OUTER HOUSE, COURT OF SESSION

[2023] CSOH 76

P46/23

OPINION OF LORD HARROWER

in the Petition of

(FIRST) THE SCOTTISH ASSOCIATION OF LANDLORDS; (SECOND) PROPERTYMARK LIMITED; AND (THIRD) SCOTTISH LAND ESTATES LIMITED

Petitioners

against

THE LORD ADVOCATE

and

THE SCOTTISH MINISTERS

Respondents

for

Judicial review of the Cost of Living (Tenant Protection) (Scotland) Act 2022

Petitioners: Lord Davidson of Glen Clova KC; T Young; TC Young LLP
Respondents: Mure KC; Irvine; SGLD

2 November 2023

The issues

[1] The Cost of Living (Tenant Protection) (Scotland) Act 2022, as amended, imposes a rent cap and a moratorium on evictions in respect of private residential tenancies. The petitioners describe themselves as "representatives of those persons and other entities that are engaged in renting properties to tenants in the private rented sector in Scotland". They

challenge the legislative competence of the Act on the basis that its provisions involve a disproportionate interference with their members' rights under Article 1, Protocol 1 of the European Convention on Human Rights. The respondents are the Lord Advocate and the Scottish Ministers.

[2] The 2022 Act originally applied to all tenancies in Scotland. Exercising powers conferred on them by the Act, the Scottish Ministers introduced regulations bringing about the expiry of the rent cap for Scottish secure tenancies and short Scottish secure tenancies, while suspending the rent cap for student residential tenancies. As a result, the petitioners make an additional complaint that the continued application of the rent cap only to landlords of private residential tenancies amounts to unjustified discrimination against them contrary to Article 14 of the Convention. They do so notwithstanding that their pleaded case was directed solely at whether the Act was within the legislative competence of the Scottish Parliament. The respondents have taken no particular objection to that, other than to focus, as a separate issue in the case, whether the regulations fall within the devolved competence of the Scottish Ministers.

Background

[3] On 6 September 2022, the Scottish Government announced its intention to introduce emergency legislation to protect tenants by freezing rents and imposing a moratorium on evictions until at least 31 March 2023. This was said to be in response to the cost of living crisis. The Cost of Living (Tenant Protection) (Scotland) Bill was introduced in the Scottish Parliament on 3 October 2022. On 4 October 2022, after debate, the Scottish Parliament agreed by a majority to treat the Bill as an Emergency Bill, meaning the Bill could be enacted more quickly than the normal legislative timetable allows. Stage 2 and 3 consideration of

the Bill took place before a committee of the whole Parliament on 5 and 6 October 2022 respectively. The Bill was passed on 6 October and received the royal assent on 27 October 2022. The Cost of Living (Tenant Protection) (Scotland) Act 2022 came into force the following day.

[4] The first petitioner, the Scottish Association of Landlords, supports and campaigns on behalf of private landlords and letting agents operating in Scotland. The majority of its members are private landlords who own fewer than five properties. The second petitioner, Propertymark Limited, is a professional membership body for property agents. The third petitioner, Scottish Lands and Estates Limited, represent and support those who run rural businesses in Scotland. Its membership includes large estates, farmers, community owners, environmental NGOs and the National Trust for Scotland. Many of these members provide rural housing to tenants under private tenancies. Each petitioner represents persons engaged in renting properties to tenants in the private rented sector who are affected by the terms of the Act.

[5] The respondents did not contend that the petitioners lacked sufficient interest to raise proceedings, even though they had no property rights of their own that could be said to have been disproportionality interfered with, as distinct from the landlords they claimed to represent. Nor did the respondents take issue with the petitioners' lack of "victim" status, even though they were not themselves victims, in the sense required by section 100 of the Scotland Act 1998. However, the respondents did maintain that the petitioners' representative status entailed that they were unable to point to any factual circumstances of their own which might give rise to a finding of disproportionate interference with property rights. As a result, the respondents argued, the petitioners were unable to satisfy the threshold test for an *ab ante* challenge to the legislative competence of the 2022 Act, by which

they meant an "abstract" challenge made without reference to the actual circumstances of any individual case. This was because the petitioners could not demonstrate that the operation of the Act would give rise to a disproportionate interference with Convention rights in all or almost all cases (*Christian Institute* v *Lord Advocate* [2017] SC (UKSC) 29 at para 88; *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] 2 WLR 33 at para 19).

Relevant statutory provisions

The position prior to the 2022 Act

[6] The two main types of private sector residential tenancies are private residential tenancies and assured or short assured tenancies. The former are regulated by the Private Housing (Tenancies) (Scotland) Act 2016 and the Private Housing (Tenancies) (Scotland) Act 2016 (Commencement No 3, Amendment, Saving Provision and Revocation) Regulations 2017/346. The latter are regulated by the Housing (Scotland) Act 1988. It has not been possible to enter into a new assured or short assured tenancy since 1 December 2017 (2016 Act, Sch 5, paras 1 and 2), when the private residential tenancy regime came into force, but those assured or short assured tenancies which have not yet ended are still valid.

[7] The 2016 Act and the 1988 Act regulate the ability of private sector landlords to increase rent and regain possession of let property. They impose a minimum period which must expire before notice of any rent increase can take effect (2016 Act, s 22; 1988 Act, s 24). They allow a tenant to refer a rent-increase notice to the First-tier Tribunal in respect of an assured tenancy (1988 Act, s 25), or to the rent officer and thereafter to the First-tier Tribunal on appeal in respect of a private residential tenancy (2016 Act, ss 24 and 28). The rent officer

or the First-tier Tribunal, as the case may be, determines the open market rent (2016 Act, s 32(1); 1988 Act, s 25(1)).

[8] Both Acts set out limited grounds on which let property may be repossessed (2016 Act, Sch 3; 1988 Act, Sch 5). Both regimes ultimately require the landlord to obtain an eviction order on one of those limited grounds from the First-tier Tribunal.

The 2022 Act and subsequent regulations

[9] Part 1 of the Act concerns the rent cap (s 1) and the eviction moratorium (s 2) in respect of residential tenancies. It refers to Schedules 1 and 2, which make provision for the operation of these measures. The remainder of the Act comprises supporting and ancillary provisions, and provisions which give the Scottish Ministers, in anticipation of the expiry or suspension of the rent cap provisions in Schedule 1, power to modify the law on the adjudication of rent.

[10] The rent cap provisions disallow any rent increase by more than the permitted rate. When the 2022 Act came into force, the permitted rate was 0% (2022 Act, Sch 1, para 1; 2016 Act, s 21A(1) and (2); 1988 Act, s 23A(1) and (2)). It was increased to 3% as of 1 April 2023 (The Cost of Living (Tenant Protection) (Scotland) Act 2022 (Amendment of Expiry Dates and Rent Cap Modification) Regulations 2023, regs 3(2) and 4(2); 2016 Act, s 21A(1) and (2); 1988 Act, s 23A(1) and (2)). A landlord may apply to the rent officer for a rent increase by more than the permitted rate, but only in order to recover up to 50% of the increase in any prescribed property costs incurred during the 6 months prior to the application (2022 Act, Sch 1, paras 1 and 2; 2016 Act, s 33A(1) and (6); 1988 Act, s 24E(1) and (7)). The prescribed property costs are: (i) any interest payable in respect of a mortgage or standard security relating to the let property; (ii) any premium payable in respect of

insurance, other than general building and contents insurance, relating to the let property and the offering of the property for let; and (iii) any service charges relating to the let property for which the tenant is responsible in accordance with the terms of the tenancy, but that are paid for by the landlord. The application must include evidence of the increase.

[11] Initially, the rent officer could only allow an increase above the permitted rate of up to 3%. This figure was increased as of 1 April 2023 to 6% (The Cost of Living (Tenant Protection) (Scotland) Act 2022 (Amendment of Expiry Dates and Rent Cap Modification) Regulations 2023, regs 3(3) and 4(3); 2016 Act, s 33B(2)(b)(6), 1988 Act s 24F(2)(b)(4)).

[12] The rent cap applies only to increases in rent notified on or after 6 September 2022. It initially applied to all forms of residential tenancies but since 26 February 2023, it no longer applies to social sector tenancies (Scottish secured and Scottish short secured tenancies) or student residential tenancies (The Cost of Living (Tenant Protection) (Scotland) Act 2022 (Early Expiry and Suspension of Provisions) Regulations 2023, paras 2 and 3).

[13] The eviction moratorium continues to apply to all residential tenancies. Landlords are not permitted to execute a decree for removing or serve a charge for removing in respect of the decree for a period of 6 months beginning on the day on which the decree for removing was granted (2022 Act, Sch 2, paras 1(1), (2) and (3)). The 6-month moratorium does not apply where eviction is granted on specified grounds, including where the tenant has engaged in criminal or antisocial behaviour (2022 Act, Sch 2, para 1(5)). It does not apply where eviction is granted on the basis of either of the additional grounds of eviction, described as "safeguards for landlords", which were introduced by the Act. Those are:

(i) where the landlord intends to sell the property to alleviate financial hardship; and

(ii) where the tenant has substantial rent arrears, meaning arrears equating to 6 months' rent

or more (2022 Act, Sch 2, paras 4 - 6; 2016 Act, Sch 3, paras 1A and 12A; 1988 Act, Sch 5, Part 1, Grounds 1A and 8A).

The petitioners' submissions

[14] Part 1 and Schedules 1 and 2 of the Act were not within the legislative competence of the Scottish Parliament. The Act disproportionately interfered with the rights of all landlords' Article 1, Protocol 1 rights. Contrary to Article 14, it discriminated against landlords of private residential tenancies without any objective or reasonable justification. The function of the court's supervisory jurisdiction in relation to challenges to the legislative competence of an Act of the Scottish Parliament was not limited to redressing individual grievances in relation to individual petitioners; it played an important constitutional function in maintaining the rule of law. The court required to consider how the legislation applied more generally (*Walton* v *Scottish Ministers* 2013 SC (UKSC) 67, paras 90 - 95). This involved the court focusing on hypothetical circumstances which commonly arise in day to-day life (*R* v *Goltz* [1991] 3 SCR 485 at 515). The Lord Advocate's attempt to argue that there was an evidential hurdle, that a challenge to a legislative scheme as a whole must show the scheme will give rise to an unjustified interference in all or almost all cases, was misplaced. The court was concerned with a general statutory measure that was not reliant on implementation by a decision maker on a case-by-case basis (*cf* the circumstances in *R (Bibi)* v *SSHD* [2015] 1 WLR 5055, Lady Hale at paras 2 and 60, Lord Hodge, para 59; *Christian Institute* v *Lord Advocate* (2017) SC (UKSC) 29, para 88; *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] 2 WLR 33, Lord Reed at paras 13 - 14 and 18 - 19). The petitioners therefore did not require to prove the circumstances of every single individual to whom the legislation applied (*Salvesen* v *Riddell* 2013 SC (UKSC) 236).

A1P1

[15] A1P1 protected "possessions", which included a landlord's right to control use of land, receive rent and derive profit from renting their property (*Hutten-Czapska* v *Poland* (2007) 45 EHRR 4, para 202; *Fleri Soler and Camilleri* v *Malta* (2008) 47 EHRR 27, para 57; *Bitto & Othrs* v *Slovakia* (28 January 2014, 30255/09 2014), para 113). The three rules of A1P1, concerning the peaceful enjoyment of property, the deprivation of possession of property, and the right of the state to control the use of property in certain circumstances, were connected. The second and third rules required to be construed in light of the general principle in the first rule (*Fleri Soler*, at para 55). Rent controls amounted to control of the use of property, but they may also amount to a deprivation of property in some cases.

[16] The correct approach to assessing the proportionality of an interference was well-established (*In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016, Lord Mance, paras 52 - 54; *Christian Institute* v *Lord Advocate* 2017 SC (UKSC) 29 at para 90). The courts' assessment of proportionality required consideration of (i) whether the objective was sufficiently important to justify the limitation of a protected right; (ii) whether the measure was rationally connected to the objective; (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (iv) whether the severity of the measure's effects on the rights of those to whom it applied outweighed the importance of the objective. It involved analysing and weighing all relevant interests, which included giving full weight to the legitimate interests of landlords. Landlords, however unpopular, were as much entitled to the protection of their Convention rights as anyone else (*Salvesen*, Lord Hope at para 38).

[17] Rent controls had repeatedly been found to amount to a disproportionate interference with A1P1 by the European Court of Human Rights (*Hutten-Czapska*; *Zammit* v *Malta* (2017) 65 EHRR 17; *Lindheim* v *Norway* (2015) 61 EHRR 29; *Bitto*; *Statileo* v *Croatia* (10 July 2014, App No. 12027/10); *R&L, SRO and Others* v *The Czech Republic* (3 July 2014); *Fleri Soler*; *Ama to Gauci* v *Malta* (2011) 52 EHRR 25). Certain general themes had emerged from the ECtHR's case law. Deprivation of property without payment of compensation would normally be disproportionate, and could only be justified in exceptional circumstances. The absence of compensation was also a factor in assessing the proportionality of any controls on the use of property (*Sporrong and Lönnroth* v *Sweden* (1983) 5 EHRR 35, para 73). Whatever the legitimate aim, the measure must involve a fair distribution of the social and financial burden it was intended to address. It was unacceptable for the burden to be placed on one particular social group however important the interests of the other group or community as a whole may have been (*Lindheim*, para 134; *Fleri Soler*, para 78; *Bitto*, para 115; *Statileo*, paras 142 - 143; *Hutten-Czapka*, para 225). Schemes that carefully balanced the costs of maintaining the property and the income from controlled rent were more likely to be proportionate than those that did not provide sufficient procedures to enable a landlord to recover their maintenance costs, or derive a sufficient profit from their property (*cf Mellacher* v *Austria* (1990) 12 EHRR 391, para 55 and *Hutten-Czapska*, paras 202 - 203). The concern was with ensuring that a landlord was not limited to very low returns for use of his or her property (*Statileo*, para 138). A1P1 rights required to be practical and effective. Legislative or administrative uncertainty was a factor to be taken into account when assessing the state's conduct (*Zammit*, para 58).

[18] Turning to the application of the proportionality assessment to the 2022 Act, the petitioners submitted that there was no emergency justifying the enactment of legislation

without proper consultation. The true objective of the Act was to respond to the effect of an increase in energy prices, and to a lesser extent, consumer good prices, on tenants, irrespective of those tenants' economic circumstances. That legislative aim was not manifestly unreasonable. However, insofar as it was concerned with energy prices, it was not rationally connected to the measures adopted, which targeted rent prices. If there was a rational or logical connection, it was not explained in the material lodged by the respondents. Nowhere was there an explanation of the connection between these general economic issues and the desire to control rent, the extent to which rent might increase without controls, the likely effect of the measures on landlords or why current tenants should benefit, but new tenants should not. It could be inferred that the reason that the measures targeted rent was because the Scottish Parliament did not have the power to legislate for a general price freeze, for example, in relation to energy (Scotland Act 1998, Sch 5, para D1). It was not open to the Lord Advocate to rely upon that lack of competence in order to prove the proportionality of the measures. If less restrictive measures were available to the Parliament or Government of the UK, that rendered a measure taken by the Scottish Government or Parliament incompatible with A1P1 (*cf The Scotch Whisky Association* v *Lord Advocate* 2013 SLT 776, Lord Doherty at para 62).

[19] In any event, there were less intrusive measures that could have been imposed to address directly the energy price increases. For example: additional transfer payments to the financially vulnerable, setting the Energy Price Guarantee (The Energy Bill Relief Scheme Regulations 2022 (SI 2022/1100)) at a lower rate; using the existing rent control measures in the Private Housing (Tenancies) (Scotland) Act 2016 to deal with particular issues in a particular local authority area; or controlling mortgage costs.

[20] The balance struck between the interests of tenants and those of landlords was manifestly unfair. The impact of the Act on landlords was serious. Landlords were already subject to significant regulatory and legal obligations. The Act did not relieve landlords from any of their onerous statutory repair and maintenance obligations, or provide them with any compensation or support in relation to their continued fulfilment of those obligations. It did not provide landlords with any protection from the repossession of their property should they become unable to meet their mortgage payments. The Act restricted the ability of landlords to evict tenants who were in arrears. No compensation was to be paid to landlords for the permanent loss of income or for the loss of capital value caused by the eviction moratorium and rent control measures. The Act lacked clarity in relation to the scope for the alteration or extension of the rent cap over time and the duration of the eviction moratorium. The measures were unlikely to be temporary, owing to the inevitable shock in rent prices which would result were the measures to expire.

[21] The Act's objective, however legitimate, did not outweigh those serious, adverse impacts on landlords. There was no presumption in policy or law that landlords could not experience financial vulnerability, yet they were to bear the entire financial burden of the measures. There were no procedural safeguards in place to assist financially vulnerable landlords. The cost of living increases affected landlords too. Costs which affected landlords but not tenants, such as interest rates, had also increased. All tenants would benefit from the measures, even if they were not financially vulnerable or in fuel poverty. The administrative burden of making an application for an above-cap rent increase was on landlords. If granted, a tenant could appeal such an increase to the First-tier Tribunal. Given the low overall limit of the increase, it might not be worthwhile for landlords to make an application.

Article 14

[22] Whether or not the 2022 Act infringed A1P1, it discriminated against landlords in the private residential sector contrary to Article 14. The court required to address the following under Article 14: (i) whether the measure which was the subject matter of the complaint fell within the ambit of a Convention right; (ii) whether the petitioners had been treated differently from others on grounds that they held a particular "status"; (iii) whether that status was sufficient to engage Article 14; and (iv) whether that treatment had an objective and reasonable justification (*A* v *Criminal Injuries Compensation Authority* [2021] 1 WLR 3746, Lord Lloyd-Jones at para 22). Determining whether there was an objective and reasonable justification was essentially a proportionality assessment. Ambit was a broad concept. It was sufficient that the measure held a more than tenuous connection with the petitioner's Convention right (*A* v *CICA*, paras 36 - 39). Being a landlord was a "status" (*Salvesen*, Lord Hope, para 45).

[23] The Act fell within the ambit of A1P1 and thus engaged Article 14. It treated those with the status of landlords of private residential tenancies differently from other, similarly-situated landlords, namely, those of social and student residential tenancies, which were originally covered by the Act's measures but had not been since 26 February 2023. That difference in treatment lacked any objective and reasonable justification; it was disproportionate. The exclusion of student tenancies had not been justified. The First Report to the Scottish Parliament concerning the Act had stated that the reason for excluding social tenancies was to ensure landlords had adequate funds to carry out repairs, maintenance, meet energy efficiency and carbon neutral targets and deliver essential support services to tenants. All of those considerations applied to private residential

tenancies too. It was said an agreement had been reached with social landlords that they would adopt a voluntary approach to rent increases, but that approach would result in an average rent increase of 6.1 - 6.4% across the country. That represented more of an increase than private landlords were entitled to apply for under the Act. All landlords would inevitably have regard to what tenants may afford in setting rents, as to do otherwise would result in rental voids and loss of income. Social sector tenants were significantly more financially vulnerable, according to the Policy Memorandum to the Act. They would therefore appear to be the tenant group most harmed by rent rises and most deserving of the Act's protections.

The respondents' submissions

[24] As already noted, the respondents submitted that the petitioners had raised an *ab ante* challenge, meaning that they had challenged the legislation in the abstract, rather than under reference to the particular circumstances of an affected individual. Anyone advancing an *ab ante* challenge required to show that the operation of the legislation would give rise to an unjustified interference with Convention rights in all or almost all cases (*Christian Institute,* para 88; *Safe Access Zones,* para 19). Consistent with their status as representative organisations rather than landlords, the petitioners had been unable to show that the Act gave rise to a breach of A1P1 and Article 14 in relation to every or almost every private rented sector landlord, no matter the type of tenancy, any funding arrangements entered into for the purchase of the property, the level of rent actually charged or whether the landlord was an individual or a commercial organisation.

A1P1

[25] In order to assess whether there had been a violation of any of the three rules of A1P1, peaceful enjoyment, deprivation or control of use of possession, the court required to consider the following matters: (i) whether a possession existed, and, if so, what the possession was; (ii) whether there had been an interference with the possession, and, if so, the nature of the interference; and (iii) whether the interference complied with the principle of lawfulness and pursued a legitimate aim by means that were reasonably proportionate to that aim (*AXA General Insurance Company Ltd* v *Lord Advocate* 2012 SC (UKSC) 122, Lord Reed, para 108). The third stage required consideration of whether a fair balance had been struck between the demands of the general interest of the community and the individual's fundamental rights; not whether a fair balance had been struck as between one class of persons, such as landlords, and another class of persons, such as tenants (*AXA*, Lord Hope, para 34 and Lord Reed, paras 108 and 126). The courts' assessment of proportionality required a structured approach: (i) whether the objective was sufficiently important to justify the limitation of a protected right; (ii) whether the measure was rationally connected to the objective; (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (iv) whether the severity of the measure's effects on the rights of those to whom it applied outweighed the importance of the objective (*Bank Mellat*, Lord Reed, para 74; *Christian Institute* v *Lord Advocate* 2017 SC (UKSC) 29, para 90).

[26] The petition ought to be refused. The petitioners could not satisfy the threshold test for proportionality which applied in respect of an abstract challenge. Both the rent cap and the eviction moratorium were temporary. Neither measure was absolute. Rents could still be increased between tenancies. Property could still be re-possessed on ordinary timescales

on specified grounds. Those grounds included grounds based on landlords' financial circumstances. There was no bar to a property being sold. Lack of compensation was a factor to be taken into consideration in determining whether a fair balance had been achieved but was not of itself sufficient to constitute a violation (*Depalle* v *France* (2012) 54 EHRR 17, para 91). Standing the existing degree of regulation of rent levels in private residential tenancies, and the right of landlords to evict tenants, the additional interference represented by the Act was modest. The objective of providing support and protection to tenants during the cost of living crisis, including by stabilising their housing costs, and giving them more time to find alternative accommodation where they would otherwise be evicted, was sufficiently important to justify the temporary limitation of a protected right. Forty per cent of the total households in the private rented sector were financially vulnerable. It would have been unworkable to try to distinguish between tenants based on relative financial vulnerability. To distinguish between landlords based on financial vulnerability would have defeated the purpose of the legislation, which was to protect tenants. In the whole circumstances, balancing the Act's effects on landlords as a class against the importance of the objective being pursued, it could not be said that the infringement of landlords' rights was disproportionate to the likely benefit of the measure in all or almost all cases.

[27] There was no merit in the petitioners' contention that the Act lacked clarity in relation to the scope for the alteration or extension of the rent cap over time and the duration of the eviction moratorium, somehow depriving the Act of the quality of law. The Act plainly satisfied the legality requirements of the Convention of accessibility, precision, foreseeability and a lack of arbitrariness as to how a given power might be operated. The Act provided for adjustment of the rent cap. The Act required the Ministers to provide a

statement of reasons alongside any statutory instrument extending the eviction moratorium and to review and report on whether the measures remained necessary and proportionate.

Article 14

[28] It was not disputed that the circumstances fell within the ambit of A1P1. However, the respondents submitted that private and social sector landlords were not in an analogous situation, and that in any event there was an objective justification for the difference in their treatment.

[29] Private rented sector landlords were not relevantly similarly situated to social rented sector landlords. This was due to the level of regulation to which the social sector was subject, the level of rent which might be imposed by social landlords, and the manner in which the sector was organised, which facilitated an agreed approach. The number of private rented sector landlords and the absence of equivalent representative bodies to those in the social sector precluded a voluntary arrangement of the sort now in effect for the social sector. In light of the agreement reached with all social sector landlords, the provision in question was no longer considered necessary and proportionate. The expiry of the rent cap in respect of the social rented sector was reasonable. The different approaches taken to the two sectors reflected those differences between the two sectors, whilst ensuring their tenants were being treated substantially the same in cash terms. Compared with social sector landlords, private rented sector landlords benefitted from the provisions insofar as they could seek an increase on a commercial basis and in respect of higher starting rents.

[30] Whether there was justification for a difference in treatment depended on whether the interference was proportionate in its impact (*In re McLaughlin* [2018] 1 WLR 4250; *R (Carson)* v *Secretary of State for Work and Pensions* [2006] 1 AC 173). The regulations'

objective was sufficiently important to justify the limitation of the right not to be discriminated against in the enjoyment of the right to peaceful enjoyment of possessions. The regulations were plainly rationally connected to the aim being sought to be achieved. Balancing the effect of the difference in treatment on private sector landlords as a class, against the importance of the objectives being pursued, it could not be said that any infringement was disproportionate to the likely benefit of the measures in all or almost all cases.

Decision

[31] The central issue in this case is whether either the 2022 Act or the regulations disapplying the rent cap to social sector tenancies amounts to a disproportionate interference with the Convention rights of landlords. As can be seen from the above summary of their submissions, parties were agreed that any consideration of proportionality involved the standard four-stage assessment set out in *Bank Mellat (No 2)*. They disagreed sharply, however, regarding what should be the appropriate intensity of the court's review.

The intensity of review

[32] The petitioners argued that at the fourth stage, that is, in considering whether or not the Scottish Parliament arrived at a fair balance between the rights of landlords and the interests of the community, "the Court is not concerned with applying any margin of appreciation or deference to the legislature", citing Lord Mance's opinion in *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016 (para 46). In a judgment with which Lords Neuberger and Hodge agreed, Lord Mance was considering whether it was correct to say that the court would always respect the legislature's judgment of what was in

the public interest unless that judgment was "manifestly without reasonable foundation". Lord Mance observed that such a low level of intensity of review may be appropriate for the first three stages of the proportionality assessment, but not when the court is considering whether a fair balance has been struck. However, as Lord Mance immediately added, "that does not mean that significant weight may not or should not be given to the particular legislative choice even at the fourth stage" (*ibid,* para 46). In its more recent decisions, the Supreme Court has considered it more useful to think of the intensity of review as being "nuanced" and context-dependent. In any given case, "a number of factors may be present possibly pulling in different directions, and the court has to take them into account in order to make an overall assessment" (*R (SC)* v *Secretary of State for Work and Pensions* [2021] 3 WLR 428, at 99).

[33] In this case, the court is being asked to consider, primarily, whether legislation of general application in the area of social and economic policy proportionately interferes with the Convention rights of landlords. As a generality, these are precisely the sort of circumstances in which it is recognised that the legislature is better placed than the court to form a judgment about what is in the public interest. At the very least, in such circumstances, significant weight must also be given to the judgment of the legislature in its assessment of how to balance the rights of the individual and the interests of the community. The fact that the legislation was a response to a perceived emergency was of significance not only in that it allowed the Bill to be treated as an Emergency Bill, and be enacted more quickly than the normal legislative timetable allows. It is also a factor affecting the intensity of review, which, depending on how it is viewed, may be seen as pulling in one of two conflicting directions.

[34] The petitioners founded on the absence of formal consultation, and the fact that the Bill was introduced and passed by the Scottish Parliament within a single week. This reduced the time available to the Scottish Parliament and correspondingly raised the appropriate intensity of review. However, in my view, the very fact that the legislature saw itself as responding to an emergency should be seen by the court as lowering the intensity of review, when viewed along with the legislature's response to that situation, which may be described as both temporary and provisional.

[35] It was temporary, in the sense that the rent cap and the eviction moratorium may not be extended beyond 31 March 2024. It is true that the Act gave powers to the Scottish Ministers to modify the law on rent adjudication, in anticipation of the expiry or suspension of the rent cap, but for the reasons I discuss later, I view that as a separate matter. The rent cap and eviction moratorium may also be described as provisional in the sense that the Act placed the Scottish Ministers under a duty to keep under review the question of whether they were necessary and proportionate in connection with the cost of living, and, if not, to suspend their operation or bring forward their expiry date. In addition, the Act required the Scottish Ministers to report to the Scottish Parliament within a fortnight of the end of the first reporting period on 31 December 2022, and on a three-monthly basis thereafter, on the necessity and proportionality of the Act's measures, following consultation with representatives of tenants and landlords. A further element of provisionality was incorporated into the rent cap by means of both the adjustable "permitted rate" and the adjustable maximum percentage rent increase. These legislative devices provided mechanisms by reference to which both the rent cap and above-cap rent increases might be adapted to changing circumstances, including any changes in the cost of living.

[36] In the event, in its first report to the Scottish Parliament, following the end of the short initial reporting period, the Scottish Ministers proposed to continue to fix the permitted rate at 0%, partly in view of the limited data then available (First Report, para 7.1.15). However, its statement of reasons for laying before the Scottish Parliament draft regulations proposing to extend the expiry date of the Act until 30 September 2023 contained a further review of the necessity and proportionality of the Act's measures, and in terms of section 9(8) of the Act this replaced the need for any further report in relation to the second reporting period. As a result of that second review, the Scottish Ministers proposed to introduce draft regulations to discontinue the rent cap in the social rented sector, something which is the subject of the petitioner's Article 14 challenge, and to suspend its operation in the student residential sector. However, the Scottish Ministers also proposed, for the private rental sector, to raise the permitted rate to 3%, and to raise the maximum permitted above-cap rent increase to 6%, in recognition of the ongoing impacts of the cost crisis experienced by some landlords (Statement of Reasons, para 7.1.5). The Scottish Government's impact assessments annexed to the Statement of Reasons added that the increase to the rent cap would mitigate against a disproportionate impact on private landlords, "allowing them to maintain their properties and meet other expenses".

[37] Against that background, the Act should be understood as providing a set of procedures, through which the legislature's assessment of the proportionality of its measures could be reviewed and adjusted during the course of their very operation. This includes the question of whether these measures achieved a fair balance between the rights of the individual and the interests of the community. In my view, the existence of these procedures lowers the appropriate intensity of review, such that at each stage of the court's

proportionality assessment, not only is the judgment of the legislature entitled to significant weight, but it must be shown to have been manifestly without reasonable foundation.

The cost of living crisis as an emergency

[38] The petitioners raised a fundamental challenge to this approach inasmuch as they disputed that there ever was any emergency. A genuine emergency, they said, would be something comparable to that faced at the outbreak of the first or second world wars, and which brought about the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915 or the Rent and Mortgage Interest Restriction Act 1939. Nor did the economic situation towards the end of 2022 amount to an "emergency" in terms of the Civil Contingencies Act 2004. A pervasive suspicion running throughout the petitioners' submissions was that, specifically in the area of rent control, ostensibly temporary measures always turn out to be something more than just temporary. The 2022 Act was no exception. They urged the court not to allow the legislature to rush in a rent freeze, without proper consultation, while "shelter[ing] behind assertions" of an emergency (note of argument, para 6.2.1).

[39] I address firstly the petitioners' reference to the Civil Contingencies Act 2004. Its definition of what amounts to an "emergency" provides a basis, specifically for ministers, to exercise certain powers, including the making of regulations that take effect despite any provision made by primary legislation (*ibid,* s2(5)(q)). However, this case, insofar as it is directed at the 2022 Act, is not concerned with the exercise of ministerial power but with legislation enacted by the Scottish Parliament.

[40] More fundamentally, however, the petitioners faced an uphill battle in challenging the Scottish Government's assessment of whether the cost of living crisis amounted to a genuine emergency. The respondents made the point that this amounts to a bad faith or

ulterior purpose challenge requiring proof to the same high standard as if made under Article 18 of the Convention. Article 18, which is accessory in nature, provides that permitted restrictions to Convention rights "shall not be applied for any purpose other than those for which they have been prescribed". It applies to implied permitted restrictions such as the proportionate interference with qualified Convention rights. And it requires proof beyond reasonable doubt that the authorities' actions were actually driven by an ulterior purpose (*Merabishvili* v *Georgia* (72508/13); *Democracy and Human Rights Resource Centre and Mustafayev* v *Azerbaijan* (74288/14 and 64568/16)). Why, it may be asked, should any lesser standard of proof apply just because the petitioners chose not to plead Article 18 together with A1P1.

[41] Insofar as the petitioners' case amounted to saying that the Scottish Parliament, under the guise of a supposed emergency situation, sought to impose upon landlords, without proper consultation, a lasting set of rent controls, then I consider that the respondents were well founded in describing this as a bad faith or ulterior purpose challenge to the legislation. In that event, the petitioners would have failed to meet the high standard of proof beyond reasonable doubt which is appropriate to challenges of that nature.

[42] However, it may not be necessary to go that far. The Act's objective is set out in the Scottish Government's policy memorandum. In its judgment, as at October 2022, the cost of living crisis had created an emergency situation for tenants. That is a political judgment in an area of social and economic affairs that requires to be respected by this court unless it can be shown to be manifestly without reasonable foundation. Whatever suspicions the petitioners may have harboured about ulterior motives, the petitioners did not even begin to surmount that high hurdle.

Ab ante ***challenges***

[43] An *ab ante* challenge to legislation is simply one made in advance of, that is to say, without reference to, the application of the legislation to any particular facts (*In re Abortion Services (Safe Access Zones) (NI) Bill*, *ibid,* para 14). The timing of the challenge is not in itself critical. Nor is the status of the legislation, that is, whether it is "extant" legislation, or whether it is merely draft or "uncommenced" legislation (*Department for Justice* v *JR123* [2023] NICA 30, para 82). As I have said, the 2022 Act required Ministers to keep the necessity and proportionality of its measures under review. It also permitted Scottish Ministers to introduce regulations adjusting both the rent cap and the maximum amount by which rent increases may be justified. These factors make it difficult for the petitioners to argue that the Act itself is structurally incapable of ensuring that a fair balance is maintained between the rights of the individual and the interests of the community.

[44] As the respondents argued, for the petitioners to succeed in an *ab ante* challenge, they must show that the operation of the Act would give rise to an unjustified interference with Convention rights "in all or almost all cases" (*Christian Institute* v *Lord Advocate* [2017] SC (UKSC) 29 (para 88), following *R(Bibi)* v *Secretary of State for the Home Department* [2015] 1 WLR 5055 (Baroness Hale, paras 2 and 60, Lord Hodge, para 69), and *In re Abortion Services (Safe Access Zones) (NI) Bill*, *ibid,* para 19, disapproving the Supreme Court's earlier formulation in *In re McLaughlin*, that, "It is enough [to render legislation incompatible with Convention rights on the basis of a lack of proportionality] that it will inevitably operate incompatibly in a legally significant number of cases" [2018] 1 WLR 4250, para 43). The petitioners did not dispute that they faced a high hurdle. Rather they claimed to have overcome it, referring to the Act as giving rise to an "unjustified interference with

Convention rights in all or almost all cases" (petition, para 7(iii)). This did not require them to prove "the circumstances of every individual to whom the legislation applie[d]" (note of argument, para 4.6), since the Act imposed "generalised rules on all landlords as a class" (petition, para 7(iii), note of argument, para 2.1.2).

[45] Against that background, it was unclear to me what the petitioners wished to take from the affidavits lodged on their behalf, selected passages from which were referred to at the substantive hearing. One was from the Chief Executive Officer of the first petitioner, representing private landlords and letting agents in Scotland. He provided a report on a survey of the first petitioner's members, said to number over 4,000, 30% of whom responded. The second petitioner represents property agents across the whole of the United Kingdom, where it has over 17,000 members. Timothy Douglas, its Head of Policy and Campaigns, provided a report based on a number of different sources, including a 2022 survey of UK members. The third petitioner represents landlords running businesses in rural Scotland. Its Chief Executive, Sarah-Jane Laing, provided a report of the results of a survey undertaken of its members, 156 of whom responded. In addition, there were affidavits from the Chief Executive Officer of a lettings agency managing over 9,500 properties in Scotland, from a solicitor for the Church of Scotland, and from two landlords whose sole source of income was rent received from their property portfolios.

[46] In total the number of landlords represented by those providing affidavits was a fraction of the estimated 238,000 private landlords in Scotland owning approximately 340,000 households (see the Scottish Government's Business and Regulatory Impact Assessment, prepared in October 2022). Of those who responded to the first petitioner's survey, 71% stated that they faced an adverse material impact on their finances as a result of the legislation. Of those who responded to the third petitioner's survey, the majority did not

have mortgages and had not suffered financial hardship, though they said that their finances had been materially adversely impacted, as a result of the legislation. Certainly, the affidavits may be understood as illustrating some of the problems faced by landlords as a result of the legislation, but it is difficult to see how they could ever establish that the Act interfered disproportionately with the Convention rights of all or almost all private sector landlords.

[47] Much the same might be said of the expert report from Grant Robertson, chairman of Allied Surveyors Scotland plc, on the impact of the Act on the capital value of rental property in Scotland. He was of the view that the effect of the legislation had only begun to be "seen and felt" in the first quarter of 2023. His own business had seen a substantial increase in the number of instructions to provide home reports on properties sold with tenants *in situ*. He did not opine on how substantial that increase was, or what specific effect it had on their capital value, although, as a generality, the value of homes sold with vacant possession would be 15-40% higher than that of properties with tenants *in situ*. In the context of the high hurdle that the petitioners face in seeking to establish a disproportionate interference with landlords' Convention rights, I considered this report too to be illustrative, but of limited utility.

A1P1

[48] A1P1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived on 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 or to secure the payment of taxes or other contributions or penalties."

[49] A1P1 can be seen as comprising three distinct, but connected, rules. The first enunciates the principle of peaceful enjoyment of possessions. The second rule is that no one shall be deprived of his possessions except in the public interest and subject to conditions provided for by law. The third rule provides that states are entitled to control the use of property in accordance with the general interest (*Sporrong and Lönnroth* v *Sweden* (1983) 5 EHRR 35; *James* v *UK* (1986) 8 EHRR 123; *Axa General Insurance Company Ltd* v *Lord Advocate* [2012] SC (UKSC) 122).

[50] The respondents accepted that the Act interfered with the petitioners' landlord-members' possessions, where the possession in question was the let property and the ability to derive income from it. Proceeding on that basis, the issue in this case is whether that interference is disproportionate. I shall follow the four-stage assessment of proportionality accepted by parties as being applicable.

[51] Take first the importance of the objective. The Policy Memorandum stated that the purpose of the Bill was to respond to the emergency situation caused by the impact of the cost crisis on those living in the rented sector. Its intended effect was to support and protect tenants during the crisis: by stabilising their housing costs; where possible, by reducing negative health and well-being impacts arising from eviction by giving tenants more time to find alternative accommodation; and by seeking to reduce unlawful evictions. The economic context in which the Bill was passed was set out by the Scottish Government in its November 2022 document, "Cost of Living Bill – Economic Background". It reported that increases in energy bills were expected to be substantial, with mitigations insufficient to offset the impact of higher energy costs. The increase in inflation as measured by the Consumer Prices Index, together with an expectation of continued high inflation had had an

impact on the cost of other necessities, such as food, transport and clothing. Increases in wages and benefits were not keeping pace with inflation, resulting in a decline in their real value. The annual increase in private rents had been accelerating in recent months. The Scottish Government provided further information on housing costs in the rented sector in their November 2022 paper, "Key Statistics". It estimated that 40% of households were "financially vulnerable", as that term was defined in the Scottish Government's statistical publication, "Wealth in Scotland 2006-2020".

[52] I have already considered the petitioners' objection to the Scottish Government's assessment that they faced an emergency. Putting that to one side, the petitioners' objection at this stage of the proportionality assessment was not that the Bill had no legitimate objective. Rather, they objected to the manner in which that objective was described by the Scottish Government. They objected to the use of the term "cost crisis". They argued that the Bill's focus was almost exclusively on fuel costs. However, this submission was made without reference to the Bill's supporting documents other than the Policy Memorandum. In particular, it ignored that section of the "Economic Background" paper discussing wider inflationary pressures outwith the energy sector which were expected to cause an "extended period of high inflation" (p4). The petitioners essayed a restatement of the Act's objective as being:

> "a measure seeking to respond to the effect of an increase in energy prices (and to a lesser extent consumer good prices) of tenants across the board irrespective of economic circumstances".

However, they did not seek to argue that the objectives, as stated by the Scottish Government, were manifestly without reasonable foundation. That being the case, I see no good reason to accept their restatement.

[53] Secondly, are the Act's measures rationally connected to its objective? The petitioners questioned the logic of seeking to freeze or limit rent for current tenants in order to counter an increase in energy prices, while abandoning new tenants to the market. However, the premise of this objection is that the objective of the legislation was to counter an increase in energy prices, whereas I have already accepted that the objective was to counter an increase in the cost of living more generally. More importantly, perhaps, there are obvious reasons for distinguishing between a current tenant, who is already under an existing obligation to pay rent, and at a level that may lawfully be increased from time to time by the landlord, and a putative tenant, who has not yet committed himself to taking on a tenancy at all. No doubt the Act's provisions reflect a compromise between the aim of protecting tenants and the need to provide safeguards for landlords. If so, it is difficult to see how that compromise can be criticised for having no rational connection whatsoever to the Act's objective. It is clear from the discussion in *Bank Mellat* that it would be enough for the measures to contribute to the Act's stated objectives at least to some extent (*ibid*, Lord Reed, para 116).

[54] Thirdly, could a less intrusive measure have been used without unacceptably compromising the achievement of the objectives? The petitioners offered up a number of arguably less intrusive measures: for example, the UK government setting energy prices at a lower level or controlling mortgage costs. They say the respondents may not pray in aid any lack of competence to enact legislation in areas that are reserved to the UK Parliament (citing *The Scotch Whisky Association* v *Lord Advocate* 2013 SLT 776). However, *The Scotch Whisky Association* case concerned the compatibility of the Alcohol (Minimum Pricing) (Scotland) Act 2012 with the free movement of goods provisions in EU law. Derogations from any of the fundamental pillars of EU law are strictly applied, in order to prevent disguised

discrimination and barriers to integration (*R (Lumsdon)* v *Legal Services Board* [2016] AC 697, para 37). As a result the proportionality test in EU law does not apply in the same way as it does in the context of the Convention. The third requirement of the *Bank Mellat* analysis requires a consideration of whether the measure adopted was one that was reasonable, and the courts are not called upon to substitute judicial opinions for legislative ones regarding where to draw the line (*Bank Mellat*, *ibid*, Lord Reed, para 75). This flexibility is particularly important, according to Lord Reed, in a devolved system such as the United Kingdom's, where a strict application of the "least restrictive means" test would involve only one legislative response to an objective that involved limiting a protected right (*ibid*). Contrast the situation under EU law, where the question is whether the Member State itself could have chosen a measure that is less restrictive of intra-EU trade.

[55] The Deputy Director for Better Homes, Catriona Mackean, set out the alternatives to the rent cap and eviction moratorium that were considered by the Scottish Government (supplementary affidavit). These included using the existing rent adjudication provisions that allow tenants to challenge rents above the open market value. This was rejected primarily on the ground that it required tenants to initiate the challenge. They might have been unaware of their right to challenge, or been reluctant to deploy it, either for fear that the rent might be raised above that proposed by the landlord, or that it might harm their relationship with their landlord. It would not have provided a sufficiently speedy response to the perceived urgency of the situation. The alternatives also included using the rent pressure zone legislation in the Private Housing (Tenancies) (Scotland) Act 2016. However, this too was rejected owing to the difficulties in meeting the legislation's data-compiling requirements sufficiently quickly, or indeed at all: no local authority in Scotland has yet been able to introduce a rent pressure zone. Finally, consideration was also given to

providing funding to tenants through discretionary housing payments and other devolved benefits. These were all rejected as either requiring action to be taken by tenants, or having too long a lead-in time to respond to the perceived crisis, or else being inadequate to address the sheer scale of the numbers of households affected. Crucially, the Deputy Director deponed that:

> "the wider economic and fiscal position in the UK mean[t] that the Scottish Government [could not] support an additional budget on top of the significant support already provided to households" (supplementary affidavit, para 11).

The petitioners did not challenge the reasonableness of these considerations. Having regard to the legislature's discretionary area of judgment in socio-economic matters, this court has not been provided with any basis on which to judge that a less intrusive measure could have been used without unacceptably compromising achievement of the legislature's objectives.

[56] Fourthly, and finally, has a fair balance been struck between the rights of the individual and the interests of the community (to adopt the shorthand formulation preferred by Lord Sumption in *Bank Mellat, op cit*, para 20)? This was the crux of the petitioners' challenge, and here they relied on a number of factors, which I will attempt to summarise in what follows.

[57] Firstly, the petitioners relied on the absence of compensation. Parties accepted that rent controls and the regulation of evictions would generally amount to a control of use rather than a deprivation of property. So far as rent controls were concerned, this is particularly the case where the measure is subject to a statutory time limit (*Hutten-Czapka* v*Poland* (2007) 45 EHRR 4, paras 202-3; *Mellacher* v *Austria* (1990) 12 EHRR 391). However, "[i]n some cases", the petitioners insisted, rent controls will amount to a deprivation of property, for example, where the legislation makes no provision for the recovery of maintenance costs such that the landlord's right to derive profit from the

use of his property is "effectively destroyed" (note of argument, para 5.6, citing *Hutten-Czapka* v *Poland* (2007) 45 EHRR 4, paras 202-3).

[58] But this is exactly the sort of situation that can only be examined on a case by case basis rather than in an *ab ante* challenge to the validity of the legislation itself. It is not the case that the legislation makes "no provision" for the recovery of maintenance costs. As stated above, the need for landlords to recover maintenance costs was one of the reasons for raising the permitted rate to 3%. Further, that which the petitioners described as a "permanent forced transfer of income" from landlords to tenants (note of argument, paras 8.2.8, 8.3.1) does not necessarily destroy the landlord's right to derive profit from the use of his property, or "impair [its] very essence", as it was put by the ECtHR in *Hutten-Czapka* (*ibid,* para 202). In any event, future income will not be considered a possession unless it has already been earned or is definitely payable (*Anheuser-Busch Inc* v *Portugal* (2007) 45 EHRR 36.

[59] Secondly, the petitioners objected to the Act's over-inclusivity. The Act applied to all tenants regardless of their means, whereas by the Scottish Government's own figures only 40% of tenants in the private rented sector would be classed as "financially vulnerable". However, this estimate of 40% was taken from the Scottish Government's publication "Wealth in Scotland 2006-2020" (published on 18 February 2022). It defined as "financially vulnerable" those households "with savings which would cover less than one month of income at the poverty line". In her first affidavit, the Deputy Director for Better Homes explained that this was just one among a range of measures of vulnerability considered (paras 44-47). In any event, "financial vulnerability" should be seen as a spectrum not an either/or. Households with only a little more by way of savings would not have been

classed as financially vulnerable by this criterion but nor would they have been significantly less vulnerable in reality.

[60] The Act also applied to all landlords regardless of means. The Deputy Director explained that consideration was given to devising a model that might take account of potential differences in the financial circumstances of landlords. However, she deponed that this would have posed difficulties in terms of evidence and implementation. There was resistance among those consulted, including the First-tier Tribunal, to a model that required exercising a greater degree of discretion than the Tribunal does at present, given time constraints and resources (first affidavit, para 54).

[61] The petitioners did not seek to challenge these views contained in the Deputy Director's affidavit. In any event, it is not enough for the petitioners to say that the legislation will necessarily disproportionately interfere with the A1P1 rights of some landlords. They need to establish a disproportionate interference with the rights of all or almost all landlords.

[62] Thirdly, the petitioners complained that the burden of achieving the Act's objectives was being placed solely on landlords (note of argument, paras 5.11.1, 8.3.1). However, this is to ignore the financial assistance provided by the Scottish Government through discretionary housing payments and the Tenant Grant Fund (Catriona MacKean, supplementary affidavit, paras 8-9).

[63] Fourthly, the petitioners complained of an absence of procedural safeguards. However, rent may still be increased between tenancies without restriction. I have already discussed the petitioners' complaint regarding an absence of logic in failing to apply the rent cap between tenancies. It seems the petitioners wish to have it both ways, that is, to be allowed to criticise the Act both for not fully meeting its stated objectives, while also

complaining about the absence of safeguards. So far as the eviction moratorium is concerned, the moratorium is temporary, even while the Act remains in force; eviction is still permitted on certain grounds; and new grounds of eviction are introduced based on the landlords' financial circumstances. The Act does not prevent property from being sold.

[64] Finally, the petitioners complained that there is uncertainty regarding how long rent controls will remain in place. They submitted that:

> "it seems likely that rent controls will be continued for some indeterminate period of time at some indeterminate level of rent as part of the transitional powers introduced by Part 4 and Schedule 3 of the Act" (note of argument, para 8.3.6).

So far as the rent cap and eviction moratorium measures are concerned, in terms of section 7(3)(b) of the Act, they cannot be extended beyond 31 March 2024. However, in anticipation of the expiry of these measures, Schedule 3 of the Act gives the Scottish Ministers power to make regulations, taking effect as modifications to the 1988 and the 2016 Acts, concerning the basis on which rent may be determined by a rent officer or the First-tier Tribunal, or limiting the rent that may be so determined. In other words, it is incorrect to conclude from the existence of these powers that rent controls may be continued for an "indeterminate period" or at some "indeterminate level of rent". On the contrary, under the rent adjudication provisions, the rent will be determinable, even if that will be on a basis that must remain as yet undetermined. The petitioners' challenge is premature.

[65] Having regard to the petitioners' challenge as a whole, it falls far short of what is required in order *ab ante* to demonstrate that the Act disproportionately interferes with the A1P1 rights of landlords.

Article 14

[66] Article 14 of the Convention, entitled "Prohibition of discrimination", provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status."

[67] As its opening words make clear, Article 14 is not a free-standing prohibition of discrimination. It is enjoyment only of the rights and freedoms set out in the Convention which the Article requires to be secured without discrimination on any of the identified grounds. The respondents did not dispute that the circumstances of this case fell within the ambit of the rights and freedoms protected by A1P1. Nor did they take issue with the question of status, even if the petitioners were rather vague as to what status ground they were founding on. They argued that "landlords" were a sufficient status. It may be that they intended to argue that private sector landlords enjoyed sufficient status. If so, I am inclined to accept that submission.

[68] The respondents did dispute whether landlords in the social sector were analogously situated to landlords in the private rented sector. In that connection, they relied heavily on the level of regulation to which the social sector is subject. However, it is significant that, from the outset, the Scottish Ministers treated the social rented sector and the private sector in the same way (Ms MacKean, supplementary affidavit, para 12). This was then reflected in the legislation which applied to all tenancies. It is also significant that, although they were ultimately able to reach an agreement with the social rented sector, allowing the expiry as regards that sector of the rent cap provisions, the Scottish Ministers nevertheless attempted to achieve broad parity of treatment, at least in cash terms, between landlords in that sector and landlords in the private rented sector. In my view, this represented a realistic acknowledgement that landlords in those sectors were in an analogous situation, and that the difference in treatment between them required to be justified.

[69] In other words, does the discontinuation of the rent cap as regards landlords in the social sector amount to unjustified discrimination against landlords in the private rented sector contrary to Article 14? That is a question of proportionality. The respondents explained that the social rented sector has a small number of coordinated bodies, all operating on a "not for profit" basis. A voluntary commitment from representatives of landlords in the social sector was able to be obtained, in which the rent cap would be replaced with an average figure to be achieved across social housing providers. This allowed a more flexible approach, in which, provided the majority of rents were increased at a level below the average, some social housing providers might be permitted a higher than average level of increase in order to fund maintenance and improvements. Average levels of 6.4% were set for local authorities and 6.1% for registered social landlords. Rents in the social sector were significantly lower, on average, than rents in the private sector. The respondents estimated that a 3% increase in private sector rent and a 6% increase in social sector rent would equate to roughly £5 per week. In the result, notwithstanding the different approaches, there would be a broad parity of treatment of landlords across both sectors.

[70] In my view, the opportunity to introduce a more flexible approach in the social rented sector, while achieving broad parity in the result between the two sectors, was a legitimate objective justifying the limitation of the right of landlords in the private rented sector not to be discriminated against in the enjoyment of their possessions. It follows that there was a rational connection between that objective and the regulations bringing about the expiry of the rent cap in the social rented sector. I am also satisfied that there was no less intrusive measure that could have been used without unacceptably compromising the achievement of the objective. The Act not only permitted but required a differential

approach to be taken, in any case where the Scottish Ministers considered that the rent cap was no longer necessary or proportionate in connection with the cost of living. As to whether a fair balance has been maintained between the rights of landlords and the interests of the community, I have already noted the broad parity of treatment of landlords in the two sectors, at least in cash terms. In addition, however, landlords in the private rented sector have the opportunity to seek an above-cap increase in respect of prescribed property costs. Taking each of the four stages of the proportionality assessment into consideration, I find it impossible to say that the Scottish Ministers' assessment of proportionality was manifestly without reasonable foundation (*R (Elan-Cane)* v *Secretary of State for the Home Department* [2022] 2 WLR 133, para 107). The petitioners' Article 14 challenge therefore fails.

[71] The petitioners' note of argument sought to introduce a discrete Article 14 challenge based on the suspension of the rent cap in the student residential sector. However, in the absence of any pleaded basis for such a challenge, the respondents moved me to refuse to allow the argument to be advanced. I will accede to that request, partly because the Deputy Director for Scottish Homes only had an opportunity briefly to address the topic in her supplementary affidavit (para 22), but also because the argument was not developed at the substantive hearing.

Disposal

[72] I shall sustain the respondents' third and fourth pleas in law, and repel the petitioners' second and third pleas in law. The result is that I shall refuse to grant the orders craved in the petition. I shall reserve any question of expenses.