convictions that the person has for a banning order offence,

(c) whether the person is or has at any time been included in the database of rogue landlords and property agents, and

(d) the likely effect of the banning order on the person and anyone else who may be affected by the order.[[8]](#footnote-8)

The meaning of a ‘banning order offence’ is key to making an order. The Housing and Planning Act 2016 (Banning Order Offences) Regulations 2018[[9]](#footnote-9) sets out the 41 offences. These can be grouped in to ‘landlord’ offences (eg unlawful eviction or harassment under the Protection from Eviction Act 1977 or failing to comply with a Housing Act 2004 notice), immigration offences (under the Immigration Act 2014, ss.33A and 33B) and those offences not directly related to housing, (eg fraud, sexual assault, misuse of drugs, theft and stalking). In the case of the latter, the statute only applies if:

1. The offence was committed against or in collusion with a tenant occupying any housing (or another person occupying that housing with the tenant) or the offence was committed at or in relation to that housing;
2. at the time the offence was committed, the offender was the residential landlord or property agent of that housing….; and
3. the offender was sentenced for the offence in the Crown Court.[[10]](#footnote-10)

Turning to the rogue landlord database, authorities ‘must’ make an entry if a banning order was made.[[11]](#footnote-11) In addition they have a power to made an entry in two other cases:

1. if a person has been convicted of a banning order offence and at time it was committed the person was a residential landlord or a property agent, or
2. in respect of a person who has, at least twice within a period of 12 months, received a financial penalty in respect of a banning order offence committed at a time the person was a residential landlord or a property agent.[[12]](#footnote-12)

## Geography and Outcomes

The tribunal database includes cases from December 2018, so it is possible there are some early cases which are not available. It is also possible that recent cases have not yet been uploaded. In total the database has 984 decisions[[13]](#footnote-13) under the Housing Act 2004 and the Housing and Planning Act 2016. A search for banning orders found eleven cases.

Of the eleven cases, nine applications were successful and led to the granting a banning order and two were unsuccessful. Applications were brought by eight local authorities located in the south of England, four of which were brought by London Borough Councils. London Borough of Camden brought two of these applications. Two applications were made by Telford and Wrekin Council. Only one application was made in the north of England by Doncaster MBC. Given the small number it is not possible to make any generalisations on the geography of the local authorities, but clearly it is only a handful of authorities that are making applications.

All eleven cases involved Houses in Multiple Occupation (HMOs) and related to housing offences under the Housing Act 2004 (primarily failure to licence an HMO[[14]](#footnote-14) or breach of the management regulation of a HMOs[[15]](#footnote-15)). Other offences also relied on included failure to comply with an operative improvement notice,[[16]](#footnote-16) failing to comply with a prohibition order[[17]](#footnote-17)

and conviction under section 16 of the Local Government (Miscellaneous Provisions) 1976 for not providing information about the ownership of land. There is no evidence that local authorities are bringing cases based on illegal eviction or for non-housing crimes undertaken by landlords in the residential setting.

All the cases demonstrated how the tribunal considered the factors in 2016 Act, s.16(4). In the successful cases under the seriousness of the offence the Tribunal took particular account of:

* Landlords who were suspected of committing offences deliberately and who failed to show remorse.
* The unwillingness of the landlord to comply or engage with authorities.
* A systemic pattern of behaviour, as opposed to it being an isolated incident. Previous similar convictions, civil actions for illegal eviction, prior emergency prohibition orders, and investigations by other local authorities were evidence of systematic behaviour.
* Fire safety offences were a recurring theme and viewed as serious given the increased fire risk of HMOs.
* Overcrowding. Facts of particular seriousness include: overcrowding of eleven people in a property suitable for three with two of them living in a cupboard,[[18]](#footnote-18) makeshift structures created in storage areas housing nine people in two flats,[[19]](#footnote-19) a person living on an inflatable mattress on the living room floor,[[20]](#footnote-20) breach of fire safety in five properties putting 56 occupiers including children at risk.[[21]](#footnote-21)
* Non-use of tenancies, eg licenses, rent to rent schemes, lifestyle clubs.
* The risk to vulnerable tenants.
* The level of fines awarded by the Magistrates Court. Fines ranging between £2,400 and £40,000 were considered significant, while fines below £2,000 were considered low with the lowest being £284. However, low fines did not prevent the Tribunal making an Order.

See examine some of these issues further below.

Although the applications were not prompted by illegal evictions, they were part of the relevant convictions considered under 2016 Act, s.16(4)(b). An entry to the Rogue Landlord Database (s.16(4)(c)) was a factor considered by the Tribunal but where the reason for being added to the Database was the same offence being considered in the application it did not add much weight to the case. The Tribunal did consider the financial effect upon the respondents (2016 Act, s.16(4)(d)) but found, in all cases where this information had been provided, that so long as the determination was proportionate this would not change the decision because the ban was a legitimate punishment and had a deterrent effect.

Of the two unsuccessful cases one failed on the basis that, although the conditions were met, the offences were not serious enough to warrant an order.[[22]](#footnote-22) The Tribunal found that although the two offences relating to fire safety were serious due to the safety risk, they were not the most serious type of offence because adequate fire safety facilities had been installed albeit not adequately maintained. Further the other two offences were not sufficiently serious or related to the provision of substandard accommodation. The lack of previous banning order offences and of evidence of the prior improvement notices also weakened the case. The Tribunal commented on the Local Authorities policy matrix (see below) as ‘confusing and unwieldy’ and highlighted its failure to assess offences individually rather than as a whole.

The other unsuccessful case[[23]](#footnote-23) failed because the notice of intended proceeding[[24]](#footnote-24) failed to give reason why the conviction justified the application for a banning order. The Tribunal highlighted the importance of the requirement to give reasons for the respondent’s right to respond in his defence effectively.[[25]](#footnote-25) The Tribunal did consider whether the case would nevertheless be successful. The case was based on a conviction for not having a HMO license. Beyond this the Tribunal found the authority's evidence was based on supposition, mere suspicion and vague assertion in regard to the wider conduct and aggravating factors surrounding the respondent’s conviction, and this was not sufficient.

## Length of the ban

The ban must specify its length and be of at least 12 months.[[26]](#footnote-26) Local authorities proposed periods between a lifetime ban and two years. There was no pattern in terms of response of the Tribunal to the length of the ban proposed by the local authority. The Tribunal upheld the proposed time periods in two cases, reduced the time period in four cases, increased the time period in two cases, and in a case with two respondents one time period was upheld and the other reduced. The Tribunal granted periods between five years and two years six months, with an average of approximately five years.

The reasons given for reducing the time period included: facts not being included in the Notice of Intention, no previous offending, flaws in the local authority matrix, and failure to include the accurate proposed period on the Notice of Intention. Reasons for upholding and increasing the time period included: systematic history and pattern of failure to meet obligations and comply or engage with authorities, disregard for the safety of tenants, the serious nature of the offence, the risk posed by the Respondent, and a deterrent effect.

## Health and safety and fire risk

‘Health and Safety’ was mentioned in ten of the cases. A strong element of health and safety was fire safety; mentioned in ten cases. ‘Fire Safety’ issues included: obstructed means of escape, fire-fighting equipment in poor order, broken or lack of fire alarms, inadequate fire safety facilities, inadequate fire safety doors, and electrical hazards. Other ‘Health and Safety’ issues included: dangerous accommodation, poor plumbing and electrical system, rubbish outside, overcrowding accommodation unsuitable for human habitation, no heating, failure to meet planning requirements, shoddy partitions, poor living conditions and, overcrowding during first Covid-19 lockdown causing concerns for tenants and local community. The Tribunal relied upon ‘Health and Safety’ and ‘Fire Safety’ when determining the seriousness of the offences. These were found to be particularly serious where a number of lives were put at risk, particularly vulnerable individuals including children.

## Vulnerable Tenants

The Tribunal appears to take the approach that those living in HMOs tend to be vulnerable, especially those using a rent to rent system. Vulnerability was explicitly mentioned by the Tribunal in six cases. Vulnerability was taken as an aggravating factor to the seriousness of the offence. It represented the tenant’s exposure to exploitation. Vulnerable tenants included: ‘individuals who have been homeless, assaulted or are recovering from broken relationships’,[[27]](#footnote-27) young, from other countries or overseas, students, those not aware of their rights, those who have composite health needs, and children.

## Rent to Rent and Lifestyle Clubs

In the recent report on the ‘shadow private rented sector’[[28]](#footnote-28) in London it was suggested that certain property management behaviours strongly linked to illegality including a tendency to operate at the edges of tenancy law, such as ambiguity around tenant rights, for example, in rent-to-rent scams, ‘lockdown’ subdivision, property guardianship, ‘lifestyle’ clubs and short-term lettings.

A number of these were evidence in the banning order cases. Rent to rent systems were highlighted in four cases; all of which were in London. Both local authorities and the Tribunal were particularly concerned over rent to rent business models because of the risk to vulnerable tenants. The view of the Tribunal in one case was:

“We also consider that the rent to rent model adopted by Mr Cikanavicius is undesirable. This type of model, whereby there is a fixed rental payment to a superior landlord, is an encouragement to landlords to optimize profits by placing the maximum number of people in the properties. This had the potential to lead to overcrowding and to leave vulnerable people and families having to contend with sub-standard housing. This model envisages an individual taking rental payments directly from occupiers but with seemingly no repairing obligations and therefore no incentive to ensure compliance with health and safety requirements. The making of a Banning Order in the current case, should act as a deterrent to landlords who wish to exploit vulnerable occupiers.”[[29]](#footnote-29)

In another London case[[30]](#footnote-30) one of the respondents:

‘either sub-lets properties with the knowledge of the Freehold owners (known as a ‘rent to rent’ arrangement), and carry out alterations to make those properties into HMOs (with or without the Freeholders’ consent), or assert ownership and residency in connection with them as demonstrated in the First Respondent’s ‘booking summary’.’[[31]](#footnote-31)

In addition there was evidence of an illegal eviction from a ‘lifestyle club’ for ‘members’.

## MHCLG guidance and local authority policies

The MHCLG guidance provides advice on both the factors a local housing authority should take into account when deciding whether to seek a banning order and assessing the likely effect of the banning order on the person and anyone else that may be affected by the order. [[32]](#footnote-32) It states that:

Local housing authorities are expected to develop and document their own policy on when to pursue a banning order and should decide which option it wishes to pursue on a case-by-case basis in line with that policy.[[33]](#footnote-33)

In addition it suggests that in making an application the authority should recommend how long a banning order should be and set out their reasons.[[34]](#footnote-34)

In seven cases the Tribunal decisions referred to the authority’s policy. Many of the authorities had created a matrix of factors to be taken into account in determining when to pursue a banning order and a further matrix to determine the recommended time period for a banning order to be made.

The unsuccessful case LON/00BJ/HBA/2020/0008, demonstrates the importance of having a policy based on the MHCLG guidance. The local authority was not aware of the MHCLG Guidance and did not have a policy in the tri-borough area. The unawareness of the Guidance perhaps explains the authority’s failure to provide a valid notice of the intended proceedings. The notice failed to give reason, beyond the Banning Order offences, for bringing an application. The Tribunal highlighted the importance of this:

“Ordinarily the Tribunal would expect to see the explanation for why a banning order is justified in a particular case, given by reference to the LHA’s own policy on enforcement and matrices therein. This ensures uniformity of approach applying objective standards, and that the LHA’s decision is properly ‘challengeable’.”[[35]](#footnote-35)

The Tribunals in making their decisions regularly referenced the MHCLG guidance. Properly they were not constrained by the polices of the authorities. Thus, in LON/00BC/HBA/2020/0007 the Tribunal concluded:

In this case Redbridge has proposed a ban for four years. This proposal was based upon the scoring set out in the matrix created by Redbridge. As mentioned previously, it is not the role of the Tribunal to consider the details of the LHA’s policy or matrix.[[36]](#footnote-36)

However this did not prevent Tribunals criticising the policies of the authorities in passing or adopting the same view on issues (eg rent to rent scheme).

## Evidence

The cases mention a variety of evidence provided by the local authorities. Witness statements, detailing inspections and notices, were produced from council officers (with a range of work titles - Public Protection Managers, Trading Standards Compliance Officer, Standards Enforcement Officers, Housing Enforcement Officer, an Environmental Health Officer, a Housing Enforcement Team Manager, Private Sector Housing Team Manager, Housing Enforcement Officers). A witness statement from a police officer was also submitted in one case and witness statements from (ex)tenants. Examples of the tenancy agreements, licence or such like were also provided. Photographs, to show the state of the property, were also produced. In only one case did the Tribunal undertake an inspection of the property.

In a number of cases the landlord or agent did not appear. Where they did, they relied upon letters from tenants attesting to him being a good landlord, details of their financial situation and oral evidence given at the hearing. One respondent, when giving oral evidence during the hearing, was stated to have been vague and evasive. Not surprisingly this did not help in supporting his case and the banning order was made.[[37]](#footnote-37)

## Conclusion

Much has been made of the failure of the database of rogue landlords. In October 2018 the then Prime Minister committed to opening up access to information on the database of rogue landlords and property agents to tenants and a consultation opened in 2019.[[38]](#footnote-38) The consultation also sought views on expanding the scope of offences and infractions which could lead to entries on the database.

While the main route to putting a landlord on the database is the banning order it is not clear whether reform will necessarily lead to more entries on the database. The banning order is not being utilised by most local authorities. The small number of cases shows that when local authorities make a strong case for a banning order the Tribunal will make the order. Cases are focused on issues of health and safety and vulnerable tenants. They are targeted at the ‘small minority of rogue landlords and property agents who knowingly flout their legal obligations.’

It seems unlikely that there are few such landlords and agents. The Government’s original estimate that there are well over 10,000 rogue landlords and that there would be 600 banning orders a year.[[39]](#footnote-39) It seems unlikely that amending the Act will help. We need to understand why local authorities are not using the order and the barriers they face in bringing cases.

1. \* York Law School, University of York.

 In fact the database is wider that this – see below. [↑](#footnote-ref-1)
2. MHCLG, ‘Banning Order Offences under the Housing and Planning Act 2016 - Guidance for Local Housing Authorities’, April 2018 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/697643/Banning_order_guidance.pdf> (accessed 18 July 2021). [↑](#footnote-ref-2)
3. Lavelle D. ‘Only 39 rogue landlords and agents hit with banning orders’ *The Guardian* (5 April 2021) <https://www.theguardian.com/society/2021/apr/05/only-39-rogue-landlords-and-agents-hit-with-banning-orders> (accessed 18 July 2021). [↑](#footnote-ref-3)
4. <https://www.gov.uk/residential-property-tribunal-decisions> (accessed 19 July 2021). [↑](#footnote-ref-4)
5. 2016 Act, s.14. [↑](#footnote-ref-5)
6. 2016 Act, s.15. [↑](#footnote-ref-6)
7. 2016 Act, s.16(1). [↑](#footnote-ref-7)
8. 2016 Act, s.16(4). [↑](#footnote-ref-8)
9. SI 2018/216. [↑](#footnote-ref-9)
10. The Housing and Planning Act 2016 (Banning Order Offences) Regulations 2018, reg.3(c)(iii). [↑](#footnote-ref-10)
11. 2016 Act, s.29. [↑](#footnote-ref-11)
12. 2016 Act, s.30. This would include financial penalties under the Housing Act 2004, s.249A for offences under that Act. [↑](#footnote-ref-12)
13. On 23 July 2021. [↑](#footnote-ref-13)
14. Housing Act 2004, s.72. [↑](#footnote-ref-14)
15. Housing Act 2004, s.234. [↑](#footnote-ref-15)
16. Housing Act 2004, s.30. [↑](#footnote-ref-16)
17. Housing Act 2004, s.32. [↑](#footnote-ref-17)
18. CHI/00HP/HBA/2019/0002. [↑](#footnote-ref-18)
19. CHI/00HB/HBA/2020/0001. [↑](#footnote-ref-19)
20. CHI/00HE/HBA/2021/0001. [↑](#footnote-ref-20)
21. LON/00BC/HBA/2020/0007. [↑](#footnote-ref-21)
22. BIR/00GF/HBA/2020/0001. [↑](#footnote-ref-22)
23. LON/00BJ/HBA/2020/0008. [↑](#footnote-ref-23)
24. 2016 Act, s.15. [↑](#footnote-ref-24)
25. LON/00BJ/HBA/2020/0008, para. [33]. [↑](#footnote-ref-25)
26. 2016 Act, s.17(1), (2). [↑](#footnote-ref-26)
27. BIR/OOGF/HBA/2019/0001. [↑](#footnote-ref-27)
28. Spencer, R., Reeve-Lewis, B., Rugg, J & Barata, E. (2020) *Journeys in the Shadow PRS* <https://ch1889.org/safer-renting> (accessed 22 July 2021). See also [2021] JHL pp31-35 for a summary of the Report by the authors. [↑](#footnote-ref-28)
29. LON/00BC/HBA/2020/0007, para.[22]. [↑](#footnote-ref-29)
30. LON/00BA/HBA/2020/0011. [↑](#footnote-ref-30)
31. Para. [15]. [↑](#footnote-ref-31)
32. MHCLG, ‘Banning Order Offences under the Housing and Planning Act 2016 - Guidance for Local Housing Authorities’, April 2018, para.3.3. [↑](#footnote-ref-32)
33. MHCLG, ‘Banning Order Offences under the Housing and Planning Act 2016 - Guidance for Local Housing Authorities’, April 2018, para.3.1. [↑](#footnote-ref-33)
34. MHCLG, ‘Banning Order Offences under the Housing and Planning Act 2016 - Guidance for Local Housing Authorities’, April 2018, para.3.2. [↑](#footnote-ref-34)
35. LON/00BJ/HBA/2020/0008, para. [34]. [↑](#footnote-ref-35)
36. LON/00BC/HBA/2020/0007, para. [74]. [↑](#footnote-ref-36)
37. LON/00BC/HBA/2020/0007. [↑](#footnote-ref-37)
38. <https://www.gov.uk/government/consultations/rogue-landlord-database-reform> (accessed 23 July 2021). The consultation closed in October 2019, and there is no more recent update. [↑](#footnote-ref-38)
39. <https://hansard.parliament.uk/Lords/2021-05-26/debates/07E89DCF-E021-4DF7-A923-8B2FDFBDDBE0/RogueLandlordsRegister> (accessed 23 July 2021). [↑](#footnote-ref-39)