OUTER HOUSE, COURT OF SESSION

[2023] CSOH 10

P531/22

OPINION OF LORD RICHARDSON

in the cause

(FIRST) KAAGOBOT LIMITED;
(SECOND) Y11JTR LIMITED;
(THIRD) NETHERVIEW LIMITED;
(FOURTH) PIOTR ARKADIUSZ SZULC

Petitioners

against

CITY OF EDINBURGH COUNCIL

Respondent

and

UNITED SEX WORKERS, a branch of the UNITED VOICES OF THE WORLD TRADE UNION

Additional Party

Petitioners: O'Neill KC; Balfour + Manson LLP
Respondent: O'Neill KC, Solicitor Advocate; Blair; Brodies LLP
Additional Party: Welsh; Gilson Gray LLP

10 February 2023

Introduction

[1] On 31 March 2022, the respondent's Regulatory Committee resolved that Schedule 2 of the Civic Government (Scotland) Act 1982 would apply within the City of Edinburgh for the purpose of licensing Sexual Entertainment Venues ("SEVs") from 1 April 2023. The

Regulatory Committee determined further that the appropriate number of SEVs within the City of Edinburgh was to be nil (the "Decision").

[2] The first to third petitioners all operate SEVs with the City of Edinburgh. The fourth petitioner is a Polish national and EU citizen. He currently works for the first petitioner as part of its security staff at its Edinburgh premises.

[3] The additional party is a trade union. In particular, the membership of its branch, the United Sex Workers, is predominantly comprised of strippers and other sex workers. The additional party's membership includes at least 12 women who currently work at SEVs within the City of Edinburgh. By interlocutor dated 12 September 2022, I granted the additional party leave to enter the process. By subsequent interlocutor dated 21 September 2022, I granted a Protective Expenses Order in favour of the additional party. It was a requirement of my granting leave to the additional party to enter the process both that it should advance its submissions primarily in writing and that it should be given only limited time orally to supplement those submissions at the first hearing.

[4] In the present proceedings, both the petitioners and the additional party seek the reduction of the respondent's Decision on a number of grounds. The petitioners also seek an award of damages against the respondent as just satisfaction for the contended breach of their rights under Article 1 of the First Protocol of European Convention for the Protection of Human Rights and Fundamental Freedoms.

[5] At the first hearing on 1 and 2 December 2022, I heard argument on the challenges raised by the petitioners and the additional party to the respondent's Decision. The parties were agreed that all issues relating to the petitioners' damages claim should be reserved meantime pending the result of the first hearing.

Background – the Air Weapons and Licensing (Scotland) Act 2015

[6] The first to third petitioners have each been operating SEVs within the City of Edinburgh for a number of years. These venues are also premises licensed for the sale of alcohol. At these venues, female performers work on a self-employed basis. This entails both stage performances and performances for individual customers. These SEVs were operated in cooperation with the licensing standard officers and the respondent as local authority.

[7] Following section 76 of the Air Weapons and Licensing (Scotland) Act 2015 fully coming into force, local authorities like the respondent were given the power to resolve that SEVs in their areas would be subject to the licensing regime detailed in Sections 45A to 45F and Schedule 2 of the Civic Government (Scotland) Act 1982 (as amended). It was pursuant to this legislation that the respondent made the resolution and determination on 31 March 2022 which are the subject of the present proceedings.

[8] The relevant legislative provisions are in the following terms:

> **"45A Licensing of sexual entertainment venues: interpretation**
>
> (1) This section applies for the purposes of the interpretation of section 45B and Schedule 2 (as modified for the purposes of section 45B).
>
> (2) 'Sexual entertainment venue' means any premises at which sexual entertainment is provided before a live audience for (or with a view to) the financial gain of the organiser.
>
> …
>
> **45B Licensing of sexual entertainment venues**
>
> (1) A local authority may resolve that Schedule 2 (as modified for the purposes of this section) is to have effect in their area in relation to sexual entertainment venues.
>
> (2) If a local authority passes a resolution under subsection (1), Schedule 2 (as so modified) has effect in their area from the day specified in the resolution.

(3) The day mentioned in subsection (2) must not be before the expiry of the period of one year beginning with the day on which the resolution is passed.

(4) A local authority must, not later than 28 days before the day mentioned in subsection (2), publish notice that they have passed a resolution under this section.

(5) The notice must— (a) state the general effect of Schedule 2 (as modified for the purposes of this section), and (b) be published electronically or in a newspaper circulating in the local authority's area.

(6) For the purposes of this section, paragraphs 1 and 3 to 25 of Schedule 2 apply with the following modifications—

(a) references to a sex shop are to be read as references to a sexual entertainment venue,
(b) references to the use by a person of premises, vehicles, vessels or stalls as a sexual entertainment venue are to be read as references to their use by the organiser,
(c) in Paragraph 1—

(i) in sub-Paragraph (b)—
(A) the word "or" immediately following Paragraph (i) is omitted,
(B) Paragraph (ii) is omitted, and (ii) sub-Paragraph (c) is omitted,

(d) in Paragraph 7—

(i) […]
(ii) after sub-Paragraph (3) insert—

"(3A)…
(3C) The applicant must also, not later than 7 days after the date of the application—

(a) send a copy of the application to each person or body listed in the local authority's determination under sub-Paragraph (3D), and
(b) submit to the local authority a certificate stating that the applicant has complied with this sub-paragraph.

(3D) For the purposes of sub-paragraph (3C), a local authority must—
(a) from time to time determine the persons or bodies who must receive a copy of the application, and
(b) publicise the determination in such manner as they consider appropriate.",

(e) in paragraph 9—

(i) in sub-paragraph (5)(c)—

(A) after the word "in" insert "the local authority's area or",

(B) after the word "for" insert "their area or",

(ii) after sub-paragraph (5) insert—

'(5A) For the purposes of sub-paragraph (5)(c), a local authority must—

(a) from time to time determine the appropriate number of sexual entertainment venues for their area and for each relevant locality, and

(b) publicise the determination in such manner as they consider appropriate.',

(iii) after sub-paragraph (6) insert—

'(6A) A local authority may refuse an application for the grant or renewal of a licence despite the fact that a premises licence under Part 3 of the Licensing (Scotland) Act 2005 is in effect in relation to the premises, vehicle, vessel or stall to which the application relates.',

(f) in paragraph 12(2)(b), for 'shorter' substitute 'other',

(g) in paragraph 19(1)(e), for the words from 'without' to the end of paragraph

(e) substitute

'knowingly permits any person under the age of 18 to enter the sexual entertainment venue—

(i) at a time when sexual entertainment is being provided, or

(ii) without reasonable excuse, at any other time,', and

(h) in paragraph 25, in each of sub-paragraphs (1)(a) and (2), for '45' substitute '45B'.

(7) In carrying out functions conferred by virtue of this section, a local authority must have regard to any guidance issued by the Scottish Ministers.

45C Statements of policy in relation to sexual entertainment venues

(1) This section applies where a local authority passes a resolution under section 45B(1).

(2) The local authority must prepare a statement of their policy with respect to the exercise of their functions in relation to the licensing of sexual entertainment venues (a 'SEV policy statement).

(3) In preparing a SEV policy statement, a local authority must—

(a) consider the impact of the licensing of sexual entertainment venues in their area, having regard, in particular, to how it will affect the objectives of—

(i) preventing public nuisance, crime and disorder,
(ii) securing public safety,
(iii) protecting children and young people from harm,
(iv) reducing violence against women, and

(b) consult such persons or bodies as they consider appropriate.

(4) The local authority must publish the SEV policy statement at the same time and in the same manner as they publish the notice of the resolution under section 45B(4).

(5) The local authority must—

(a) from time to time review the SEV policy statement and make such revisions as they consider appropriate (if any), and
(b) publish the revised statement in such manner as they consider appropriate.

(6) Subsection (3) applies to a review of a SEV policy statement as it applies to preparing such a statement.

(7) In exercising their functions in relation to the licensing of sexual entertainment venues, a local authority must have regard to their SEV policy statement or revised statement.

(8) In this section—

'children' means persons under the age of 16,
'young people' means persons aged 16 or 17."

[9] Section 45D deals with the time period in which the local authority is to consider applications for licences made to it (section 45 D(1)) as well as providing for the deemed grant of such applications in the event that such time limits are exceeded.

[10] Schedule 2 of the 1982 Act is headed "Control of Sex Shops". (Sex Shops are subject to a separate licensing regime in terms of section 45 of the Act.) However, in terms of 45B(6) of the 1982 Act (set out above), paragraphs 1 and 3 to 25 of Schedule 2 apply to SEVs with the modifications set out in that subsection. For present purposes, the material provisions of Schedule 2 are contained in paragraph 9 and are as follows:

> "Disposal of applications for licences
> **9.**
> (1) Where an application for the grant or renewal of a licence under this Schedule has been made to a [local authority] 1 they shall, in accordance with this paragraph—
>
> (a) grant or renew the licence ; or
> (b) […]
> (c) refuse to grant or renew the licence.
>
> …
> (3) A licence under this Schedule shall not be granted—
>
> (a) to a person under the age of 18;
> (b) to a person who is for the time being disqualified under paragraph 13(10) or 19(5) below;
> (c) to a person other than a natural person if any director of it or partner in it or any other person responsible for its management is disqualified under paragraph 13(10) or 19(5) below;
> (d) to a person who has been convicted of an offence under paragraphs 19 to 21 below;
> (e) to a person who is not resident in the United Kingdom or was not so resident throughout the period of six months immediately preceding the date when the application was made;
> (f) to a body corporate which is not incorporated in the United Kingdom;
> (g) to a person who has, within the period of 12 months immediately preceding the date when the application was made, been refused by the same local authority the grant or renewal of a licence under this Schedule for the premises, vehicle, vessel or stall in respect of which the application is made, unless the refusal has been reversed on appeal; or
> (h) to a person other than a natural person if any director of it or partner in it or any other person responsible for its management has, within that period, been refused by the same local authority the grant or renewal of such a licence, unless the refusal has been reversed on appeal.
>
> (4) But without prejudice to sub-paragraph (3) above, the local authority shall refuse an application for the grant or renewal of a licence if, in their opinion, one or more of the grounds specified in sub-paragraph (5) below apply.

(5) The grounds mentioned in sub-paragraph (4) above are—

(a) that the applicant or, where the applicant is a person other than a natural person, any director of it or any partner in it or any person responsible for its management, is unsuitable to hold the licence by reason of having been convicted of an offence or for any other reason;

(b) that, if the licence were to be granted or renewed, the business to which it relates would be managed by or carried on for the benefit of a person, other than the applicant, who would be refused the grant or renewal of such a licence if he made the application himself;

(c) that the number of sex shops in the relevant locality at the time the application is made is equal to or exceeds the number which the local authority consider is appropriate for that locality;

(d) that the grant or renewal of the licence would be inappropriate, having regard—

(i) to the character of the relevant locality; or
(ii) to the use to which any premises in the vicinity are put; or
(iii) to the layout, character or condition of the premises, vehicle, vessel or stall in respect of which the application is made.

(6) Nil may be an appropriate number for the purposes of sub-paragraph (5)(c) above.

(7) In this paragraph 'the relevant locality' means—

(a) in relation to premises, the locality where they are situated; and
(b) in relation to a vehicle, vessel or stall, any locality where it is desired to use it as a sex shop."

[11] Paragraph 24(2)(b) provides that there is no right of appeal to the sheriff against a decision to refuse an SEV licence for the grounds set out in paragraph 9(5)(c) and (d). In the absence of a right of appeal, such a refusal can be challenged only by way of judicial review.

Circumstances in which the respondent's Decision was made

[12] The process which culminated in theDecision involved consultation and deliberation by the respondent. In October 2019, the respondent agreed in principle, to licence SEVs

subject to consultation. In early 2020, prior to the Covid-19 pandemic, the respondent held three evidence sessions with stakeholders including performers. Further work was affected by the onset of the pandemic in March 2020. The respondent subsequently conducted further consultation in April 2021 and July 2021. A report on that consultation was made to the Regulatory Committee on 2 December 2021. Thereafter, matters were continued until the meeting of 31 March 2022. On that date, deputations from a range of perspective were received by the Committee. The meeting was broadcast live and a recording of the meeting was made. (I was provided with a transcript of the meeting).

[13] The respondent's officers provided the Committee with a report which advised the Committee to consider and determine matters in the following order:

- First, to agree to resolve that Schedule 2 of the 1982 Act was to be effective within the City of Edinburgh for the purposes of licensing SEVs; to make a resolution to license SEVs from 1 April 2023; and, accordingly, to adopt a scheme to license SEVs from that date.
- Second, to determine an appropriate number of SEVs for the City of Edinburgh and to determine the number as being either four (the number of existing operating venues) or nil.
- Third, to agree to the proposed SEV licensing policy statement and agree that the SEV licensing policy shall include a statement that any area in the city other than in the city centre ward would not be considered suitable for the operation of a SEV.
- Finally, to agree to the proposed standard licensing conditions for SEV licences.

[14] The report also set out advice from the respondent's officers to the Committee. In respect of the determination of an appropriate number of SEVs for the City of Edinburgh, the report provided as follows:

> "4.8 Should Committee make a resolution to introduce a licensing scheme for SEVs, the Council will have to set a limit on the number of SEV premises permitted in the city. Any decision made by Committee in respect of determining a limit on the number of licensed SEVs in Edinburgh must be based on an assessment of the evidence gathered. This would include information from the consultation exercises which took place in 2019 and 2021, and evidence sessions with stakeholders, in addition to any other relevant material contained within previous Committee reports on this issue.
>
> 4.9 Members must also consider the legislative requirements, the guidance, and the Scottish Government's strategy 'Equally Safe; Scotland's strategy for preventing and eradicating violence against women and girls'.
>
> 4.10 Consultation has shown that there is a broad range of views with respect to the setting of limits on SEV premises in the city generally, and in certain localities in particular. The consultation responses demonstrated that views on what any limit should be are polarised. Some responses have advocated that a zero limit should be introduced, which would create a rebuttable presumption against granting any SEV licence. Other respondents clearly favour no limit being introduced on the number of premises…
>
> …
>
> 4.14 The tension between potentially licensing SEVs, including permitting a number to operate, and these concerns, are specifically addressed in the guidance which states:
>
> > 20 Equally Safe: Scotland's strategy for preventing and eradicating violence against women and girls was first published in 2014 and updated in 2016 and again in 2018. It sets out a definition of violence against women and girls which includes 'commercial sexual exploitation, including prostitution, lap dancing, stripping, pornography and human trafficking'.
> >
> > 21 Whilst recognising the conflict between this definition and the licensing of SEV, this guidance will help to ensure that such activities take place in safe and regulated environments. When deciding whether to licence, and whether to limit, SEV in their area, local authorities will need to consider the interaction with their own local policies and strategies, as well as the legal implications around limiting a legitimate business activity to minimise the risk of legal challenge'.

4.15 Therefore, Committee will have to balance competing views and to determine whether any limit which is imposed will be, on balance, appropriate and proportionate in order to support the Council's objectives in adopting a licensing system. The Committee must base its decision on the evidence available in the consultation responses, taking account of the relevant legislation and guidance. The Committee should exclude moral opinion in its decision-making process and make a decision based on the evidence before it. Committee will be required to weigh up the evidence provided and to set out why they have preferred one body of evidence over another. By introducing legislation, the Scottish Government has agreed that the operation of SEVs is a lawful activity which is best controlled at a local level by councils which have knowledge and understanding of local circumstances. Accordingly, should factors other than those considered relevant, as set out in the legislation and guidance, be seen to influence the determination of a numbers limit by the Council, then this would increase the risk of a successful legal challenge to any decision."

[15] In addressing the option of setting a limit of nil for SEVs, the report provided as follows:

"4.23 As with determining a numbers limit of four, in making a decision on the limit to set for SEVs at zero, Committee must be able to demonstrate that it has weighed up the evidence before it and reached a decision that is both rational and proportionate. The Committee must also refer to the promotion of the licensing objectives set out in the 1982 Act and which are detailed at section 3.6 of this report. Specifically, Committee should consider: is there a sufficiency of evidence available to it that would enable it to decide that a proportionate limit on the number of SEVs is zero? There is some evidence suggesting that there may be wider policy concerns about the appropriateness of SEV-style venues and their place in modern society, Paragraph 45 of the guidance states that the Council should:

"…reflect on whether reducing the number of venues, or setting the number at zero, in their area will have a disproportionate effect on business. The local authority should also consider whether reducing the number of SEV in their area or setting the number at zero would create a risk of legal challenge (for example under ECHR or on grounds of reasonableness)".

4.24 The Scottish Government guidance further states at paragraph 46:

"…in setting the number at zero, a local authority will require to demonstrate proportionality by evidencing that the competing interests of SEV operators alongside those of the community had been fairly considered and appropriately balanced."

4.25 In adopting a licensing scheme, the Council is required to take into account the socio-economic and public sector equality duties in the Equality Act 2010 ('the 2010 Act') as well as human rights legislation. The Council is also prohibited from

indirectly discriminating against a group which shares a protected characteristic, unless that discrimination can be objectively justified. Section 19 of the 2010 Act provides that indirect discrimination arises where a provision, criterion or practice ('PCP') that applies in the same way for everyone has the effect of putting a group of people who share a protected characteristic (e.g. sex) at a particular disadvantage. By setting a zero limit in respect of SEVs, a PCP would be created for the purposes of the 2010 Act.

4.26 If it can be clearly demonstrated that a zero-limit policy is justifiable in that it is a proportionate means of achieving a legitimate aim, it will not amount to unlawful discrimination. In doing so, Committee must have considered the evidence which has been gathered throughout the consultation process and consider whether there is an evidential basis to demonstrate that a zero-limit policy would be a proportionate means of achieving a legitimate aim. Further, Committee should also have considered whether a less discriminatory means (e.g. setting a limit of two SEVs) could achieve the same objective.

4.27 A limit of zero creates a rebuttable presumption against the grant of SEV licences in the Council's area, which could ultimately result in the closure of existing premises and a loss of income for operators, performers and employees of those premises. The Committee will also recall hearing evidence which suggested that a zero limit could lead to SEV activities taking place in unregulated and unsafe environments. Members should also refer to the Integrated Impact Assessment (Appendix 12) for a detailed assessment of what impact the licensing policy could have in this regard.

4.28 Both human rights legislation (and in particular Protocol 1, Article 1 of the ECHR – the right to peaceful possession) and the guidance make clear that, in limit-setting, Committee must consider any impact on existing operators. In the event of a zero limit being set, this would not have an immediate impact, since operators could continue until the new regime had commenced and applications for licences were finally determined. However, ultimately it could lead to the closure of the SEVs in the event that they were refused a licence by the Licensing Sub-Committee because of the zero cap on SEVs within the Council's area.

4.29 During consultation, Committee heard from those who are in favour of the a [sic] zero-limit being introduced for SEVs. In summary, those respondents raised the following issues:

- Sexual Entertainment is a key contributing factor to wider gender inequality in society;
- The Scottish Government's Equally Safe Strategy which defines sexual entertainment as a form of VAWG;
- Experiences in other countries which have taken similar steps, such as Sweden and Iceland, which have criminalised the purchase of sex and outlawed similar premises respectively;

> • Women being pushed towards the sex industry as a result of the health pandemic;
> • Anecdotal experiences reported in the media;
> • The Lileth Project in London which saw an increase of reported rapes in the vicinity of SEVs; and
> • Reference to academic texts that argue that SEVs normalise behaviours and interactions between men and women that would normally be considered as sexual harassment, violence and gender discrimination in any other setting.
>
> 4.30 Members will be aware that some other local authorities have set the limit at zero but that so far these have only been those authorities which did not have any SEVs operating. At the time of drafting this report, Glasgow and Aberdeen have decided the numbers issued in their area, and in effect have allowed existing premises to continue to operate within any cap.
>
> 4.31 Committee is asked to take the considerations set out at 4.23 - 4.30 above into account when reaching a determination on the appropriate number of SEVs within Edinburgh namely: 1) weighing up the representations received in response to the consultation; 2) consistency with the licensing objectives; and 3) proportionality in terms of achieving the licensing objectives and balancing the rights of SEVs operators and performers against the rights of those opposed to SEVs."
> (Emphasis added)

[16] The parties were agreed that, as is apparent from the report and, in particular, paragraph 4.27 (quoted above), the Committee were advised that were they to determine that a limit of zero was appropriate this would create a "rebuttable presumption". In other words, the Committee were advised that such a determination would not in itself result in the automatic refusal of an application for a licence from an SEV in Edinburgh.

The respondent's decision

[17] The minutes of the meeting of the Regulatory Committee on Thursday 31 March 2022 record its decision as follows:

> "1) To agree to resolve that Schedule 2 of the Civic Government (Scotland) Act 1982 ('the 1982 Act') shall be effective within the City of Edinburgh for the purpose of licensing Sexual Entertainment Venues and to make a resolution to license Sexual Entertainment Venues (as set out at Appendix 11 to the report by the Executive Director of Place) from 1 April 2023, and accordingly to adopt a scheme to license Sexual Entertainment Venues in terms of the 1982 Act from the said date thereafter.

2) To note that Committee was required to determine a Sexual Entertainment Venues number appropriate for the City of Edinburgh Council area and to produce and publish a Sexual Entertainment Venue Licensing Policy for the said area all in terms of the 1982 Act.

3) To note the updated advice received from officers in respect of what should be considered if the Committee introduced a limit for the number of Sexual Entertainment Venues and agree that the City of Edinburgh Council would set the number of SEVs at zero within Edinburgh.

4) To agree to the proposed Sexual Entertainment Venues licensing policy statement set out at Appendix 9.

5) To agree that the policy shall include a statement that any area in the city other than in the city centre ward would not be considered suitable for the operation of a Sexual Entertainment Venue.

6) To agree to the proposed standard licensing conditions for Sexual Entertainment Licences set out at Appendix 10."

It is notable to record that, in making this decision, the Regulatory Committee was relatively evenly split with five votes in favour and four against.

Subsequent events

[18] On Thursday 22 October 2022, the respondent, sitting as the full Council, passed the following motion:

"1) To note that the key aims of civic licensing are the preservation of public safety and the prevention of crime and disorder.

2) To note the implementation of a Nil Cap policy on Sexual Entertainment Venues (SEVs) on 1 April 2023, which may lead to the closure of four venues.

3) To note that entertainers may continue to work in the industry despite possible closures and may be working in less safe and completely unregulated environments.

4) To recognise that this could lead to the further deterioration of performers' safety in the city.

5) To agree, therefore, that a report shall be presented to the Regulatory Committee within 2 cycles to consider this.

> 6) To recognise that the Equally Safe strategy for ending violence against women and girls expects that we work with others to reduce the demand for Commercial Sexual Exploitation.
>
> 7) To agree that the Council should work with partners to put in place a programme of support for entertainers who may be affected by these closures."

[19] Notably, at the same meeting, the Council declined to pass an amendment to the motion in the following terms:

> *"Therefore, to instruct the Regulatory Committee to re-consider the Nil cap policy in regard to sexual entertainment venues at the next Regulatory Committee in November 2022."*

Submissions for the petitioners

[20] Mr O'Neill began by moving me to find and declare the respondent's determination fixing "nil" as the appropriate number of sexual entertainment venues for the whole city of Edinburgh to be unlawful; to order reduction of the respondent's determination; to award the petitioners expenses against the respondent for the whole process to date; and thereafter for the petition to be continued for further procedure relative to the petitioners' damages claims.

[21] He submitted that despite the number of grounds of challenge set out in the petition, the key difference between the parties turned on a construction of the statutory provisions introduced by the 2015 Act.

The statutory scheme

[22] Mr O'Neill's starting point was section 45B(6)(e)(ii) of the 1982 Act. This provision modified paragraph 9 of Schedule 2 of the 1982 Act by introducing paragraph (5A):

> "(5A) For the purposes of sub-paragraph (5)(c), a local authority must— (a) from time to time determine the appropriate number of sexual entertainment venues for

> their area and for each relevant locality, and (b) publicise the determination in such manner as they consider appropriate."

The effect of this provision was to impose a duty of the respondent to make a determination of the appropriate number of SEVs for its area. As the opening words made clear, this was something which the respondent "must" do. The duty to make this determination of an appropriate number of SEVs was not linked to any particular application for a licence. This determination required to be publicised. Mr O'Neill also drew my attention to section 45(7) of the 1982 Act. This subsection required the local authority to have regard, in carrying out functions conferred by section 45, to any guidance issued by the Scottish Ministers. The requirement to make a determination was such a function and, therefore, fell within the scope of subsection 45(7).

[23] Furthermore, Mr O'Neill submitted that the provision made clear that the determination is for the purpose of one of grounds of refusal set out in paragraph 9(5) – namely (c). When the modifications made by section 45B(6)(a) and (e)(i) are incorporated that provision reads as follows:

> "that the number of sexual entertainment venues in the local authority area or relevant locality at the time the application is made is equal to or exceeds the number which the local authority consider is appropriate for their area or that locality."

[24] Mr O'Neill submitted that when ground 9(5)(c) was read with paragraph 9(4), it was apparent that the respondent had no discretion but to refuse an application if, at the time it was made, the number of SEVs in its area was equal to or exceeded the number determined under paragraph 9(5A). He pointed to the fact that subparagraph 9(4) stated that the respondent "shall" refuse an application where in its opinion one or more of the grounds specified in subparagraph 9(5) applied.

[25] Mr O'Neill criticised the construction of these provisions relied upon by the respondent. The respondent sought to argue that the determination merely created a "rebuttable presumption". Such a construction ignored both nature of the duty created by paragraph 9(5A) and the mandatory language in paragraph 9(4) which required refusal.

[26] Mr O'Neill accepted that the drafting of paragraph 9(5) and, in particular, ground (c) might seem slightly odd in that a mandatory ground of refusal had not been included in paragraph 9(3) along with other such grounds. However, Mr O'Neill submitted that, bearing in mind the way in which the scheme for the control of sex shops contained in Schedule 2 had been modified by section 45B in order to apply to SEVs, the significance that might be attached to this point could not outweigh the plain meaning of the words used in paragraphs 9(4), (5)(c) and (5A) of Schedule 2 taken together.

[27] Mr O'Neill noted that the respondent also relied upon section 45D and, in particular, on the fact that no reference was made in that provision to the determination made in terms of subparagraph 9(5A). However, Mr O'Neill submitted that the absence of any reference to the determination in section 45D was, at best, neutral for the respondent. Section 45D dealt with situations in which a relevant application had been made to the respondent but had not been dealt with in the time limits provided. It was in no way necessarily linked to the situation of an application being made which equalled or exceeded the number of SEVs the local authority had determined for its area in terms of paragraph 9(5A). Where the limit determined by paragraph 9(5A) applied, the local authority required, in terms of paragraph 9(4) to refuse the application. In these circumstances, it was difficult to see how section 45D would be engaged.

[28] Mr O'Neill emphasised that the provisions regulating the licensing of SEVs in Scotland were unique. These provisions differed in material terms from those which

governed licensing in other areas. The provisions also had no identical equivalent in either England and Wales or Northern Ireland. In particular, there was no equivalent in any other area of Scottish licensing law to the requirement contained paragraph 9(5A) (which was introduced by Section 45B(6)(e)(ii)) for the local authority formally to determine the appropriate number of venues for their area and to publicise this determination. There was also no such provision in the equivalent schemes which applied either in England and Wales or in Northern Ireland.

[29] Mr O'Neill submitted that these provisions were essentially different from, for example, those relating to the duty of a licensing board to assess overprovision of premises licensed for the sale of alcohol (section 7 of the Licensing (Scotland) Act 2005); or, in relation to taxi and private hire licenses (section 10 of the Civic Government (Scotland) Act 1982). On this basis, Mr O'Neill submitted that the case of *Coyle* v *City of Glasgow Council* 1997 SC 370, which was relied upon by the respondent, fell to be distinguished because the provisions with which that case was concerned – section 10 of the Civic Government (Scotland) Act 1982 – did not impose a duty on the council to make a determination equivalent to that required by paragraph 9(5A).

[30] In this regard, Mr O'Neill also drew my attention to *Belfast City Council* v *Miss Behavin' Limited* [2007] 1 WLR 1420. This case involved consideration by the House of Lords of the statutory scheme regulating sex shops in Northern Ireland contained in Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985. It is apparent that the provisions under consideration in that case are similar to the 1982 Act with two important distinctions. First, the equivalent provision to Paragraph 9(4) of Schedule 2 – Paragraph 12(2) of Schedule 2 to the 1985 Order – provides that a local authority "may refuse" as opposed to "shall refuse". Second, there is no equivalent in the Northern Irish

scheme to the duty to determine an appropriate number of SEVs contained in Paragraph 9(5A). Notwithstanding these differences, Mr O'Neill drew my attention to paragraph [6] of Lord Hoffman's speech where he considered the nature of the local authority's power to refuse a licence in circumstances where number of premises is equal to or exceeds the number the local authority considers is appropriate:

> "The effect of these rather convoluted provisions is that a council may refuse a licence for a sex shop in any locality on the ground it does not consider it appropriate to have sex shops in that locality. It was said that because the Order says that the council 'may' refuse, this ground is 'discretionary'. But I am not sure whether that is a very helpful adjective. It would hardly be rational for the council to decide that the appropriate number of sex shops in the locality was nil, but that it would all the same exercise its discretion to grant a licence. I think it is more accurate to say that the question of how many sex shops, if any, should be allowed is a matter for the council's judgment."

[31] The effect of, and Mr O'Neill submitted, the reason for these differences was that, in respect of Scottish scheme for Sexual Entertainment Venues – Schedule 2 of the 1982 Act as adapted, the provisions enabled the local authority to create certainty by imposing a complete ban on such venues.

[32] Once a local authority had resolved to adopt the licensing regime for SEVs (in terms of Section 45B(1)), the local authority then had to prepare a statement of policy "with respect to the exercise of their functions in relation to the licensing of SEVs" pursuant to Section 45C(2). Subsection 45C(3) detailed various matters which the local authority requires to consider in preparing the policy statement. Section 45C(7) also provided that in the exercise of their functions in relation to the licensing of SEVs, the local authority required to have regard to this policy statement.

[33] Against the background of these provisions, Mr O'Neill submitted that the policy statement should both be consistent with and explain the reasoning underpinning the

determination to be made in terms of subparagraph 9(5A) of Schedule 2. However, Mr O'Neill highlighted that, in the present case, the respondent, having adopted the licensing regime and then determined that the appropriate number of SEVs was nil, had then agreed a policy statement which did not reflect the fact that, in light of the nil, no SEVs could be licensed. The policy statement proceeded, erroneously, on the basis that applications could still be granted.

[34] Mr O'Neill emphasised that the petitioners did not take issue with the sequencing of the determination (in terms of subparagraph 9(5A)) and the preparation of the policy statement (in terms of section 45C(2)). The point taken by the petitioners was that the policy statement which had, in fact, been adopted by the respondent was fundamentally inconsistent with the nil determination.

Prematurity

[35] Based upon the construction of the statutory provisions for which he contended, Mr O'Neill submitted that the respondent's plea of prematurity was misconceived. The respondent contended that the petition was premature because none of the first to third petitioners had, as yet, made an application for an SEV licence. However, the respondent's argument presupposed wrongly, according to Mr O'Neill, that it was still open to the respondent to grant any such application notwithstanding the nil determination it had made.

[36] Mr O'Neill submitted further that no prematurity point could properly be based on the fact that none of the first to third petitioners had applied for a waiver from the respondent in terms of paragraph 5 of Schedule 2. In terms of subparagraph 5(4), a local authority may grant such a waiver in any case where they consider that to require a licence

would be unreasonable or inappropriate. However, in the present case, the respondent had determined, in terms of paragraph 9(5A), that no sexual entertainment venues were appropriate in their area. In such circumstances, Mr O'Neill submitted it was not possible to see how the respondent could ever reasonably grant a waiver.

[37] The respondent also sought to argue that the petition was premature because of a motion that had been passed by the respondent, sitting as a full Council, on 27 October 2022 to "re-consider the Nil cap policy" (see paragraph [18] above). It was understood that this would be considered in early 2023. Mr O'Neill submitted that this development, whilst potentially good news for his clients, was irrelevant to the present proceedings. Unless and until it was changed, the nil determination made by the respondent, which lay at the heart of these proceedings, remained in place. The suggestion from the respondent that it might change its mind did not provide a basis for the Court not to decide upon the arguments advanced by the petitioners.

Court's discretion to refuse remedy of reduction

[38] Mr O'Neill then addressed the argument made by the respondent that, even if the petitioners were correct as to the construction of the 1982 Act and, in particular, Schedule 2, then the respondent's error in law was not such as to vitiate the determination that had been made. The respondent contended in its Note of Argument that, on this hypothesis, any error by the respondent had not in itself given rise to substantial prejudice because the prejudice arose from the determination itself. Furthermore, notwithstanding the error, the result would almost certainly have been the same. The respondent relied upon the case of *Douglas* v *Perth & Kinross Council* 2017 SC 523 in this regard.

[39] In response to this argument, Mr O'Neill submitted that there was simply no evidence to support the respondent's contention that, had the Regulatory Committee been advised that the nil determination established a ban on SEVs as opposed to merely creating a rebuttable presumption, it would have reached the same decision. Mr O'Neill submitted that these two results were very significantly different and it could not be assumed, certainly in the absence of any clear evidence, that the Committee's decision would have been the same. There was also no question that were the determination to be reduced this would have a practical effect for the petitioners. Unlike the *Douglas* case, it was not the case that the reduction of the determination would not have a real and practical impact on the petitioners.

[40] Mr O'Neill then advanced a series of grounds challenging the procedure adopted by the respondent in making the nil determination.

Failure to have regard to guidance issued by the Scottish Ministers

[41] First, Mr O'Neill submitted that there had been a failure by the respondent to have regard to guidance issued by the Scottish Ministers as required by section 45B(7) of the 1982 Act. The Scottish Government had issued *Guidance on the Provisions for Licensing Sexual Entertainment Venues* dated March 2019. This guidance provides at paragraph 27

> "Local authorities will have to consider the circumstances pertaining in their local area and their statutory obligations (including, but not limited to, their obligations under the EU Services Directive and the Regulatory Reform (Scotland) Act 2014). Local authorities will also have to consider the rights SEV operators may have under the European Convention on Human Rights (ECHR) particularly under Article 1, Protocol 1 (peaceful enjoyment of possessions) and Article 10 (freedom of expression) of the Convention...."

[42] Mr O'Neill drew my attention particularly to the reference in the guidance to the EU Services Directive. This was a reference to the Internal Market Directive (2006/123).

Mr O'Neill submitted that there was nothing to suggest that the respondent had had any regard either to this Directive or the obligations it imposed.

[43] The Directive had been implemented into law in the UK by the Provision of Services Regulations 2009 (SI 2009/2999). Mr O'Neill submitted that the 2009 Regulations set down parameters for, among other things, the conditions that may lawfully be imposed under the licensing regimes applicable to SEVs in the UK. Regulation 14 imposed requirements on competent authorities, such as the respondent, in making the provision of services subject to an "authorisation scheme". In particular, Mr O'Neill drew my attention to Regulation 15 which provided:

> "15.— Conditions for the granting of authorisation
>
> (1) An authorisation scheme provided for by a competent authority must be based on criteria which preclude the competent authority from exercising its power of assessment in an arbitrary manner.
>
> (2) The criteria must be—
>
> (a) […]
> (b) justified by an overriding reason relating to the public interest,
> (c) proportionate to that public interest objective,
> (d) clear and unambiguous,
> (e) objective,
> (f) made public in advance, and
> (g) transparent and accessible."

[44] Mr O'Neill submitted that the actions of the respondent in adopting the licensing of SEVs and, subsequently making the nil determination required to be consistent with Regulation 15. However, in the absence of proper supporting reasons (for example, in the section 45C policy statement), the nil determination could not be said to comply with paragraphs (b), (c) and (g).

[45] Furthermore, Mr O'Neill submitted that consideration of the requirements of Regulation 15 pointed in favour of the petitioners' construction of Schedule 2. On the petitioners' construction, the determination in terms of Paragraph 9(5A) of Schedule 2, would be made having regard to the Section 45C policy statement. In the event that it was, as in the present case, a nil determination, the position would be clear in advance to those considering making applications for SEV licences. Such a construction was consistent with requirements of Regulation 15. By contrast, on the respondent's construction, there was apparently no requirement to give reasons for the paragraph 9(5A) determination. Further, the impact of the determination on the grant or refusal of any subsequent applications - in other words, how the rebuttable presumption was to be put into practice – was entirely obscure.

[46] Finally, on this point, Mr O'Neill drew my attention to the decision of the Supreme Court in *R (Lumsdon* v *Legal Services Board)* [2016] AC 697 and, in particular, to paragraph [68] of the joint judgment of Lords Reed and Toulson where their Lordships consider the approach of the European Court of Justice, in the context of proportionality, to considerations of "principles of good administration". Mr O'Neill pointed out that, as their Lordships note at paragraph [31]:

> *"Where the proportionality principle is applied by a national court, it must, as a principle of EU law, be applied in a manner which is consistent with the jurisprudence of the court: as is sometimes said, the national judge is also a European judge."*

[47] As he developed his submissions, Mr O'Neill also argued that the provisions of the 2009 Regulations implementing the Internal Market Directive also fell to be applied to the respondent's Decision as a result of the Regulations forming part of retained EU law in terms of section 2 of the European Withdrawal Act 2018. He argued, separately, that the

fourth petitioner had retained EU law rights as a worker protected under and in terms of Part 2 of the EU-UK Withdrawal Agreement. He also maintained that the "general principles of good administration" referred to in *Lumsdon* also formed part of "retained general principles of EU law" in terms of Section 6(7) of the 2018 Act. Notwithstanding these different routes to the application of the principles Mr O'Neill derived from EU law, I did not understand him to be submitting that these differences in route impacted in any material way upon the challenge to the respondent's Decision that he was advancing under this head. The essential question was whether the respondent had demonstrated, on the basis of relevant and sufficient evidence, that the Decision pursued a legitimate aim which was justified by overriding reasons in the public interest and did not go beyond what is necessary for that purpose.

Failure to provide proper and adequate reasons

[48] Second, Mr O'Neill contended that the failure to provide proper and adequate reasons in itself represented an error of law. He submitted that the guidance issued by the Scottish Ministers stated the following at paragraph 43 in relation to the Section 45C policy statement:

> "The statement might include information on the locations where the local authority is likely to consider the operation of SEV to be appropriate or inappropriate. The statement could also be used to indicate how many SEV are considered to be appropriate for the local authority's area or particular localities within its area. <u>The reasons for these policy positions should also be provided."</u> (Emphasis added)

[49] In any event, Mr O'Neill submitted that, even in the absence of an express statutory provision, the respondent was under a duty to provide reasons at common law. He founded upon the decision of Lord Justice Elias in *R (Oakley)* v *South Cambridgeshire District Council* [2017] EWCA Civ 71 and, in particular, at paragraphs [26] to [33]. He accepted that

there was no general obligation at common law to provide reasons, but submitted that in the present case, considerations of fairness required that adequate reasons be provided by the respondent for the nil determination. The effect of that determination was, so Mr O'Neill contended, the banning of the business operated by the first to third petitioners. Furthermore, Mr O'Neill argued that these considerations of fairness applied even more strongly where the statutory scheme did not provide for any means of reviewing this determination other than by way of judicial review.

[50] Mr O'Neill observed that the respondent had advanced no good reasons against the giving of reasons for the determination in accordance with paragraph 9(5A) of Schedule 2. The respondent had referred to the express duty for the respondent to give reasons in writing in respect of applications for a licence (paragraph 23 of Schedule 2). But this duty co-existed with the requirement on the respondent to prepare a policy statement in terms of section 45C with respect to the exercise of its functions in relation to licensing of SEVs. The respondent also suggested that the nature of the respondent's collective decision making process mitigated against the imposition of a duty to give reasons. However, Mr O'Neill pointed out that licensing decisions are routinely taken collectively by a board and this did not prevent reasons from being issued. Mr O'Neill also noted that the respondent appeared to suggest that the fact that the determination was taken in the context of a wide range of policy decisions about a framework to govern future licensing applications meant that a duty to give reasons ought not to be imposed. Whereas Mr O'Neill submitted that this fact ought to give rise to the opposite conclusion. It was precisely because the respondent's determination in terms of paragraph 9(5A) of Schedule 2 had a wider impact than a decision in respect of an individual application that reasons ought to be given for that determination.

[51] Mr O'Neill submitted that the material produced by the respondent in this case which was said to evidence the reasons – namely, the Minute together with the transcript of what the members of the committee had said – could not reasonably be regarded as a statement of reasons. On this basis, the cases cited by the respondent which relate to what is required by way of reasoning all fell to be distinguished as in each of those cases there was a statement of reasons albeit one that was being criticised. This point could be made in respect of *Tesco Stores* v *City of Glasgow Licensing Board* 2013 SLT (Sh Ct) 75. That was not the position here.

[52] Mr O'Neill also submitted that one had to be careful when seeking to identify reasoning from a transcript of what appeared to him to have been a somewhat fractious meeting in which the discussion seemed to have been more free ranging than focussed.

Failure to inform itself of the relevant facts

[53] Third, Mr O'Neill submitted that the respondent had failed to comply with its obligation to inform itself of the relevant facts. Mr O'Neill based this challenge on the duty which he argued was incumbent on the respondent to inform itself of the relevant facts before coming to its decision in respect of the nil determination. He relied upon the decision of the English Court of Appeal in *R (Balajigari)* v *Home Secretary* 2019 1 WLR 4647 at paragraph 70 of Lord Justice Underhill's judgment as summarising the relevant principles in this area.

> "First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a Wednesbury challenge …, it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken: see *R (Khatun)* v *Newham London Borough Council* [2005] QB 37, para 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries

> made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further inquiries if no reasonable authority possessed of that material could suppose that the inquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."

[54] Against this background, Mr O'Neill's point, as I understood it, was essentially that because the respondent had, as a result of what Mr O'Neill contended was its misconstruction of the provisions of Schedule 2, failed to appreciate that in making the nil determination it was imposing a ban on SEVs, it had not properly informed itself of the impact of that decision.

Article 1 of the First Protocol ECHR

[55] The final challenge of the respondent's decision advanced by the petitioners was the respondent had failed to comply with the rights of the first, second and third petitioners under the European Convention of Human Rights. In particular, the petitioners argued that the respondents' nil determination represented a disproportionate interference with the rights which the petitioners enjoyed under Article 1 of the First Protocol to the Convention. Mr O'Neill submitted that, in the circumstances of the nil determination and its effect on their businesses, the petitioner's Convention rights were engaged and it was necessary to consider whether the determination was disproportionate. He relied on *R (Mott)* v *Environment Agency* [2018] UKSC 10 [2018] 1 WLR 1022 per Lord Carnwath at paragraphs 14- 17, 22, 32-34.

[56] Mr O'Neill submitted that the approach to be taken to this assessment of proportionality was set out in the judgment of Lord Mance JSC in *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3 [2015] AC 1016 at [45] and [52]

> "45 There are four stages, which I can summarise as involving consideration of (i) whether there is a legitimate aim which could justify a restriction of the relevant protected right, (ii) whether the measure adopted is rationally connected to that aim, (iii) whether the aim could have been achieved by a less intrusive measure and (iv) whether, on a fair balance, the benefits of achieving the aim by the measure outweigh the disbenefits resulting from the restriction of the relevant protected right. The European Court of Human Rights has however indicated that these stages apply in relation to A1P1 with modifications which have themselves been varied over the years.
>
> …
>
> 52 I conclude that there is Strasbourg authority testing the aim and the public interest by asking whether it was manifestly unreasonable, but the approach in Strasbourg to at least the fourth stage involves asking simply whether, weighing all relevant factors, the measure adopted achieves a fair or proportionate balance between the public interest being promoted and the other interests involved. The court will in this context weigh the benefits of the measure in terms of the aim being promoted against the disbenefits to other interests. Significant respect may be due to the legislature's decision, as one aspect of the margin of appreciation, but the hurdle to intervention will not be expressed at the high level of 'manifest unreasonableness. In this connection, it is important that, at the fourth stage of the Convention analysis, all relevant interests fall to be weighed and balanced. That means not merely public, but also all relevant private interests. The court may be especially well placed itself to evaluate the latter interests, which may not always have been fully or appropriately taken into account by the primary decision-maker."

[57] Mr O'Neill submitted that it was incumbent on the respondent to satisfy the Court that each of the four steps had been satisfied. Whereas, the respondent had failed, he contended, either by way of averment or evidence, to address, in particular, the third and fourth steps.

[58] In advancing this submission, Mr O'Neill recognised that, when considering human rights in the present context, there were statements in a number of cases which suggested

that these rights only operated at a low level. He referred to what was said by Lord Hoffman in *Belfast City Council* v *Miss Behavin' Limited* (above) at paragraph [16]:

> "If Article 10 and Article 1 of the First Protocol are engaged at all, they operate at a very low level. The right to vend pornography is not the most important right of free expression in a democratic society and the licensing system does not prohibit anyone from exercising it. It only prevents him from using unlicensed premises for that purpose. Even if the council considered that it was not appropriate to have a sex shop anywhere in Belfast, that would only have put its citizens in the same position as most of the rest of the country, in having to satisfy their demand for such products by internet or mail order or going to more liberally governed districts like Soho. This is an area of social control in which the Strasbourg court has always accorded a wide margin of appreciation to member states, which in terms of the domestic constitution translates into the broad power of judgment entrusted to local authorities by the legislature. If the local authority exercises that power rationally and in accordance with the purposes of the statute, it would require very unusual facts for it to amount to a disproportionate restriction on Convention rights."

[59] He also referred to the observations of Mr Justice Stuart-Smith in *R (Bean Leisure Trading A Limited)* v *Leeds City Council*

> "[54] If the licensing regime engages the human rights of operators of lap dancing clubs at all, it does so at a very low level. While some may wish to argue that there are material distinctions between the sale of pornography and the running of a lap dancing venue, they have in common that they are areas of social control in which the broad power of judgment entrusted to local authorities by the legislature is accorded a wide margin of appreciation. If the local authority exercises that power rationally and in accordance with the purposes of the statute, it would require very unusual facts for it to amount to a disproportionate restriction on Convention rights. If the local authority does not refer to an applicant's Convention rights that may be an indication that it has given inadequate attention to them; but the question in every case is whether the applicant's rights have been infringed, which is a question of substance and generally not simply one of procedure: see *Belfast City Council* v *Miss Behavin' Ltd Northern Ireland* [2007] UKHL 19, [2007] 1 WLR 1420, [2007] LLR 312 at paras [16], [17], [37], [91]–[95]. Proportionality requires the striking of a fair balance between a claimant's economic interests and the general public interest: see *Tre Traktörer Aktiebolag* v *Sweden (Application No 10873/84)* (1991) 13 EHRR 309."

[60] Mr O'Neill sought to distinguish the present case from these authorities on the grounds that he was advancing human rights arguments in an EU law context. In this

regard, he referred to three cases which he submitted showed that so far as EU law was concerned, services such as those provided in the establishments operated by the first, second and third petitioners were analysed in economic terms. The rights of the operators were not diminished in any way because of the nature of the services being provided. The cases he referred to were *C-340/14 & C-341/14 Trijber (t/a Amstelboats)* v *Amsterdam* [2016] CMLR 38; *C-315/15 R (Hemming)* v *Westminster Council (Third Chamber CJEU)* [2018] AC 650; and *C-230/18 PI* v *Landespolizeidirektion Tirol (Sixth Chamber)* [2019] CMLR 31.

Submissions for the additional party

[61] As noted above, the additional party advanced its submissions primarily in writing supplemented by short oral submissions by Mr Welsh. He submitted that the respondent's Decision and, in particular, the nil determination ought to be reduced on four grounds.

Misdirection in law – taking account of irrelevant factors

[62] First, the additional party submitted that the respondent had misdirected itself in law by taking into account irrelevant factors. Mr Welsh made clear that he was advancing this ground on two bases.

[63] In respect of the first basis, Mr Welsh aligned himself with and adopted Mr O'Neill's submissions on behalf of the petitioners in relation to the proper construction of the 1982 Act and, in particular, Schedule 2. In this regard, and specifically on the question of remedy, Mr Welsh drew my attention to the decision of the English Court of Appeal in *Amid* v *Kirklees Metropolitan Borough Council* [2001] EWCA Civ 582 *per* Sedley LJ at [17], [20] and [21]. On this point, the relevant test was whether, had the respondent's committee been properly advised, it *might* have reached a different decision in respect of the nil determination. In

other words, was there a realistic possibility of this occurring. Given how narrowly the respondent's Committee had passed the nil determination, Mr Welsh noted that even a small difference might have led to a different outcome.

[64] The second basis upon which the additional party advanced its first ground was based on the Committee's reference to the Equally Safe document produced by the Scottish Government. This document contains the following definition of violence against women and girls:

> "Violence against women and girls encompasses (but is not limited to):
>
> » physical, sexual and psychological violence occurring in the family (including children and young people), within the general community or in institutions, including domestic abuse, rape, and incest;
>
> » sexual harassment, bullying and intimidation in any public or private space, including work;
>
> » commercial sexual exploitation, including prostitution, lap dancing, stripping, pornography and trafficking;
>
> » child sexual abuse, including familial sexual abuse, child sexual exploitation and online abuse;
>
> » so called 'honour based' violence, including dowry related violence, female genital mutilation, forced and child marriages, and 'honour' crimes."

[65] Mr Welsh submitted that this definition had to be seen in the context of what was said in the forward to the document:

> "Equally Safe is our country's strategy to take action on all forms of violence against women and girls. By this we mean the violent and abusive behaviour carried out predominantly by men directed at women and girls precisely because of their gender. Behaviour that stems from systemic, deep-rooted women's inequality, and which includes domestic abuse, rape, sexual assault, commercial sexual exploitation (like prostitution), and so called 'honour based' violence like female genital mutilation and forced marriage."

Read in this context, it was apparent, Mr Welsh contended that the strategy was directed against violent and abusive behaviour. Stripping was included in the definition of "violence

against women and girls" insofar as it formed part of the commercial sexual exploitation of women and girls and not more generally. Mr Welsh pointed out that there was no other reference to stripping in the Equally Safe document.

[66] The short point advanced by Mr Welsh was that it was apparent from what was said by two of the members of the respondent's committee during the course of the meeting on 31 March 2022 that they had misunderstood and had misapplied this definition. In particular, it did not appear that these members of the respondent's committee had recognised the inherent tension between the inclusion of stripping within the definition of violence against women and girls, on the one hand, and the fact that the Air Weapons and Licensing (Scotland) Act 2015 introduced a legislative scheme for licensing that very activity. This tension had been recognised in the Guidance produced by the Scottish Government in respect of the 2015 Act (at paragraphs [20] and [21]).

[67] As such, Mr Welsh argued the respondent's committee had misdirected itself and had had regard to an irrelevant factor.

Indirect discrimination

[68] The second ground advanced by the additional party was that the respondent's decision constituted indirect discrimination contrary to section 29(6) of the Equality Act 2010 which provides:

> "A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation."

[69] The definition of what constitutes indirect discrimination is set put in section 19 of the 2010 Act:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> (c) it puts, or would put, B at that disadvantage, and
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

[70] In advancing this ground, Mr Welsh started by noting that it was accepted by the respondent in its answers that the nil determination is a "provision, criterion or practice" for the purposes of section 19. Furthermore, the respondent accepts that the nil determination would put women at a particular disadvantage in comparison with others who share the protected characteristic of sex. Accordingly, the question was only whether section 19(2)(c) and (d) had been satisfied.

[71] In relation to section 19(2)(c), Mr Welsh submitted that, in the present case, there was not much of a gap between (b) and (c). He urged me to reject the respondent's response that the additional party's argument was premature. It was clear from the wording of section 19(2) and the use of the words "would apply" and "would put" that it was not necessary for the provision in question to have been actually put into practice. This was also consistent with the Statutory Code of Practice which stated expressly at paragraph 5.8 that:

> "It is a requirement of the Act that the provision, criterion or practice puts or would put people who share the service user's protected characteristic at a particular disadvantage when compared with people who do not have that characteristic. The Act also requires that it puts or would put the particular service user at that disadvantage. <u>This allows challenges to provisions, criteria or practices which have</u>

> not yet been applied but which would have a discriminatory effect if they were." (Emphasis added).

[72] In this regard, Mr Welsh drew my attention to affidavits which had been lodged by three members of the additional party setting out the impact that the nil determination would have on them.

[73] Provided that the Court is satisfied that the requirements of section 19(2)(a) to (c) are satisfied, the onus then shifts to the respondent to establish the justification (*R (Independent Workers Union)* v *Mayor of London* (CA) [2020] 4 WLR 112 at [37] citing *Bilka Kaufhaus GmbH* v *Karin Webster von Hartz* (Case 170/84) [1986] ECR 1607 at paragraphs 35 to 36). Furthermore, the Court required to conduct its own assessment of evidence put forward in order to decide whether an impugned measure was a proportionate means of achieving a legitimate aim. The court was not merely exercising a review jurisdiction.

[74] In the present case, Mr Welsh submitted that the respondent had neither averred nor led evidence to enable the requirement of section 19(2)(d) to be determined. It followed that the respondent could not succeed in demonstrating that the nil determination was proportionate.

Public Sector Equality Duty

[75] The third ground advanced by the additional party was that the respondent had failed to comply with the Public Sector Equality Duty in terms of section 149(1) of the Equality Act 2010. This section provides as follows:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> > (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

[76] There was no dispute that this duty applied to the respondent in relation to making the Decision and, in particular, the nil determination.

[77] Mr Welsh submitted that correct approach to this duty was set out in *McHattie* v *South Ayrshire Council* [2020] CSOH 4 in the opinion of Lord Boyd of Duncansby at paragraph [24] by reference to the judgement of Lord Justice McCombe in the English Court of Appeal decision of *R (Bracking)* v *Secretary of State for Work and Pensions* [2013] EWCA Civ 1345:

> "i) The public authority decision maker must be aware of the duty to have 'due regard' to the relevant matters;
> ii) The duty must be fulfilled before and at the time when a particular policy is being considered;
> iii) The duty must be 'exercised in substance, with rigour, and with an open mind'. It is not a question of 'ticking boxes'; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;
> iv) The duty is non-delegable; and
> v) Is a continuing one."

[78] Mr Welsh emphasised that the duty is an onerous one. Its purpose is to create an atmosphere in which decisions are to be taken. The duty was not delegable.

[79] Against that background, Mr Welsh submitted that the respondent had failed to demonstrate that the duty had been complied with. Although an Integrated Impact Assessment had been produced and had been before the respondent's Committee, this was not sufficient. The assessment identified the discriminatory effect of the nil determination if implemented. However, it failed to address how that negative effect might be minimised, mitigated or otherwise addressed.

Article 8 ECHR

[80] The final ground advanced by the additional party was that the respondent's Decision constituted a disproportionate interference with the rights of its members in terms Article 8 of the European Convention of Human Rights.

[81] As a preliminary point, Mr Welsh recognised that the additional party required to demonstrate that it, as a trade union, was entitled to bring proceedings in terms of section 7(1) of the Human Rights Act 1998. That section requires that the person bringing proceedings against a public authority must be the victim of the alleged unlawful act. Mr Welsh submitted that representative claims were permissible in terms of the Strasbourg jurisprudence where to find otherwise would mean that the protection of rights under the Convention became ineffectual and illusory. He accepted that Strasbourg does not countenance applications that are an *actio popularis* which raise issues in the abstract without reference to the individuals whose rights have been interfered with. Mr Welsh was clear that the present intervention by the additional party was not such. He reminded me of the affidavits from three women, members of the additional party, who worked in the establishments operated by the petitioners and are, therefore, affected by the respondent's Decision. Mr Welsh emphasised that he was not urging the Court to go beyond what had been allowed by the Strasbourg Court. In this regard, Mr Welsh referred me to a line of three decisions of the European Court of Human Rights: *Lizarraga* v *Spain* (2007) EHRR 45; *Beizaras and Levickas* v *Lithuania* (Case 41288/15); and *Centre of Societies for Krishna Consciousness in Russia* (Case 37477/11).

[82] Mr Welsh submitted that, in the circumstances of the present proceedings, there were a number of factors which meant, in combination, that the members of the additional party required to utilise it as the means of vindicating their rights in respect of the respondent's

decision. He pointed to what he described as the prohibitive costs of entering proceedings together with the costs risks associated with being a party to ongoing proceedings. He also highlighted the fact that without the protection of anonymity, the additional party's members were at risk of victimisation and harassment.

[83] Turing to the merits of the argument in terms of Article 8, Mr Welsh submitted that the rights of the additional party's members were engaged. Mr Welsh advanced this submission on the basis that the Strasbourg Court had recognised that Article 8 could be engaged where an impugned measure had a seriously negative effect on the individual's private life (*Denisov* v *Ukraine (Case 76639/11).* In considering whether or not this threshold had been reached, the Court considered (i) the impact on the individual's "inner circle"; (ii) the individual's opportunities to establish and develop relationships with others; and (iii) the impact on the individual's reputation. In this regard, Mr Welsh also drew my attention to the decision of the Court in *Platini* v *Switzerland* (Case 526/18) albeit it was only available in French and in an unofficial translation from French and *Gumenyuk and others* v *Ukraine* (Case 11423/19).

[84] On this basis, Mr Welsh submitted that the consequences of the respondent's Decision were so severe in respect of the additional party's members as to engage Article 8. He referred me again to the three affidavits prepared by women who worked in the establishments operated by the petitioners. These referred to significant disruption to the women concerned consequent upon the closing of these establishments including financial hardship; the breaking up of families and the need to move away from Edinburgh.

[85] If the rights of the additional party's member in terms of Article 8 were engaged, it would be necessary for the respondent to demonstrate that its Decision and, in particular, the nil determination, was proportionate. However, for reasons akin to those that he had

advanced in respect of the ground based on indirect discrimination, Mr Welsh submitted that the respondent had simply not meaningfully engaged with the issue of proportionality.

Submissions for the respondent

[86] Ms O'Neill for the respondent began her submissions by moving me to dismiss the petition and to sustain her first plea in law.

The Legislative Background

[87] Ms O'Neill began by making the point that the legislative framework established by the Air Weapons and Licensing (Scotland) Act 2015 was designed to enable local authorities such as the respondent to licence SEVs and, thereby, to bring previously unregulated activity within the framework of the Civic Government (Scotland) Act 1982.

[88] The rationale and purpose of the 2015 Act was set out in the Policy Memorandum which accompanied the Bill. Ms O'Neill referred to the following passage which was specifically in relation to the licensing of SEVs:

> "250. The view of the Scottish Government is that a specific licensing regime for sexual entertainment venues (of which the Scottish Government believes there are around 20 in Scotland) is the best solution for future regulation of the industry. It removes uncertainty around attempting to regulate under alcohol licensing matters that go beyond the remit of that scheme. It offers local licensing authorities the ability to consider local circumstances and develop approaches appropriate to those circumstances. This would include the ability to set a desired number of sexual entertainment premises for their area (and for that number to be zero). It would also include the ability to set conditions that control the conduct of activities on premises in their area."

In this regard, Ms O'Neill drew my attention to the fact that the Memorandum refers to the ability of a local authority to set a "desired number" of SEVs.

[89] She also highlighted that Memorandum explained that Scottish Government was creating a new regime for SEVs which utilised the pre-existing licensing arrangements contained in the 1982 Act.

[90] Finally, before leaving the Memorandum, Ms O'Neill drew my attention to a number of passages that she argued could be read consistently with the respondent's construction of the statutory provisions – namely, that the determination of an appropriate number did not foreclose the subsequent consideration of an application. In making these submissions, she recognised both that none of these references explicitly supported the respondent's construction and, in any event, that the Court required to consider the provisions themselves.

[91] Turning to the provisions introduced by the 2015 Act, Ms O'Neill submitted that the steps which a local authority required to take were as follows:

- First, the local authority requires to resolve that Schedule 2 to the 1982 Act shall have effect in their area from the day specified in the resolution (section 45B(1)).
- Second, at least 28 days before the date specified for the coming into effect of Schedule 2, the local authority must publish notice that it has passed the resolution (Section 45B(4)).
- Third, where a resolution has been passed, the local authority must prepare a statement of its policy with respect to the exercise of its functions in relation to the licensing of SEVs (Section 45C(2)).
- Fourth, the local authority must publish the SEV policy statement at the same time and in the same manner as it publishes the notice of the resolution (Section 45C(4)).

[92] Thereafter, once the resolution had been passed, the local authority was required to determine applications that were made to it for a licence. The local authority could not

consider any application for a licence before the day on which Schedule 2 was to have effect and, at that point, the local authority was not to grant any applications until it had considered all such applications (Paragraph 25 of Schedule 2). The local authority was required to consider each "relevant application" made to it within 3 months of the date on which the application was made and reach a final decision within 6 months of the end of that 3 month period (Section 45D(2)). Where an application has been made, the local authority must grant or refuse that application (Paragraph 9(1) of Schedule 2). Where the authority failed to determine the licence within the prescribed period the licence is deemed to have been granted (Section 45D(4)).

[93] Ms O'Neill noted that none of this mechanism was disapplied or qualified by reference to the determination made in terms of paragraph 9(5A) of Schedule 2. She submitted that if the draftsperson had intended the Paragraph 9(5A) determination to be an exception to the process for making and dealing with applications as was contended for by the petitioners, then this would have been made explicit in the drafting. However, no such distinction was made and, apparently, applications which, according to the petitioner, the local authority was bound to refuse still required to be processed in the same way. This process included the receipt of objections and representations (Paragraph 8 of Schedule 2). Ms O'Neill accepted that these were issues of procedure and process but, nonetheless, submitted that they were supportive of the respondent's construction of the legislation.

Prematurity

[94] Ms O'Neill's short point under this heading was that none of the petitioners had made an application for a licence. Even if such an application were to be made, it could not be considered until 1 April 2023. In any event, the respondent's position was that, even on

the assumption that the determination of the appropriate number of SEVs remained nil (which could not be assumed), that would not preclude those applications being granted.

[95] Ms O'Neill advanced this argument on two bases. First, she submitted that when the legislation was properly construed, a nil determination in terms of paragraph 9(5A) did not have the effect contended for by the petitioners.

[96] Second, she submitted that it would be open to respondent to make a new determination in terms of Paragraph 9(5A) of Schedule 2. She submitted further that, in light of the motion passed by the respondent on 27 October 2022 (see paragraph [18] above), sitting in full council, to consider a report from the respondent's officers in early 2023, this was not merely hypothetical.

The proper construction of Schedule 2

[97] In considering the legislation, Ms O'Neill began by pointing out that the ground of refusal linked to the determination was to be found in paragraph 9(5) and not paragraph 9(3). The latter opened with the words "A licence under this Schedule shall not be granted". Paragraph 9(3) could, fairly, be described as containing mandatory grounds of refusal. This description had been used by Lord Neuberger in *Miss Behavin'* (above) when referring to the equivalent paragraph within the Northern Irish provisions (at paragraph [92]). Ms O'Neill observed that had the draftsperson wished to require the refusal of applications over the paragraph 9(5A) determination, then paragraph 9(3) would have been the obvious place but this had not been done.

[98] Instead, the ground of refusal which was linked to the paragraph 9(5A) determination was to be found in paragraph 9(5)(c). The grounds in paragraph 9(5) were referred to in paragraph 9(4). The opening of paragraph 9(4) was couched in language that

was redolent of the exercise of discretion: "*But without prejudice to sub-paragraph (3) above, the local authority shall refuse an application for the grant or renewal of a licence if, in their opinion, one or more of the grounds specified in sub-paragraph (5) below apply.*" In respect of these grounds, the local authority was being asked to form an opinion as to their application. She also pointed out that paragraph 9(5)(c) does not refer, in terms, to the determination made in paragraph 9(5A). For example, the provisions did not state expressly that the local authority was bound by the determination made in terms of paragraph 9(5A).

[99] Ms O'Neill continued that, on the respondent's construction, the determination made in terms of paragraph 9(5A) continued to be of importance. It was, in her submission, designed to create transparency and give guidance. Importantly, however, it was not in her submission designed, in itself, to preclude or prevent the subsequent grant of applications.

[100] Ms O'Neill submitted that in considering the relevant legislative provisions, I required to have regard to analogous provisions in other areas of licensing law together with the way in which those provisions had been construed by the courts.

[101] In this regard, Ms O'Neill draw my attention to Section 10(3) of the 1982 Act which provided that:

> "...the grant of a taxi licence may be refused by a licensing authority for the purpose of limiting the number of taxis in respect of which licence are granted by them if, but only if, they are satisfied that there is no significant demand for the services of taxis in their area which is unmet."

[102] This provision had been considered by the Inner House in *Coyle* v *City of Glasgow Council* 1997 SC 370. In that case, the council had determined that 1428 was the number of taxi licences which were required to meet the demand for taxi services. It had then refused an application for a taxi licence on the basis that the limit which the council had set had been

reached. The Lord President, Lord Rodger, in giving the opinion of the Court, construed section 10(3) as follows:

> "Section 10(3) gives the committee a discretion to refuse to grant a licence 'if, but only if, they are satisfied that there is no significant demand for the services of taxis in their area which is unmet'. Two things stand out. First, the use of the phrase 'if, but only if' emphasises how tightly this discretion is drawn. Secondly, the use of the present tense throughout the condition shows that the committee's assessment must be made in relation to the situation at the time when the application falls to be considered, in this case 10 April 1996. In other words when making their decision the committee required to be aware of the current demand for the services of taxis and to be satisfied that there was no significant unmet demand for those services." (at page 372)

[103] Ms O'Neill submitted that the Court's approach to section 10(3) would have been known to the draftsperson adapting Schedule 2 for the purposes of SEVs. She recognised that there were a number of differences in the wording used in section 10(3) and Paragraph 9 of Schedule 2. In particular, she accepted that section 10(3) used "may be refused" as opposed to "shall refuse" in paragraph 9(4). Furthermore, there was no equivalent of paragraph 9(5A). However, she submitted that when the discretionary nature of the language in paragraph 9(4) was considered, these differences were not significant.

[104] Ms O'Neill also referred me to the Licensing (Scotland) Act 2005 which provides for licensing the sale of alcohol. This requires a Licensing Board to prepare and publish a licensing policy statement that includes, among other things, a statement as to the extent to which the Board considers there to be overprovision of licensed premises within the Board's area (Section 7). The provisions which then deal with the determination of licence applications provide that the Board must, where a ground for refusal of an application for a licence exists, refuse the relevant application (section 23(4)). Furthermore, one of the grounds for refusal is that the Board considers that, if the application were to be granted, there would, as a result, be overprovision of licenses premises (s23(5)(e)). These provisions

were considered by the learned Sheriff Principal of North Strathclyde in *Martin McColl Limited* v *West Dunbartonshire Licensing Board* 2018 SLT (Sh Ct) 322. Ms O'Neill drew my attention in particular to the learned Sheriff Principal's comment on the policy statement:

> "The effect of the policy is to create a rebuttable presumption against the grant of an application where overprovision has been identified. However an application still requires to be determined on its own merits and it is understood that there may be exceptional cases in which an applicant is able to demonstrate that the grant of the application would not undermine the licensing objectives, or those objectives would not be undermined if the applicant's operating plan were to be modified or the grant of the licence made subject to appropriate conditions."

[105] Ms O'Neill submitted that the report which had been prepared by the respondent's officers and which was before the respondent's Committee took an approach to Schedule 2, in general, and to the paragraph 9(5A) determination, in particular, which was consistent with the learned Sheriff Principal in the *Martin McColl* case. On this approach, the determination established a rebuttable presumption which then had to be considered in the context of each application.

[106] Ms O'Neill submitted that nether the petitioners nor the additional party had provided any explanation as to why the legislation should be construed so as to deprive local authorities from being able to exercise discretion in particular cases. As she had sought to demonstrate by a consideration of other licensing regimes, such an approach to the licensing of SEVs would represent a very different approach and no adequate explanation had been put forward as to why this should be the case. If it was being contended that the reason for the differences in the regime applicable to SEVs was to enable local authorities to impose a complete ban, it was surprising that the legislation should apparently impose an additional procedural hurdle in their way. Furthermore, it was all the more surprising that, if this result was what was intended, the legislative provisions should not more explicitly reflect this.

[107] The final submission that Ms O'Neill made in response to the challenges based on the construction of the legislation was that, even if there was an error of law – and that as a matter of law the respondent's Decision of 31 March 2022 precluded the subsequent grant of any SEV licence – that error was not such as to vitiate the determination that has already been made. Ms O'Neill advanced this submission on the basis that I should infer that, but for the supposed error, the result would almost certainly have been the same and that, therefore, no prejudice accrued to the petitioners (or the additional party) from the error. Any prejudice resulted from the respondent's Decision itself. In this regard, she referred me to *Douglas* v *Perth and Kinross Council* 2017 SC 523 at paragraph [46]. When I pressed Ms O'Neill as to the basis for this submission, she did no more than direct me to consider the deliberations of the respondent's Committee and the transcript of the meeting on 31 March 2022 in their entirety.

Challenge to the policy statement

[108] As a starting point, Ms O'Neill noted that the petitioners no longer advanced any challenge based on the sequencing of the steps which had been taken by the respondent. In other words, no criticism was made on the basis that the respondent's Committee had made a determination in terms of paragraph 9(5A) of Schedule 2 before adopting a Sexual Entertainment Venues licensing policy statement in terms of section 45C(2) of the 1982 Act.

[109] Thereafter, Ms O'Neill was able to state the respondent's position in relation to the challenge she understood to be based on the policy statement shortly. First, she noted that no challenge had been taken to the policy statement which had been adopted by the respondent. There was no suggestion that the statement which had been adopted was unlawful. Second, in her submission, there was simply no requirement for the policy

statement adopted in terms of section 45C(2) to set out reasons for the determination made in terms of paragraph 9(5A) of Schedule 2.

Failure to have regard to guidance issued by the Scottish Ministers

[110] Turning to the alleged failure by the respondent's Committee to have regard to the Scottish Government Guidance, Ms O'Neill noted that there was no dispute that the relevant guidance - The Scottish Ministers' "Air Weapons and Licensing (Scotland) Act 2015: Guidance on the Provisions for Licensing of Sexual Entertainment Venues and Changes to Licensing of Theatres" (2019) – was before the Committee when it reached its Decision on 31 March 2022. Section 45B(7) required the respondent to "have regard to" any guidance issued by the Scottish Ministers. Ms O'Neill submitted that the respondent's Committee had clearly done this. The question as to what weight to attach to that guidance was a matter for the Committee (*City of Edinburgh Council* v *Secretary of State for Scotland* 1998 SC (HL) 33 at 42 to 43 per Lord Clyde).

The Equally Safe Document

[111] Addressing the argument advanced, on behalf of the additional party, in relation to the Scottish Government's Equally Safe document, Ms O'Neill submitted that no clear and relevant ground of review was disclosed by the arguments advanced on behalf of the additional party. The additional party's argument presupposed that there was a "correct" and, therefore, objectively verifiable, construction of the definition of "violence against women and girls" with in the Equally Safe document. However, Ms O'Neill submitted that this definition was not amenable to such an assessment. It was essentially a matter of policy about which reasonable people might disagree and in respect of which there was a wealth of academic literature. It was not for the Court to resolve these competing views and,

moreover, there was no basis upon which it could properly do so. As such, the respondent's Committee could not be criticised for having had regard to either the definition or the Equally Safe document. Furthermore, Ms O'Neill also urged caution in relation to how I should approach the passages from the deliberations of the members of the Committee to which Mr Welsh had drawn my attention. These were remarks made in the context of a longer meeting and should be seen in that broader context.

Failure to provide proper and adequate reasons

[112] In response to the challenge taken by the petitioners on the basis of the alleged inadequacy of the reasons given by the respondent, Ms O'Neill began by highlighting the fact that, within the statutory scheme, whereas reasons require to be given, on request, in respect of decision in relation to a particular application (paragraph 23(2) of Schedule 2), there was no equivalent provision in respect of a determination made in terms of paragraph 9(5A).

[113] According to Ms O'Neill, this distinction was entirely appropriate. The determination as to the appropriate number of SEVs for their area was a policy decision. In this regard, Ms O'Neill referred to the decision of Sheriff Ross (as he then was) in *Tesco Stores* v *City of Glasgow Licensing Board* 2013 SLT (Sh Ct) 75 at paragraphs [54] to [67]. Sheriff Ross gave a detailed analysis of the extent to which the duty to give reasons applied to the Licensing (Scotland) Act 2005. In particular, he highlighted the fact that, under the 2005 Act, there was no statutory duty to give reasons for the designation of overprovision required by section 7 of the 2005 Act. Furthermore, in relation to the duty to give reasons for refusing an application (under section 23(4)), Sheriff Ross concluded that the issue of adequacy is a

matter of fact and degree. In making that assessment, Sheriff Ross drew particular attention to the wording that had been used to frame the duty imposed on the licensing board.

[114] Ms O'Neill drew an analogy between the duty incumbent on licensing boards in respect of overprovision contained in section 7 of the 2005 Act and the duty to determine the appropriate number of SEVs in paragraph 9(5A) of Schedule 2. On this basis, she submitted that as there was noduty to give reasons in respect of section 7 of the 2005 Act, there was also no such duty in relation to the paragraph 9(5A) duty.

[115] In the alternative, she submitted that I should approach the content of any such duty as had been done in *Tesco Stores*. The reasons given did not require to be elaborate or detailed. As such, when the terms of the Committee's discussion together with the minutes recording their decision, were considered, the respondent had discharged any duty incumbent on it to give reasons. An informed reader considering this material would not have been in any doubt as to either the reasons for the determination or the material considerations taken into account.

[116] Finally, on this issue, Ms O'Neill submitted that, in the present case where a report had been submitted to the Committee which set out two options and the Committee went on to choose one of those options, it was also open to me to infer the Committee's reasoning from the report. In this regard, Ms O'Neill referred to *Oakley* v *South Cambridgeshire District Council* [2017] 1 WLR 3765 at paragraph [65] as an illustration of this type of situation.

Failure to inform itself of the relevant facts

[117] In response to this challenge, Ms O'Neill submitted that it was apparent from the material before the Court that the respondent had gone to considerable lengths to inform itself of the facts that might be relevant to the determination. She also noted that the

petitioners had not identified specific facts about which the respondent had allegedly failed to inform itself.

[118] Ms O'Neill accepted that the relevant principles applicable in this area had been set out in *Balajigari* (above) referred to by the petitioners. However, she submitted that it was important to have regard to the nature of the decision which the respondent was taking in making a determination in terms of Paragraph 9(5A). This was a policy decision. It was not a decision which depended upon proof of harm by reference to empirical evidence.

EU law arguments

[119] In dealing with the petitioner's arguments based on EU law, Ms O'Neill dealt first with the position of the fourth petitioner. She submitted that the fourth petitioner's rights were not engaged by the respondent's Decision. Put another way, the fourth petitioner's rights did not require the grant of an SEV licence. The Decision was not directed in any respect at the fourth petitioner's employment relationship and it did not seek to impose restrictions or limitations based on residence or nationality. It was not intrinsically liable to affect workers who are nationals of other member states more than national workers (see Case C-437/17 *Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach GmbH* v *EurothermenResort Bad Schallerbach GmbH* (13 March 2019) at [19]). In any event, even if the fourth petitioner's rights were engaged, then the respondent's Decision both pursued a legitimate aim and was proportionate.

[120] Turning to the EU law argument advanced on behalf of the first to third petitioners, Ms O'Neill raised a preliminary point. She submitted that these were new arguments for which permission had not been granted. She contended that it was unfair for the

respondent to have to deal with new arguments being brought in only at the point of adjustment of the petition.

[121] In terms of the merits, Ms O'Neill accepted that the Provision of Services Regulations 2009 (as amended) remained in force and formed part of retained EU law by virtue of section 2 of the European Union (Withdrawal) Act 2018. She also accepted that relevant "authorisation scheme" relating to SEVs comprised the provisions of the 1982 Act together with the respondent's Decision. Beyond consideration of the 2009 Regulations, she submitted that the first to third petitioners had no retained EU law rights to rely upon.

[122] In relation to Regulation 15, Ms O'Neill submitted that whether or not she was correct as to the correct construction of Schedule 2 of the 1982 Act, there had been no failure to comply by the respondent. She submitted that it could not be the case that the mere exercise of a discretion constituted arbitrariness in terms of Regulation 15. Otherwise, all decisions taken in relation to licensing would fall foul of it. As to transparency, she drew attention to the fact that both the policy statement and the determination were published in advance of the coming into force of the licensing regime. As to proportionality, she submitted that for the reasons she would set out in relation to the Human Rights arguments advanced by the petitioners and additional party, the respondent's Decision was both pursuing a legitimate aim and was proportionate.

[123] Ms O'Neill dealt with the challenges based on Human Rights raised by the petitioners and the additional party separately as different issues arose in relation to each.

Article 1 of the First Protocol ECHR

[124] In relation to the arguments advanced by the first to third petitioners based on their rights in terms of Article 1 of the First Protocol, Ms O'Neill started by highlighting that, on

her argument, the determination was not in itself a deprivation, control or other form of interference with the petitioner's possessions. The issue of proportionality could only be considered in the context of a particular application.

[125] However, even if she was wrong as to the correct construction of the 1982 Act, she submitted that the respondent's Decision was still compatible with the rights of the first to third petitioners. In support of this submission, she advanced a series of propositions based on the judgments in *Miss Behavin'* (above).

- First, in considering whether a public body such as the respondent has acted compatibly with Convention rights the Court is concerned with the merits of the decision that has been taken and not the adequacy of the decision-making process adopted by the public body in reaching its decision: Lord Hoffmann at paragraph [13], Baroness Hale at paragraph [31] and Lord Mance at paragraph [44].
- Second, it is for the Court to consider the justification for the measure in question on its merits, regardless of whether the decision-maker had done so: Baroness Hale at paragraph [31].
- Third, while the extent to which a public body has in fact weighed competing considerations will inform the Court's analysis of a measure's proportionality, proportionality is not to be judged by reference to the quality of the debate which proceeded a measure's adoption: Lord Rodger of Earlsferry at paragraph [24], (by reference to *R (SB)* v *Governors of Denbigh High School* [2007] 1 AC 100).
- Fourth, in assessing the Convention compatibility of a measure such as the licensing of sex shops (or SEVs) the Court "is bound to acknowledge that the local authority is much better placed than the court to decide whether the right of sex shop owners to sell pornographic literature and images should be restricted for the prevention of

disorder or crime, for the protection of health or morals, or for the protection of the rights of others.": Baroness Hale at paragraph [37].

- Fifth, to the extent that Article 1 of Protocol 1 is engaged at all, it operates, in this context, at very low level: Lord Hoffmann, at paragraph [16] and Lady Hale at paragraph [38]. As the right to vend pornography is not the most important right in a democratic society, nor is the right to operate a sexual entertainment venue.
- Sixth, the extent of debate or consideration (or lack of it) that might be expected to be had reflects the (relative lack of) importance of the rights of operators in this context: "in a case like the present, it is hard to see what anyone could have said beyond reciting the value of the right to sell and use the pornographic material. Similarly, the value of that right is all that the council could have been expected to consider. So, at most, the council are criticised for failing to take into account what can only be the modest value of that right": Lord Rodger, at paragraph [28].
- Seventh, where the question is one of control of use member states are accorded a wide margin of appreciation (or in the domestic context a generous discretionary area of judgment) when striking the balance between the general interest of the community and the protection of individual rights: Lord Neuberger of Abbotsbury, at paragraph [99], (by reference to *Jacobson* v *Sweden* (1989) 12 EHRR 56).
- Finally, given that revocation of an existing licence "with its substantial detrimental effect" can be justified, it is hard to conceive of circumstances in which the refusal of a grant of a licence in this context could amount to an infringement of the property owner's A1P1 rights: Lord Neuberger, at paragraph [102] by reference to *Fredin* v *Sweden* (1991) 13 EHRR 784

[126] Turning to the Respondent's Decision, Ms O'Neill began by observing that there was no dispute that the legislation clearly enabled the respondent to make a nil determination. Furthermore, no challenge was taken against the legislation itself. It also appeared to be accepted that the respondent's aims of preventing public nuisance, crime and disorder; securing public safety; protecting children and young people from harm; and reducing violence against women were legitimate. These aims had been set out in the report which was before the respondent's Committee. The Committee had also had before it competing representations on the question of the appropriate number of SEVs together with evidence as to the potential impact on operators such as the first to third petitioners. In this type of situation involving issues about which opinions in a democratic society may differ, Ms O'Neill submitted that the respondent was entitled to conclude that determining the appropriate number of SEVs at zero was proportionate to its legitimate aim. In this regard, she referred to *James* v *United Kingdom* [1986] 8 EHRR 123 at paragraph [46]). This was particularly so, where, as here, the rights relied upon by the petitioners operated at a "low level".

[127] Ms O'Neill also rejected the petitioner's submission that the assertion of Convention rights in an EU law context made any significant difference. She submitted that, for present purposes, she could detect no significant difference in the Court's approach in *Lumsdon* (above).

Article 8 ECHR

[128] In respect of the additional party's arguments based on Article 8 of the Convention, the respondent's principal response was that the additional party had no standing to make this argument. A person who claims that a public body has acted (or proposed to act) in a

way made unlawful by section 6 of the Human Rights Act 1998 may bring proceedings in the appropriate court but only if he or she is (or would be) a victim of the unlawful act – Human Rights Act 1998, section 7(1). For the purposes of section 7, a person is a victim of an unlawful act only if he or she would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act - Human Rights Act 1998, section 7(7).

[129] Against this background, Ms O'Neill's short submission was that the additional party was, in itself, neither a victim nor would it have such standing before the Strasbourg Court. Ms O'Neill drew my attention to the case of *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği* v *Turkey*, (Application no. 37857/14, 7 December 2021), at paragraphs 38 to 43:

> "38. According to the Court's established case-law, associations will normally only be granted victim status if they have been directly affected by the measure in question …. It is important to reiterate in this respect that the sole fact that a non-governmental organisation considers itself as a guardian of the collective interests of its members does not suffice to make it a victim within the meaning of Article 34 of the Convention (see *Kalifagiannis and Prospert* v. *Greece (dec.)*, § 50, no. 74435/14, 9 June 2020). That is because the Convention does not envisage the bringing of an *actio popularis* for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention (see *Aksu*, cited above, § 50, and *Burden* v. *the United Kingdom* [GC], no. 13378/05, § 33, ECHR 2008).
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> 39. The Court reiterates that, like the other provisions of the Convention, the term "victim" in Article 34 must also be interpreted in an evolutive manner in the light of conditions in contemporary society. Indeed, in modern day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means – sometimes the only means – available to them whereby they can defend their particular interests effectively. Moreover, the standing of associations to bring legal proceedings in defence of their members' interests is recognised by the legislation of most European countries (see *Gorraiz Lizarraga and Others*, cited above, § 38, and *Beizaras and Levickas* v. *Lithuania*, no. 41288/15, § 81, 14 January 2020)

> 40. In this regard the Court reiterates that it has granted victim status to associations in cases relating to Article 6 § 1 of the Convention in respect of proceedings where the substance of the applicant association's claim before the domestic courts concerned its members' interests in respect of their private lives, families and homes and their right to participate in the decision making process (see, in particular, *Gorraiz Lizarraga and Others*, cited above, §§ 9-10, 32… Having regard to the fact that the applicant associations in question had been set up with the specific purpose of defending their members' interests before the courts, that their members were directly affected by the impugned measures in question and that they had been granted legal standing in the domestic proceedings, the Court did not regard their respective applications as constituting, respectively, an *actio popularis* and examined the cases from the standpoint of Article 6 § 1 of the Convention.
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> 41. According to the above-cited case-law, there are two principal reasons why an association may not be considered to be a direct victim of an alleged violation of the Convention. The first reason is the prohibition on the bringing of an *actio popularis* under the Convention system; this means that an applicant cannot lodge a claim in the public or general interest if the impugned measure or act does not affect him or her directly. It follows that in order for an applicant to be able to argue that he is a victim, he must produce reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient in this respect (see *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 101). The second reason concerns the nature of the Convention right at stake and the manner in which it has been invoked by the applicant association in question. Certain Convention rights, such as those under Article 2, 3 and 5, by their nature, are not susceptible of being exercised by an association, but only by its members… In *Asselbourg and Others* (cited above), when declining to grant victim status to the applicant association, the Court noted that the applicant association could only act as a representative of its members or employees, in the same way as, for example, a lawyer represented his client, but could not itself claim to be the victim of a violation of Article 8."

[130] Based on the Court's approach in this case, Ms O'Neill submitted that the additional party would not be accorded victim status before the Strasbourg Court. In the present case, the additional party based this part of its challenge to the respondent's Decision on the alleged interference with the rights of its members to a private life in terms of Article 8. That was a right which could only be asserted by those members and not by the additional party on their behalves. This was not analogous to those cases where the Strasbourg Court had granted victim status to an association which was itself integrally involved in litigation which also involved its members such as the *Lizarraga* case (above) referred to by Mr Welsh.

In this regard, Ms O'Neill highlighted that it was important to appreciate that in both the *Lizarraga* case and the *Beizaras and Levickas* cases relied upon by Mr Welsh, the individual victims were, unlike in the present proceedings, parties before the Strasbourg Court. The issue in those cases was one concerning the exhaustion (or otherwise) of domestic remedies. In the third case relied upon by Mr Welsh, the *Centre of Societies for Krishna Consciousness* case (above), the Court had held that the Centre was itself a victim of the hostile speech targeting the Krishna movement.

[131] Ms O'Neill submitted that there were important reasons why it was not appropriate for a body such as the additional party to advance claims which were personal to its individual members. The additional party's Convention rights claim concerned an aspect of Article 8 of the Convention that required the complainer to demonstrate serious negative effects on their private life, on their 'inner circle' and on their opportunities to establish and develop relationships with others. The Court must be satisfied that it has compelling evidence that the requisite threshold of severity has been attained. Any such breach is inevitably highly personal and fact specific. Ms O'Neill submitted that it is not appropriate (and is not reflective of Strasbourg case law) to treat a representative party such as a trade union as having victim status based on averments and submissions about 'some' of its members. The additional party's members were not a homogenous group and the impact of the respondent's Decision on them cannot be assumed to be the same on all of them.

[132] In respect of the merits of the additional party's Article 8 challenge, Ms O'Neill submitted that, based on the material which had been lodged by the additional party, the threshold in the *Denisov* case (above) had not been met. She submitted that the respondent's Decision in no way amounted to denigration of the reputations of the additional party's members. She pointed out that on the facts of the *Denisov* case itself, the Court did not

consider that there had been a breach of Article 8 notwithstanding the fact that, in that case, the applicant had demonstrated a reduction in salary and prospective pension benefits. The Court had not been satisfied that the "inner circle" of the applicant's private life had been affected. Ms O'Neill submitted further that the *Platini* case fell to be distinguished on its particular facts.

[133] Finally, Ms O'Neill referred me *to R (Independent Workers' Union GB)* v *Mayor of London* (QBD) [2019] 4 WLR 118. This was a first instance decision dealing with a challenge to changes to the Congestion Charge in London to remove an exemption for taxis and private hire vehicles. The challenge had been brought by, among others, two individual claimants. Mr Justice Lewis had concluded that the changes did not involve an interference within the meaning of Article 8(1) of the Convention.

> "92 The removal of an exemption from the congestion charge for private hire vehicles does not involve an interference within the meaning of Article 8.1 of the ECHR. It is a measure concerned with managing the use of the available road system and seeks to remove the exemption from liability to charges for one group of vehicles, namely private hire vehicles. As with many legislative changes to a regulatory scheme, those affected by the changes may well have to adapt their behaviour in response to the changes. The fact that a person may have to work different or longer hours, or both, in order to earn enough to pay increased overheads because of a change in the regulatory scheme would not normally give rise to an interference with private or family life within the meaning of Article 8.1 of the ECHR. Not all changes in a regulatory scheme, even those which have economic impacts for individuals, involve an interference within Article 8.1 which has to be justified under Article 8.2 of the ECHR…."

Although the decision had been appealed, the claims based on Article 8 had not been renewed on appeal.

[134] Ms O'Neill dealt finally with the arguments advanced by the additional party in respect of the Public Sector Equality Duty and alleged indirect discrimination.

Public Sector Equality Duty

[135] In relation to the Public Sector Equality Duty, Ms O'Neill's starting point was the judgment of the English Court of Appeal in *R (Sheakh)* v *London Borough of Lambeth Council* [2022] EWCA 457 at paragraph [10]. Ms O'Neill also relied on the way in which the Court of Appeal had treated the principles in *Bracking* (above) which had been referred to by Mr Welsh. The Court in *Sheakh* had described these as "principles" as opposed to "requirements" and noted that they were no substitute for the language of the statute (at paragraph 13).

[136] Turning to the respondent's Decision, the Regulatory Committee had had an Integrated Impact Assessment before it. That Assessment recorded the evidence available to the respondent including the consultation responses and the steps taken to engage in the process of developing the respondent's policy in relation to SEVs. The Assessment also records the potential positive and negative impacts of the respondent's policy on, among others, the women who work at such venues. Ms O'Neill submitted that I was entitled to draw inferences from the materials placed before the respondent's Committee and the minutes of the discussion before it (*R (Jewish Rights Watch)* v *Leicester City Council* [2019] PTSR 488 per Sales LJ (as he then was) at paragraph 34). Ms O'Neill submitted that, if nothing else was clear from the materials before the respondent's Committee, it was apparent that the interests of women and girls had been at the centre of the discussion.

Indirect discrimination

[137] Finally, in response to the additional party's argument based on section 19 of the Equality Act 2010, Ms O'Neill accepted that the determination of the appropriate number of SEVs under paragraph 9(5A) of Schedule 2 of the 1982 Act was a "provision, criterion or

practice" in terms of that section which would put women who work in SEVs at a particular disadvantage in comparison with others who do not share their protected characteristic of sex. However, Ms O'Neill submitted that, at this stage, it was not possible to carry out the adjudication exercise required by section 19(2) of the 2010 Act because it was impossible to know at this stage who would be affected and to what degree.

[138] Ms O'Neill contended that the additional party's argument was premature not just on the basis of the respondent's argument as to the proper construction of the 1982 Act but also because of the motion passed by the respondent on 27 October 2022 which expressly refers to the need for support measures for workers who may be affected. Ms O'Neill submitted that a similar approach had been taken by Mr Justice Linden in considering whether to grant permission for judicial review *in R (The 3Million Ltd)* v *Secretary of State for the Home Department* [2021] EWHC 1159 (Admin). She accepted that this decision was not in any way binding but suggested that it provided an example of the very real difficulties which would arise in trying to address the indirect discrimination arguments at this stage.

Reply by the additional party

[139] In a short reply, Mr Welsh submitted that the respondent's reliance on *Martin McColl* (above) failed to appreciate the essential difference between a determination of the appropriate number of SEVs for the area of the local authority in terms of paragraph 9(5A) of Schedule 2, on the one hand, and a statement as to the extent to which a licensing board considers there to be an overprovision of licensed premises in any locality in terms of section 7 of the 2005 Act, on the other. The former was a black and white cap which was given effect to in the automatic refusal of any applications made in excess of that cap required by

paragraphs 9(4) and 9(5)(c) of Schedule 2. The latter clearly required the Licensing Board to exercise discretion as was reflected in section 23(5)(e) of the 2005 Act.

Reply by the petitioners

[140] Mr O'Neill noted that Ms O'Neill had rhetorically asked during her submission - why should the statutory regime for SEVs be different from other licensing regimes? Mr O'Neill's answer to this was that what was different was that the regime for SEVs expressly provided the local authority with the power to ban SEVs from its area. Local authorities were empowered to do this by determining that the appropriate number was to be zero. If this step were properly taken, there would be no SEVs. This would explain why the provisions were worded differently from those which were considered in *Miss Behavin'* (above). In that case, although there had been a nil determination, the local authority had still required to consider applications and properly exercise its discretion in that regard. Mr O'Neill submitted further that one could see an inherent difference in this regard between SEVs, which a local authority might wish to ban completely, and other licensed services such as taxis or the same of alcohol. This difference was reflected in the different approaches to and wording of the applicable licensing regimes.

[141] In relation to the need for the respondent to give reasons for its paragraph 9(5A) determination, Mr O'Neill submitted that one had to have regard to the SEV policy statement to be prepared in terms of section 45C. This was to state the local authority's policy as to the exercise of its functions in relation to licensing SEVs (section 45(2)) and the local authority was required to have regard to the statement when exercising its functions in relation to licensing SEVs (section 45(7)). As such, the policy statement should be consistent with and explain the determination which was to be made regard having been had to the

policy statement. Such an approach was also consistent with Regulation 15 of the Provision of Services Regulations 2009.

[142] By contrast, the respondent's position was nonsensical. There was, on the respondent's argument, apparently no requirement to give reasons for the paragraph 9(5A) determination but there was in respect of the individual applications which were, at the very least, significantly affected by the earlier determination, if not, in fact, pre-determined by it.

Decision

[143] Having had the benefit of and carefully considered the submissions made both orally and in writing, it appears to me that the critical difference between the parties is the proper construction of those provisions of the Civic Government (Scotland) Act 1982 which were introduced by the Air Weapons and Licensing (Scotland) Act 2015. Notwithstanding the lengthy submissions that I have heard, I consider that this issue is essentially determinative of the present case.

Schedule 2 of the Civic Government (Scotland) Act 1982

[144] As I have set out above, the petitioners and the additional party submit that the nil determination made by the respondent in terms of paragraph 9(5A) of Schedule 2 of the 1982 Act has the effect of constituting a ban on SEVs in the respondent's area. The respondent, on the other hand, argues that the nil determination only creates a rebuttable presumption against the grant of an application which, despite the determination, can still be granted by the respondent in its discretion.

[145] In short, I consider that the petitioners and the additional party are correct. I have reached this conclusion for the following reasons.

[146] First, I consider that this conclusion is compelled by the wording of Schedule 2 and, in particular, paragraphs 9(4), 9(5)(c) and 9(5A).

[147] In terms of the paragraph 9(4), the local authority "shall" refuse an application if, in their opinion, one or more grounds specified in paragraph 9(5) apply. This wording makes clear that when one or more of the grounds set down in paragraph 9(5) apply, the local authority requires to refuse the application.

[148] I accept that the reference in paragraph 9(4) to the local authority's opinion as to whether the grounds apply could suggest discretion. However, the wording of the relevant ground – paragraph 9(5)(c) – makes it plain that there is no such discretion.

Paragraph 9(5)(c) is in the following terms:

> "that the number of sexual entertainment venues in the local authority's area… at the time the application is made is equal to or exceeds the number which the local authority consider is appropriate for their area…"

This ground has to be read along with the local authority's duty contained in paragraph 9(5A) (which was introduced by section 45B(6)(e(ii) of the 1982 Act). This paragraph imposes a duty on each local authority to determine, from time to time, the appropriate number of SEVs for their area and for each relevant locality and to publicise that determination.

[149] Accordingly, in order for the local authority to decide, in terms of paragraph 9(4) whether the ground provided in paragraph 9(5)(c) applies, it requires only to compare two numbers: first, the number of SEVs in its area; and, second, the number it has determined in accordance with its duty in terms of paragraph 9(5A). In the event that the first number is equal to or greater than the second number, then the ground will apply and, as a consequence, the local authority must refuse the application. Construed in this way, the exercise which the local authority requires to carry out in considering the application of the

ground contained in paragraph 9(5)(c) is simply arithmetical. I do not consider that it can properly be considered to represent an exercise of discretion by the local authority.

[150] Given the relative clarity of the language used in these provisions and the straightforward meaning derived from them, I do not consider that the other aspects of the legislation relied upon by the respondent come close to producing a different result.

[151] The respondent points to the location of the relevant ground – paragraph 9(5)(c) – and highlights the fact that it has not been placed by the drafter along with the other "mandatory" grounds in paragraph 9(3). I do not consider that much can be taken from this and it certainly cannot overcome the effect of the language used. Schedule 2 was originally drafted and structured for a different purpose: namely the licensing of sex shops. It was then adapted in order to be applied to SEVs and a number of significant changes made. In particular, the duty for a local authority to pre-determine the appropriate number of SEVs for its area was introduced in paragraph 9(5A). I consider that what might be perceived as minor infelicities in the drafting of Schedule 2 as it applies to SEVs can be attributed to this adaption process.

[152] The respondent also points to the fact that the drafter made no exception to the provisions regulating the timing and consideration of applications to address the situation in which a nil determination has been made by the local authority in section 45D. Essentially, it is suggested that had the drafter wished to make it clear that the paragraph 9(5A) determination was to result in a ban, then this could have been made more explicit. Again, this argument seems to me to try to attach undue weight to relatively inconsequential drafting points. It did not seem to me that the respondent could point to any fundamental problem in the way in which the process for applications was to work if a nil determination had the effect of constituting a ban on SEVs. The issues which the respondent highlighted

arose from the prospective applicants applying for a licence notwithstanding the fact that, as a result of a nil determination, such applications were doomed to be refused. The same might be said for any application made which fell to be refused for the reasons set out in paragraph 9(3). However, no equivalent cross-reference had been made in section 45D in respect of those applications.

[153] Second, I consider that the effect of the language used is entirely consistent with what I understand to be the underlying rationale and purpose of the changes made as a result of the introduction of the Air Weapons and Licensing (Scotland) Act 2015. The rationale for the legislation is set out in the Explanatory Memorandum which accompanied the Bill.

> "10. The Bill also creates a new licensing scheme for sexual entertainment venues. The Scottish Government considers it appropriate that sexual entertainment venues should be licensed in order that the risk of adverse impacts on neighbours, general disorder and criminality is reduced and both performers and customers can benefit from a safe, regulated environment. Central to this proposal is the belief that local communities should be able to exercise appropriate control and regulate sexual entertainment venues that operate within their areas. Local licensing authorities are best placed to reflect the views of the communities they serve and determine whether sexual entertainment establishments should be authorised and under what conditions. The Scottish Government believes that communities should be able to limit the number of these licences in their area.
>
> …
>
> 253. The proposals also allow for greater local control over the provision of sexual entertainment venues in an area. There are provisions for a local licensing authority to set an appropriate number of sexual entertainment venues for their area (and for that number to be zero). It would be grounds to refuse an application if the number of venues in an area or locality already meets the appropriate number." (Emphasis added)

[154] As I construe the legislation, it enables local authorities to exercise appropriate control over SEVs in their respective areas. Each local authority is empowered, if it so chooses, to determine, as a matter of policy, that there should be no SEVs in its area by

making a nil determination in terms of paragraph 9(5A) of Schedule 2. This is consistent with the legislation's stated policy objective, the legislation increases the ability of local authorities to regulate matters within their areas. As the facts of the *Miss Behavin'* case demonstrate, were the legislative scheme only to have created a rebuttable presumption against the grant of licences in the event of a nil determination (as the respondent would have it), the exercise of the local authority's discretion in respect of any particular application would still be open to challenge by prospective applicants.

[155] Finally, my construction of Schedule 2 as it applies to SEVs is consistent with the authorities dealing with other licensing regimes. In this regard, I consider that the key point is that Schedule 2 as it applies to SEVs has two connected features which distinguish it from the other licensing regimes which were considered in the cases which were the subject of argument before me.

[156] First, paragraph 9(4) of Schedule 2, as I have noted above, provides that an application shall be refused in the event that the local authority considers that one or more of the grounds contained in paragraph 9(5) applies.

[157] Second, Schedule 2 as adapted for the licensing SEVs contains the duty imposed by paragraph 9(5A) for local authorities to determine, for the purpose of paragraph 9(5)(c), the appropriate number of SEVs for their area. This duty alters the nature of the ground to which it applies – paragraph 9(5)(c). Instead of the application of paragraph 9(5)(c) requiring the exercise of discretion by the local authority as to how many SEVs are appropriate in its area, it becomes simply a question of arithmetic.

[158] These two features distinguish Schedule 2 as it applies to SEVs from other Scottish licensing regimes such as the regime under the Licensing (Scotland) Act 2005 applicable to the sale of alcohol which was considered in *Martin McColl* (above). The same can also be

said for taxi licensing under section 13 and Schedule 1 of the 1982 Act which was considered in *Coyle* (above). These features also have the result that Schedule 2 as it applies to SEVs is materially different from the legislative scheme applicable to sex shops in Northern Ireland being considered in *Miss Behavin'* (above).

Exercise of discretion as to remedy

[159] Given my construction of the 1982 Act, it follows that the respondent's officials erred in the advice that was given to the Regulatory Committee. That Committee was wrongly advised that in the event that it made a nil determination in terms of paragraph 9(5A) that would not constitute a ban on SEVs.

[160] Senior counsel for the respondent submitted that even if I found against her as to the correct construction of the 1982 Act, I should nevertheless exercise my discretion not to reduce the respondent's Decision.

[161] I consider that the correct approach to the exercise of my discretion was helpfully set out by Lord Boyd of Duncansby in the recent case of *McHattie* v *South Ayrshire Council* (above). In considering the question of whether the Court ought to exercise its discretion not to quash a decision taken on erroneous grounds he said the following:

> "[51] I accept the submission of senior counsel for the petitioner as to the legal principles that are involved. A court should be slow to refuse to quash an illegal decision by a public authority. The onus is on the respondent to make out a good reason why the decision should not be quashed. In so far as the decision maker would require to retake the decision it seems to me that it would only be where it was plain and obvious that the outcome would be the same that it would be right to refuse to reduce a decision on that ground. The court should not attempt to take over the decision making process or speculate as to what the outcome might be.
>
> [52] The fundamental principle at stake is the rule of law. An illegal decision is an affront to the rule of law. Of course there are times when the court has to take a pragmatic decision in the interests of good governance and the wider interests of society in ensuring certainty. That may be important where people have altered their

> position in reliance of the decision that has been taken. Even there, however, the question will be whether any alteration of position can be restored without undue cost in money or emotional distress."

[162] This is consistent with what is said by the Inner House in *Douglas* v *Perth & Kinross Council* (above) relied upon by the respondent. Although approaching matters in a slightly different way, it seems to me that Lord Boyd's analysis is also consistent with that Lord Justice Sedley in *Amid* v *Kirklees Metropolitan Borough Council* (above) cited to me by the additional party.

[163] Approaching the question on this basis, I do not consider that the respondent has put forward a good reason why the erroneous decision should not be quashed.

[164] I have considered carefully the materials available to me in respect of the respondent's Decision. As I have noted above, the Regulatory Committee were clearly advised that making a nil determination would only create a "rebuttable presumption" which could "ultimately" result in the closure of existing premises (paragraph 4.27). They were advised further:

> "In the event of a zero limit being set, this would <u>not have an immediate impact</u>, since operators could continue until the new regime had commenced and applications for licences were finally determined." (Emphasis added).

[165] I have also considered both the transcript of the Committee meeting which took place on 31 March 2022 and the minutes of that meeting. It was apparent to me, unsurprisingly perhaps, that the Committee's discussion took place within the framework of the advice which the Committee had been given. Taking this all into account and bearing in mind that the resulting decision was the result of vote which split the Committee 5:4, it was far from plain and obvious to me that, had the Committee been correctly advised as to the impact of a nil determination, the resulting decision would have been the same. Or,

approaching the issue as Lord Justice Sedley did in *Amid* (above), I do consider that there is a realistic possibility that, properly advised, a different decision may have been taken. It seems to me that, were I to decide otherwise, I would be trespassing on the decision making process which has been entrusted to the respondent.

[166] In this context, I have also considered the respondent's argument that the present challenge is premature. As I understood it, that argument was based, in part, upon the respondent's construction of the legislation. For the reasons I have already set out, I consider that the construction upon which that argument proceeds is in error. However, the respondent also argued that the present challenge was premature because of the motion passed by the respondent, sitting as the full Council, on 27 October 2022 (see paragraphs [18] and [96] above).

[167] I do not consider that this argument is either well founded or represents a good reason not to quash the respondent's Decision. I recognise that, of course, that it is open to the respondent to make a new determination under paragraph 9(5A) if it chooses to do so. However, as I understand it, the motion passed on 27 October 2022 is not a re-consideration of the nil determination. An amendment to the motion to that effect, instructing the respondent's Regulatory Committee to re-consider the nil determination, was not passed. Accordingly, at present, the respondent's Decision which is the subject of these proceedings remains in place and, as I consider it to have been reached on the basis of erroneous legal advice, I see no reason not to grant the remedy sought and to reduce it.

The other grounds of challenge advanced

[168] My conclusion as to the principal argument between the parties together with my decision on the issue of remedy, is sufficient to resolve the matters before me.

[169] However, in deference to the lengthy arguments I have heard, I set out below my views on the other grounds of challenge. I do so more briefly for two reasons. First, at the first hearing, the parties were united in their desire for me to reach a decision as quickly as possible and I have endeavoured to do so. Secondly, I do not consider that the remaining grounds of challenge make a material difference to the result either because they are simply consequential upon the principal argument or because they are not well founded.

The reasons challenges

[170] The petitioners challenged the respondent's Decision on the basis of a failure by the respondent to provide proper and adequate reasons for it. These challenges proceeded by way of a number of different routes: an alleged failure to provide reasons as required at common law; an alleged failure by the respondent to have regard to the guidance issued by the Scottish Ministers and, in particular, the reference within that guidance to the EU Services Directive; and together with various other routes founded in or deriving from EU law (see paragraph [47] above.

[171] The starting point for a consideration all of these challenges must be the extent to which the respondent is obliged to provide reasons for its determination under paragraph 9(5A) of Schedule 2, either in terms of the statutory scheme or at common law, together with the nature and content of that duty. In this regard, it is notable that there is no express duty imposed on the respondent to give reasons for such a determination. This is in contrast to the duty to give reasons, on request, for a decision given in respect of an application (see paragraph 23(2) of Schedule 2).

[172] However, I consider that the duty on local authorities to make a determination in terms of paragraph 9(5A) clearly forms part of the exercise of a local authority's functions in

relation to the licensing of SEVs. As such, I consider further that the local authority's policy underlying its determination of the appropriate number of SEVs for their area should be set out in the SEV policy statement. The preparation of this policy statement is mandated by section 45C(1). The policy statement, properly prepared, will thus explain and provide the reasons for the determination made. Such an approach to the content of the policy statement is consistent with the fact that the local authority is required to have regard to its SEV policy statement when exercising its functions by, for example, making a determination in terms of paragraph 9(5A) (section 45C(7)).

[173] As was pointed out by Mr O'Neill, this approach is also consistent with guidance issued by the Scottish Ministers which provided at paragraph 43 the following:

> "The statement might include information on the locations where the local authority is likely to consider the operation of SEV to be appropriate or inappropriate. The statement could also be used to indicate how many SEV are considered to be appropriate for the local authority's area or particular localities within its area. <u>The reasons for these policy positions should also be provided."</u> (Emphasis added).

Local authorities are obliged, in terms of section 45B(7) to have regard to this guidance in carrying out functions conferred by this section. Those functions include the requirement to make a determination in terms of paragraph 9(5A) of Schedule 2 which is introduced by section 45B(6)(e)(ii).

[174] I consider that this construction of the obligations of a local authority in respect of the policy statement and the determination in terms of paragraph 9(5A) accords with the importance of the latter in the licensing process. It is consonant with the reasons set out by Lord Justice Elias in *R (Oakley)* v *South Cambridgeshire District Council* (above) at paragraphs [26] to [33]. In these circumstances, I consider that the need to provide the reasons for the policy positions underlying the determination arise, apart from anything

else, both as a matter of simple fairness and taking account the possibility of challenges to the determination.

[175] The question which follows from this conclusion is what is the nature and content of the respondent's duty to give reasons? In this regard, I consider the analysis of Sheriff Ross in *Tesco Stores* v *City of Glasgow Licensing Board* (above) at paragraphs [54] to [67] of the position under section 23 of the Licensing (Scotland) Act 2005 to be helpful. At root, as with any obligation to give reasons, the key for adequacy is, to paraphrase the well known test from *Wordie Property Co Ltd* v *Secretary of State of Scotland* 1984 SLT 345 that the informed reader should be in no real and substantial doubt as to what the reasons for the determination were and what material considerations were taken into account in making it. An assessment of the adequacy of reasoning is always going to be a matter of fact and degree and should have regard to the statutory language used.

[176] Applying this approach to the present case, I consider that it is important, as a starting point, to bear in mind that the document which the local authority has to prepare is a statement of its policy not a reasoned decision. It is notable that the wording of Section 45C imposes no particular quality of reasoning or transparency on local authorities. The only constraint is as to issues to be considered by the local authority in preparing the policy statement (section 45C(3)). Overall, on the above analysis, I consider that the reasoning for a local authority's determination of the appropriate number of SEVs would not require to be elaborate or detailed.

[177] However, turning to consider the detail of the policy statement agreed to by the respondent's Regulatory Committee on 31 March 2022, one is confronted with an immediate problem: namely, the policy statement is fundamentally inconsistent with the true legal effect of the nil determination of the appropriate number of SEVs which the respondent

made in terms of paragraph 9(5A) of Schedule 2. This is because the policy statement proceeds on and enshrines the same erroneous legal advice contained in the report prepared for the Regulatory Committee and which formed the basis of the respondent's positon in these proceedings. As a result, the policy statement proceeds on the basis that, independently of a nil determination having been made by the respondent, it would still be open to the respondent to consider and grant licences for SEVs. (The respondent's policy statement as agreed to in fact contains a blank in respect of respondent's determination marked "[To be updated after Committee decision]"). The policy statement goes on to set out the application process including how applications are to be determined. As a result of this inconsistency, the respondent's policy statement does not provide any explanation of or reasons underlying the respondent's nil determination.

[178] One also cannot find any explanation or reasons in any of the material which formed part of the process which culminated in the Respondent's Decision on 31 March 2022: the material put before the Committee; the transcript of the discussions; or, the minutes recording the Decision. No part of this process provides any such explanation because the respondent and its officials were in error as to the true legal effect of the determination that had been made. They erroneously considered that by making the nil determination they were not imposing a ban on SEVs.

[179] Therefore, as a result of this same error, I consider that the respondent's decision falls to be reduced on the basis that no adequate reasons have been provided for it.

[180] In light of this conclusion, it is not necessary for me to consider further the other routes which the petitioners advanced to challenge the adequacy of the reasons for the respondent's Decision based on, among other things, the Provision of Services Regulations 2009, retained EU law and general principles of good administration.

Obligation of the respondent to inform itself of the relevant facts

[181] I do not consider that this challenge to the respondent's Decision is well founded. The argument advanced by Mr O'Neill was essentially a development of the challenge as to the adequacy of the reasons provided by the respondent which I have already dealt with. The petitioners' contention was that as the respondent had failed to appreciate that in making the nil determination it was imposing a ban on SEVs, it had not properly informed itself of the impact of that decision.

[182] However, based on the material which was before the respondent's Committee, it is apparent to me that the Committee had taken steps to inform itself of potential consequences of closure on SEV operators and those who worked at such establishments. These consequences were highlighted to Committee in responses received to the consultation exercise undertaken by the respondent together with the deputations received both in person and in writing. The Committee had before it responses from operators, performers and organisations including the additional party.

[183] Overall, I am not satisfied that no reasonable authority could have been satisfied on the basis of the inquiries made by the respondent that it possessed the information necessary for its decision.

Article 1 of the First Protocol

[184] I am also not persuaded that the petitioners' arguments based on an alleged unjustified interference with their rights under Article 1 of the First Protocol adds anything to their position.

[185] As a starting point, because of view I take of the legislative scheme, I do accept that the first to third petitioners' rights to peaceful enjoyment of their possessions are engaged by the respondent's nil determination. However, I also consider that the control of the use of the petitioners' property represented by the respondent's Decision is compatible with those rights.

[186] I am heavily influenced in reaching this conclusion by the analysis contained in the *Miss Behavin'* case. As I have noted above, that case involved a challenge to licensing of sex shops in Belfast. Belfast Council had resolved to introduce a system of licensing of sex shops. It had also determined that the appropriate number of sex shops in the relevant locality was nil. A subsequent refusal of an application for a licence was challenged on a number of grounds, including that the applicant's rights under Article 1 of the First Protocol had been violated. The House of Lords firmly rejected this challenge.

[187] In doing so, a number of the speeches emphasised that in the area of the sale of pornography, insofar as A1P1 rights are engaged, this is at a very low level (see, for example, Lord Hoffman at [16] and Lady Hale at [38]). This is, in part, as it was put in the case, that there are far more important human rights in the world than the right to sell pornographic literature. It is also because this is an area in which the Strasbourg court has always accorded a wide measure of appreciation to member states which translates into the broad power of judgment entrusted to local authorities (see also Lord Neuberger at [99] to [102]). Lady Hale also emphasised that the Court is bound to acknowledge that a local authority is much better placed than the court to decide upon the restriction of rights for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights of others: (Baroness Hale at paragraph [37]).

[188] Against that background, Lord Hoffman summarised the position as follows:

> "If the local authority exercises that power rationally and in accordance with the purposes of the statute, it would require very unusual facts for it to amount to a disproportionate restriction on Convention rights." (at [16])

[189] I see no good reason for present purposes in distinguishing between the right to use one's property to sell pornography, which was considered in *Miss Behavin'*, and the right to use one's property as an SEV (see *R (Bean Leisure Trading A Limited)* v *Leeds City Council* (above) at [54]). I am also, contrary to Mr O'Neill's submission, not persuaded that the European Court of Justice's approach in the three cases he cited (at paragraph [60] above) dealing with different rights required a different outcome.

[190] In the present case, the petitioners make no challenge to the legislative scheme for SEVs established by the Air Weapons and Licensing (Scotland) Act 2015. That scheme expressly empowers local authorities to make a nil determination which will have the effect of banning SEVs in a local authority's area (paragraph 9(6) of Schedule 2). The petitioners also accept that the respondent's aims in adopting Schedule 2 of preventing public nuisance, crime and disorder; securing public safety; protecting children and young people from harm; and reducing violence against women are legitimate. The respondent's Committee had before it competing representations as to appropriate number of SEVs and the potential impact of and on SEVs.

[191] In all the circumstances, had the respondent's Committee exercised its power to make a nil determination on a proper legal basis and provided adequate reasons for that determination, I do not consider that such a determination would constitute a violation of the petitioner's rights under Article 1 of the First Protocol.

The Equally Safe document

[192] I do not consider that the additional party's challenge based on the references made by the Regulatory Committee to the definition of "violence against women and girls" in the Scottish Government's Equally Safe document is well founded. The additional party does not criticise the Equally Safe document directly nor the fact that the Committee had regard to it. Rather, Mr Welsh argued that it was the way in which the document had been used by the Committee which founded his challenge.

[193] The difficulty for this argument, as was pointed out by the respondent, is that it depends upon there being a "correct" interpretation of the definition of "violence against women and girls". In other words, one that was objectively verifiable and which it could be shown that the Committee had erred in not using. Neither the Equally Safe document, taken as a whole, nor the definition of "violence against women and girls" are amenable to such interpretation. These are matters about which there are competing views. Indeed the tension or conflict between the definition contained in the Equally Safe document and the licensing of SEVs was recognised in the Guidance issued by the Scottish Government (at paragraph 21).

[194] In these circumstances, I do not consider that the respondent's Committee can be criticised on this basis.

Indirect discrimination

[195] In respect of the additional party's challenge based on indirect discrimination contrary to section 29(6) of the Equality Act 2010, the respondent, as I understand it, does not dispute that the Decision represented a provision, criterion or practice for the purposes of the definition of "indirect discrimination" in terms of section 19 of the Equality Act. The

respondent also accepted that the Decision would put women who work in SEVs at a particular disadvantage in comparison with others who do not share their protected characteristic of sex.

[196] However, the respondent submits that the additional party's challenge on this basis is premature because it is not possible, at this time, to determine whether the additional party's members would be put at that disadvantage. The basis for the respondent's position was said to be not only its position in respect to the effect of the nil determination but also the motion passed by the respondent on 27 October 2022 (see paragraph [18] above). The support measures referred to in that motion were yet to be put in place. In this regard, the respondent sought to rely on the approach taken in *R (The 3Million Ltd)* v *Secretary of State for the Home Department* (above).

[197] I note also that, beyond a reference in Answer 58 to the respondent's position in response to the petitioners' challenge based on Article 1 of the First Protocol, no argument was made, either orally or in writing, to address the final limb of section 19(2)(d) namely, proportionality.

[198] Having considered the submissions, I must admit that I am sceptical as to the extent to which the position of the UK Government in relation to the EU Settlement Scheme which confronted the English court in the *3Million* case is truly analogous to the position of the respondent. However, in light of my decision of the principal ground of challenge advanced by both the petitioners and the additional party, it is ultimately not necessary for me to reach a decision on this part of the additional party's argument in order to resolve the parties' dispute.

[199] Accordingly, in all the circumstances, I consider it appropriate not to do so.

Public Sector Equality Duty

[200] Having considered the material that was before the respondent's Committee in light of the submissions made to me, I do not consider that a breach of the Public Sector Equality Duty has been made out.

[201] In assessing this ground of challenge, I consider that the respondent is correct that the correct approach to this duty is set out by the English Court of Appeal in *Sheakh* (above) at paragraph [10]. The passage in full is as follows:

> "10 There is ample authority on the meaning and effect of section 149. Five points are especially relevant here. First, section 149 does not require a substantive result (see the judgment of *Dyson LJ in Baker* v *Secretary of State for Communities and Local Government* [2008] EWCA Civ 141; [2009] PTSR 809 (at para 31)). Second, it does not prescribe a particular procedure. It does not, for example, mandate the production of an equality impact assessment at any particular moment in a process of decision-making, or indeed at all (see *R (Brown)* v *Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin); [2009] PTSR 1506, para 89). Third, like other public law duties, it implies a duty of reasonable enquiry (see *Secretary of State for Education and Science* v *Tameside Metropolitan Borough Council* [1977] AC 1014). Fourth, it requires a decision-maker to understand the obvious equality impacts of a decision before adopting a policy (see the judgment of *Pill LJ*, with which the other members of this court agreed, in *R (Bailey)* v *Brent London Borough Council* [2011] EWCA Civ 1586; [2012] Eq LR 168, paras 79, 81 and 82). And fifth, courts should not engage in an unduly legalistic investigation of the way in which a local authority has assessed the impact of a decision on the equality needs (see the judgment of *Davis LJ in Bailey*, with which *Richards LJ* agreed, at para 102)."

[202] As the passage from *Sheakh* makes clear, the Public Sector Equalities Duty mandates neither a particular outcome nor a particular procedure. Rather it implies a duty of reasonable enquiry into the issues and it requires the decision maker to understand the obvious impacts of a decision. However, the weight that the decision makers attach to particular considerations is a matter for them.

[203] Applying those points to the present case, I consider that, adopting the approach of Lord Justice Sales (as he then was) in the *Jewish Rights Watch* case (above) I am entitled to draw inferences from the material which was before the respondent and the record of the

subsequent discussions. The material included, in particular, the respondent's Integrated Impact Assessment. Among other things, this assessment highlights the positive and negative impacts for women- both those who work in SEVs and those who do not. In the case of the nil determination, I consider that weighing up the positive and negative impacts on women will not have been a straightforward process.

[204] Overall, I conclude that the respondent has had due regard to the matters identified in section 149(1) of the 2010 Act and that a breach of the duty has not been made out.

Article 8 ECHR

[205] Finally, I reject the additional party's challenge based on Article 8 of the Convention. I do so on the basis that I do not consider that the additional party has standing in terms of section 7 of the Human Rights Act 1988. This is because I do not consider that the additional party is a "victim" itself in terms of Article 34 of the Convention and, furthermore, I do not consider that, consist with the jurisprudence of the Strasbourg Court, the additional party is entitled to act make a representative claim on behalf of its members.

[206] I do not consider that the additional party falls to be treated as a victim in its own right. I recognise that the Strasbourg Court has granted this status to certain bodies particularly where the cases relate to an alleged infringement of Article 6 ECHR on the basis that the bodies themselves were "directly affected". The case of *Lizarraga and Others* (above) is an example of this. In that case, the association in question had been set up by its members for the specific purpose of defending their interests and had been involved in the litigation. Furthermore, notably for present purposes, the association's members were also claimants before the Strasbourg Court. In that case, the issue of the standing of the

association arose in the context of an argument about non-exhaustion of domestic remedies. The same points can be made in respect of the *Beizaras and Levickas* case (above).

[207] Thereafter, the Court has consistently made clear that the Convention does not envisage the making of an *actio popularis* by a body, which has not been directly affected, on behalf of individuals who have been. In part, this derives from the nature of the Convention rights at stake which, in accordance with the Court's consistent case law, can only be exercised by an association's members and not by the association itself. The Court has indicated that this applies to rights under Articles 2, 3, 5 and 8 (see *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği* (above) at paragraph 41).

[208] Having reached this conclusion, I do not ignore Mr Welsh's submissions concerning the potential difficulties that might have arisen were the additional party's members to have sought to have to become parties to the present proceedings in their own right both in relation to questions of expense and anonymity. However, on the basis of the information available to me and taking account of the powers of the Court both to make Protective Expenses Orders (as was done in the case of the additional party itself) and in relation to reporting restrictions (in terms of Rule of Court 102), I do not accept that my conclusion would have the effect of depriving the additional party's members of the ability effectively to vindicate their rights under the Convention.

Order

[209] In light of my decision, in light of the respondent's error in law, I will sustain the petitioner's first and fourth pleas in law, grant declarator as first concluded for and reduce the respondent's Decision dated 31 March 2022.

[210] I will put the case out by order in order that I can be addressed on further procedure in light of my decision and will reserve all questions of expenses meantime.