HOUSE OF LORDS SESSION 2006–07
[2007] UKHL 19
on appeal from: [2005] NICA 35

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Belfast City Council (Appellants)

v.

Miss Behavin' Limited (Respondents) (Northern Ireland)

Appellate Committee

Lord Hoffmann
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Mance
Lord Neuberger of Abbotsbury

Counsel

Appellants:
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John O'Hara QC
David Scoffield
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Respondents:
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[2007] UKHL 19

LORD HOFFMANN

My Lords,

1. The end of the *Chatterley* ban and the Beatles' first LP marked a sudden loss of confidence in traditional British prudishness by legislators and jurors which made the law against obscene publications very difficult to enforce. As a result, the distribution of all but the most hard core pornography became, at least in practice, a lawful trade. This gave rise to unexpected social and environmental problems. It was unacceptable for vendors of pornography to flaunt their wares before the public at large. Ordinary newsagents who sold soft porn avoided outraging sensitive customers by putting it on high shelves. Shops which specialised in pornographic publications and videos, together with sex aids and other such articles, tended to have opaque windows, as much to protect the privacy of customers as the sensibilities of passers-by. They congregated in run-down areas of large towns, usually near the railway station, clustering together on the same principle that people carrying on similar businesses have always traded in close proximity to each other. But the other inhabitants of the locality, both commercial and residential, often objected to the proliferation of sex shops on a mixture of environmental, social, aesthetic, moral and religious grounds: fears about the kind of people who ran them and the customers they attracted; distaste or moral or religious objection to what was going on inside; concern that they lowered the tone of the neighbourhood and attracted other even less desirable trades such as prostitution and organised crime.

2. All these concerns bubbled to the surface in the debate in the House of Commons in 1981 on the second reading of the Local Government (Miscellaneous Provisions) Bill, which contained elaborate

provisions dealing with the licensing of premises supplying meals or refreshments, tattooing and ear-piercing (the piercing of other parts of the body does not appear to have been contemplated), acupuncture and electrolysis, but said nothing about sex shops. Honourable members wanted to know why not. The strength of feeling was such that the government brought forward amendments at the report stage, introducing the system of local authority licensing which is now contained in section 2 and Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982. The Act applied only to England, but the identical system was extended to Northern Ireland by the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985 No 1208 (NI 15). In the Order, the relevant provisions are article 4 and Schedule 2.

3. Article 4 gives a council power to resolve that the licensing system contained in Schedule 2 should apply to its district. The Belfast City Council has so resolved. Paragraph 6 makes it unlawful to use premises as a sex shop without a licence. Paragraph 10 prescribes how an application for a licence should be made and sub-paragraphs (15) and (16) provides for representations by interested parties:

> "(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 sub-paragraph (15), the council shall, before considering the application, give notice of the general terms of the representation to the applicant."

4. Paragraph 12 deals with grounds of refusal. Sub-paragraph (1) specifies certain grounds personal to the applicant on which refusal is mandatory; for example, the council cannot grant a licence to a person under 18, or a foreign company, or someone whose licence has been revoked by the council within the previous 12 months. Sub-paragraph (3) contains grounds on which the council may refuse, of which the one relevant for present purposes is (c):

> "that the number of sex establishments in the relevant locality at the time the application is made is equal or

> exceeds the number which the council considers is appropriate for that locality"

5. This must be read with sub-paragraphs (4) and (5):

> "(4) Nil may be an appropriate number for the purposes of sub-paragraph 3(c).
>
> (5) In this paragraph, "the relevant locality" means…in relation to premises, the locality where they are situated …"

6. 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. In this case the respondent company applied for a licence to run a sex shop at premises in Gresham Street and the Council's Health and Environmental Services Committee, to which the application was referred, recommended refusal on the ground that the appropriate number of sex shops in the relevant locality was nil. In arriving at this decision, it said that it —

> "gave consideration to the character of [the] 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 …"

7. This recommendation was adopted by the Council and the application refused. The Council also gave other reasons, personal to the applicant, but I shall confine myself to the question of whether the refusal under paragraph 12(3)(c) was valid.

8. In arriving at its decision, the Council appears to have considered some representations and objections by members of the public which were made outside the 28 day period prescribed by paragraph 10(15). There was an argument about whether they were entitled to do so. Both the judge and a majority of the Court of Appeal said that the Council had a discretion to consider late objections but the Court of Appeal, reversing the judge, said that the Council had not purported to exercise such a discretion and was therefore wrong to have taken them into account. I do not agree. In my opinion, paragraph 10(15) is concerned only with the position of the objector. If he does not comply with the deadline, he cannot complain that the Council did not take his objection into account. But paragraph 10(15) does not prohibit the council from taking all relevant matters into account, whether they have been communicated by objectors or others, early or late, or in any other way. It would be very strange if such a provision, designed to allow the Council to carry on its business in an orderly and expeditious manner, had the effect of requiring it to shut its eyes to facts which it considered relevant to its decision. The only difficulty is sub-paragraph (16), which seems to suggest that only the terms of representations received within the 28 day period need be communicated to the applicant. Fairness obviously requires that the terms of any representations which the Council proposes to consider should be communicated to the applicant so that he may have an opportunity to comment. But this general principle is in my opinion sufficient to supplement sub-paragraph (16) and keep the scheme fair and workable.

9. As to the substance of the decision, both the judge and the Court of Appeal agreed that the Council had acted fairly and properly exercised its powers under the Order. But they disagreed over whether the Council had complied with the Human Rights Act 1998. The Court of Appeal said that the Council, in exercising its statutory powers, had not sufficiently taken into account the respondent's right to freedom of expression under article 10 of the Convention and its right to the peaceful enjoyment of its possessions under article 1 of Protocol 1.

10. I am prepared to assume, without deciding, that freedom of expression includes the right to use particular premises to distribute pornographic books, videos and other articles and, rather more doubtfully, that a person who is denied the right to use his premises as a sex shop is thereby "deprived of his possessions": compare, however, *ISKCON v UK* (1994) 18 EHRR CD 133 and *Re UK Waste Management Limited's Application* [2002] NI 130. But both of these rights are qualified. The right to freedom of expression may be subject to such restrictions as are necessary in a democratic society "for the prevention

of disorder or crime, for the protection of health or morals, for the protection of the…rights of others". The right to enjoyment of possessions is subject to the right of the State to "control the use of property in accordance with the general interest."

11. The Court of Appeal accepted that, in principle, the legislature was entitled to restrict both freedom of expression and the enjoyment of possessions by requiring that sex shops be licensed. The respondent has not argued the contrary. What it says is that, in exercising its judgment under article 12(3)(c) as to whether a sex shop was appropriate in the locality of Gresham Street, the Council ought to have had regard to its obligation under section 6 of the 1998 Act to respect Convention rights. Although the requirement of a licence was a restriction which pursued a legitimate aim, the Council should not, by its decision to refuse a licence, have interfered with the respondent's rights more than was necessary and proportionate for the achievement of that aim.

12. My Lords, I would not dissent from this proposition, although for the reasons I shall mention later, I find it difficult to imagine a case in which a proper exercise by the Council of its powers under the Order could be a breach of an applicant's Convention rights. If, however, the Court of Appeal had considered that the refusal of a licence was in this case a disproportionate interference with the human right of the respondent to sell pornography in a place of its own choosing, it should have quashed the decision for that reason. I would have disagreed on the facts, but at least the judgment would have proceeded on orthodox grounds. But the Court of Appeal did not say that the respondent's human right to operate a sex shop in Gresham Street had been infringed. Instead, it said that its Convention rights had been violated by the way the Council had arrived at its decision. In the reasons it gave, the Council had not shown that it was conscious of the Convention rights which were engaged. The decision was therefore unlawful unless it was inevitable that a reasonable Council which instructed itself properly about Convention rights would have reached the same decision.

13. This approach seems to me not only contrary to the reasoning in the recent decision of this House in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 but quite impractical. What was the Council supposed to have said? "We have thought very seriously about your Convention rights but we think that the appropriate number of sex shops in the locality is nil." Or: "Taking into account article 10 and article 1 of the First Protocol and doing the best we can, we think that the appropriate number is nil." Would it have been sufficient to say that

they had taken Convention rights into account, or would they have had to specify the right ones? A construction of the Human Rights Act which requires ordinary citizens in local government to produce such formulaic incantations would make it ridiculous. Either the refusal infringed the respondent's Convention rights or it did not. If it did, no display of human rights learning by the Belfast City Council would have made the decision lawful. If it did not, it would not matter if the councillors had never heard of article 10 or the First Protocol.

14. In the *Denbigh High School* case, the Court of Appeal likewise quashed the decision of a school not to allow a pupil to wear a religious form of dress on the ground that it had arrived at its decision on grounds which did not sufficiently show consciousness of the pupil's Convention right to manifest her religion. As in this case, the Court of Appeal did not say that the school had actually infringed her Convention right to wear the dress. It demanded only that the school demonstrate a correct process of reasoning. Lord Bingham of Cornhill said (at pp 115-116):

> "[T]he focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated. In considering the exercise of discretion by a national authority the court may consider whether the applicant had a fair opportunity to put his case, and to challenge an adverse decision, the aspect addressed by the court in the passage from its judgment in *Chapman* quoted above. But the House has been referred to no case in which the Strasbourg Court has found a violation of Convention right on the strength of failure by a national authority to follow the sort of reasoning process laid down by the Court of Appeal. This pragmatic approach is fully reflected in the 1998 Act. The unlawfulness proscribed by section 6(1) is acting in a way which is incompatible with a Convention right, not relying on a defective process of reasoning, and action may be brought under section 7(1) only by a person who is a victim of an unlawful act."

15. As Lord Bingham noted, some Convention rights may have a procedural content; most obviously article 6, but other rights as well. In such cases, a procedural impropriety may be a denial of a Convention

right. Thus in *Hatton v United Kingdom* (2003) 37 EHRR 28, an article 8 case, the ECHR considered not only the effect on the applicant's private life but whether he had had a fair opportunity to put his case. In such cases, however, the question is still whether there has actually been a violation of the applicant's Convention rights and not whether the decision-maker properly considered the question of whether his rights would be violated or not.

16. The Court of Appeal, as I have said, did not decide whether refusal of a licence was a violation of the respondent's Convention rights or not. Weatherup J decided that it was not. I agree. If article 10 and article 1 of Protocol 1 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. That was not the case here and I would therefore allow the appeal and dismiss the application for judicial review.

LORD RODGER OF EARLSFERRY

My Lords,

17. I agree that the appeal should be allowed for the reasons given by my noble and learned friend, Lord Hoffmann. I add only a few observations on the Court of Appeal's conclusion that the Council's decision should be quashed because they failed to consider the human rights issue properly.

18. The amended Order 53 statement on behalf of the applicant, Miss Behavin' Ltd, indicated that relief was sought on two broad grounds. The first related to natural justice. The second claimed that the Council's decision was "illegal" inter alia because it turned upon a decision that the appropriate number of sex establishments in the relevant locality was nil, "which was in breach of the European Convention on Human Rights". Two of the supposed reasons advanced by the applicant related to article 10 of the Convention and one related to article 1 of protocol 1.

19. Mr Larkin QC, who appeared for the applicant, acknowledged that if he could not win on article 10 then he could not win at all on human rights. So he concentrated on article 10. In considering the position, I assume, without deciding, that the idea of freedom of expression in article 10(1) is wide enough to cover the use of premises to sell pornographic books, etc. Again, since the contrary was not suggested, I proceed on the basis that in an appropriate case it may be necessary for a council to restrict this use of premises in order to protect health or morals, as envisaged in article 10(2). The applicant's initial position, at least, was that in the circumstances of this case, however, a restriction in the form of a refusal of a licence was not justified.

20. In the Order 53 statement the first article 10 reason for illegality was said to be that the denial of a licence amounted to a disproportionate interference with the applicant's right to freedom of expression. The second was that the Council's decision was disproportionate since they were empowered, when granting a licence, to apply conditions which would have met their concerns, but they declined to do so. Before the House Mr Larkin presented no argument in support of either of these reasons. Matters of procedure were the order of the day.

21. Defects in procedure are, of course, very often a good reason for quashing a decision and requiring the relevant body to reconsider it. In its Order 53 statement the applicant mentioned various concerns about the procedure which the Council had adopted, but it did not suggest that any procedural failing had given rise to a breach of article 10. So far as article 10 was concerned, the applicant relied on the effects of the refusal of a licence: it meant that the applicant could not sell its books etc in its shop in Gresham Street in Belfast and such a restriction was unnecessary for the protection of morals in a democratic society.

22. Dealing with the issue as one of substance rather than procedure, Weatherup J concluded that the refusal of a licence had not violated any right to freedom of expression which the applicant might have under article 10. So he upheld the Council's decision. The Court of Appeal reversed him. They held that, since the Council had not taken the applicant's right to freedom of expression into account when reaching their decision, it would have to be quashed, unless the court could say that the Council would have reached the same decision if their deliberations "had taken place on an informed basis, taking into account the appellant's convention rights".

23. The basis for the applicant's contention that the Council's decision to refuse it a licence was illegal because of a violation of article 10 must be section 6(1) of the Human Rights Act 1998. In terms of that subsection the Council's refusal was unlawful if it was incompatible with the applicant's right to freedom of expression. In other words, if their refusal was disproportionate – because it went too far in interfering with the applicant's right to sell its books or films - then it was unlawful. In that event it would still have been unlawful however much the Council had analysed and agonised over the applicant's right to freedom of expression before refusing the licence. Equally, if the refusal did not interfere disproportionately with the applicant's right to freedom of expression, then it was lawful for purposes of section 6(1) – whether or not the Council had deliberated on that right before refusing.

24. This is just to apply what was said by Lord Bingham of Cornhill and Lord Hoffmann in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, 114E-116H, paras 26-31, and 125D-126C, paras 66-68. The House had, of course, already adopted much the same approach when carrying out the related function of considering the proportionality of legislation. What matters is its impact in the relevant circumstances, not the quality of the debate which preceded its enactment, perhaps many years before. In *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, 843F-844A, Lord Nicholls of Birkenhead said:

> "In particular, it is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments. The proportionality of legislation is to be judged on that basis. The courts are to have due regard to the legislation as an expression of the will of Parliament. The proportionality of a statutory measure is not to be judged by the quality of the reasons advanced in support of it in the course of parliamentary debate, or by

> the subjective state of mind of individual ministers or other members. Different members may well have different reasons, not expressed in debates, for approving particular statutory provisions. They may have different perceptions of the desirability or likely effect of the legislation. Ministerial statements, especially if made ex tempore in response to questions, may sometimes lack clarity or be misdirected. Lack of cogent justification in the course of parliamentary debate is not a matter which 'counts against' the legislation on issues of proportionality. The court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister's exploration of the policy options or of his explanations to Parliament."

Similarly, Lord Hobhouse, at p 866F-H, para 144, emphasised that the question of justification and proportionality has to be answered by reference to the time of the events to which the statutory provision was being applied:

> "Those who are seeking to justify the use of the statutory provision have to do so as at the time of that use. If they cannot justify it at that time, their use of it is a breach of the victim's 'Convention rights'. That is how the European Court would decide the question and it is also how the municipal court is required to look at it. In most cases the difference will probably be academic.... But as circumstances change so the justification or the absence of it may change. Merely to examine the situation at the time the Act in question was passed and treat that as decisive is wrong in principle.... [J]ust as the current state of the legislation at that time is what has to be the subject matter of the decision so also the circumstances and social needs existing at that time are what is relevant, not those existing at some earlier or different time. To look for justification only in the Parliamentary debates at the time the statute was originally passed invites error."

25. On behalf of the Council Mr Gordon QC emphasised that the applicant had not alleged that any of the provisions on the licensing of sex establishments in Schedule 2 to the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985 was incompatible with the Convention. So its provisions must be regarded

as having appropriately balanced the competing interests for Convention purposes, even though the Order was passed some fifteen years before the 1998 Act came into force. It followed, he submitted, that any decision duly taken by a council applying the Order would be compatible with the right to freedom of expression of any applicant for a sex establishment licence. Such an approach may have its attractions in practice, but the court must always keep in mind that it is not concerned with generalities about the legislation in question, but with whether the effect of the council's exercise of its statutory powers in the particular circumstances was in fact compatible with the Convention rights of the applicant for a licence.

26. Of course, where the public authority has carefully weighed the various competing considerations and concluded that interference with a Convention right is justified, a court will attribute due weight to that conclusion in deciding whether the action in question was proportionate and lawful. As Lord Bingham said in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, 116G, para 31:

> "If, in such a case, it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder. But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it."

Similarly, having observed that head teachers and governors could not be expected to make decisions with textbooks on human rights at their elbows, Lord Hoffmann observed, at p 126C, para 68:

> "The most that can be said is that the way in which the school approached the problem may help to persuade a judge that its answer fell within the area of judgment accorded to it by the law."

27. In this case the Council did not weigh the competing human rights and other considerations in that way. So, when deciding whether their refusal of a licence interfered disproportionately with the applicant's right to freedom of expression, the court had to go about its task without that particular kind of assistance. Weatherup J concluded that, having regard to the various features of this particular locality which he

mentioned, the refusal of a licence to sell pornography in the applicant's Gresham Street premises did not interfere disproportionately with its right to freedom of expression. Neither the Court of Appeal nor indeed Mr Larkin actually challenged that conclusion on its merits. But, if it is sound – as I believe it is - then the Council's decision was lawful in terms of section 6(1) of the 1998 Act and cannot be quashed on the ground of incompatibility with article 10.

28. The Court of Appeal would also have quashed the Council's decision on the separate ground that the applicant's article 10 right was a relevant consideration which the Council had failed to take into account in reaching their decision. The court felt unable to say that, if the Council had taken account of that right, they would have reached the same decision. This is back to a traditional judicial review point – but, significantly perhaps, not one which was advanced by the applicant in its Order 53 statement. At the meeting of the Health and Environmental Services Committee on 11 December 2002 the applicant's representative had referred to the right to freedom of expression of the applicant and of users of sex shops in Belfast. But he does not seem to have developed the point. Nor did the representative who appeared at the full Council meeting on 3 March 2003. Nor again did Mr Larkin in the hearing before the House. All this is scarcely surprising since, 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. The basic pros and cons of having a right to sell and use pornography must surely have been well known, however, to the members of the Council who took the decision. Unlike the Court of Appeal, I am accordingly satisfied that, even if they had had regard to the applicant's article 10 right in formulating their decision, it would still have been the same. There were, in any event, other special factors relating to the applicant which would have justified refusing the licence.

29. For these reasons, as well as the others given by Lord Hoffmann, I would allow the appeal and restore the order of Weatherup J dismissing the application for judicial review.

BARONESS HALE OF RICHMOND

My Lords,

30. This case must take the prize for the most entertaining name of any that have come before us in recent years. It also takes the prize for exemplifying two of the most important questions which have so far arisen under the Human Rights Act 1998. But since the decision of the Northern Ireland Court of Appeal in this case, both have been effectively answered by this House, one in the case of *R (SB) v Governors of Denbigh High School* [2007] AC 100, the other in the case of *R (Huang) and R (Kashmiri) v Secretary of State for the Home Department* [2007] UKHL 11.

31. The first, and most straightforward, question is who decides whether or not a claimant's Convention rights have been infringed. The answer is that it is the court before which the issue is raised. The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account. If it were otherwise, every policy decision taken before the Human Rights Act 1998 came into force but which engaged a convention right would be open to challenge, no matter how obviously compliant with the right in question it was. That cannot be right, and this House so decided in *R (SB) v Governors of Denbigh High School* [2007] AC 100, in relation to the decisions of a public authority. To the same effect were *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 and *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246, in relation to legislation passed before the 1998 Act came into force. In each of those cases, the House considered the justification for the policy or legislation in question on its merits, regardless of whether the decision-maker had done so.

32. The second, and more difficult, question is the weight to be accorded to the views of the various public authorities involved in making the decision which is alleged to have infringed convention rights. The recent decisions of this House in *R (Huang) and R (Kashmiri) v Secretary of State for the Home Department* [2007] UKHL 11 address this very point.

33. In this case, there are arguably four levels of such decision making. The first is the decision of the Northern Ireland legislature permit local authorities to prohibit the operation of sex establishments without a licence. No-one has suggested that this decision in itself infringed convention rights. Control of the use of land is permitted under Article 1 of Protocol 1 to the Convention and restrictions on freedom of speech are permitted under Article 10. Having such a licensing regime is clearly consistent with the convention rights, provided that it is operated consistently with those convention rights. The question is how it is operated.

34. The second level is the decision of Belfast City Council to adopt the licensing regime in its area. No-one has suggested that this decision in itself infringed convention rights, for the same reasons that the legislation itself does not do so.

35. The third level is the decision of Belfast City Council that there should be no sex shops in this particular locality. That might have been taken as a policy decision which would dictate all subsequent decisions on individual applications. However, the legislation, as explained by my noble and learned friend, Lord Neuberger of Abbotsbury, indicates that the decision should be made in relation to each individual case. An application may - but not must - be turned down on the basis that the authority considers that there already are enough sex shops in the locality, enough being capable of being none: see Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985, Schedule 2, para 12(2), (3)(c) and (4). The decision that the appropriate number in this locality was none appears to have been taken in response to individual applications rather than as a general policy. So, perhaps unusually, this third level of decision making merges into the fourth.

36. The fourth level is the decision on the individual application. Mr Gordon QC, on behalf of the Council, argues that this decision cannot be attacked if the existence of the licensing regime itself cannot be attacked. I cannot agree. I do agree, of course, that there are situations in which the court is entitled to say that the legislation itself strikes a fair balance between the rights of the individual and the interests of the community, so that there is no room for the court to strike the balance in the individual case. That is what this House decided in *Kay v Lambeth London Borough Council* [2006] 2 AC 465. At issue there was whether a landowner with the right to possession of land (in that case a public authority, but the same question would arise with a private landowner whose rights are protected under Article 1 of

Protocol 1) could be deprived of that right because to enforce it against the particular individual occupier would be a disproportionate interference with the occupier's right to respect for his home under Article 8 of the Convention, even though he had no right in domestic law to be or to continue in occupation. The whole history of housing law since rent control began has been an attempt by the legislature to strike just that balance. In those circumstances, the courts are entitled to say that unless the legislation itself can be attacked, the issue cannot be raised in an individual case.

37. But this is not a case in which the legislation itself attempts to strike that balance. The legislation leaves it to the local authority to do so in each individual case. So the court has to decide whether the authority has violated the convention rights. In doing so, it 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. But the views of the local authority are bound to carry less weight where the local authority has made no attempt to address that question. Had the Belfast City Council expressly set itself the task of balancing the rights of individuals to sell and buy pornographic literature and images against the interests of the wider community, a court would find it hard to upset the balance which the local authority had struck. But where there is no indication that this has been done, the court has no alternative but to strike the balance for itself, giving due weight to the judgments made by those who are in much closer touch with the people and the places involved than the court could ever be.

38. My Lords, there are far more important human rights in this world than the right to sell pornographic literature and images in the backstreets of Belfast City Centre. Pornography comes well below celebrity gossip in the hierarchy of speech which deserves the protection of the law. Far too often it entails the sexual exploitation and degradation of women for the titillation of men. But there is always room for debate about what constitutes pornography. We can all think of wonderful works of literature which once were banned for their supposed immorality (my example would be *The Well of Loneliness* by Radclyffe Hall rather than *Lady Chatterley's Lover*, but the point is the same). No-one is suggesting that pornographic literature and images (always supposing that it is lawful) should be inaccessible to those in Belfast who wish to gain access to them. The authors can publish their work in any other medium should they wish to do so, and the public can

gain access to them there. Indeed, the City Council has not, as far as we know, refused to license sex establishments elsewhere in the city. There were good reasons for refusing to license establishments in this street and even better ones for refusing this particular company a licence. The suggestion that this is a disproportionate limitation on the company's right to freedom of expression is to my mind completely untenable. The same applies, *a fortiori,* to the complaint under Article 1 of Protocol 1.

39. For these reasons, and I believe in agreement with all of your lordships, I would allow this appeal and restore the decision of Weatherup J.

LORD MANCE

My Lords,

40. I have had the advantage of reading in draft the opinions of my noble and learned friends, Lord Hoffmann, Lord Rodger of Earlsferry, Baroness Hale of Richmond and Lord Neuberger of Abbotsbury. For the reasons given by Lord Hoffmann and Lord Neuberger, there is nothing in the complaint that the Council should have declined to consider the late representations and objections.

41. In agreement with other members of the House, I would reject the Council's submission that, if the respondent had any cause for complaint, it was inherent in the scheme of the relevant legislation so that, in the absence of any challenge to that scheme, the appeal should succeed on that ground alone. The present scheme is not analogous with *Kay v. Lambeth L.B.C.* [2006] UKHL 10; [2006] 2 AC 465. Here, the Council had a licensing jurisdiction, in the exercise of which it was both able and bound to act compatibly with the Convention: cf section 6 of the Human Rights Act 1998.

42. I can for present purposes proceed on the basis that both freedom of expression under article 10 of the Convention and the enjoyment of possessions under Protocol 1 were engaged by the exercise of that jurisdiction, albeit (as others have observed) hardly in a very compelling sense. But both those interests may be restricted, in the former case for inter alia the protection of health or morals and of the rights of others

and in the latter case in accordance with the general interest. I agree that any complaint about restriction of the latter interest, assuming that it exists, can add nothing in the present context to any complaint about restriction of the former article 8 interest.

43. The Court of Appeal cited *Re Connor's Application* [2004] NICA 45 for the uncontroversial proposition that the evaluation of the interests protected by the Convention was primarily one for the Council (paragraph 55). But it went on to rely on that case (decided in relation to article 8) for the proposition that:

> "Where no appraisal of the relevant interests had been made, 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)".

The Court of Appeal went on to apply that proposition in relation to both article 1 of the First Protocol (paragraph 56) and article 10 of the Convention (paragraph 63). It said (paragraph 56):

> "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."

44. Authority now shows that this is not the correct approach. The court's role is to assess for itself the proportionality of the decision-maker's decision: *R (SB) v. Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100. The court will not require a decision-maker to put itself through the hoops of a complex series of questions such as the Court of Appeal suggested in that case ([2005] EWCA Civ 199; [2005] 1 WLR 3372). In the *Denbigh* case, Lord Bingham rejected the "new formalism" that the Court of Appeal's approach would have involved, and said that "what matters in any case is the practical outcome, not the quality of the decision-making process that led to it" (paragraph 31).

45. Lord Hoffmann also contrasted the position regarding judicial review, where "the court is usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer" (*Denbigh*, paragraph 68). This is not of course to say that the Convention contains no procedural rights; it clearly does - articles 5 and 6 contain the most obvious examples - but there is authority in the European Court of Human Rights that other provisions can implicitly involve ancillary procedural rights, e.g. article 8: cf *McMichael v. United Kingdom* (24th February 1995, paragraphs 85-93; *Buckley v. United Kingdom* (25th September 1996, paragraph 76) and *Chapman v. United Kingdom* (2001) 33 EHRR 399, paragraph 92).

46. The question may arise how the approach described in paragraph 44 above inter-relates with the courts' recognition of a "discretionary area of judgment" within which "the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention": *R v. DPP, Ex p Kebilene* [2000] 2 AC 326, 381B-D per Lord Hope; *A v. Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, paragraphs 37-42 per Lord Bingham. The existence of a discretionary area of judgment means necessarily that there may be decisions which a court could regard as proportionate, whichever way they went. Lord Hope's dicta in *Kebilene* postulate a context in which the decision-maker has reached a "considered opinion", whatever the formal structure of his decision-making process. But, what is the position if a decision-maker is not conscious of or does not address his or its mind at all to the existence of values or interests which are relevant under the Convention?

47. The court is then deprived of the assistance and reassurance provided by the primary decision-maker's "considered opinion" on Convention issues. The court's scrutiny is bound to be closer, and the court may, as Baroness Hale observes in paragraph 37 of her opinion, have no alternative but to strike the balance for itself, giving due weight to such judgments as were made by the primary decision-maker on matters he or it did consider.

48. In the present case, however close the court's scrutiny, I have no hesitation in concluding that the Council's decision was proportionate (and indeed inevitable) for the reasons relating to both the Council's primary and its secondary grounds for refusal with which Lord Neuberger deals in paragraphs 94 to 96, which are also consistent as I

see it with those given by Lord Rodger in his paragraph 28 and Baroness Hale in her paragraph 38. I too would therefore allow this appeal and restore the decision of Weatherup J dismissing the respondent's application.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

49. This appeal concerns an application for a sex establishment licence in respect of Unit 2, 2-8 Gresham Street, Belfast ("the premises"), made to the Belfast City Council ("the Council") under the provisions of the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985 (1985 No. 1208 NI15), which I shall refer to as "the 1985 Order".

Schedule 2 to the 1985 Order

50. Article 4 of the 1985 Order provides that a council "may resolve that Schedule 2 is to apply to its District". It then sets out the procedure to be adopted in such an event. Schedule 2 to the 1985 Order is headed "Licensing of Sex Establishments", and references hereafter to paragraphs are to paragraphs of that Schedule.

51. Paragraph 2 provides that ""sex establishment" means a sex cinema or a sex shop". The expression "sex shop" is defined in paragraph 4(1) as including premises:

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

By virtue of paragraphs 4(3) and (4), a "sex article" includes "any article containing or embodying matter to be read or looked at" and "any recording of vision or sound".

52. Paragraph 6 precludes the use of any premises "in any district in which this Schedule is in force" "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". Paragraph 7 enables a council "to waive the requirement of a licence" where "to require a licence would be unreasonable or inappropriate". Paragraph 8 empowers the council to grant, renew or transfer licences, and paragraph 9 is concerned with the duration of licences.

53. Paragraph 10 deals with applications for licences. Sub-paragraphs (1) to (6) set out procedural requirements to be satisfied by applicants for licences. Sub-paragraphs (7) to (14) are concerned with publicising the existence of the application, and require an applicant to advertise his application in a newspaper within seven days of it having been made, and to display a notice of the application in an appropriate location "for 21 days beginning with the date of the application".

54. Sub-paragraphs (15) to (18) of paragraph 10 are in these terms so far as relevant:

> "(15) Any person wishing to make any representation in relation to an application for the grant…of a licence…shall give notice to the council, stating in general terms the nature of representation not later than 28 days after the date of the application.
>
> (16) Where the council receive notice of any representation under sub-paragraph (15) the council shall, before considering the application, give notice of the general terms of the representation to the applicant.
>
> (17) …
>
> (18) In considering any application for the grant…of a licence the council shall have regard to…any representations of which notice has been sent to it under sub-paragraph (15)"

55. Paragraph 10 (19) requires a council to give an applicant "an opportunity of appearing before and of being heard by the council…before refusing to grant a licence, to the applicant…".

56. Paragraph 12 (1) sets out the grounds upon which a council "shall refuse an application for the grant…of a licence". They include cases where the applicant is under 18, has had a licence revoked, has been refused a licence within the past 12 months, or is a foreign company. Paragraph 12 (2) provides that a council "may refuse" to grant a licence on the grounds set out in paragraph 12 (3), which are:

> "(a) that the applicant is unsuitable to hold the licence by virtue of having been convicted of an offence or for any other reason;
>
> (b) that if the licence were to be granted…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…of such a licence if he made the application himself;
>
> (c) that the number of sex establishments in the relevant locality of the time the application is made is equal to or exceeds the number which the council considers is appropriate for that locality;
>
> (d) that the grant…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…in respect of which the application is made."

57. Paragraph 12 (4) provides that "nil may be an appropriate number for the purposes of sub-paragraph (3) (c)". Paragraph 12(5) identifies "the relevant locality" as "the locality" in which the premises the subject of the relevant application "are situated".

58. Paragraph 20 states that a person who "knowingly uses, or knowingly causes or permits the use of, any premises…contrary to paragraph 6…shall be guilty of an offence". Paragraph 26 is concerned with the right of appeal of a disappointed applicant for a licence. It entitles such a person to appeal to the County Court within 21 days of the licence being refused, save where the ground of refusal is under paragraph 12 (3) (c) or (d).

The facts

59. In 1988, the Council resolved, pursuant to article 4 (1) of the 1985 Order, that Schedule 2 should apply to its district. In 1989, when considering an application for a sex establishment licence in respect of a property in the same locality as the premises ("the Gresham Street locality"), the Council had determined that the appropriate number of sex establishments in that locality should be nil, a view that the Council revisited and confirmed in February 1997.

60. On 13th May 2002, the respondent, Miss Behavin' Limited, applied to the Council for a sex establishment licence (a "Licence") to use the premises as a sex shop. This application ("the Application") was duly advertised, and resulted in 70 notices of objection ("objections"), only one of which was received within the 28 day time limit stipulated in paragraph 10 (15). During September and October 2002, the Council informed the respondent of these objections, together with the grounds upon which they were based.

61. At the time of the Application, the premises had been operated as a sex shop without a Licence, and therefore unlawfully, for a period before February 2001. During that period, the premises had been leased to a Mr Patrick McCaffrey. In 2001, he was successfully prosecuted for a number of offences arising out of his business at the premises. About one month prior to the Application, the respondent was incorporated as a limited company with an issued capital of 99 shares, of which 40 had been allocated to Mr McCaffrey.

62. Together with five other applications for sex establishment licences in the Gresham Street locality and a neighbouring locality, the Application came before the Council's Health and Environmental Services Committee ("the Committee"), whose functions include the consideration of such applications with a view to recommending to the full Council whether they should be granted or refused.

63. The Committee met on 18th November 2002 in order to consider the six applications. The respondent had been invited to attend this meeting in order to present arguments as to why there should be a change in the nil determination – i.e. the determination that the appropriate number of sex establishments in the locality should be nil - and why the Application should succeed. The meeting was abortive for

present purposes, because of the respondent's expressed concern that certain documents had not been disclosed. Accordingly, it was adjourned to 2nd December 2002.

64. Ahead of the 2nd December 2002 meeting, the members of the Committee were supplied with reports from Mr Crothers, a Chartered Surveyor, which dealt with the nature of the Gresham Street locality, and future developments therein, and from Mr Martin, the head of the Council's Building Control Services. Mr Martin referred to earlier decisions of the Council and to the previous meetings of the Committee at which it had been determined that the appropriate number of sex establishments in the Gresham Street locality should be nil. He reported that 70 objections had been received, and that "all but one of the letters was received outside the 28 day period", and he summarised the various different grounds of objection that had been raised. His report concluded by stating that there were two issues for the Committee to decide, namely (1) if the nil determination was confirmed, then the Application should be refused and (2) if the number was to be "other than nil", than it would be necessary to decide which of the applications to grant..

65. The meeting of 2nd December overran, and was adjourned to the 11th December 2002, when the Application was considered. The Committee was addressed by Mr Fox, the respondent's solicitor. The minutes record that Mr Fox "enquired whether the objections had been received within the statutory 28 day period". He is also recorded as having suggested that the Committee reconsider and reverse the earlier nil determination, and having said that the respondent "together with those members of the public who used the sex shops which were currently operating illegally in Belfast, were entitled to freedom of expression" under the Human Rights Act 1998.

66. The Committee deferred making the decision on the six applications to its meeting of 20th January 2003. The minutes of that meeting reveal that:

> "The Committee gave consideration to the character of each 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 agreed to recommend that the Council, in its

> capacity as Licensing Authority, determine that the appropriate number of sex establishments in the Gresham Street and North Street localities be nil. The Committee in recommending that the appropriate number of sex establishments be nil, acknowledged that these recommendations would not necessarily impact on its views in relation to the appropriate number of such establishments in other localities in the City."

The Committee then went on to consider (and to recommend the refusal of) each of the six applications on their perceived merits; the relevant extracts from the minutes for present purposes are as follows:

> "In considering the above mentioned matter, the Committee was mindful of the Council might, if it so desired, decide that the appropriate number of Sex Establishments in the Gresham Street and/or North Street localities be other than nil. Accordingly, the Committee agreed to consider the merits of each application.
>
> After discussion, the Committee, having regard to the information contained in the report of the Head of Building Control…agreed to recommend that the Council…refuse the under noted applications…for the following reasons:
>
> …..
>
> Miss Behavin'
>
> Unit 2, 2-8 Gresham Street
>
> (1) that the applicant had been operating a sex shop without a Licence and in breach of the relevant legislation;
>
> (2) that an associated person, convicted of relevant offences, appeared to have an interest in the business carried out under the Licence; and
>
> (3) that the company's formation appeared to have been for the purpose of making the application other than in the name of a convicted person."

67. The six applications were accordingly remitted to the full Council with a refusal recommendation. For reasons not germane to this appeal, the Council at its monthly meeting of 3rd February 2003 sent back the six applications to the Committee for reconsideration. At its meeting of

10th February 2003, the Committee "affirmed its decisions of 20th January to recommend that the Council…determine that the appropriate number of Sex Establishments in the Gresham Street and North Street localities be nil and refuse the applications in respect of Sex Establishment licences for the reasons outlined in the minutes of that meeting".

68. The six applications then came before the Council at its monthly meeting on 3rd March 2003. Before discussing those applications, the Council afforded each of the applicants an opportunity to make representations. On this occasion, the respondent was represented by Mr Reel of Counsel, a summary of whose submissions is contained in the minutes of that meeting. The Council then turned to the various applications, and resolved that "the minutes of the proceedings of the Health and Environmental Services Committee of 10th February 2003 be and they are hereby approved and adopted…". The decision of the Council was communicated to the respondent in a letter dated 13th March 2003.

The procedural history

69. Pursuant to leave given by Weatherup J on 25th June 2003, the respondent applied to the High Court to quash the Council's decision of 3rd March 2003 to refuse the Application. The respondent's case was based on a number of grounds, only two of which are now relevant, namely: (1) the Council (through the Committee) ought not to have taken into account the 69 objections which were out of time, or in the alternative ought not to have taken them into account without first considering whether to exercise their discretion to do so; (2) the decision of the Council was flawed in that it infringed the respondent's rights under article 10 of the European Convention on Human Rights ("Article 10") and under article 1 of the first Protocol to the Convention ("Article 1 of the First Protocol").

70. This application came before Weatherup J who dismissed it on all grounds – see [2004] NIQB 61. The respondent appealed to the Court of Appeal, who, on 15th September 2005, allowed the appeal – see [2005] NICA 35. On the first issue, the majority, Kerr LCJ and Sheil LJ, held that it was, in principle, open to the Council to take into account late objections, but their decision was flawed because the Committee had not expressly considered and determined whether or not to exercise its discretion to take the late objections into account. Hart J held that, on a

true construction of paragraph 10, it was not open to the Committee to have taken into account late objections at all. The Court of Appeal unanimously considered that the Committee should have taken into account the respondent's rights under Article 10 and under Article 1 of the First Protocol, and that for those reasons also, the respondent should succeed. Accordingly, the Court of Appeal decided that the Council's refusal of the Application should be quashed.

The late notices of objection

71. The first question is whether a council to whom an application for a sex establishment licence is made is entitled to take into account a late objections, that is objections received after the 28-day period referred to in paragraph 10 (15). It would, in my judgement, be unrealistic and unjust if a council were absolutely precluded from taking into account such objections. If an objection which revealed to a council for the first time certain highly relevant information was received one day late, it would be a little short of absurd if it could not be taken into account. It might reveal, for instance, that a family with a large number of small children had moved into the flat above the subject property, or that the applicant had a string of relevant convictions. In such cases, it would be contrary to the purpose of the 1985 Order, and to the public interest generally, if the council was obliged to ignore the information. Furthermore, it would be the duty of council officers to open and read any letter received; such an officer would be placed in an impossible situation if she or he had read a late letter of objection, with new and important information, but was effectively precluded from communicating this information to Council members.

72. Indeed, unless the 1985 Order provided otherwise in very clear terms, it would seem to me that, if a council received significant relevant information in a late objection, there could be circumstances in which its failure to take that information into account would itself be judicially reviewable. Of course, much would depend on the circumstances of the particular case. It may very well be right to disregard a late objection if it was intentionally last minute, or if it was received so late that taking it into account would lead to unfairness to the applicant (because he would not have had the chance to consider it) or to unacceptable disruption to the council's business. Accordingly, one would expect the effect of Article 10 to be that late objections could, but need not, be taken into account.

73. In my view, that is indeed the effect of the provisions of paragraphs 10 (15) to (18). Paragraph 10 (18) is merely concerned with identifying what a council is obliged to take into account; it says nothing about what the council is entitled to take into account. Accordingly, nothing in paragraph 10 (18) would exclude the consideration of late objections. Once one appreciates that that is the effect of paragraph 10 (18), the meaning of paragraph 10 (15) seems clear. Its effect is that, if an objector wishes to have his objection taken into account as of right under the terms of the Schedule, then he has to ensure that it is sent to the council within the 28 day period. In other words, what those two subparagraphs are concerned with for present purposes is to make it clear that, if an objection is received within 28 days, the council has an obligation to take it into account, and the objector has a right to expect it to be taken into account. Neither sub-paragraph says anything about the parties' respective rights and duties in relation to a late objection. A late objection is therefore governed by general administrative law principles: it is a matter for the council whether to take it into account, and the court will not interfere with its decision in that regard, save on classic administrative law principles, i.e. unless the decision took into account irrelevant factors or failed to take into account relevant factors or was a decision which no reasonable council could, in all the circumstances, have made.

74. It might be said that the notion that the council can take into account late objections is inconsistent with paragraph 10 (16), which appears to require the council to give notice to the applicant of only in-time objections. It does not seem to me that that presents any difficulties. Paragraph 10(16) is just like paragraphs 10 (15) and 10 (18) in that it is only concerned with in-time objections. In the same way as the right and duty to consider late objections are governed by general administrative law principles rather than by paragraph 10, so is the question of whether the contents of late objections have to be communicated to the applicant. In that connection, it seems to me that the answer is clear: if such a late objection is to be taken into account by the council, then the applicant must be informed as to its contents in good time so as to be able to consider it and deal with it appropriately.

75. It is right to mention that this point is not without authority. The provisions of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982 (which are to all intents and purposes identical to those of Schedule 2 to the 1985 Order) have been considered in a number of cases culminating in *Quietlynn Ltd v Plymouth City Council* [1988] QB 114. In that case, at 133A-134E, the Divisional Court

considered and, in my view rightly, rejected the submission that a council could not take into account late objections.

76. That brings me to the second question, namely whether the decision of the Council in the present case was nonetheless flawed because the Committee did not expressly direct its mind to the question of whether or not to take into account late objections. In my judgment, there are two reasons why there is nothing in that point.

77. First, on the facts of this case, it seems to me that the Committee could not have reached any conclusion other than that the late objections should be admitted. Given that there is no suggestion of the objections being late for lack of good faith, the only reasons for not admitting the late objections would have been prejudice to the applicant or disruption to the Council's business. Neither suggestion could possibly have been raised in this case, and indeed neither suggestion was raised. The respondent had ample notice of the contents of all 70 objections, and their effect had been fully reported to the Committee. Even if there had been a failure by the Committee to consider the issue, it could not have caused detriment to the respondent.

78. Secondly, on a fair reading of the documents, the Committee did in fact properly and sufficiently address the question of whether or not to admit the late objections. As I have mentioned, the Committee had Mr Martin's report which stated in terms that all but one of the objections were received out of time, and the point was specifically raised before the Committee by Mr Fox on behalf of the respondent. In those circumstances, I think it is unrealistic to suggest that the Committee did not effectively address its mind to the question of whether to take into account the late objections. There could have been no point in Mr Martin and Mr Fox referring to the fact that objections had been received late, unless that was a factor to be taken into account. On the facts of this case, at any rate, it seems to me unrealistic, at least in the absence of evidence in support, to conclude that the members of the Committee were unaware of the existence of time limits.

79. In some cases, the facts may be such that one would expect fuller consideration to have been given to the issue of whether to consider late objections. Here, however, as already mentioned, there was no question of tactical lateness on the part of the objectors, or prejudice to the respondent or disruption to the Council as a result of taking the late

objections into account, so the consideration given to this issue was, in my view, quite sufficient.

80. There may well be two other reasons for reaching this conclusion. First, the respondent has effectively waived its right to take the point. It was represented by a solicitor before the Committee and by a barrister before the Council, and they were clearly aware of the fact that 69 of the 70 objections had been received out of time. Yet on neither occasion was it argued that those late objections should not be taken into account. Secondly, even if the Council should not have taken into account the late objections, it appears highly unlikely (to put it at its lowest) that it would have granted the Application if it had disregarded the late objections. Given that these two reasons were only touched on in argument, and do not need to be ruled on in order to determine this appeal, I shall say no more about them.

81. Accordingly, in respectful disagreement with the Court of Appeal, I consider that Weatherup J was right to dismiss the respondent's case on this issue.

Article 10 of the Convention

82. My Lords, in my judgment, it is, necessary to answer three questions of principle in relation to the applicability of Article 10 where a council refuses an application for a Licence, and then to apply the answers to those questions to the facts of the present case.

83. The first question which has to be considered is whether Article 10 is engaged at all. Mr Richard Gordon QC, who appeared for the Council, contended that it was not. Article 10 provides:

> "Freedom of expression.
>
> 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…
>
> 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…, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others…"

In my judgment, both as a matter of language and as a matter of principle, Article 10 is indeed engaged in this case, albeit at a relatively low level, so far as the proposed use of the premises was for the sale of books, magazines and DVDs and the like. In addition to the respondent's right to seek to disseminate such articles, the compilers, whether they are writers, photographers, film-makers or actors, are entitled to seek to express themselves through the medium of these articles; indeed members of the public wishing to buy and look at these articles have the right to seek to do so. The fact that some people may well find some or all of the articles in question offensive or damaging to public morality is catered for by the second part of Article 10. Like many other fundamental rights, the right to freedom of expression must not be abused and can be subject to appropriate restriction. Indeed, when it comes to restrictions on the dissemination of pornographic material, the margin of appreciation afforded to member states must, it appears to me, be wide.

84. Having decided that Article 10 is, in principle, engaged in a case such as this, the second question is how it is engaged. Mr Gordon contended that the sole question of principle is whether the legislation in question, in this case the 1985 Order, complies with Article 10. If it does comply, then it is not open to a disappointed applicant, such as the respondent in the present case, to raise an Article 10 argument in relation to his own particular application. If that is right, then the respondent in the present case has effectively "sold the pass" by not contending that the 1985 Order does not comply with Article 10.

85. There is no doubt that in relation to some legislation the approach urged on us on behalf of the Council is appropriate: see, for example, the view of the majority in *Kay v Lambeth London Borough Council* [2006] 2 AC 465 at paragraph 110. However, that does not seem to me to be the appropriate approach in the present case.

86. *Kay* was a case concerned with the impact of Article 8 (right to respect for private and family life) on the domestic law which gave a public authority landlord an unqualified right to possession of property occupied by temporarily homeless people and by gypsies. By a bare majority, your Lordships decided that, unless it could be shown that the

domestic law did not achieve fair balance between the competing interests of occupiers of land and landowners, it would be compatible with Article 8.

87. In my judgment, the present case is very different. It is not concerned with the property rights of a local authority, but with the exercise of a licensing jurisdiction which has been delegated by the legislature, through the medium of the 1985 Order, to a local authority which decides to adopt the provisions of Schedule 2. In other words, when exercising its functions under schedule 2, a council is carrying out what may be characterised as a public administrative function; in that capacity, a council should carry out its functions in a manner, and to achieve a result, which is compatible with the Convention. That seems to me to follow from the provisions of section 6 of the Human Rights Act 1998, which renders it "unlawful for a public authority to act in a way which is incompatible with a Convention right".

88. The third question to be considered is what the engagement of Article 10 means in practice. In my judgment, it means that any decision reached by a council in relation to an application for a Licence must comply with the Convention, and that, where a decision is challenged in this connection, it is a matter for the court to decide whether it does so comply. That seems to me to follow from the decision of this House in *R (SB) v The Governors of Denbigh High School* [2006] 2 WLR 719, a case concerned with Article 9 of the Convention.

89. In that case, at paragraphs 29 and 30 Lord Bingham of Cornhill said that:

> "29. ….the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's convention rights have been violated. ….
>
> 30. …[T]he court's approach to an issue of proportionality under the convention must go beyond that traditionally adopted to judicial review in a domestic setting… .There is no shift to a merits review, but the intensity of review is greater than was previously appropriate… . The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant

> time… . Proportionality must be judged objectively, by the court."

To the same effect, at paragraph 68, my noble and learned friend Lord Hoffmann said this:

> "68. …In domestic judicial review, the court is usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer. But Art. 9 is concerned with substance, not procedure. It confers no right to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under Art.9 (2)?..."

Article 9 is very similar to Article 10, both in the nature of the topic with which it is concerned (freedom of thought, conscience and religion, a substantive right), and in the way it is structured (in two parts, the first of which is concerned with identifying the right, and the second of which is concerned with permitted restrictions on the right).

90. In my view, therefore, the contention advanced by Mr Larkin QC, on behalf of the respondent (which was accepted by the Court of Appeal), namely that, because Article 10 is engaged, the Council's decision was irretrievably flawed because it failed to take the respondent's Article 10 rights into account when considering the Application, is incorrect. The right issue to be considered, and which is to be determined by the court, is whether, in all the circumstances of this case, the Council's decision to refuse the Application infringed the respondent's Article 10 rights. In connection with that issue, I respectfully agree with the analysis in paragraph 37 and paragraphs 45-47 of my noble and learned friends Baroness Hale of Richmond and Lord Mance, whose speeches I have had the benefit of reading in draft.

91. Because the issue involves careful scrutiny by the court of the decision, a council faced with an application for a sex establishment licence would be well advised to consider expressly the applicant's right to freedom of expression, and to take it into account when reaching a decision as to whether to grant or refuse the licence. While the fact that a council has expressly taken into account Article 10 when reaching a

decision cannot be conclusive on the issue of whether the applicant's Article 10 rights have been infringed, it seems to me, consistently with what Lord Bingham and Lord Hoffmann said in *Denbigh* at paragraphs 31 and 68, that where a council has properly considered the issue in relation to a particular application, the court is inherently less likely to conclude that the decision ultimately reached infringes the applicant's rights.

92. It is fair to say that it may not always be easy to see, or at least to express in clear terms, how an applicant's Article 10 rights can satisfactorily be weighed against a council's decision to refuse a Licence (or, indeed, could be factored in to a council's decision-making process when deliberating on whether to grant a Licence). In the present case, what was at any rate the primary reason for refusing the Application was the nil determination. It can be said with considerable apparent force that, where a council has made a nil determination in respect of a locality on environmental and social grounds, it is hard to see how the applicant's Article 10 rights could justify the grant of a Licence. I accept that this would be correct in the majority (possibly the great majority) of cases. However, the nil determination is a discretionary, and not a mandatory, ground of refusal, because it is within paragraph 12 (2) (3), not paragraph 12 (1). One can imagine circumstances where, for instance, the demand is so great, the level of objections is so low, the articles proposed to be sold are relatively inoffensive to any but the most prudish, and a nil determination is issued for every locality in the whole city or district, that Article 10 considerations in a particular case could outweigh the effect of the nil determination.

93. I turn now to apply these conclusions to the facts of the present case. On a fair reading of the minutes, it seems clear that, in the last two meetings to which I have referred, the Committee decided to recommend rejection of the Application for two reasons; the primary reason was in order to give effect to the nil determination; the second reason, which only applied in the event that the nil determination was either resisted or not put into effect, was that the Application should be refused for the three-pronged reason of the respondent being in breach of the legislation, Mr McCaffrey, who had been convicted of a relevant offence, having an interest in the respondent, and the respondent having been formed in order to make the application in place of Mr McCaffrey.

94. In these circumstances, it seems to me positively fanciful to suggest that the decision to refuse the Application could conceivably have infringed the respondent's Article 10 rights. Assuming for the

moment in favour of the respondent that the Council's decision to refuse the Application on the primary ground might have been incompatible with the respondent's Article 10 rights, it seems to me inconceivable that the secondary grounds could possibly be similarly assailed. I arrive at this conclusion by taking into account the nature of the articles, namely pornographic books, magazines and videos, whose sale from the premises is precluded by the refusal of the Application (and the consequent low level at which Article 10 is engaged), and the three secondary grounds for refusing the Licence, which speak for themselves.

95. Turning to the primary ground for the refusal of the Licence in this case, it appears to me clear that the assumption upon which the analysis in the previous paragraph proceeded was over-generous to the respondent. In my judgement on the facts of the present case, the primary reason given by the Council for refusing the Application cannot possibly be said to fall foul of the respondent's Article 10 rights. The reason put forward by the Committee, as adopted by the Council, for the nil determination for the Gresham Street locality, namely the proximity of certain public buildings and shops of particular attraction to children, and of places of worship, appears to me to represent a rational ground for making and adhering to a nil determination: indeed it is just the sort of assessment that a local authority is best able to judge. Article 10 is, as mentioned, engaged at a low level, and no special facts were advanced for departing from this determination by allowing the Application. The effect of the refusal of the Application was merely to prevent the sale taking place, at best, from buildings within the Gresham Street locality: it is not as if it has been suggested that the general policy of the Council was to prevent the sale of pornographic articles anywhere in Belfast.

96. It is not even as if the question of freedom of speech was wholly overlooked by the Council (as the Court of Appeal appears to have thought). As already explained, the solicitor representing the respondent told the Committee that the right to free speech under the Convention was engaged by the Application, and the minutes of the meeting record that what had been said on behalf of the respondent had been taken into account. While that cannot be said to suggest any sort of careful consideration of Article 10, it does indicate that some regard was had to it. However, for reasons already given, that is not the essential point. The essential point is that, particularly when one looks at the reasons for refusing the Application as a whole, and the fact that the respondent has not argued that there are any special features in this case (which might conceivably have justified a different result), such as, for instance, a policy on the part of the Council which resulted in there being no sex

shops anywhere in Belfast, there cannot be said to have been any Article 10 infringement.

97. Accordingly, it seems to me that Weatherup J reached the right conclusion on this issue also. The Court of Appeal appears to have reached the opposite conclusion, not so much on the basis that the Council's refusal of the Application represented a substantive breach of the respondent's Article 10 rights, but more on the basis that in failing to consider the respondent's Article 10 rights, the refusal was, in effect, procedurally defective. Apart from the facts that it is at least arguable that the council did in fact consider and take into account the respondent's Article 10 rights (albeit only cursorily), and that I would not accept that the Court of Appeal's conclusion follows from its premises, it seems to me that this analysis fell foul of the proper approach as laid down by this House in the *Denbigh* case (and it should be added that the decision of the Court of Appeal in this case predated your Lordships' decision that case).

Article 1 of the First Protocol

98. In his submissions for the respondent, Mr Larkin QC, who appeared with Mr Reel, realistically accepted that, if he could not persuade your Lordships to uphold the decision of the Court of Appeal under Article 10, then he would be bound to fail, essentially for the same reasons, insofar as his case rested on Article 1 of the First Protocol.

99. Article 1 of the First Protocol provides as follows:

> "Protection of property
>
> 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 and subject to the conditions provided for by law…
>
> 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…."

In my judgement, it is highly questionable whether the respondent's case can even get as far on Article 1 of the First Protocol as it gets on Article 10. In this case, your Lordships are concerned with the third limb of that Article, control of use, in relation to which it is well established that member states are accorded a wide margin of appreciation when striking the balance between the general interest of the community and the requirement of the protection on an individual's rights under the Article: see for instance the observations of the Strasbourg court in *Jacobson v Sweden* (1989) 12 EHRR 56 at paragraph 55.

100. While Article 1 of the First Protocol is, as I see it, engaged in the present case, I find it impossible to conceive of circumstances in which a disappointed applicant for a sex establishment licence who could not show that a refusal contravened his Article 10 rights could nonetheless succeed on the ground that it infringed his rights under Article 1 of the First Protocol. It would be wrong to express a concluded view to that effect, because experience shows that circumstances can arise which are not foreseen by judges.

101. Nonetheless, it is appropriate briefly to refer to two decisions in this connection. The first is *ISKCON v United Kingdom* 18 EHRR CD 133, where the Commission, in a decision that the application in question was inadmissible, observed "that, as a general principle, the protection of property rights ensured by Article 1 of Protocol Number 1…cannot be used as a ground for claiming planning permission to extend permitted use of property". Secondly, there is the reasoning of the Court of Appeal in *re UK Waste Management Limited's Application* [2002] NI 130, where the Court of Appeal similarly held that a refusal of planning permission could not give rise to an infringement of Article 1 of the First Protocol. Carswell LCJ, giving the judgment of the court, said at 143F that the applicant's "peaceful enjoyment of its property has not been disturbed" and that "[s]till less is it a deprivation of [its] possessions". He also stated that, if there had been any relevant interference "it was in the public interest and proportionate".

102. It is perhaps also worth mentioning the decision of the Strasbourg court in *Fredin v Sweden* [1991] ECHR 12033/86 which concerned the revocation of an existing licence to extract gravel from land owned by the applicant. It was held that this did not infringe the applicant's rights under Article 1 of the First Protocol on the grounds that, even though the applicant suffered a substantial financial loss as a result of the revocation, and received no compensation therefore, the revocation, which was for environmental reasons, was within the wide margin of

appreciation afforded to the state under the third limb of the Article. Of course each case turns on its own facts, but if the revocation of an existing licence, with its substantial financial detrimental effect on the landowner, can be justified, it is indeed hard to conceive circumstances in which the refusal of the grant of a licence for the use of a property for the selling of pornographic articles on any of the grounds set out in paragraph 12 could fall foul of the property owner's rights under Article 1 of the First Protocol.

103. In this case, I consider that the respondent's case on Article 1 of the First Protocol is hopeless. That was the view of Weatherup J, but the Court of Appeal, again approaching the issue in the wrong way (for the reasons given in *Denbigh*), held that the decision of the Council was flawed because it had not specifically addressed the respondent's rights under Article 1 of the First Protocol. I am bound to add that, even if that had been a good point, it would seem to me fanciful to think that the Council would (or even could) have come to a different conclusion from that which it did, if it had taken into account those rights.

Conclusion

104. In all these circumstances, I would allow the appeal and restore the Order of Weatherup J dismissing the respondent's application for judicial review.