



Roof Terraces and Higher Risk Buildings

This post considers the First-tier Tribunal's decision in [Blomfield v Monier Road Limited \(Smoke House & Curing House\) LON/00BG/HYI/2023/0024](#).

Key takeaways:

- The FtT departed from government guidance in concluding that a rooftop garden was a 'storey' and that the building was therefore a higher risk building under Pt 4, BSA 2022.
- The Ministry of Housing, Communities and Local Government is said to be considering this. It is possible that future regulations could be implemented to re-confirm the original position taken in the government guidance.
- The decision also provides a reminder that when making a remediation order, the FtT has no power to specify which materials or contractors the respondent may or may not use.

Introduction

The case concerned a block of flats in East London that consisted of commercial premises on the ground floor, five storeys of residential flats above, and a roof terrace containing a roof garden as well as plant and machinery.

The applicant leaseholders had applied for a remediation order against the respondent freeholder under section 123 of the Building Safety Act 2022 ('BSA 2022'). The Respondent did not contest the making of a remediation order, but the parties disagreed on aspects of the proposed works, including as to the type of material to be used and whether the Respondent should be prevented from using the original contractors to carry out the works. On both of these points, the FtT held that it had no power under s.123 to specify which materials or contractors the Respondent could use (paras 48 and 55).

However, the decision is of greater interest for the issue raised of the FtT's own motion as to whether or not the building was a 'higher risk building', which was relevant to the appropriate scope of the works to be ordered.

The Respondent and its experts had proceeded on the basis that it wasn't, relying on government guidance that a roof is not to be treated as a storey for the purposes of counting storeys or measuring the height of the building. However, the Tribunal disagreed.

The legislation

The starting point is s.65 of the BSA 2022, which defines a 'higher-risk building' as "*a building in England that (a) is at least 18 metres in height or has at least 7 storeys, and (b) contains at least 2 residential units*". That section also provides a power for the Secretary of State to make regulations supplementing this definition and states that this may, "*in particular*", include a definition of 'storey'.

Regs 5-6 of The Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023 then provide some elaboration on that definition. The most relevant provisions for present purposes are:

- 5. (1) Subject to paragraph (2), the height of a building is to be measured from ground level to the top of the floor surface of the top storey of the building (ignoring any storey which is a roof-top machinery or roof-top plant area or consists exclusively of roof-top machinery or roof-top plant rooms)*



6. (1) Subject to paragraph (2), when determining the number of storeys a building has the following is to be ignored: ... (b) any storey which is a roof-top machinery or roof-top plant area or consists exclusively of roof-top machinery or roof-top plant rooms.

The FtT noted that these regulations do not provide an actual definition of a ‘storey’. They do, however, specifically provide that a rooftop storey containing exclusively machinery/plant should be ignored when counting the number of storeys or measuring the height of the building. The Tribunal concluded that: “[t]his, by implication, would therefore mean that a useable rooftop containing a roof garden together with plant/machinery would count as a storey” (paragraph 62). This meant that the building had seven storeys and was also over 18m, and so was a higher risk building.

The government guidance

That conclusion was contrary to a government guidance document published on 21 June 2023, which stated:

A storey must be fully enclosed to be considered a storey. The roof of a building should not be counted as a storey. Open rooftops such as rooftop gardens are not considered storeys and should not be counted as such when determining the number of storeys or measuring the height.

The guidance also provided a worked example of a building similar to the one in this case:

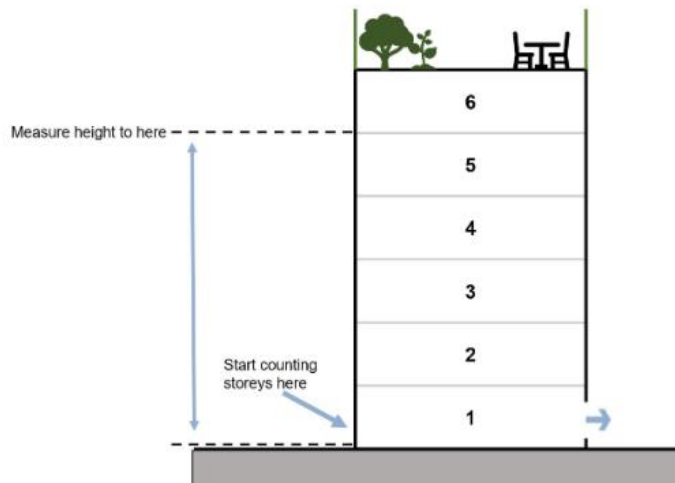


Diagram 11 shows a six-storey residential tower with a rooftop garden.

In this example, height should be measured to the proposed floor surface of the top storey, as indicated by the arrow. The rooftop garden is not considered a storey, so the floor level of the roof should not be measured. Storeys should be counted from the first storey above ground. The proposed building in Diagram 11 has 6 storeys.

The FTT declined to follow that guidance on the basis that there was nothing in the BSA 2022 or the supporting regulations that provided that a storey needed to be fully enclosed. On the contrary, the specific exclusion of rooftops exclusively containing machinery/plant suggested that rooftops not falling within that exclusion would qualify as a storey. The government guidance is non-binding and the FtT noted that it is continuously amended, added to, and in some cases withdrawn, so that: “[t]hese web-pages therefore do not constitute a reliable method of interpretation of law” (para 74).



On the FtT's analysis, the building shown in Diagram 11 above would have seven storeys and the height would be measured from the ground to the floor of the roof garden.

The Tribunal went on to substantially expand the scope of the proposed remediation works in light of its assessment that the building was a higher-risk building. It declined, however, to make a declaration that the building was a higher-risk building, on the basis that it had no jurisdiction to do so (para 88).

MHCLG's response

Following this decision, a note has been added to the [government guidance](#), stating:

“The Ministry of Housing, Communities and Local Government and the Building Safety Regulator are currently considering the views expressed by the Tribunal in the recent First Tier Tribunal decision that roof gardens should be classified as a storey when determining whether a building meets the height and storey criteria under the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023.

It is important to note the Tribunal itself acknowledged it was not within its jurisdiction to formally determine whether the building being considered was a higher-risk building. Until stated otherwise, the sector and regulatory bodies should continue to refer to existing government guidance.”

It seems very possible that future regulations may re-confirm the previously issued government guidance by defining a storey as needing to be fully enclosed. In the meantime, however, this disparity between the guidance and the FtT's approach will create uncertainty in respect of other buildings where the inclusion or exclusion of a roof terrace may determine whether or not the building is classified as a higher risk building, thereby becoming subject to greater safety standards and a statutory requirement to be registered with the Building Safety Regulator.

Whilst the FtT did not make a declaration as to the building's status, and as an FtT decision this is non-binding anyway, the case does provide an indication as to how courts and tribunals are likely to approach this question in the absence of further regulations.

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