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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY MISBEHAVIN' LIMITED FOR JUDICIAL REVIEW

Before Kerr LCJ, Sheil LJ and Hart J

KERR LCJ

Introduction

[1] This is an appeal from the decision of Weatherup J of 24 September 2004 whereby he dismissed the appellant's application for judicial review of Belfast City Council's refusal to grant the appellant's application for a sex establishment licence in respect of premises at Gresham Street, Belfast.

Factual background

[2] Misbehavin' Limited applied to Belfast City Council for a sex establishment licence on 13 May 2002 pursuant to the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985. By letters of 5 September 2002 and 22 October 2002 the council informed the appellant that objections had been received to its application. The letters outlined the grounds of objection in general terms.

[3] The council wrote to the appellant on 11 November 2002, enclosing copies of extracts from minutes of its meetings on 18 October 1989 and 13 February 1997. These included information about previous applications for sex establishment licences for premises in Gresham Street. On those earlier occasions the council had resolved that the applications for licences should be refused and had determined, in line with the provisions of the Act, that the appropriate number of sex establishments in the relevant locality should be

nil. Having thus been told that previously the council had decided that there should be no sex establishments in the Gresham Street area, the appellant was invited to present arguments to a hearing on 18 November 2002 before the Health and Environmental Services Committee of the council as to why that position should be changed.

[4] At the committee hearing on 18 November 2002, the appellant raised two particular concerns. The first of these related to documents that had not been disclosed. The second concerned the way in which the committee was dealing with objections to the appellant's application. The committee was hearing objectors in person and the appellant was not being told who the objectors were nor was it being informed of the full extent of their objections to the application. As a result of the appellant's representations it was agreed that a special meeting of the committee would be held on 2 December 2002 at which the appellant's representatives would be permitted to address the committee.

[5] Before the meeting on 2 December, the appellant was supplied with the following additional documents:-

> (1) A report of Kenneth Crothers dated 15 November 2002 that advised on the retail character of the area in which the premises were located. This report also described the future development proposals that would affect the area; and
>
> (2) A report from the Special Health and Environmental Services Department Building Control Service that outlined the nature of objections that had been received in relation to the application. This report defined the relevant locality as that within a 600m radius from a centre point in Gresham Street. It referred to the character of the relevant locality and described previous decisions affecting the area. It also considered the appellant's proposals and the current policy of the council and made recommendations in relation to the application.

[6] At a further meeting on 11 December 2002 the committee heard representations on behalf of the appellant. Then, at its meeting on 20 January 2003, the committee decided to recommend that the council, in its capacity as licensing authority, should refuse the application. The appellant was informed of this by letter dated 23 January 2003.

[7] The recommendation of the committee was subject to ratification by the council at its meeting on 3 February 2003. At that meeting it became apparent that when the committee had considered the application on 20 January 2003, it had before it a number of documents that had not been furnished to the

appellant or the council. The council therefore deferred consideration of the matter and referred the application back to the committee.

[8] On 10 February 2003, the committee considered the application further. At that meeting the Director of Health and Environmental Services informed the committee that the full reports of the special meetings of the committee of 18 November 2002 and 2 and 11 December 2002 had not been included with the minutes of the committee meeting of 20 January 2003 which had been presented to the council meeting of 3 February 2003. In addition, the letter to the appellant of 23 January 2003 setting out the committee's recommendation had not included the reports of the earlier meetings of the committee. Despite these omissions, the committee affirmed the recommendation it had made to the council on 20 January 2003 but decided that all papers should be furnished to the council and the appellant in advance of a council meeting to be held on 3 March 2003 at which the matter was to be discussed. In due course, by letter of 25 February 2003, the appellant was supplied with the affirmation of the committee's earlier recommendation to the council, the minutes of the earlier meetings of the committee, reports of the committee meetings of December 2002 and the report of the Head of Building Control. These documents were available to the appellant before the meeting of the council on 3 March 2003 when submissions on behalf of the appellant were made.

[9] The council accepted the committee's recommendation and by letter of 13 March 2003, informed the appellant of its decision to refuse the grant of the sex establishment licence. The grounds stated in the committee letter of 23 January 2003 and repeated in the council's letter of 13 March 2003 were these:-

> "In coming to that conclusion [to refuse the licence], the committee considered the character of the relevant locality, including the type of retail premises located therein, the proximity of public buildings such as the Belfast Public Library, the presence of a number of shops which would be of particular attraction to families and children and the proximity of a number of places of worship, and determined that the appropriate number of sex establishments for that locality be nil.
>
> The committee was mindful that the Council might, if it so desired, decide that the appropriate number of sex establishments in the locality be other than nil, and accordingly, agreed to consider the merits of your application. The committee has recommended

> that the Council refuse your application on the grounds that you have been operating a sex shop without a licence and in breach of the relevant legislation and that Mr P McCaffrey, a person convicted of relevant offences, appears to have an interest in the business to be carried on under the licence and, in addition, the company's formation appears to have been for the purpose of making the application other than in the name of a convicted person."

[10] The appellant began judicial review proceedings on 3 March 2003 against the council's decision to refuse the licence, asserting that the hearing it had received in the course of its licence application was procedurally unfair and that the council's approach in refusing the licence amounted to a disproportionate restriction on the appellant's rights under the European Convention on Human Rights. Leave was granted on 25 June 2003 on the grounds relating to procedural fairness but refused on the grounds relating to the appellant's convention rights and proportionality. At the hearing before Weatherup J on 2 and 4 March 2004, however, the appellant was permitted to present arguments on all the original grounds in the Order 53 statement, including those based on the convention.

Statutory Background

[11] The licensing of sex establishments in Northern Ireland is governed by the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985. Article 4 of the Order provides that:-

> "A council may resolve that Schedule 2 is to apply to its district; and if a council does so resolve, that Schedule shall come into force in its district on the day specified in that behalf in the resolution…"

[12] Belfast City Council has resolved that Schedule 2 should apply to its district and the schedule was in force at the time of the appellant's application for a licence. The schedule provides a scheme for the licensing of sex establishments. Paragraph 6(1) sets out the general requirement that there be a licence for such establishments, as follows:-

> "6. - (1) Subject to the provisions of this Schedule, no person shall in any district in which this Schedule is in force use any premises, vehicle, vessel or stall as a sex establishment except under and in accordance

with the terms of a licence granted under this Schedule by the council for the district."

[13] In this instance, the premises proposed to be licensed by the appellant fall under the definition of a 'sex shop' set out in paragraph 4 of Schedule 2:-

> "…any premises… used for a business which consists to a significant degree of selling, hiring, exchanging, lending, displaying or demonstrating –
>
> (a) sex articles [which are further defined by paragraph 4]; or
>
> (b) other things intended for use in connection with, or for the purpose of stimulating or encouraging –
>
> (i) sexual activity; or
>
> (ii) acts of force or restraint which are associated with sexual activity."

[14] A detailed scheme for the procedure to be adopted by a district council in determining an application for a sex shop licence is set out in Schedule 2, principally in paragraphs 10 to 12. Paragraph 10 deals with the procedure for applications for a licence and includes, in particular, sub-paragraphs (15), (16) and (17) which respectively provide a 28 day time limit from the date of the application for representations regarding the application to be made; that an applicant for a licence is entitled to receive the general terms of such representations; and that (subject to obtaining consent) disclosure of the name and address of the person making such an objection is prohibited. We shall set out the relevant sub-paragraphs of paragraph 10. They are as follows:–

> "(15) Any person wishing to make any representation in relation to an application for the grant, renewal or transfer of a licence under this Schedule shall give notice to the council, stating in general terms the nature of the representation not later than 28 days after the date of the application.
>
> (16) Where the council receives notice of any representation under subparagraph (15), the council shall, before considering the application,

give notice of the general terms of the representation to the applicant.

(17) The council shall not without the consent of the person making the representation reveal his name or address to the applicant.

(18) In considering any application for the grant, renewal or transfer of a licence the council shall have regard to any observations submitted to it by the appropriate sub-divisional commander and to any representation of which notice has been sent to it under sub-paragraph (15).

(19) The council shall give an opportunity of appearing before and of being heard by the council -

(a) before refusing to grant a licence, to the applicant;

(b) before refusing to renew a licence, to the holder; and

(c) before refusing to transfer a licence, to the holder and the person to whom he desires that it shall be transferred.

(20) Where the council refuses to grant, renew or transfer a licence, it shall, if required to do so by the applicant or holder of the licence, give him a statement in writing of the reasons for its decision within 7 days of his requiring it to do so."

[15] Paragraph 12 makes provision for the refusal of licences. The application for the grant of a licence *must* be refused by the council if any of the five grounds at paragraph 12 (1) apply and *may* be refused by the council if any of the four grounds at paragraph 12 (3) apply. Paragraph 12 (2) provides for the refusal of applications for the grant, renewal or transfer of licences on grounds specified in subparagraph (3) which provides:-

"12. -…..

(3) The grounds mentioned in sub-paragraph (2) are -

(a) that the applicant 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, renewed or transferred 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, renewal or transfer of such a licence if he made the application himself;

(c) that the number of sex establishments in the relevant locality at the time the application is made is equal to or exceeds the number which the council considers it 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.

[16] In relation to the number of establishments and the definition of the 'relevant locality' sub-paragraphs (4) and (5) of paragraph 12 are relevant. They provide: -

"(4) Nil may be an appropriate number for the purposes of sub-paragraph (3) (c).

(5) 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 establishment."

The European Convention on Human Rights

[17] The Council as a public body is subject to section 6(1) of the Human Rights Act 1998, which makes it unlawful for a public authority to act in a way that is incompatible with a convention right. The convention right principally relied on by the appellant in this case is article 1 of the First Protocol to the European Convention. It provides:-

> "(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest subject to the conditions provided for by law and by the general principles of international law.
>
> (2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[18] The appellant also relied on article 10 of the convention which provides:-

> "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontier. This article shall not prevent States from requiring the licensing of broadcasting television or cinema enterprises.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation

> or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The decision on the judicial review application

[19] Weatherup J found that all but one of the 70 objections that had been lodged in relation to the appellant's application for a sex establishment licence were outside the 28 day limit specified in paragraph 10 (15) of Schedule 2 to the Order. He rejected the appellant's contention that the 28 day time limit represented a cut off point, beyond which objections should not be considered. He held that the council enjoyed a discretion whether to consider objections made outside this period. The learned judge examined the appellant's procedural complaints in detail at paragraphs [13] to [29] of his judgment and, at paragraph [27] found that the council had decided to exercise its discretion and consider the late objections in the knowledge that the objections were late:-

> "[27] The applicant contends that the Council did not exercise discretion to consider the late objections. The existence of 69 late objections was brought to the attention of the Council in accordance with a general practice of informing the Council of that matter. I consider that the purpose of drawing this matter to the Council's attention must be to inform the Council of the late objections so that it might be determined whether they are to be considered. By electing to consider all objections in such circumstances the Council exercised its discretion."

[20] The committee minutes of 10 February 2003 disclosed that the appellant had not been provided with an opportunity to address the committee following the full disclosure of additional materials. On this point Weatherup J said in paragraph [15] of his judgment:-

> "[15] …….The committee minutes were approved and adopted by the council on 3 March 2003 and it must be the case that had the actions of the committee been other than in accordance with the requirements of the council on the reference back on 3 February 2003, then that shortcoming would have been noted on 3 March 2003. Accordingly, I conclude that the council did not intend that

> the first applicant should have the opportunity to make representations to the committee prior to its reconsideration of the recommendation that would be made to the council."

[21] The judge found that, although the appellant had not been allowed to make submissions to the committee, the opportunity given to make representations to the council on 3 March 2003 was sufficient to fulfil the requirement of a fair hearing and that the appellant was in possession of all relevant material before that meeting when the council was addressed on its behalf. The judge said this at paragraph 16:-

> "[16] However, it remains to be determined whether the opportunity afforded to the first applicant to make representations to the Council on 3 March 2003 met the applicant's right to know and to respond. The applicant contends that Council meetings are a rubberstamp of Committee meetings. Consideration of the minutes of Council meetings would indicate that that is not the case. A large amount of business is transacted but it is apparent that there are different approaches adopted in relation to the business of the different Committees and different parts of the business of each Committee. Voting patterns also indicate different groups have different views on some items of business. In relation to the Health and Environmental Services Committee meeting of 10 February 2003 one aspect of the Committee business dealing with an entertainment licence was referred back to the Committee for further consideration. I do not accept the applicant's contention that the absence of opportunity to make representations to the Committee prior to 10 February 2002 rendered the procedure unfair and prevented the first applicant from having an opportunity to make fully informed representations to the effective decision-maker."

[22] In paragraphs [46] and [47] Weatherup J dealt with the argument that, before article 1 of the First Protocol could be engaged, exceptional circumstances would have to be shown. This argument had been made by the council, relying on a decision of this court in *Re UK Waste Management Application* [2002] NI 130 and the first instance decision in *Re Green's Application* [2003] NIQB 54. The judge concluded that the control of the use of

the appellant's premises and businesses engaged article 1 of the First Protocol. At paragraph [48] he said:-

> "[48] In *Re Green's Application* and *Re UK Waste Management Limited's Application* the court was dealing with the operation of the planning system and not with a licensing system for business activities that involves the control of use of existing premises. While it requires exceptional circumstances to engage the Articles in relation to the effect on the applicant of the grant of planning permission to a third party I am satisfied that that is not the threshold that applies to the direct effect of the refusal of a licence to carry on business activities. Where the refusal of the licence will have direct effect on the use of the property concerned and the economic interest in the business concerned, it is not apparent why such effect should only engage the protection of Article 1 of Protocol 1 in exceptional cases where there is a particularly adverse effect on the party concerned. I am satisfied that the control of the use of the applicants' premises and businesses in the present cases engages Article 1 of the First Protocol."

[23] Weatherup J stated that any interference must be in the general interest and satisfy the requirements of proportionality. He identified the public interest matters in question from the respondent's letter of decision and the Service's report, as follows:-

> "[49] When Article 1 of Protocol 1 is engaged in a particular case by the operation of a system of control of the development of land or of permitted uses of land or by a system of licensing particular trades, any interference must be in the general interest and satisfy the requirements of proportionality. A fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's rights and the search for such a balance is inherent in the whole of the Convention. *Sporrong and Lonnroth v Sweden* [1982] 5 EHRR 35. It is this fair balance that the applicants contend has not been achieved in the present cases.

> [50] As with the planning process the type of balancing exercise weighing the respective public and private interests is inherent in the assessment carried out by local councils. In the present cases the applicants contend that there has been no identification of the public interest that warrants the conclusion that the number of sex establishments appropriate for the relevant locality should be nil. In the case of the first applicant the public interest matters appear in the Council's letter of decision and are taken from the Services Report as discussed in the minutes of meetings included in the papers….."

[24] In paragraphs [51] and [52] of his judgment the judge considered whether the respondents had struck a fair balance between the appellant's interests and the public interest and whether the concerns outlined in the council's letter and the Service's report were legitimate concerns. He concluded that the concerns expressed by the council were valid and that they had not been removed from the proper consideration of the council by the 1985 legislation. He rejected the argument that the council was operating a policy of blanket rejections to applications for sex shop licences.

[25] The learned judge proceeded on the basis that the refusal of a licence to the appellant constituted interference with the right to freedom of expression under article 10 of the Convention. He concluded, however, that this was also justified for essentially the same reasons as applied to article 1 of the First Protocol.

The appeal

[26] The two principal grounds of appeal were (1) that the council was guilty of procedural unfairness in admitting the late objections and in failing to afford the appellant a fair hearing in the determination of its application; and (2) that the council had failed to recognise that, by its decision to refuse the licence, it had interfered with the appellant's rights under article 1 of the First Protocol and article 10 of the convention. Having failed to recognise that such interference had occurred, the council had neglected to examine whether it was justified.

Procedural fairness before Belfast City Council

[27] On the issue of the council's consideration of the late objections, the primary submission of counsel for the appellant, Mr Larkin QC, was that the requirement in paragraph 10(15) of Schedule 2 was mandatory and that the learned judge was wrong to conclude that the council had a discretion to

admit the late representations. He argued alternatively that the judge's finding that the council had exercised its discretion to admit the objections submitted after the 28 day period was not supported by the available contemporaneous evidence. It was clear from the materials placed before the council, Mr Larkin said, that no information about the discretion had been given to the council, much less any advice on how it might be exercised.

[28] On the second procedural challenge Mr Larkin pointed out that it had been accepted in an affidavit filed by Trevor Martin, the council's head of building control, that it was open to the council to refer the application back to the committee when the matter came before the meeting of 3 March 2003. The council had merely ratified the committee's decision and that decision had been taken without the benefit of a fully informed submission from the appellant, Mr Larkin claimed. The procedure adopted was not sufficient to secure the appellant's right to a fair hearing, therefore.

[29] For the respondent, Mr O'Hara QC defended the judge's conclusion that the requirement contained in paragraph 10 (15) was not mandatory. In support of the view that the council had a discretion he relied on the decision of Woolf J in *R v City of Chester and Others ex parte Quietlynn Limited* (unreported 14 October 1983). In meeting Mr Larkin's second argument he claimed that the council knew that it had to exercise its discretion in order to avoid the impact of paragraph 10(15) of Schedule 2 because it was specifically drawn to the attention of councillors that only one of the objections had been lodged on time and that the other sixty-nine were out of time. Although no record was to be found in the council's minutes of it having addressed the matter of discretion, since it was aware that virtually none of the objections had been lodged on time, it was to be assumed that the council had exercised its discretion to admit the late representations.

[30] In relation to the appellant's argument that the council should have referred the appellant's case back to the committee Mr O'Hara submitted that the opportunity given to the appellant to make fully informed submissions to the council on 3 March 2003 satisfied all the demands of a fair hearing. The appellant was unable, Mr O'Hara said, to point to any matter that had not been canvassed before the council. There was no warrant for concluding therefore that its representations were not fully taken into account.

Conclusions on the procedural challenge

[31] I consider that the provisions of paragraph 10 (15) of the second Schedule to the Order should not be read as imposing a mandatory requirement that all objections lodged after the stipulated period must be ignored. In *Re Robinson's application* [2002] NI 206, Carswell LCJ reviewed the vexed question of whether a statutory provision requiring that a certain step be taken by use of the word 'shall' should be taken to connote a mandatory or directory

requirement. As he pointed out, recent judicial authority has tended to regard the classification of provisions in the traditional categories of mandatory or directory as not infallibly indicating the consequence of a failure to comply strictly with the provision. The approach favoured by Carswell LCJ was that outlined by Lord Woolf CJ in *R v Immigration Appeal Tribunal, ex parte Jeyeanthan* [1999] 3 All ER 231 where he said at pages 238-9:-

> "… I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test … Which questions will arise will depend on the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not."

[32] In the course of the hearing of the appeal, Hart J helpfully drew to the attention of the parties the decision of this court in *McLean and others v Kirkpatrick and others* [2003] NI 14 and we heard argument on its relevance to the present case. In *McLean* the appellants had lodged objections to the grant of a bookmaking office licence pursuant to Schedule 2 to the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985. Paragraph 5 of the schedule required the objection to be lodged not less than one week before the court sitting at which the application for a licence was to be made. Carswell LCJ, delivering the judgment of the court, referred to the fact that under the earlier Betting and Lotteries Act (Northern Ireland) 1957 there was no provision prescribing the time at which or the manner in which objections had to be lodged to the grant of bookmaking office licences. The legislature had seen fit to limit (in the manner provided for in the 1985 Order) the right to appear and put forward objections and the court concluded that this betokened an intention an objection submitted late must be disregarded.

[33] The scheme under consideration in *McLean* was, of course, different from that involved in the present appeal and that decision is not therefore in any sense binding on this court. In any event, it is to be noted that neither the *Robinson* decision nor Lord Woolf's judgment in *Jeyeanthan* was cited to the court in *McLean*. As Carswell LCJ said in *Robinson*, the paramount objective is to ascertain the intention of the legislature in enacting the provision under consideration. In my judgment, Parliament did not intend that the council

should be prevented from considering late applications where they contained material relevant to the decision that it had to make. This conclusion accords with the approach taken by the Divisional Court in England on similar provisions in the equivalent legislation in that jurisdiction – see the judgment of Webster J in *Quietlynn Ltd v Plymouth City Council* [1987] 3 WLR 189 in which he held that the local council had a duty to consider objections made within 28 days and a discretion whether to entertain objections made outside that period.

[34] The conclusion that the council had a discretion to admit late objections does not dispose of the appellant's submissions on this issue. It is argued that, even if such a discretion existed, the council failed to exercise it because it was not made aware that it required to do so. I am satisfied that in order to validly admit the late objections, the council had to recognise that the late objections had not complied with the statutory time limit but that they should nevertheless, in the exercise of the council's discretion, be considered. Mr O'Hara for the council accepted that in order that the late objections could be legitimately considered, it was necessary that the council exercise its discretion to admit them.

[35] It is beyond dispute that the council was informed that sixty-nine of the objections were late. Is this sufficient to establish that the council exercised its discretion to admit them, notwithstanding the failure of the late objectors to fulfil the statutory requirement? Weatherup J thought that it was. Regrettably, we cannot agree. The exercise of a discretion requires of the decision makers that they apply their minds to the question whether a particular course should be followed and that they weigh the competing arguments in favour and against following that course. There is no evidence whatever that the council did this. On the contrary all the available evidence suggests that they did not. Knowledge that the objections were late cannot, in our opinion, be taken as awareness that a balancing exercise by the council had to be undertaken. It is, in our view, impossible to conclude that the council gave consideration to the question whether they should refuse to entertain the late applications. In the absence of such consideration it cannot be said that the council exercised a discretion. Their decision to admit the late applications is as consistent with ignorance that it was open to them to refuse to allow these applications as with a considered decision that, despite the lateness of the applications, they should.

[36] We have decided therefore that the council's decision cannot stand because we have concluded that the council failed to exercise its discretion as to whether the late applications should be admitted.

[37] We turn then to the second limb of the procedural challenge. We can deal with this briefly. The appellant was not given all the relevant materials to enable it to present fully informed submissions to the committee. But those

materials were provided in advance of the council meeting before which the appellant's representatives were given full opportunity to make representations. Apart from the matter of its convention rights (to which we shall shortly turn) the appellant has been unable to demonstrate that the council (which was, after all, the deciding authority) failed to take any relevant matter in favour of the application into account. We do not consider, therefore, that the appellant has suffered any disadvantage by the procedure in fact adopted. We reject the appellant's arguments on this issue.

Convention rights and proportionality

[38] Mr Larkin submitted that the respondent had failed to recognise that the appellant's convention rights were engaged by the decision to refuse its application. Inevitably, therefore, the council had failed to make any assessment of whether the interference with those rights could be justified. Relying on recent decisions of this court in *Re Connor's Application for Judicial Review* [2004] NICA 45 and *A R v Homefirst Community Trust* [2005] NICA 8 Mr Larkin argued that the failure to make such an assessment was fatal to the decision to refuse the application. Weatherup J had examined the reasons that the council had decided to refuse the application and had concluded that these constituted sufficient justification for the interference with the appellant's convention rights. This approach, Mr Larkin, submitted, was wrong in principle. It was for the decision-maker (in this case, the council) to make the assessment that the judge purported to carry out.

[39] Counsel argued alternatively that the learned judge had applied the wrong test in evaluating the justification for interference with the appellant's article 1 First Protocol rights. He had equated justification under article 8 (2) with that which applied to article 1 of the First Protocol and the test of justification in each of the provisions was, Mr Larkin said, markedly different from the other. Likewise, he claimed, the judge had wrongly treated the justification under article 10 (2) as equivalent to that required to validate interference with the appellant's article 1 First Protocol rights.

[40] For the council Mr O'Hara submitted that that the appellant's convention rights were not engaged by the decision to refuse the application for a sex establishment licence. Alternatively, if any such right was engaged the interference was justified for the reasons articulated by Weatherup J.

Conclusions on the convention arguments

[41] The starting point for the consideration of these arguments is the acceptance of the council that it did not consider the appellant's application for a licence in a "convention context". Mr O'Hara submitted that such consideration was unnecessary because none of the appellant's convention

rights was engaged. The first question that must be addressed, therefore, is whether any of the appellant's convention rights are engaged.

[42] It had been argued before Weatherup J that the council's decision constituted a violation of the appellant's rights under articles 8 and 10 of the convention and article 1 of the First Protocol. On the appeal the appellant relied on the latter two of these and did not seek to argue that there had been a violation of article 8.

[43] We shall deal first with article 1 of the First Protocol. In *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, ECtHR observed that this provision comprises three distinct rules. The first rule, set out in the first sentence of the first paragraph, states the principle of peaceful enjoyment of property. The second rule deals with deprivation of possessions and the third rule, set out in the second paragraph, recognises that states are entitled to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for that purpose.

[44] As Lester and Pannick point out in paragraph 4.19.8 of *Human Rights Law and Practice,* 'in considering whether there has been a violation of article 1 of the First Protocol, it is necessary first to consider which of these three rules applies'. It appears to us that the present case involves the third rule, control of the use of property. It is analogous to legislative control of rent chargeable for property – see *Mellacher v Austria* (1989) 12 EHRR 391; and to planning control of the use of land – see, for instance, *Pine Valley Developments v Ireland* (1991) 14 EHRR 319 in which ECtHR held that where an impugned measure was designed to ensure that land was used in conformance with relevant planning laws, the interference was to be considered a control of property within article 1 of the first Protocol.

[45] In the *UK Waste Management* case this court concluded that the refusal of planning permission to extend a landfill site did not amount to a breach of article 1 of the first Protocol. At page 143, Carswell LCJ delivering the judgment of the court said:-

> "The appellant's peaceful enjoyment of its property has not been disturbed in any ordinary sense of the word. It has not been enabled to use it as it would wish, but that it is not in our view an interference with *peaceful* enjoyment, which connotes some kind of invasion of the property. Still less is it a deprivation of the appellant's possessions, which involves permanent extinction of ownership rights. Moreover, even if it were to be held that the department's acts or omissions constituted an interference with the appellant's

> peaceful enjoyment of its property, we would take the view that it was in the public interest and proportionate."

[46] The view expressed in that passage was consistent with the approach taken in the subsequent case of *Re Stewart's application* [2003] NI 149. In that case the appellant sought judicial review of the grant of planning permission by the Planning Appeals Commission for a development on land adjacent to his property. One of the issues that arose was whether the appellant's rights under article 8 and article 1 of the First Protocol were engaged. At paragraph [26] Carswell LCJ said:-

> "These provisions are intertwined to an extent and can be considered together. It appears clear enough in principle and also consistent with the European jurisprudence that both may be engaged if a person is particularly badly affected by development carried out in consequence of a planning decision made by the state: see, e.g., *S v France* (1990) 65 DR 250 and cf the discussion by Sullivan J in *R* (*on the application of Malster*) *v Ipswich BC* [2001] EWHC Admin 711. Under each provision there is a saving permitting the state to act in the public interest. It has to carry out a proper balancing exercise of the respective public and private interests engaged in order to satisfy the requirement that it act proportionately. This type of balancing is an inherent part of the planning process, in which the determining authorities carry out a scrutiny of the effect which the proposal will have on other persons and weigh that against the public interest in permitting appropriate development of property to proceed. In the vast majority of cases this will suffice to satisfy the requirements of the two provisions, bearing in mind that the authorities are entitled to the benefit of the 'discretionary area of judgment' referred to by Lord Hope of Craighead in *R v DPP, ex p Kebeline, R v DPP, ex p Rechachi* [2000] 2 AC 326 at 381."

[47] The *Stewart* case did not involve control of the use of property but the *UK Management* case did, although it was not considered by the court in that way. In both cases the court focused on the first rule involved in article 1 of the First Protocol and concluded that something more than an adverse effect on property was required to prompt engagement of the article. Weatherup J

distinguished this line of cases on the basis that a different approach was warranted where the avowed interference with peaceful enjoyment of possessions arose from control of the use of land by planning conditions rather than by the refusal of a licence to carry on certain activities on the land. We consider, however, that the licensing of activities on land must be regarded as analogous to the grant of planning permission and we do not agree with the learned judge, therefore, that this constitutes a valid ground of distinction.

[48] It is to be noted, however, that there is Strasbourg jurisprudence to the effect that control of the use of land by planning laws engages article 1 of the First Protocol through the second paragraph of that provision. Thus in the *Pine Valley* case, although in paragraph 56 of its judgment ECtHR stated that "the impugned measure [*i.e.* the statutory provision which invalidated an earlier grant of planning permission] was basically designed to ensure that the land was used in conformity with the relevant planning laws", it nevertheless amounted to an interference with the applicant's property rights. The claim that the applicant's rights under article 1 of the First Protocol had been violated failed not because the court considered that the article was not engaged but because it pursued a legitimate objective (*viz* the protection of the environment) and because it was proportionate – see paragraphs 57-59 of the judgment of ECtHR).

[49] So also in *Fredin v Sweden* [1991] ECHR 12033/86 it was held that article 1 of the First Protocol guaranteed in substance the right of property. Deprivation of control of possessions by a contracting state, by enforcing such law as they deemed necessary for the purpose, was permissible only where such control of property was in accordance with the general interest. In that case the applicants had obtained permits to extract gravel from a number of pits. The revocation of the permits by legislation was held to be an interference with the applicants' right under article 1 of the First Protocol.

[50] There is an obvious point of difference from the present case in that in *Fredin* the applicants had already been extracting gravel as a commercial activity whereas here the use of the appellant's premises as a sex establishment is prospective but we do not consider that this alters the principle that to control the use to which an individual may put his land constitutes a fetter on the way in which he enjoys his possessions and thereby engages article 1 of the First Protocol. At paragraph 41 of its judgment in *Fredin* ECtHR put the matter in this way:-

> "Article 1 guarantees in substance the right of property. It comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of

> property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose. However, the rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property. They must therefore be construed in the light of the general principle laid down in the first rule (see, inter alia, the *Mellacher and others* judgment of 19 December 1989, Series A no. 169, pp. 24-25, para. 42)."

[51] The third rule (the control of the use of property) is explained as a 'particular instance of interference with the right to peaceful enjoyment of property', in other words a species of interference with the general right enshrined in the first rule. We consider, therefore, that the refusal of the council to allow the appellant to use its premises in a way that would permit their commercial exploitation involves an interference with the appellant's article 1, First Protocol rights.

[52] It is clear that the council did not take into account the fact that the appellant's rights under article 1 of the First Protocol were engaged by its decision whether to grant the application for a sex establishment licence. Indeed, it has been the respondent's consistent position that these rights have not been engaged. The consequent failure of the council to consider the applicant's convention rights gives rise to two issues. Firstly, can the interference with those rights be justified if the council has not weighed them against the competing interests that might be said to warrant the interference? Secondly, does the failure of the council to take into account what was a plainly relevant matter, in itself warrant the quashing of its decision?

[53] In *Re Connor's application* a health and social services trust had refused to permit the appellant, a person subject to a guardianship order, to live permanently with her husband. It was established that this decision interfered with the appellant's rights under article 8 of the convention and that the trust had not recognised, much less addressed, the interference with those rights. At paragraph [28] of its judgment, dealing with the question of the justification of an interference with article 8 rights, this court said:-

> "It is for the state to justify the interference. Generally this will require that the public authority responsible for the impugned decision recognises that there is interference with the applicant's article 8 rights and satisfies itself that such interference is essential in order to fulfil the objective that has prompted it. The interference should be no more than is necessary to achieve that aim – see, for instance, *Hatton v United Kingdom* [2003] 37 EHRR 28."

[54] An interference with an article 8 right can only be justified within the terms of article 8 (2) of the convention which provides:-

> "2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[55] In *Connor* the court concluded that the evaluation of what lay in the interests protected by this provision was primarily one for the public authority, subject always to the court's superintendence where a challenge to its assessment of those interests had been made. Where no appraisal of the interests had been made by the public authority, the court could only conclude that the interference was justified if, on analysis, it determined that it was inevitable that the decision-maker would have decided that the article 8 rights of the individual would have to yield to protect the wider interests outlined in article 8 (2).

[56] The position in relation to article 1 of the First Protocol is, if anything, clearer. The terms of the second paragraph of this provision allow the state to "to enforce such laws *as it deems necessary* to control the use of property in accordance with the general interest". The interference with the appellant's rights can only be justified, therefore, if either the public authority has decided that the general interest demands it or it is inevitable that it would have so decided had it been conscious of the interference with the appellant's rights that refusal of the application entailed.

[57] Mr O'Hara argued that the council had engaged in an examination of what lay in the general interest; it took into account the nature of the area and had regard to the presence of schools, churches, shops etc in the vicinity. It is clear, however, that this consideration did not take place against the

background of awareness that interference with the appellant's convention rights would arise from a refusal of the application. An examination of what lies in the general interest in the abstract must be distinguished from consideration of whether matters of general interest are sufficient to prevail over and justify interference with convention rights. We have concluded that it is not inevitable that, if the council had been aware that the appellant's article 1 Protocol 1 rights were engaged, it would have decided that those matters of general interest were of sufficient weight to justify the interference with the appellant's convention rights. On that account also the decision must be quashed.

[58] As we have said, the appellant's rights under article 1 of the First Protocol were clearly relevant matters to be taken into account by the council in reaching its decision on the application for the licence. The failure to take those rights into consideration would vitiate the decision unless one could conclude that, had they been taken into account, it would not have changed the outcome of the application. For the reasons that we have given, we find it impossible to say that this would have been the result of the council's deliberations if they had taken place on an informed basis, taking into account the appellant's convention rights. For that reason also the decision cannot stand.

[59] We turn then to consider the appellant's claim that its article 10 rights are engaged. Mr O'Hara submitted that since the appellant's purpose in obtaining a sex establishment licence was simply to sell articles that came within the definition of 'sex article' in paragraph 4 of schedule 2, the right to freedom of expression did not arise. We do not accept this argument. Expression which has a financial or economic motivation, even commercial advertising, is protected by article 10 – see, for instance, *Markt Intern Verlag v Germany* (1989) 12 EHRR 161. As Lester and Pannick point out in paragraph 4.10.16 of *Human Rights Law and Practice*, the approach of the ECtHR has been to grant less protection to commercial speech than that accorded in the core area of political expression but that is because interference with such speech may be more readily justified, not because the article is not engaged.

[60] In *Autronic AG v Switzerland* (1990) 12 EHRR 485 ECtHR dealt with a similar argument to that made on behalf of the council in the present case. In the *Autronic* case the applicant had applied for permission to give a showing at a trade fair of a public television programme that it received direct from Russia by means of a private dish aerial, its object being to demonstrate the technical capabilities of the equipment in order to promote sales of it. The government agency concerned refused permission because it had not been possible to obtain the consent of the Soviet authorities to the broadcast. The applicant claimed a violation of article 10. The government submitted that the right to freedom of expression was not relevant to the applicant's complaint; the company had not attached any importance to the content of

the transmission since it was pursuing purely economic and technical interests. It was a corporate body whose activities were commercial and its sole object had been to give a demonstration at a fair of the capabilities of a dish aerial in order to promote sales of it. Freedom of expression that was exercised exclusively for pecuniary gain came under the head of economic freedom, which was outside the scope of the convention. ECtHR rejected these arguments in paragraph 47 of its judgment:-

> "47. In the Court's view, neither Autronic AG's legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10 (art. 10). The Article (art. 10) applies to "everyone", whether natural or legal persons. The Court has, moreover, already held on three occasions that it is applicable to profit-making corporate bodies (see the *Sunday Times* judgment of 26 April 1979, Series A no. 30, the *Markt Intern Verlag GmbH and Klaus Beermann* judgment of 20 November 1989, Series A no. 165, and the *Groppera Radio AG and Others* judgment of 28 March 1990, Series A no. 173). Furthermore, Article 10 (art. 10) applies not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information. Indeed the Article (art. 10) expressly mentions in the last sentence of its first paragraph (art. 10-1) certain enterprises essentially concerned with the means of transmission."

[61] The appellant's purpose in applying for a sex establishment licence is to be permitted to sell sex articles. Sex articles are defined in paragraph 4 of Schedule 2 and, by virtue of paragraph 4 (4) include:-

> "(a) … any article containing or embodying matter to be read or looked at or anything intended to be used, either alone or as one of a set, for the reproduction or manufacture of any such article; and
>
> (b) … any recording of vision or sound, which,
>
> (i) is concerned primarily with the portrayal of, or primarily deals with or relates to, or is

> intended to stimulate or encourage, sexual activity or acts of force or restraint which are associated with sexual activity; or
>
> (ii) is concerned primarily with the portrayal of, or primarily deals with or relates to, genital organs, or urinary or excretory functions."

[62] While the appellant's objective is unquestionably commercial, it appears to us that, given the nature of the articles that it is proposed to sell, a freedom of expression dimension is involved that inevitably engages article 10.

[63] The conclusions that we have reached in relation to article 1 of the First Protocol as to effect of the failure of the council to conduct a balancing exercise between the appellant's convention rights and the matters that might justify interference with those rights apply *mutatis mutandis* to the appellant's rights under article 10. Indeed, as Mr O'Hara accepted, it is more difficult to argue that the council's consideration of the application mirrored that which should have been carried out in relation to the appellant's article 10 rights. This is because of the specific nature of the inquiry that must be undertaken in order to address the issues that arise under article 10 (2). It is clear that no exercise sufficient to satisfy the requirements of this provision was conducted by the council and for that reason also the decision must be quashed.

Conclusions

[64] We have rejected the appellant's claim that paragraph 10 (15) of Schedule 2 to the 1985 Order imposes a mandatory requirement that all objections lodged later than 28 days after the date of the application must be disregarded. We have concluded, however, that, in order to entertain late objections, the council was required to exercise a discretion and that it failed to do so. On that account the decision to refuse the sex establishment licence must be quashed. We have also concluded that the appellant's rights under article 10 of ECHR and article 1 of the First Protocol to the convention were engaged and that the council failed to conduct the necessary balancing exercise in order to determine whether interference with those rights could be justified. The circumstances of the case are not such as would enable the conclusion to be reached that, if the council had considered the matter properly, it is inevitable that the application would have been rejected.

[65] The appeal must therefore be allowed and an order of certiorari in favour of the appellant, quashing the decision of the council, will be made. In considering the appellant's application anew the council will have to determine whether the late objections should be entertained and must exercise the discretion available to it in relation to that matter. It will also be

necessary for the council to consider the application for the licence in light of the engagement of the appellant's convention rights. In this context, it should be noted that the justification for interference with rights under article 10 differs from that which applies to article 1 of the First Protocol. It appears that the learned trial judge may have treated as equivalent the justification that is appropriate under article 8 of the convention with that applicable under article 1 of the First Protocol. We are satisfied that the justification for interference with article 1 Protocol 1 rights must be considered in terms of the second paragraph of that provision. Likewise, the justification for interference with the appellant's rights under article 10 of the convention must be dealt with by reference to the language contained in paragraph (2) of article 10.