Neutral Citation No. [2005] NIQB 22 | *Ref:* **GIRC5216**

Judgment: approved by the Court for handing down | *Delivered:* **14/03/2005**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY THE LANDLORDS ASSOCIATION FOR NORTHERN IRELAND FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION BY DECLAN BOYLE, ROBERT GREER, GORDON JACKSON AND DAIRMID LAIRD FOR JUDICIAL REVIEW

IN THE MATTER OF THE COMPATIBILITY OF THE EUROPEAN CONVENTION ON HUGH RIGHTS WITH ARTICLE 75G OF THE HOUSING (NORTHERN IRELAND) ORDER 1992 (AS EFFECTED BY ARTICLE 144) AND SCHEDULE 3 OF THE HOUSING (NORTHERN IRELAND) ORDER 2003

IN THE MATTER OF THE STATUTORY REGISTRATION SCHEME FOR HOUSES IN MULTIPLE OCCUPATION IN NORTHERN IRELAND MADE UNDER THE HOUSING (NORTHERN IRELAND) ORDER 2003 BY THE NORTHERN IRELAND HOUSING EXECUTIVE

GIRVAN J

Introduction

[1] There is an emerging body of law, anti-social behaviour law, which in unique to the United Kingdom (See, for example, Collins and Cattermole in their new textbook "Anti-social Behaviour Powers and Remedies"). This body

of law includes the pre-existing common law and statutory law, the recent reforms in that field and embraces new laws which have the common aim of regulating conduct in public so as to protect and enhance the communities and the common good. The legislation and Scheme under consideration in the present application form part of that corpus of law.

[2] In R v Crown Court at Manchester ex parte McCann [2003] 1 AC 787 the House of Lords had occasion to consider whether anti-social behaviour orders (ASBOs) were civil orders for the purposes of convention law. In the course of his speech Lord Steyn succinctly described the problem of anti-social behaviour thus:

> "It is well known that in some areas, notably urban housing estates and deprived inner city areas, young persons and groups of young persons cause fear and distress and misery to law abiding and innocent people by outrageous anti-social behaviour. It takes many forms. It includes behaviour which is criminal such as assaults and threats, particularly against old people and children, criminal damage to individual property and amenities of the community, burglary and theft and so forth. Sometimes, the conduct falls short of recognisable criminal offences. The culprits are mostly but not exclusively male. Usually they are relatively young… in recent years this phenomenon became a serious social problem. There appears to be a gap in the law. The criminal law offered insufficient protection to communities. Public confidence in the rule of law was undermined by the not unreasonable view in some communities that the law had failed them."

[3] There is no question that people have the right to be protected against harassment, alarm, distress and anti-social behaviour. Collins and Cattermole point out that as an instance of so called communitarian policy such provisions on occasions may not sit well with civil liberties or the Human Rights Act 1998. The European Court of Human Rights has, however, recognised as a feature of citizens' rights under Article 8 of the Convention that the state authorities may on occasions have a duty to take steps to deal with what can be broadly termed third party nuisance behaviour. In a recent decision Moreno-Gomez v Spain (Application No. 4143-02, 16 November 2004) (discussed in an article in the New Law Journal on 18 February 2005) the court gave a decision on a complaint made against Spain as a result of Valencia City Council's failure to take steps to tackle noise and vandalism near a person's home. It followed a decision in Surugiu v Romania (Application No. 48995-99, 20 April 2004) in which a complaint was

made relating to the failure of Romanian authorities to protect a Romanian citizen from serial and malicious manure dumping. In both cases the court held that the state authorities had failed to discharge their obligation to take steps to protect their citizens from third party nuisance. In Moreno-Gomez the applicant moved into a flat in Valencia's residential quarter. In 1974 the City Council began to permit bars and nightclubs to open nearby. Local residents first complained of noise and vandalism in 1980. In 1983 the City Council resolved not to permit any more nightclubs to open in the area. The resolution was not implemented and new licences were in fact granted. Despite the designation of the area as an acoustically saturated zone and the enactment of byelaws prohibiting excessive noise the Council granted a licence for a nightclub to operate from the building where the applicant's flat was located. The Spanish Constitution Court refused her claim for breaches of the Spanish Constitution reflecting Article 8 on the basis that there was no evidence of damage to her health. The European Court of Human Rights held that under Article 8:

> "The individual has a right to respect for his home, meaning not just the right to the actual physical area but also the quiet enjoyment of that area."

It held that breaches of the right to respect of the home are not confined to concrete and physical breaches such as unauthorised entry into a person's home but also include those that are not concrete or physical, such as noise, emissions, smells and all forms of interference. A serious breach may result in the breach of a person's right to respect for his home if it prevents him from enjoying the amenities of his home. The nuisance must attain the minimum level of severity required for it to constitute a violation of Article 8. On the facts of that case the court was satisfied that there was more than adequate evidence produced in the domestic proceedings to show that the minimum level of severity had been met. The Spanish state acting through the City Council had failed to discharge its positive obligations to take effective steps to address the third parties breaches. The court stated at paragraph 61:

> "Although the Valencia City Council has used its powers in this sphere to adopt measures… which should in principle have been adequate to secure respect for the guaranteed rights, it tolerated, and has contributed to, the repeated flouting of the rules which it itself had established during the period concerned. Regulations to protect guaranteed rights serve little purpose if they are not duly enforced and the court must reiterate that the Convention is intended to protect effective rights, not illusory ones. The facts show that the applicant suffered a serious

> infringement of her right to respect for her home as a result of the authorities failure to take action to deal with the night time disturbances."

[4] Edward Mitchell in his article in the New Law Journal comments that the decision is a pronouncement by the European Court that the Convention States should order their internal affairs so that effective steps are taken to tackle sufficiently serious nuisance behaviour. He points out that the emanations of the United Kingdom state that have responsibility in this respect are primarily the police and local authorities. Therefore, he argues, these are the bodies that the courts should take to be responsible for ensuring that the United Kingdom's positive obligations to tackle sufficiently serious nuisance behaviour is discharged. They should assume that they have a legal obligation to act to address sufficiently serious nuisance behaviour. It does not matter that these public bodies have generally statutory powers not duties to tackle nuisance behaviour. If a power has to be exercised to avoid a breach of the rights protected by the Human Rights Act 1998 it must be so exercised.

[5] In this case what is subject to the judicial review challenge is part of a Scheme introduced by the Northern Ireland Housing Executive ("the Executive") which is designed to regulate the duties of landlords of houses in multiple occupation ("HMOs") to deal with anti-social behaviour of tenants and their guests. The application has raised a number of interesting and difficult issues including the issue of the compatibility of the impugned provisions of the Scheme with the Convention.

[6] In the application the original applicant was the Landlords' Association for Northern Ireland ("the Association"). By leave of the court Declan Boyle, Robert Greer, Gordan Jackson and Dairmid Laird, private residential landlords of properties in the Eglantine-Fitzroy areas a manager thereof were joined as applicants. In the proceedings they all challenge the validity of at least part of the Statutory Registration Scheme of houses in Multiple Occupation in Northern Ireland ("the Scheme") made by the Executive in May 2004. It is accepted that the Association could not be a victim under the Human Rights Act 1998. I am satisfied that the other applicants are potentially victims under the Act

[7] The Association which was established in 1988 represents the interests of residential landlords, residential estate agents and residential property managers throughout Northern Ireland. The Association has some 200 members. The Association is concerned that the Scheme exposes its members as specified persons within the Scheme to duties in respect of HMOs which the owners control which are excessively onerous and which pose risks to their personal safety. It is also concerned about the inclusion in the Scheme of a fee structure for registration of properties as HMOs imposed on specified

persons in contrast with other groups of persons owning HMOs for whom exception from fees has been permitted.

The statutory context of the Scheme

[8] Under Article 75B of the Housing (Northern Ireland) Order 1992 ("the 1992 Order") as inserted by the Housing (Northern Ireland) Order 2003 ("the 2003 Order") (which took effect on 27 February 2003) the Executive is required to prepare and submit to the Department of Social Development ("the Department") a registration Scheme authorising the Executive to compile and maintain a register of HMOs. Subject to Article 75C to 75J the Scheme may contain such provisions as the Executive considers appropriate. The Scheme need not apply to the whole of Northern Ireland and need not apply to every description of HMO. The Department may approve a Scheme submitted to it. The Executive must comply with a Scheme approved by the Department. The Executive may at any time and if the Department so directs shall submit amendments to the Scheme which likewise require approval. Under Article 75C a Scheme shall make it a duty of such person as specified to register a house to which the Scheme applies and renew the registration as required. Provision is made for the specification of registration particulars and provision is made for the imposition of a reasonable fee for registration. The Department may by order make provision for the fee payable on registration specifying the maximum permissible fee (whether by specifying an amount or a method of calculating an amount) and specifying cases in which no fee is payable. Provision is made by Article 75D for the inclusion of "control provisions" that is provisions for preventing multiple occupation of a house unless it is registered and the number of households or persons occupying it does not exceed the number registered for it. By Article 75E control provisions may (inter alia) enable the Executive to refuse the application if the premises are unsuitable or incapable of being made suitable for such occupation or if the person having control is not a fit and proper person. It may impose such conditions "relating to the management of the house" during the period of the registration as the Executive may determine. Provision is made for appeals to the county court in the event of non-registration or refusal of renewal of registration. Where the decision of the Executive was to impose conditions relating to the management of a house the court may direct the Executive to grant the application without imposing the conditions and to impose conditions as varied by the court. Control provisions may enable the Executive to revoke a registration if it considers that the person in control is not a fit and proper person and there has been a breach of conditions relating to the management of the house. Provision is made for an appeal against revocation.

[9] Article 75G is of relevance in the present application. It provides:

"(1) A registration scheme which contains control provisions may also contain special control provisions, that is, provisions for preventing houses in multiple occupation, by reason of their existence or the behaviour of their residents from adversely affecting the amenity of character or character of the area in which they are situated.
(2) Special control provisions may provide for the refusal or revocation of registration, for reducing the number of households or persons for which a house is registered and for imposing conditions of registration.
(3) The conditions of registration may include conditions relating to the management of the house or the behaviour of its occupants.
(4) Special control provisions may authorise the revocation of registration in the case of -

(a) occupation of the house by more households or persons than the registration permits, or
(b) a breach of any conditions imposed in pursuance of the special control provisions, which is due to a relevant management failure.

(5) Special control provisions shall not authorise the refusal of -

(a) an application for first registration of a house which has been in operation as a house in multiple occupation since before the introduction by the Executive of a registration scheme with special control provisions, or
(b) any application for renewal of registration of a house previously registered under such a scheme, unless there has been a relevant management failure.

(6) Special control provisions may provide that in any other case where an application is made for first registration of a house the Executive may take into account the number of houses in multiple occupation in the vicinity in deciding whether to permit or refuse registration."

Article 75K defines a "relevant management failure" as:

> "A failure on the part of the person having control of, or the person managing, a house in multiple occupation to take such steps as are reasonably practicable to prevent the existence of the house or the behaviour of his residents from adversely affecting the amenity or character of the area in which the house is situation, or to reduce any such adverse effect."

[10] Under Article 75H special control provisions shall provide that the Executive shall give a written statement of its reasons to the applicant where it refuses to grant its application for first registration or for renewal or imposes conditions of registration on such an applicant. Special control provisions must provide the Executive shall give written notice to the person having control of the house and the person managing it of any decision by the Executive to vary the conditions of registration or to revoke the registration of the house and at the same time give a written statement of the Executive's reasons. An aggrieved party has a right of appeal to the county court which may reverse or vary a decision of the Executive. Where the decision of the Executive was to impose conditions of registration the court may direct the Executive to grant the application without imposing the conditions or to impose the conditions as varied in such manner as the court may direct.

[11] Under Article 75L a person who contravenes or fails to comply with the provision of a registration Scheme commits an offence. Depending on the nature of the offence a fine is fixed at an appropriate level of the standard scale.

[12] The 2003 Order amended the 1992 order in relation to the definition of a house in multiple occupation. It is now defined as "a house occupied by more than 2 qualifying persons, being persons who are not all members of the same family". Qualifying persons are defined as persons whose only or principal residence is the house in multiple occupation and for that purpose a person undertaking a full time course of further or higher education who resides during term time in a house shall during the period of that person's residence be regarded as residing there as his or her only or principal residence. A person's family is defined as spouses or persons living together as husband and wife and a person is a member of another's family if he is that person's parent, grandparent, child, grandchild, brother or sister. A relationship by marriage shall be treated as a relationship by blood, a relationship of a half blood shall be treated as a relationship of the whole blood and the stepchild of a person shall be treated as his child. The definition of an HMO will result in many houses being potentially within the legislation. Where a family allows a non-familial student to reside with them as a lodger or indeed free of charge the house would be become a HMO.

When a man A co-habits with a woman B who has a child by a previous relationship the child is not a child of A or a stepchild of A and the result would be that the house would then become a HMO. Many other situations would give rise to the apparently unintended consequence of bringing within the ambit of the legislation many houses comprising one household. The definition of a house in multiple occupation has been the subject of difficulty in relation to drafting a satisfactory definition and in England the definition has been recently radically changed by the Housing Act 2004. There the living accommodation must be occupied by persons "who do not form a single household." Such legislation makes more practical sense than the provision contained in the 2003 order. Bearing in mind the theoretical possibility of criminal liability arising from a breach of the Scheme conditions it is obvious that thought would need to be given to the drafting of the legislation and the Scheme to bring outside the ambit of the Scheme houses where in fact parties are living in a single household. The mischief behind the legislation appears to relate to problems arising from houses in true multiple occupation and the problems appear to relate to premises which are occupied by a number of disconnected lodgers or tenants.

The Scheme

[13] The Preface to the Scheme states that the Scheme defines which properties are required to register initially and defines the persons require to ensure compliance with the provisions of the Scheme. It is intended that further properties will require registration on a rolling programme over the coming years. The term "house" in the Scheme will be taken as any property that is occupied as a house in multiple occupation as statutorily defined. Under Article 75B(3) a registration Scheme need not apply to every description of a house in multiple occupation. In HMO Action Areas it will apply to all premises occupied by three or more persons not connected as members of the same family. A large number of houses may thus be caught by the Scheme, many apparently not truly intended to be affected by the legislation.

[14] Houses specified for registration are defined in paragraph 2 of the Scheme. All HMOs in HMO action areas specified in appendix 1 will be covered at various dates. These action areas include Fitzroy, Eglantine, Waterworks, Derry City and Portstewart HMO Action areas. As noted within those areas every house that falls within the statutory definition of HMO is included.

[15] In addition over a period of time specified in the Scheme all properties throughout the council areas of Northern Ireland will be covered if they are capable of occupation by more than 10 residents and are actually occupied by 3 or more persons not of the same family. The term "capable of occupation" is based on bedroom size. A couple taking in an elderly aunt or uncle

example in a large detached house would fall within the remit of the legislation and Scheme as presently enacted.

[16] Section 10 of the Scheme contains what are described as the "special control provisions". Under Para 10.1 the Scheme contains "special control provisions as set out below". Para 10.2 states that special control provisions are provisions for preventing houses and multiple occupation either by reason of their existence or the behaviour of the residence from adversely affecting the amenity or character of the area in which they are situated. Under 10.3 the Executive "may impose conditions of registration which may include conditions relating to the management of the house or the behaviour of its occupants." Clause 10.4 is relevant and provides:

> "It is a condition of registration that the person having control of the house, or the person managing the house, shall take such steps as are reasonably practicable to prevent the existence of the house of the behaviour of its residents from adversely affecting the amenity or character of the area in which the house is situated, or to reduce any such adverse effect."

Para 10.5 provides the Executive may revoke the registration if the occupation exceeds the permitted number or there is a breach of any condition "imposed in pursuance of the special controlled provisions" that is due to a relevant management failure as defined in para 10.8. Para 10.8 then defines relevant management failure incorporating the same wording as the statutory definition of a relevant management failure.

[17] The Explanatory Notes to the Scheme in paragraph 4 state that for the purposes of revoking or refusing registration due to a relevant management failure the amenity and character of an area can be adversely affected by a range of issues including excessive noise within the HMO, anti-social behaviour by occupants and guests of the occupants in the area in which the HMO is situation, problems connected with litter and disposal of waste and so forth. The note goes on to provide that before revoking or refusing an application for registration which is due to a relevant management failure the Housing Executive will wish to be satisfied that the adverse effect on the amenity or character of the area can be attributed to a specific house or to the tenants or their guests of a specific house or to the tenants or their guests of the specific house and has there has been a relevant management failure. The Executive would normally only consider refusing or revoking registration when it is provided with sufficient reliable information or evidence that the above two conditions have been met. The information would normally be supplied by the police service and by environmental health departments. The Executive would give appropriate consideration to any reliable information or evidence provided from other sources.

[18] Paragraph 8 under the heading "Reasonable practicable steps" includes matters such as the inclusion of clauses relating to behaviour in the written tenancy agreement to set the parameters and boundaries of the behaviour at the outset, the inclusion of clauses in the tenancy agreement whereby the tenant agrees to keep the garden and curtilage free from litter, the inclusion of clauses relating to proper use of bins, provision of suitable bins, provision of contact information to facilitate reporting of problems, the obtaining of references from previous landlords and so forth. Additionally HMO landlords have the power to obtain injunctions against anti-social behaviour under Statutory Rule 2003 No. 409 "Injunctions Against Anti-social Behaviour (Proscribed Premises) Regulations (Northern Ireland) 2003 which prescribes the accommodation for the purposes of Article 26(2)(d) of the Housing (Northern Ireland) Order 2003. In individual cases it is the responsibility of the manager to identify the actions that have been taken.

The Housing (Management of House in Multiple Occupation) Regulations (NI) 1993

[19] Under Article 78 of Housing (Northern Ireland) Order 1992 the Department with a view to providing a code of management of houses in multiple occupation by regulations was empowered to make provision for the purpose of ensuring that a house is occupied in accordance with "proper standards of management." This includes but does not appear to be limited to matters of repair, maintenance of good order and matters like water supply, drainage, fire escapes, common parts and so forth. Article 78(3) of the 1992 Order makes clear that the person managing the house should only be liable by virtue of the regulations to ensure repair, maintenance, cleansing and good order of any premises outside the house if and to the extent that he has power or is otherwise liable to ensure those matters in respect of such premises. This provision recognises that the landlord cannot be expected to deal with matters of repair and good management of the premises outside the house except to the extent that he had power or was otherwise by virtue of the Regulations able to ensure those matters in respect of the premises. Under Article 78(4) the regulations may impose duties on persons who live in the houses for the purpose of ensuring that a person managing the house can effectively carry out the duties imposed on him by the regulations. This provision recognises that it may be necessary to impose statutory duties directly on the relevant residents to enable the landlord to effectively discharge duties imposed by the regulations. A breach of the Regulations is a criminal offence at level 3 of the standard scale. The Regulations are all in the context of premises from which the owner receives rent.

[20] The 1993 Regulations were enacted pursuant to Article 78. The duties of management are all expressed in terms relating to the fabric of demised premises, the disposal of refuse and litter and the safety of residents.

Regulation 3 expressly provides that nothing in the Regulations shall be taken to require or authorise anything to be done which is the responsibility of a government department, district council, statutory undertaker or other person other than such action as may be necessary to bring the matter promptly to the attention of the government department, district council, statutory undertaker or person concerned. There appears to be no reason in principle why regulations could not provide for the imposition of other specific management duties on landlords.

The Guide

[21] In May 2004 the Executive published a document called "Good Management Practice Guide for Houses in Multiple Occupation". It is primarily intended to be read in conjunction with the Scheme. The Executive states therein that it may take it into account in determining whether or not there has been a relevant management failure under the Scheme. Section A states that the written tenancy agreement should contain various clauses and information. This includes agreement that the landlord may bring issues of behaviour adversely affecting the amenity and character of the area in which the house is situated to the attention of relevant authorities such as the university, the PSNI, environmental health, noise pollution control departments and so forth. The tenant is not to cause or allow any person occupying or visiting the house to cause a nuisance or annoyance to neighbours or within the area in which the building is situated. The written agreement should also provide the tenants with other useful information including information on how anti-social behaviour in and around the building will be dealt with. Section C dealing with anti-social behaviour provides that the HMO manager should have systems in place to ensure that anti-social behaviour is minimised. The manager should include clauses relating to behaviour in the written tenancy agreements. This would help set out the parameters and boundaries for behaviour at the outset and it would make it possible for a manager to consider eviction on grounds of breach of tenancy agreement should problem behaviour arise. The manager should have regard to liaising with affected neighbours, universities, PSNI, environmental health and other bodies.

Fees

[22] Article 75C(4) requires the Executive to include in the Scheme provision requiring the payment on first registration and renewal of a registration a reasonable fee of an amount determined by the Executive. Paragraph 8 of the Scheme provides that each house shall attract a fee of £15 per year for each occupant payable on first registration. Thus for example in the case of 3 occupants the fee is £225 (£45 for each year). Fees are not payable for any property in which the Executive has an interest freehold or leasehold, any property in which the registered housing association,

university or college or a hospital has an interest freehold or leasehold or any property in which a registered charity has an interest in the houses in multiple occupation The Houses in Multiple Occupation (Registration Scheme Fees) Order (Northern Ireland) 2004 Registration Scheme Fees Order (Northern Ireland) 2004 provides in paragraph 3:

> "No fee is payable on first registration or on any renewal of registration in respect of a house managed by a university, a hospital or registered charity, the Executive or a registered housing association."

The wording of the Scheme differs somewhat from the Order (see below).

The Applicants' challenge

[23] In their skeleton and oral argument on behalf of the applicants Mr Lyttle QC and Mr McEvoy contend that the Scheme is vague and uncertain in its effect in relation to the obligation of landlords. They point to the introduction in the explanatory notes beginning at page 21 of the Scheme which state the explanatory notes are intended to explain the Executive's current understanding of the legal requirements of the registration Scheme and explain the manner in which the Executive intends to carry out it duties in relation to the Scheme. It stated that the notes do not represent an authoritative statement of the law and do not bind the Executive to any particular course of action. The Scheme is ultra vires since it seeks to impose obligations on private landlords and HMO managers in respect of guests. The Scheme as a whole is not compatible with Article 1 Protocol 1 of the Convention. Where the state interferes with the individual's rights a fair balance must be struck between the general interest and the needs of the individuals, the satisfaction of which requires the fulfilment of two conditions:

(a) the interference must have a legitimate aim,
(b) there must be a reasonable relationship of proportionality between the means employed and the aim pursued.

The Scheme, it was argued, satisfied neither requirement. Moreover the nature of the Scheme is such that it carries a criminal sanction. In this context Article 6 requires clarity and certainty which was manifestly absence here. On the basis of the wording of Article 75G and the Scheme the applicants could not be certain of the geographical extent of their responsibilities. The area in respect of which private landlords are alleged to be responsible vis a vis residents, occupants and guests is not defined by the legislation or Scheme. This could refer to the curtilage of the property, the adjacent public street, the designated HMO area or some unspecified distance beyond the confines of the designated area. If it is anything other than the curtilage of

the property the private landlords are being required to act as a secondary police service (which brings with it attendant implications for persons' safety). If a private landlord is deemed to be in breach of the Scheme then he may face a financial penalty in that he is denied the right to operate HMOs and that would apply to all HMOs in the ownership and control of the manager or owner even though the management failure relates to only one house. Moreover he may be subject to criminal prosecution. The applicants accept responsibility in respect of the behaviour of the tenants within the curtilage of their buildings. It would be irrational and disproportionate to expect them to supervise the tenants once they are on the public road. If there is a problem in relation to the designated area then there is a public order issue and it is wrong to expect private landlords to deal with public order issues. To be reasonable the wording of a condition has to be sufficiently precise to enable the applicants to know what their obligations are so that they can know what is needed to be done to comply with the conditions.

[24] In relation to the imposition of fees it was contended that the system is discriminatory and unfair. University managed property can include private profit-making. There can arrangements between developers and universities leading to the developer having the right for part of the year to let the premises for profit. The 2004 Regulations provide exceptions for premises managed by any of the relevant bodies whereas the Scheme exempts them where the property in which the relevant body has an interest, whether freehold or leasehold. The respondents have produced no contemporaneous record or note to show they gave consideration to the prejudicial effect of the legislation or the Scheme. Exemptions having been made for housing associations, nursing accommodation, university accommodation, there is unlawful discrimination under Article 14 against private landlords. Only private landlords must endure the burden of fees which should be used for the benefit of exempted groups.

Case for the Executive

[25] Mr Hanna QC submitted that the Scheme was lawfully prepared by and submitted to the Department which then lawfully approved the Scheme. The general purpose of the Scheme is to control the use of certain residential property, namely houses in multiple occupation, (a) to ensure that they are safe for persons occupying them and (b) to prevent them adversely affecting the amenity and character of the area in which they are situated. The former purpose is achieved through the control provisions set out in paragraph 9 of the Scheme and in the Regulations. The latter is achieved through the special control provisions set out in paragraph 1.

[26] Special control provisions which are provided for in Article 75G(1) are provisions for preventing houses in multiple occupation from adversely

affecting the amenity and character of the area in which they are situated. There are two ways in which a house can adversely affect the amenity or character of an area:

(i) by reason of its existence, and
(ii) by reason of the behaviour of its residence.

There must be a nexus between the behaviour of the residence and the house. The wording of Article 75G(1) is paramount. If a house does not adversely affect the amenity and character of an area the special control provisions can have no application. The definition of special control provisions is repeated in paragraph 10.2 of the Scheme. The explanatory notes contain examples of behaviour which can adversely affect the amenity and character of the area but the explanatory notes are not authoritative.

[27] A relevant management failure is defined in paragraph 10.8. Examples of reasonably practicable steps are set out in explanatory note 8. These fall into two categories, namely the provision in tenancy agreements of provisions designed to control the behaviour of tenants with the sanction of eviction which landlords could reasonably be expected to invoke in appropriate cases and, secondly, steps of the kinds described to prevent tenants from adversely affecting the amenity and character of the area including the use of statutory powers conferred on landlords to obtain injunctions to restrain anti-social behaviour.

[28] The state has deemed laws to be necessary to control the use of property in accordance with the general interest. The purpose of special control provisions address a pressing social problem described in the affidavits of Jerome Burns, Head of Housing Policy Branch in the Department and in the affidavit of David Bass of the Executive. The problem is the extent of the anti-social behaviour of various kinds commonly associated with the use and occupation of HMO and the impact of such behaviour on the rights of others. The Department and Executive properly addressed the issue of proportionality. Mr Hanna did, however, accept that the Executive did not explicitly take account of Article 1 Protocol 1 of the Convention. They recognise the competing interests of landlords to peacefully enjoy their property and the rights of others in the relevant area who are entitled to enjoy their homes peacefully. All and only relevant factors had been taken into account in carrying out the balancing exercise. In support of his argument as to the proportionality of the Scheme Mr Hanna contended that there must be a sufficient nexus between the behaviour of the residents and the house. While it is not possible to specifically define the geographic extent of the special control provisions the requirement that the house must affect the amenity and character of the area will mean that any relevant behaviour if it is to have affect will have to take place in sufficiently close proximity to the house. The behaviour of guests will only be relevant if they are present in the

house at the invitation of the residents or if they have been attracted to the vicinity of the house by the behaviour of the residence (eg because the residence may be holding late night parties within the house). The Scheme does not require the landlords or managers to take steps which are not reasonably practicable steps to prevent the existence of a house or the behaviour of the residents from adversely affecting the amenity and character of the area. The Scheme does not require them to police the behaviour of the residents and the guests in circumstances where that behaviour is not capable of causing the house to adversely affect the amenity or character of the area. The Scheme contains legal control and safeguards (the giving of reasons, a right of appeal and a provision in the Scheme that the Executive will normally only consider refusing registration when it is provided with sufficient reliable information or evidence that the adverse effect can be attributed to a specific house or the tenants and their guests of a specific house and there has been a relevant management failure.

[29] The Scheme did not prevent the landlords and owners of the house in question from using that property as houses. The special control provisions may only prevent them from using their property as houses in a more intensive and profitable way if it can be shown that they have failed to take reasonable steps to prevent the intensification of use from having an unacceptable adverse impact on the rights of others. In relation to the exemption of the body specified in the Fees Order the Executive is obliged to make the exceptions provided for in paragraph 8.3 of the Scheme so Mr Hanna contended that the Executive believed that they were justified and they were not discriminatory for the reasons given in Mr Burns's affidavit.

Case for the Department

[30] Mr McCloskey QC argued that Article 75G is designed to address an identified social evil of substantial proportions in connection with HMOs commonly described as anti-social behaviour. He submitted that the applicant's complaint did not fall within the ambit of Article 1 of Protocol 1. It does not concern the peaceful enjoyment of their property or any interference with such enjoyment. This followed from a combination of (a) the use to which the applicant's property is put namely being let out to tenants and (b) the true construction and effect of the impugned statutory decisions. The Association has in any event no possessions which it is seeking to enjoy and cannot therefore have a status as a victim under Section 7 of the 1998 Act. The fourth applicant has no standing since he is a manager and not a landowner. In any event a fair balance had been struck. The Scheme gave effect to a properly balanced exercise of the respective public and private interests engaged.

The evidence of the Executive

[31] The Executive filed affidavit evidence from the Assistant Director, David Bass, who is responsible for the policy of the Executive in relation to the enforcement of HMO legislation. Mr Bass makes a number of points in his affidavit relating to the Executive's views as to the way in which the Scheme should be interpreted and implied. A general point must be made about this evidence. Firstly affidavits in judicial review cases have a tendency to be in the nature of sworn argument. This is not the purpose of affidavit evidence. The affidavit should contain the necessary factual material which a party seeks to put before the court as being material to the court's consideration of the lawfulness of impugned decisions, documents or actions. Secondly the proper legal interpretation of a statutory Scheme implemented under legislative power is a matter for the court in the light of the wording adopted. If a Scheme such as the present one requires an affidavit to be sworn to show what it was intended to mean and how it was intended to be applied this may be indicative of shortcomings in the drafting of the Scheme. The normal principle is that extrinsic evidence is not admissible to assist in the construction and application of the wording of a legal document.

[32] The key points made by Mr Bass are as follows:

(a) In response to the applicants' argument that section 10 of the Scheme was unlawful, in so far as it imposes on the owners and managers of houses responsibility for the behaviour of residents and occupants outside the property and for behaviour unconnected with the permitted use and management of the property the Executive did not accept that section 10 was unlawful but should be construed as not applying to acts which occur in places which are not within the locality of the property (though Mr Bass does not define the locality).

(b) Explanatory note 4 is a broadly accurate statement of the legal position. The note however does not bind the Executive to a particular view of the law. For the avoidance of doubt the Executive wished to explicitly state that in considering whether to revoke a registration in the case of a breach of any condition imposed in pursuance of the special control provisions the Executive will only have regard to instances of anti-social behaviour by guests and occupants "if and to the extent that such instances involve unacceptable behaviour by occupants or residents. An example would be a situation in which a guest was guilty of serious and persistent anti-social behaviour and the relevant resident or occupant took no adequate steps to dissuade or prevent the guest from behaving in that way."

(c) The Executive recognised that considerations of personal safety, considerations relating to the desirability of preventing breaches of

public order and legal costs are all relevant matters to be considered in coming to a conclusion as to whether a particular cause of action is practicable>

(d) There is no duty to supervise or superintend the conduct of persons. However, a landlord will certainly be at risk of revocation if there is a failure to take "reasonably practicable and proportionate" steps as a response to instances of anti-social behaviour.

(e) Revocation could only take place if there has been a "relevant management failure." The failure must consist of a failure to take reasonably practicable steps. The test of reasonable practicability necessarily involves a proportionality requirement, which prevents the requirement from involving a disproportionately onerous burden,

(f) The Scheme does not impose a duty on landlords to police the behaviour of tenants, landlords would be expected to investigate matters just as, for example, they would have to investigate damage to the property were it was not clear who the culprit was.

Departmental evidence

[33] Jerome Burns, Head of Housing Policy in the Department, in his affidavit gives evidence as to background, the current policy affected by the 2003 Order in relation to houses in multiple occupation.

[34] He referred to the Department's policy review which led to the publication of "Building on Success" in December 1995. This considered (inter-alia) the private rental sector. The paper pointed out that the private rental sector represents only 3.5% of housing tenures in Northern Ireland compared to 10.2% in England. The paper indicated the Government's desire to revive the opportunity for its revival through encouraging more investment in the sector.

[35] In relation to HMOs it was noted that there may be around 3,000 HMOs in the Belfast area and this may represent 70 to 75% of all HMOs in Northern Ireland. The remainder are concentrated in areas in Derry, Portstewart/Portrush and Bangor. It noted that in property in England and Wales it was proposed to strengthen the safety requirements in respect of HMOs and consideration would be given to how best to implement the thrust of proposals for England and Wales. At page 10 of the paper it was noted that the Government proposed to, "encourage managers to tackle anti-social behaviour by tenants". Mr Burns stated that it was decided by Government

that a registration Scheme should underlie the regulation of HMOs in Northern Ireland and that this should be a compulsory Scheme.

[36] The provisions of Article 75A et seq, according to Mr Burns, should be seen in the context of problems associated with HMOs. He referred to a report prepared for the Holyland University Area Residents Association referred to Government by Professor Monica McWilliams MLA. This identified an increase in anti-social behaviour in the past few years which had become intolerable to local residents. It considered that landlords should take greater responsibility with regard to the behaviour of tenants.

[37] In paragraph 14 of his affidavit Mr Burns referred to a report of the Parliamentary Debate in relation to the legislation. The Parliamentary Under-Secretary of State for Northern Ireland, Desmond Browne MP, stated:

> "The Order contains measures to help deal with anti-social behaviour in social housing. As Honourable Members are aware such behaviour blights the lives of many people today not only in Northern Ireland but also throughout the United Kingdom. The Order gives landlords greater powers to help deal with the problem which mirror provisions that operate successfully in many local authority areas in Great Britain. The right to repossess houses on the grounds of nuisance or annoyance is being extended to cover any such behaviour by visitors to a dwelling. That closes a loophole in the present legislation. However, some including the Assembly Social Development Committee have expressed the concern that the provision could result in a person having his home repossessed even though he had little or no control over the behaviour of visitors. An example would be the case of a separated wife whose husband makes unwanted visits and during those visits generates a degree of nuisance. I should like to make it clear that there is no question of action being taken to repossess a house when a tenant does not have or could not be expected to have control over the visitor."

However, this quotation from the Parliamentary Debate is not really relevant to the issue that arises in the present case. It was speaking of anti-social behaviour in "social housing" and appears to be dealing with the additional powers given to bodies such as the Executive, which have tenants creating anti-social problems and whose right to possession against such tenants is being extended.

[38] In relation to the Fees Order Mr Burns contended that it was entirely appropriate that a distinction should be made between commercial entities such as private landlords and social landlords or not for profit organisations.

Sub-commercial or private landlords may pass on the costs in the form of rent charges. Bodies in the public sector may generally not do so. Furthermore most if not all of the funding of social landlords will come from Government either directly or indirectly and there will be mere circularity of funding.

[39] In a second affidavit Mr Burns, as a further justification for the Fees Order, also relied on a point made to the Department by the Executive that HMO grants for work on houses was in general terms payable to private landlords but not to the exempt bodies. This is only partially correct that since not all private landowners are entitled to HMO grants.

Relevant general principles

(i) Common Law

[40] The right to ownership and enjoyment of private property is a central right of common law. In the locus classicus enunciating this principle Entick v Carrington (1765) 19 State Trials 1029 at 1060 Pratt LJ stated:

> "The great end for which men entered into society was to secure their properties. That right is preserved sacred and incommunicable in all instances where it has not been abridged by some public law for the good of the whole."

According to the Blackstone the absolute right inherent in every Englishman is that of property "which consists of the free use, enjoyment and disposal of all his acquisitions, without any control or diminution save only by the laws of the land". For this purpose property rights include the right of a person who is sui juris to manage control his own property. Nourse J referred to,

> "The general principle in our law that the rights of a person whom it regards as having the status to deal with them on his own behalf will not be overridden" (Re Savoy Hotel Ltd [1981]) Chancery 351 at 365.

[41] Hence it is a principle of statutory interpretation that by the exercise of state powers the property or economic interests of a person should not be taken away, impaired or endangered except under clear authority of the law. Where a statutory provision takes away a right which would have existed at common law, the provision is not to be enlarged more that the words clearly permit or require (per Sellers LJ in Newtons of Wembly Ltd v Williams [1965] 1 QB 560 at 574). Where property rights given at common law are curtailed by statute, the statutory conditions must be strictly complied with (Bennion on Statutory Interpretation 4th Edition at 725).

(ii) Convention Law

[42] The common law principles just discussed remain in place and those principles are subject to the rights recognised by Article 1 of Protocol 1 of the Convention which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international 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 and to secure the payment of taxes or other contributions or penalties."

The European Court of Human Rights has repeatedly held that the Article in fact comprises three distinct rules, namely the principle of peaceful enjoyment of property ("the first rule"); the principle that deprivation of possession of property must be in the public interest and subject to the conditions provided by law and by the general principles of international law ("the second rule"); and thirdly the principle that states are entitled to control the use of property in accordance with the general interest and to secure the payment of taxes or other contributions or penalties ("the third rule").

As Clayton on the Law of Human Rights makes clear at page 1302 et seq, the three rules are not distinct in the sense of being unconnected. The second and third rules are concerned with particular instances of interferences with the right to peaceful enjoyment of possessions and must be construed in the light of the general principle of the first sentence of paragraph 1. The second and third rules cover the power of expropriation, the power of taxation and the most relevant in the present context, the power to the regulate the use of property. A general test has been evolved to deal with the three principles. The state can only justify an interference with the enjoyment of possessions if it can show that a "fair balance" has been struck between community interests and the rights of persons entitled to enjoyment of the property. Under the European Court of Human Rights jurisprudence states have been consistently allowed a wide margin of appreciation to identify the general interest and to determine whether it outweighs the claims of the applicant. Any interference must be lawful. The law must be accessible, sufficiently certain and provide protection against arbitrary abuse. There must be a reasonable relationship of proportionality between the means employed and being pursued. As stated in Sporrong & Lönnroth v Sweden [1982] 5 EHRR 35 at para 69,

> "The court must determine whether a fair balance was struck between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights."

To satisfy the fair balance test two conditions must be fulfilled. Firstly, the interference must have a legitimate aim and secondly there must a reasonable relationship of proportionality between the means employed and the aim pursued. The test of proportionality in property cases appears to be less exacting than in cases where fundamental rights are at stake such as freedom of expression or intimate aspects of private life (see Clayton op. cit at 282). It has been held that the possible existence of alternative solutions does not make legislation unlawful under the right to property. It is not for the court to consider whether legislation represents the best way of dealing with a problem or whether the legislative discretion should have been exercised in another way (see James v United Kingdom [1986] 8 EHRR 123 at para 51).

[43] Under Article 75L the person who contravenes or fails to comply with the provisions of a registration Scheme commits an offence. In addition a breach of the Scheme may lead to revocation of the registration of a house as an HMO. The principle of legal certainty comes into play. This principle was stated in G v Germany [1989] 60 DR 256 thus:

> "Legal provisions which interfere with individual rights must be formulated with sufficient precision to enable the citizen to regulate his conduct."

In Sunday Times v UK [1979] 2 EHRR 245 para 45, a civil, not a criminal, case it was said that,

> "A norm cannot be regarded as the law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree which is reasonable in the circumstances the consequences which a given action will entail. These consequences need not be foreseeable with absolute certainty: experience shows that that is unattainable. Again, while certainty is highly desirable, it may bring a strain of excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly many laws are inevitably couched in terms which to a greater or a lesser degree are vague in their interpretation and application."

Where a criminal offence is created a higher degree of precision may be called for. In De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1998] 3 WLR 675, a Privy Council case from Antigua and Barbuda, a civil servant was deprived of his constitutional right to freedom of assembly and expression because of a statutory provision which precluded him from publishing or broadcasting any information or expressing any opinion on a matter of national or international controversy. To save the provision the Court of Appeal in Antigua had implied a limitation on the statutory provision by restricting it to such constraints as "were reasonably required for the better performance of his duties." Lord Clyde said that that implied limitation failed:

> "The critical question then is whether the prohibition in the statutory provisions as qualified by the Court of Appeal produces a rule sufficiently precise to enable any given civil servant to regulate his conduct. The rule applies to all civil servants without distinction so that it is left to the individual in any given situation to decide whether he is or is not complying with the rule. Their Lordships are not persuaded that the guidance given is sufficiently precise to secure the validity of the provision. It is to be noticed that the provision is fenced around with possible criminal sanction … and it is necessary that in that context a degree of precision is required so that the individual will be able to know with some confidence where the boundaries of legality lie. It cannot be that all expressions critical of the conduct of a politician are forbidden. It is a fundamental principle of democratic society that a citizen should be entitled to express their opinions about politicians and while there may be legitimate restraints upon their freedom in the case of some civil servants, the restraint cannot be made absolute and universal. But where the line is to be drawn is a matter which cannot in fairness be left to the hazard of individual decision. Even under the formulation of the Court of Appeal the civil servant is left with no clear guidance as to the exercise of his constitutional rights."

Speaking in a different context Brennan J in the United States Supreme Court in National Association for the Advancement of Coloured People v Button [1963] 371 US 415, 432-433 (quoted with approval by Lord Clyde in the De Feitas decision), in criticising criminal provisions which were objectionally vague and over broad, condemned the existence of a penal statute susceptible of sweeping and improper applications. He made the valid point that "the

threat of sanctions may deter their exercise almost as potently as the actual application of the sanctions."

[44] Where the provisions of the Convention are engaged, the relevant decision-maker must explicitly recognise the engagement of the relevant Convention rights. In the recent decision of the Court of Appeal In AR v Homefirst Community in the context of a case where Article 8 was engaged the court was critical of the relevant Trust's failure to recognise the engagement of Article 8, a failure which resulted in the Trust's decision-making being seriously flawed. Kerr LCJ at pages 34-35 of the judgment of the court stated:

> "The Trust's procedures were not efficacious to protect the mother's Convention rights. Quite apart from that consideration however, we consider that it is a virtually impossible task to ensure protection of these rights without explicit recognition that these rights were engaged. Where a decision-maker has failed to recognise that the Convention rights of those affected by the decision taken are engaged, it would be difficult to establish that there had not been an infringement of those rights. As this court recently said in Re Jennifer Connor's application [2004] NICA 45, 'such cases will be confined to those where no outcome other than the course decided upon could be contemplated'. Plainly this is not such a case".

The proper construction of Article 75G

[45] The special control provisions contained in the Scheme were the main focus of the applicant's attack and it is necessary to consider carefully the Article 75G enabling power to make such provisions. Article 75G is part of the statutory framework for HMOs introduced by the 2003 Order. The new schema in Article 75A et seq represents a significant range of provisions controlling the property rights of owners or controllers of property falling within the definition of HMOs. They interfere with the pre-existing common law property rights of landowners who at common law would be free to let property on such terms and conditions as they consider appropriate untrammelled by state interference. The effect of the legislation is to introduce penally enforceable obligations to comply with the Scheme's provisions and breach of the provisions can lead to a substantial restriction in the freedom of the relevant landowner to re-let the property or admit third parties to it. In line with the common law principles discussed in paragraphs 39 and 40 above, the provisions fall to be construed and in favour of the property owner.

[46] Article 75G authorises the introduction of "special control provisions." These are provisions designed to prevent HMOs adversely affecting the amenity and character of the area in which they are situated by reason for their existence or by reason of the behaviour of the residents. The conditions of registration may include conditions relating to (i) the management of the house, or (ii) the behaviour of the occupants. Revocation of registration may be effected in the case of (a) occupation of the house by more householders than permitted, and (b) a breach of any conditions imposed in pursuance of the special control provisions. Bearing in mind the interlinking of the Scheme conditions with the criminalisation of a breach of the Scheme, the court's approach to the interpretation of Article 75G must be heavily influenced by the principle of legal policy that a person should not be penalised except under clear law (what in Bennion op. cit at 705 is described as the principle of doubtful penalisation). In construing legislation the court should presume that the legislature intended to observe this principle. It should therefore strive to avoid adopting a construction which penalises the person where the legislative intention to do so is doubtful or penalise him in a way which is not made clear. Maxwell on the Interpretation of Statutes 12th Edition at 239/240 states that:

> "The strict construction of penal statutes seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; then requiring the fulfilment to the letter of statutory conditions precedent to the infliction of punishment; and in assisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction."

Bennion considers that this passage is in fact too narrow and that the principle applies to any form of detriment. A breach of the Scheme in the present instance can give rise to a liability to prosecution, a penal consequence and, in addition, to a revocation of registration, which is a clear detriment.

[48] The format of Article 75G is to empower the inclusion in the Scheme of what are called "special control provisions". Paragraph 1 describes the purpose of such provisions. It is Article 75G(2) which provides what such provisions may provide. They may provide for (a) refusal revocation of registration, (b) the reduction in the number of households in a house and (c) the *"imposing of conditions of registration"*. The conditions of registration may include conditions relation to the management of the house and the behaviour of the occupants. The formulation of the conditions will be in the context of conditions having the purpose of preventing the house by reason

of its existence or the behaviour of its residents from adversely affecting the amenity/character of the area where the house is situated. It seems clear from the legislation that what is envisaged is that when a house is registered, the Executive may in respect of that house impose particular conditions of registration. When the decision is made in respect of a particular house to impose particular conditions of registration, then the landlord has a right to receive a written statement of the reasons for the imposition of those conditions and has a right to appeal against the imposition of those particular conditions.

[49] Section 10 of the Scheme purports to impose generalised special control provisions (see paragraph 10.1). Paragraph 10.2 merely defines what special control provisions are, repeating the wording of Article 75G(1). Paragraph 10.3 states that the Executive may impose conditions of registration which may include conditions relating to the management of the house or the behaviour of its occupants. This empowers the Executive to formulate specific conditions to apply in respect of the registration of a particular house. The present case is not dealing with a specific condition attaching to a particular house. Paragraph 10.4 states that, "it is a condition of registration that the person having control of the house takes such steps as are reasonably practicable to prevent the existence of the house or the behaviour of the residents from adversely affecting the amenity or character of the area, or to reduce such adverse affect." This is, in effect, a repetition of the wording of Articles 75K which contains the definition of a breach of a relevant management failure. However, before Article 75K comes in to play at all there must be a "breach of any condition *imposed in pursuance of special control provisions*" which is due to "a relevant management failure. (See Article 75G(4)). Paragraph 10.4 of the Scheme does not contain a special control condition as such. Paragraph 10.5 provides that the Executive may revoke the registration of a house in case of a breach of a condition imposed in pursuance of the special control provisions. It does not in itself impose special provisions. Paragraph 10.8 defines "a relevant management failure" but does not formulate a special provision. It does purport to incorporate explanatory note 8 as to the meaning of "reasonable practicable steps". This sets out a number of steps a landlord can take to prevent or reduce the adverse effect of the existence of the house or the conduct of its residents. However, those do not contain special control provisions but are indicative of steps which a landlord could take. Similarly a reference to the Guide is not an imposition of a condition of registration.

[50] The generalised imprecise condition in paragraph 10.4 could not qualify as a condition of registration of a given registered HMO. If the policy or practice of the Executive is to automatically incorporate as a condition of registration of a given registered HMO the condition set out in paragraph 10.4 and if we assume that the Scheme can do this the wording of the "condition" is so vague and lacking in defined scope that it would in any event fall foul of

the principles of legal certainty required under Convention law (see paragraph 41 above). The Department would have had no power to confirm or approve such a provision under Article 24(1)(a) of the Northern Ireland Act 1998 which precludes a Northern Ireland Department from confirming or approving a provision which is contrary to the Convention. If the condition were incorporated as a condition of individual registrations by the Executive, the Executive would be attempting to enforce a condition that would be incompatible with the Convention law having regard to its uncertainty and the fact that it would not be possible from the wording of the condition for a landowner to know with reasonable clarity and certainty what steps he must take to avoid the risk of penalisation or deprivation of his registration. Moreover the so-called "condition" would at common law fail to constitute a condition of registration, for to be a valid condition it would have to be conceptually certain to enable the property owner to know with reasonable clarity what he can or cannot do. A breach of a valid condition would be akin to a breach of a condition subsequent leading to the consequence of the potential loss of rights in respect of his property. While the concept of "relevant management failure" is wide and loosely defined in the statute, the relevant offence or action that may justify revocation lies in a breach of a condition (which must be defined with reasonable and conceptual clarity) which is due to a relevant management failure. The Scheme cannot simply transpose the concept of a relevant management failure into a so-called condition.

[51] Mr Hanna on behalf of the Executive argued that the condition was a valid condition and a breach of the condition would only arise if there was a nexus between the behaviour of the residents and the house. Counsel's argument puts a limiting gloss on the wording of clause 10.4 which is not present within the actual wording. A statutory Scheme must be worded in a way which is clear to all those affected by it and to those who must regulate their conduct in its light. If the intention of the draftsman was to achieve what Mr Hanna contends was the real intention, then the wording adopted in the Scheme and approved by the Department singularly fails to reflect the true intent. Nor is it open to the Executive to contend that the Scheme can be saved because it must be interpreted and applied in a way which is compatible with Convention. It was for the Executive and the Department to exercise their powers and duties under the legislation to frame a Scheme which is compatible with the Convention. The margin for appreciation is vested in the state authorities charged with the statutory function of implementing a Scheme under Article 75A et seq. A valid Scheme could be formulated in various ways that would be compatible with the Convention. It requires the relevant authorities to exercise their judgment or margin of appreciation as to how the Scheme should be formulated. The Scheme must be formulated with regard to the Convention rights. Nor is it an answer to say that an aggrieved party has a right of appeal to the County Court which would be bound to protect the Convention rights of the aggrieved party. If

the Scheme itself has not been drafted in a way that reflects and implements the Convention rights of individuals, the court cannot redraw an invalidly formulated Scheme so as to make it comply with the Convention. In Mr Lyttle's quiver of arguments, his arrow of Ascetes is the failure of the Executive to take account of the Convention rights of landowners. Mr Hanna QC and Miss Gibson accepted that the Executive did not have Article 1 of Protocol 1 specifically in view when the Scheme was formulated. As made clear in AR v Homefirst, where a Convention right is engaged the decision-maker is required to take account of the Convention obligations explicitly. In the present case it is apparent that there was a failure on the part of the Executive to appreciate their obligations under the Convention. Furthermore, although not in issue in this case, it is clear that the application of the Scheme to all houses falling within the very broad definition in HMOs action areas and all houses with a capacity to hold 10 people (even though only 3 people not all related may live in the premises) goes well beyond the social ill which the state considered existed in relation to HMOs and which was the underlying mischief to which the new legislation was directed. As formulated the Scheme (which could have been restricted to certain categories of HMOs) produces a wholly disproportionate impact on houses occupied by 3 or more unrelated persons who may be closely associated in the one household. Counsel for the Department and the Executive appeared to accept that the Scheme must be looked at again on this point which the court brought to the attention of the parties. What appears to be an obvious point had not occurred to either the Executive or the Department previously. Legislation of this nature has profound effects on property rights and has the potential capacity to deleteriously distort property developments. An ill-formulated Scheme may (inter alia) have the undesirable and unintended impact of reducing the number of HMOs available to provide accommodation for persons in need of it. It could dissuade owners from providing accommodation in circumstances where this may produce undesirable social results.

[52] In the Order 53 statement which has been much amended since it was originally issued the first relief sought is that contained in paragraph 2(c). This seeks a declaration that Article 75G must be read as limiting the responsibility of owners and managers of houses and multiple occupation for the residents or occupants of the said houses to the extent that the said owners and managers have permitted an unlawful use of the houses in their ownership or management. For reasons given below this declaration would be too wide.

[53] In paragraph 2(e) the applicants seek an order of certiorari to quash as unlawful section 10 of the Scheme insofar as it imposes on the owners or managers of houses responsibility for the behaviour of residents or occupants of the said house outside the said property or unconnected with the permitted ownership used in management of the said property. In paragraph

2(f) a declaration that section 10 is unlawful is sought. In paragraph 2(g) the applicants seek a declaration that explanatory note 4 is unlawful insofar as it appears to impose a duty on the owner or manager to be responsible for anti-social behaviour by occupants or guests of the occupants in the area in which the house in multiple occupation is situated.

[54] The consequence of my judgment is that the Scheme as whole is effectively a bad scheme in that the Executive and Department failed to have regard to Article 1 of Protocol 1 of the Convention. That is not to say that large parts of the Scheme might not legitimately be incorporated into a freshly drafted scheme that would comply with Article 1 of Protocol 1. The Scheme will however will require to be redrafted to take account of the effect of this judgment. Strictly the present judicial review application focuses on the contents of section 10 and the explanatory notes in connection with it. Insofar as section 10 purports to incorporate a special control provision in para 10.4 that part of the Scheme fails to create an effective special condition or special control provision for the reasons given. Under section 10.3 of the Scheme the Executive is entitled to impose special conditions of registration on individual houses. This Scheme could legitimately contain precedent special conditions which could then be used in individual registrations. Special conditions must relate to the management of the house or the behaviour of the residents. The behaviour of the residents can have consequences outside the house and the behaviour of the residents can involve actions by third parties. Thus excessive noise or smells from the demised premises can have an effect on other local residents just as vermin could be attracted to an area by the consequences of the behaviour of the residence within the demise premises or in connection with their residence therein (for example by dropping rubbish out of their windows on to the street). The special conditions would have to relate to the behaviour of the residents which has such a close nexus or connection with the demised property that it could be said that the nuisance or impact on third parties flows from the resident's residence in the demised premises. In formulating any conditions of registration under Article 75G the Executive would have to:

(a) ensure that the conditions satisfy the requirements of such a close nexus between the behaviour of the resident and the residence residents in the premises.

(b) ensure thatiIt is formulated with sufficient clarity and certainty that an owner or manager would not with reasonable confidence what is expected of him so that he can regulate his conduct accordingly, and

(c) ensure that it is in all the circumstances proportionate.

Since the individual landowner is intended to have a right of appeal against the conditions imposed the Executive must be able to give reasons as to why

it is imposing the proposed conditions in the registration for that particular landowner.

Decision in relation to the Fees Order

[56] Under Article 75 the Department is given the power to make regulations in relation to fees which may exempt certain landowners from the obligation to pay these. The legislation thus empowers the making of regulations which may discriminate between different categories of landowners. The imposition of a charge or fee for registration in connection with a system of registration which impacts on the rights of landowners engages Article 1 of Protocol 1 and thus Article 14 of the Convention becomes relevant. For it provides that in connection with the enjoyment of the Convention rights there should be no discrimination on the grounds of (inter alia) property. Not every difference in treatment amounts to a violation of Article 14. Instead it must be established that the persons in an analogous or relevantly similar situation enjoy preferential treatment and there is no objective or reasonable justification for the distinction. Contracting states enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment in law. While the literal meaning of Article 14 is that any difference of treatment is unlawful discrimination it is clear from the Belgian Linguistic Case (No. [1968] 1 EHRR 252 that the European Court on Human Rights rejected as absurd an argument based on the French text suggesting that any difference of treatment would be a breach of Article 14. Some differential treatment is permissible. It is, however, for the state to establish justification. The principle of equal treatment is violated if there is no reasonable or objective justification. The Belgian Linguistic test set out two essential elements namely, a rational aim behind the differentiation and proportionality between the interference and aim pursued. In Wandsworth LBC v Michalak [2002] 4 All ER 1136 the Court of Appeal stated that in dealing with an issue under Article 14 it was convenient to pose the questions.

(i) Did the facts fall within the ambit of one or more of the substantive Convention provisions?

(ii) If so, was there different treatment as respect that right between the complainant on the one hand and other persons put forward for comparison (the chosen comparators) on the other?

(iii) Where the chosen comparators in an analogous situation to the complainant's situation?

(iv) If so, did the difference in treatment have an objective and reasonable justification? In other words did it pursue a legitimate aim and did the

differential treatment bear a reasonable relationship of proportionality to the aims sought to be achieved.

[57] In the present case the first two questions must be answered in the affirmative. The chosen comparators are the bodies exempted from payments of fees under the Fees Order. The question arises as to whether they are in an analogous position to the applicants (private landlords or managers). The Department contends that they are not in an analogous situation in that

(a) the bodies are directly funded by Government, and

(b) grant aid is not paid to Government funded bodies for HMOs.

The state authority contends that the payment of fees would be a case of circulating Government funded money. Even if there is an analogous situation, it is argued there is a subjective and reasonable justification because the bodies are Government funded and grant aid is not paid. In the case of the Executive it would be incongruous that the body charged with administering the Scheme (towards the cost of which the fees are directed) should have to pay the registration fee to itself. As far as the other bodies are concerned a "registered charity" is not Government funded (and charities are not mentioned in the departmental memo of 5 February 2004). A factor which the decision makers left out of account is the fact that the added costs of the fees can be passed on to those who are in occupation of the HMOs, either as tenants or lodgers. In some cases the tenants and lodgers may be in receipt of housing benefit but in other cases they will not (eg. nurses in hospital accommodation or students in university accommodation). By not charging the relevant bodies the Fees Order indirectly subsidises the tenants and lodgers of the HMOs of those bodies who are thus at an advantage compared to the tenants and lodgers of private landlords. The cost to individual occupants would be small (£15 per year working out at 30p per week). A hospital or university with a large block of accommodation may have to pay a significant sum to register. If it were irrecoverable then there would be logic in the conclusion that those bodies should not be expected to pay the registration fees since much of their funding comes from the Government in other sources. However, there is nothing to suggest that the Department considered the issue whether they could pass on the costs which would be a relevant matter to take into account when determining how their judgment should be exercised in relation to which bodies should be exempt. Moreover, under the Scheme as it currently stands private landowners who allow unrelated third parties to live in the accommodation free of charge would be subject to the registration fee under the Scheme. It seems to be accepted by the Executive and the Department that that aspect of the Scheme needs to be reconsidered. Since the Fees Order was itself premised on the validity of the Scheme as a whole the premise upon which the Fees Order was made has turned out to be false. In the result I conclude that the Fees Order

as presently enacted produces a result which is discriminatory under Article 14 and which has not been justified by the Department. The making of the Fees Order, accordingly, was contrary to section 24 of the Northern Ireland Act 1998. Since the Scheme will require redrafting as a consequence of this ruling the Department will need to review the question of who should be exempt in relation to the payment of fees taking account of this ruling.

[55] I shall hear counsel on the appropriate relief to be granted in the light of my ruling and in relation to the question whether it would be necessary to further amend the Order 53 notice and the notice of motion.