OUTER HOUSE, COURT OF SESSION

[2021] CSOH 32

P74/21

OPINION OF LORD BRAID

In the cause

REVEREND DR WILLIAM J U PHILIP AND OTHERS

Petitioners

for

Judicial Review of the closure of places of worship in Scotland

Petitioners: Scott QC; Lindsays
Respondents and First Interested Party: Mure QC, Irvine; Scottish Government Legal Directorate
Additional Party: O'Neill QC, Welsh; Balfour & Manson LLP

24 March 2021

Introduction

[1] The petitioners, Reverend Dr William Philip and 26 others, are ministers and church leaders of Christian churches of various protestant denominations, including the Free Church of Scotland (Continuing), the United Free Church of Scotland, the Baptist Church and others. They challenge, by judicial review, the lawfulness of the enforced closure, in January 2021, of places of worship in Scotland. That closure was a response by the respondents, Scottish Ministers, to the risks posed by Covid-19, and specifically the new variant B.1.1.7 which emerged towards the end of 2020. The case raises two issues: (1) the extent, if any, to which the respondents have the constitutional power, at common law, to

restrict the right to worship in Scotland; and (2) whether the closure is an unjustified infringement of the human rights of the petitioners and others to manifest their religious beliefs, and to assemble with others in order to do so, in terms of articles 9(2) and 11 of the European Convention on Human Rights (ECHR). I will refer to these issues as the constitutional issue, and the ECHR issue.

[2] The legislation under challenge, which effected the closure of places of worship, is the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No 11) Regulations 2021 (SSI 2021/3). For simplicity, I will simply refer to them as "the Regulations". The Regulations were made by the respondents on 6 January 2021 and laid before the Scottish Parliament on the same day. They came into force on 8 January 2021 and were approved by resolution of the Scottish Parliament on 20 January 2021. The petitioners seek three orders: declarator that the Regulations are unlawful in so far as they purport to require the closure of churches in Scotland and to criminalise public worship; reduction of regulations 4(b), (e)(i) and (f)(i) of the Regulations (which removed certain exemptions which previously existed in relation to worship); and declarator that a person living in a Level 4 area may lawfully leave the place that person is living in order to attend a place of worship.

[3] It is of course now well known that the respondents have stated an intention to permit public worship with effect from 26 March 2021, and so, at least if that statement of intention is made good, the outcome of this case will have little immediate practical effect in the short term. Nonetheless, the issues raised are of importance, since there have been previous church closures; and for aught yet seen, there may be future lockdowns. The petitioners made clear at the outset of the substantive hearing that they therefore insist in the

orders sought, as they are entitled to do, not least as for the time being, the Regulations remain in force.

[4] There is an additional party, Canon Thomas White, a Roman Catholic priest. On 26 February 2021 I allowed him to participate in the process, as a person directly affected by the issues raised in the petition. Since the case was already at an advanced stage by that time, I did not allow him *carte blanche* to raise all arguments he might have raised had he been involved from the outset. Instead, he was limited to addressing the issues already before the court. He nonetheless elected to enter the process on that basis, rather than to raise his own petition. The additional party supports the petitioners, and the orders they seek. He provides an additional perspective in relation to Roman Catholicism, both in relation to the constitutional issue, and the ECHR one.

[5] The essence of the petitioners' case is that an integral part of Christianity is the physical gathering together of Christians for prayer, proclamation of the gospel, the celebration of communion and the administration of the sacrament of baptism. The essential physical element of these aspects of their faith is absent from virtual, internet events. The petitioners maintain, first, that the Regulations are *ultra vires* (that is, that the respondents lacked the power to make them) insofar as they contravene the historic freedom of churches in Scotland to practise religion and threaten the independence of the church; and, second, that the Regulations are in any event unlawful because they amount to a disproportionate infringement of the petitioners' human rights, under articles 9 and 11 of ECHR, to freedom to manifest their religious beliefs and to freedom of peaceful assembly.

[6] The respondents do not dispute that the petitioners' religious beliefs (and those of the additional party) are genuinely held; nor that the Regulations interfere with the manifestation of those beliefs; nor that articles 9 and 11 are engaged. However, they argue

that the Regulations do not interfere with the independence of the church, and were competently made. They also argue that, at the time the Regulations were made, they were a necessary and proportionate measure in response to the new variant and accordingly that they impose acceptable restrictions on the ECHR rights of the petitioner and of the additional party.

[7] I will begin by examining the Regulations themselves, the regulations which they amended - the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 ('Local Levels Regulations') - and the enabling legislation, to give an early understanding of what exactly the Regulations restrict, and what it is that the petitioners object to (paras [8] to [21]). I will then consider the background against which both sets of regulations were made (paras [22] to [58]), the impact on the petitioners and additional party (paras [59] to [63]), before turning to deal with the constitutional, and then the ECHR, issues (paras [64] to [82] and [83] to [127]).

The Regulations

[8] Both the Regulations and the Local Levels Regulations were made by the respondents in pursuance of the power conferred on them by section 49 of the Coronavirus Act 2020 (passed by the Westminster Parliament). That section, under reference to schedule 19 of that Act, empowered the respondents to make regulations for the purpose of (schedule 19(1)):

> "preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in Scotland (whether from risks originating there or elsewhere)".

[9] Paragraph 1(2) provides that the regulation-making power in sub-paragraph (1) may be exercised:

> "(a) in relation to infection or contamination generally or in relation to particular forms of infection or contamination, and
> (b) so as to make provision of a general nature, to make contingent provision or to make specific provision in response to a particular set of circumstances."

Such regulations may, in terms of paragraph 1(3)(c), include provision:

> "imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health".

[10] Regulations under the 2020 Act may not include provision imposing a restriction or requirement unless the respondents consider, when making the Regulations, that the restriction or requirement is proportionate to what is sought to be achieved by imposing it (schedule 19, paragraph 2(1)). Paragraph 5(2) permits the creation of offences, and 5(4) makes provision for the maximum penalties which may be imposed, being, on summary conviction, imprisonment for a period not exceeding 12 months or a fine not exceeding the statutory maximum (£10,000) or both, and on conviction on indictment, imprisonment for a period not exceeding two years or a fine or both.

[11] As regards regulations made by the respondents, paragraph 6(1) of schedule 19 provides that they are subject to the affirmative procedure, but by virtue of paragraph 6(2), paragraph 6(1) does not apply if the respondents consider that the Regulations need to be made urgently. Sub-paragraph (3) provides that in such circumstances the Regulations:

> "(a) must be laid before the Scottish Parliament; and
> (b) cease to have effect on the expiry of the period of 28 days beginning with the date on which the regulations were made unless, before the expiry of that period, the regulations have been approved by a resolution of the Parliament."

[12] As introduced (and as currently in force), the Local Levels Regulations set out five protection levels (Level 0 to Level 4) which are designed to apply increasing levels of protection from the virus in local authority areas according to prevalence, the risk to communities and the need to protect the NHS. Level 4 was and is the most restrictive level.

These regulations came into effect on 2 November 2020. Regulation 3(5) and schedule 5, Part 2, paragraph 8 placed requirements on persons responsible for places of worship in Level 4 areas as follows:

> **"8.**—(1) A person who is responsible for a place of worship, carrying on a business or providing a service in a Level 4 area must take—
>
> (a) measures to ensure, so far as reasonably practicable, that—
>
> (i) the required distance is maintained between any persons on its premises (except between persons mentioned in sub-paragraph (2),
>
> (ii) persons are admitted to its premises in sufficiently small numbers to make it possible to maintain the required distance, and
>
> (iii) the required distance is maintained between any persons waiting to enter its premises … and
>
> (b) all other measures which are reasonably practicable to minimise the risk of the incidence and spread of coronavirus on the premises, for example measures which limit close face to face interaction and maintain hygiene such as—
>
> (i) changing the layout of premises including the location of furniture and workstations,
>
> (ii) controlling the use of entrances, passageways, stairs and lifts,
>
> (iii) controlling the use of shared facilities such as toilets and kitchens,
>
> (iv) otherwise controlling the use of, or access to, any other part of the premises,
>
> (v) installing barriers or screens,
>
> (vi) providing, or requiring the use of, personal protective equipment, and
>
> (vii) providing information to those entering or working at the premises about how to minimise the risk of exposure to coronavirus."

The required distance applicable to places of worship is 2 metres. In short, regulation 8 imposes a duty on any person responsible for a place of worship to take steps to reduce the risk of coronavirus spreading, including social distancing, limiting the numbers who attend, the wearing of face masks, and so on. The Local Levels Regulations further provide that persons responsible for places of worship must in addition have regard to guidance issued by the respondents under paragraph 9. The guidance, dated 7 January 2021 (number 7/5 of process) which is updated from time to time, is comprehensive and includes detailed information about the need for persons responsible for a place of worship to familiarise

themselves with Test and Protect, which is designed to prevent spread of Covid-19 in the community; to keep a temporary register of those attending to support contact tracing; and to carry out a risk assessment. It is not disputed by the respondents that when places of worship were allowed to reopen after the first lockdown in 2020, compliance with the guidance which applied to places of worship was good.

[13] As introduced, the Local Levels Regulations also required various specified premises within a Level 4 area to close (regulation 1). The specified premises did not include places of worship, which were permitted to continue to open, subject of course to regulation 8 and to the guidance. Those regulations also imposed a prohibition on public gatherings indoors in a Level 4 area, unless (among other exceptions) the gathering was for the purpose of attending a place of worship (schedule 5, paragraph 11(1)(b)(iii)). The Regulations likewise prohibited outdoor gatherings in a Level 4 area, unless (among other exceptions) the gathering was for the purpose of attending a place of worship (schedule 5, paragraph 12(1)(d)(iii)).

[14] The Local Levels Regulations also provide that they must be reviewed at least every 21 days (regulation 8(1)). As soon as the respondents consider that any restriction or requirement set out in these regulations is no longer necessary to "prevent, protect against, control or provide a public health response to the incidence or spread of infection", they must revoke that restriction or requirement (regulation 8(2)).

[15] The Local Levels Regulations are also time-limited: currently, they are due to expire on 30 September 2021 (regulation 9(1)). The expiry date has already proved to be something of a moveable feast, in that the original date for expiry of the Regulations was 31 March 2021, this date having been amended by subsequent regulation.

[16] On 6 January 2021 the respondents made the Regulations. They apply to Level 4 areas. They require a person who is responsible for a place of worship to close that place of

worship, except for certain restricted uses. Regulation 4(b) inserted paragraph 1A into schedule 5 of the Local Levels Regulations, as follows:

> "**1A – Requirement to close places of worship in a level 4 area to members of the public**
> (1) A person who is responsible for a place of worship must close that place of worship, except for a use permitted in paragraph (2).
> (2) A place of worship may be used—
> (a) for a funeral,
> (b) for a commemorative event for a person who has died but is not a wake or a funeral tea,
> (c) to broadcast an act of worship, whether over the internet or as part of a radio or television broadcast,
> (d) for a marriage ceremony or civil partnership registration which—
> (i) consists of no more than 5 persons, or
> (ii) where an interpreter is required to attend, consists of no more than 6 persons, or
> (e) to provide essential voluntary services or urgent public support services (including the provision of food banks or other support for the homeless or vulnerable people, blood donation sessions, vaccination centres or support in an emergency), provided that, in each case, the premises are used in accordance with the requirements of paragraph 8.
> (3) Sub-paragraph (1) does not prevent the use of premises, while those remain closed to members of the public, to take preparatory steps in pursuance of a requirement in paragraph 8."

[17] Regulations 4(e)(i) and (f)(i) also remove the exemptions on attending places of worship as part of indoor or outdoor gatherings from paragraphs 11 and 12 in schedule 5 of the Local Levels Regulations. Thus, those regulations not only require the closure of all places of worship except for specified purposes (which include marriages and funerals, but do not include, for example, communion or baptisms); they also prohibit any form of communal worship indoors or outdoors. Additionally, the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No 10) Regulations 2021 (SSI 2021/1) which were made on 4 January 2021, and laid before and approved by the Scottish Parliament on 5 January 2021, inserted in schedule 5 to the Local Levels Regulations new paragraphs 17 and 18. Paragraph 17 imposes a requirement that a

person living in a Level 4 area must not leave the place where that person is living. Paragraph 18 provides examples of reasonable excuse for leaving that place for the purposes of regulation 5(4). The list does not include attendance at a place of worship, (although as the respondents point out, it is simply a list of examples, albeit a lengthy one, rather than an exhaustive list of what is deemed to be a reasonable excuse).

[18] Regulation 5 of the Local Levels Regulations provides that it is an offence for a person to contravene any of the restrictions or requirements in schedule 5 (with certain exceptions, including paragraphs 8(1)(b) and 9). A contravention of a direction or failure to comply with an instruction or prohibition, under regulation 4 is also made a criminal offence by regulation 5(3). It is a defence under regulation 5(4) to show a reasonable excuse. Any person committing an offence is liable, on summary conviction, to a fine not exceeding the statutory maximum, currently £10,000: regulation 5(5). Alternatively, a fixed penalty notice may be issued under regulation 7, the first such notice imposing a penalty of £60 with subsequent penalties doubling, to a maximum of £960.

[19] There are exceptions from the requirement to close premises. Thus, while the Local Levels Regulations require, by regulation 1, the closure of all "listed businesses", including for example, cinemas, sports stadia and conference centres, that requirement does not prevent the premises being used for any purpose requested by (again, for example), a health board or the Scottish Courts and Tribunals Service (regulation 1(3)(d)), thus allowing premises which would otherwise be closed to be used for certain purposes, such as the administering of vaccines, or the conduct of remote jury trials. Additionally, while retail premises must close, by virtue of regulation 2, that requirement does not apply to retail premises deemed essential, including food retailers, pharmacies, funeral directors, bicycle shops and off-licenses (regulation 2(3)).

[20] In short, the Local Levels Regulations, as amended by the Regulations, effectively close places of worship throughout Scotland. Since 5 January 2021 every area in mainland Scotland has been designated a Level 4 area (other areas having been added subsequently). Any person opening a place of worship, or congregating indoors or outdoors to worship would be committing an offence and would be liable to be dealt with as set out above in para [18].

Are places of worship truly closed? Do the Regulations criminalise worship?

[21] This is a convenient point at which to dispose of two issues which have arisen during the course of the case. The first is whether it is correct to speak of the closure of places of worship. Some of the respondents have claimed in public, and to Parliament, that places of worship have not closed because they can remain open for certain purposes as explained above. In their answers to the petition, the respondents were at pains to avoid using the petitioners' description of the Regulations as the Closure Regulations. It is of course true that the buildings themselves may open for certain purposes if it is safe to do so. But the issue is not whether the buildings which are used as places of worship may physically open their doors but whether they can be used for the purpose for which (as the name suggests) they were intended - for worship. There can be no doubt that places of worship may not open *for worship* and in that sense it is jejune at best, misleading at worst, to state that places of worship remain open. They do not. It is no more correct to state that churches remain open because certain activities may be carried out there, than it would be state that cinemas remain open because they are used as jury centres. The second issue is whether it is correct to categorise the Regulations as criminalising worship. Again, counsel for the respondents was keen to play down the implications of regulation 5(5), submitting that there was a

graded scheme whereby a person breaching the Regulations would first be required to go home in terms of regulation 4, following which a fixed penalty notice (or successive notices) would likely be issued under regulation 7, with prosecution only being resorted to as a last resort. I accept that if an individual slipped into a church which happened to be open as a food bank (say) for a short period of private prayer (which would be an offence, in terms of the Regulations) such a person would likely receive no more than a fixed penalty notice. On the other hand, were any of the petitioners to open their churches every Sunday, in open defiance of the Regulations, then it is difficult to envisage that being dealt with by any means other than prosecution. It is worth pointing out that the fine which may be imposed on conviction is the statutory maximum of £10,000, twice as much as the highest fine on the standard scale. Perhaps, rather than using the pejorative term "criminalising worship", it is sufficient for present purposes simply to note that any person who breaches the Regulations, either by opening a place of worship, or by assembling with others for the purposes of worship, would be committing a criminal offence and to leave the matter there. I accept that the aim of the Regulations is not to criminalise worship *per se* but the fact can hardly be denied that they may have that effect.

Factual background

General

[22] To place the objections to the Regulations in context, it is necessary to rehearse the background in some detail. I will set out: the current state of knowledge about Covid-19; the history of the respondents' response to the pandemic including the basis for their decision-making to date; the legislative history in relation to places of worship in Scotland (and elsewhere); the emergence of the new variant, and the governmental response to it, in

late December 2020 and early January 2021; and more recent pronouncements by the First Minister about possible relaxation of the restrictions on places of worship. The following narrative is obtained from the respondents' productions, including, in relation to the risks posed by Covid-19, *Framework for Decision Making* (December 2020) (number 7/7 of process) at pages 15-18, 25-26 and the paper prepared by SAGE titled '*SARS-COV-2 Transmission Routes and Environments'* (22 October 2020) (number 7/12 of process) (see in particular page 2); and from the affidavits of Professor Jason Leitch, National Clinical Director of the Scottish Government; Amanda Gordon, Deputy Director of Local Interventions; and Robert Marshall, Deputy Director of the Connected Communities Division of the Scottish Government, all of which I accept as accurate insofar as they impart purely factual information.

Covid-19

[23] Covid-19 is a potentially fatal respiratory disease caused by the highly transmissible severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) pathogen. Transmission of SARS-CoV-2 primarily occurs as a result of airborne droplets from an infected person being passed to others during close personal contact within 2 metres, and aerosols (respiratory particles) exhaled by an infected person being inhaled by others within close proximity or, in indoor settings, the same room for a prolonged period of time. The risks of transmission increase with, amongst other factors, the amount of time spent in the company of an infected person, poor ventilation and the number of interactions. Repeated group activities in indoor settings with poor ventilation, and with people closely packed in a small space are particularly high-risk. The corollary of that is that well-ventilated indoor spaces with people spaced out in a large space give rise to the lowest risk of indoor transmission (for a full list of

high and low risk factors, see SAGE paper, *SARS-COV-2 Transmission Routes and Environments,* 22 October 2020 table 1 (number 7/12 of process). Mortality and morbidity as a result of Covid-19 increase with age and so demographics are also relevant in considering the risks which arise from any given setting. Since the outbreak of Covid-19 in 2020, over 7,500 people have died in Scotland from Covid-19 within 28 days of having first tested positive for SARS-CoV-2 (number 7/30 of process) and, according to the same measure, over 124,000 people have died in the United Kingdom taken as a whole. To put the Scottish figure into the context of the new variant, approximately half of all deaths to date have occurred since the end of November 2020. The new variant is now the dominant strain in Scotland. The SAGE paper just referred to also states that understanding where transmission takes place and the modes of transmission is a "very challenging" task - note: not impossible - and is more difficult in settings such as public spaces where contact tracing is very limited. Again, there is a corollary, which is that where contact tracing is possible, identifying the place and mode of transmission will be, at worst, less challenging.

The basis of and Governmental structure for decision-making

[24] Scottish Government decision-making in relation to the pandemic is based on clinical evidence, expert advice, and a balanced assessment of the risks: see *Scotland's Strategic Framework* (*23 October 2020)* (number 7/6 of process). This Framework was updated in February 2021 (number 7/19 of process). The updated version repeats what was in the earlier one, that the government's strategic intent is to suppress the virus to the lowest possible level and keep it there whilst striving to return to a more normal life for as many people as possible: page 4. Information, data and advice are obtained from a variety of external and internal resources and considered in various different ways. Data on the

prevalence of the virus, test positivity and NHS capacity are reviewed formally at least once a week by the National Incident Management Team (chaired by Public Health Scotland), the 'Four Harms' group within Scottish Government which provides recommendations to Ministers, and Cabinet itself. The Four Harms are: harm to health caused by the virus; wider harm to health and well-being and to social care services; broader social harms; and harm to the economy. Regular meetings of the Scottish Government Resilience Committee coordinated by the Scottish Government Resilience Room (SGoRR) also take place between Ministers and senior officials to discuss particular elements of the pandemic response. SGoRR works closely with and obtains information and assessments from the UK Government's Civil Contingencies Committee (commonly known as 'COBRA'). Informal internal reviews of data by civil servants take place most days on a national and local level.

[25] There is also a Faith and Belief team, within the Connected Communities Division of the Equalities, Inclusion and Human Rights Directorate of the Scottish Government. This team regularly engages and consults with representatives of most faiths, religions and denominations in Scotland to enable dialogue and detailed discussions on ongoing Covid-19 related and emerging issues. Meetings are held weekly where discussions take place, on matters such as restrictions affecting places of worship including regulations and applicable guidance, giving an opportunity for representation of views, concerns, suggestions or more general interests of the faith communities to the decision makers within the Scottish Government. The Faith and Belief team provides its views to the Outbreak Management team which has been set up to collate evidence and data from scientists, policy leads, and experts to inform and make recommendations to the Four Harms group and through them the Scottish Cabinet.

The governmental and legislative public health response, with particular regard to places of worship

[26] Covid-19 was declared to be a pandemic by the World Health Organisation on 11 March 2020. On 13 March 2020, the first death attributable to Covid-19 was confirmed in Scotland. On 17 March 2020, the First Minister in a statement to the Scottish Parliament announced stringent public health measures directed to reducing transmission of the virus, including minimising social contact as much as possible and working from home. On 19 March 2020, the Cabinet Secretary for Communities and the Chief Medical Officer (CMO) wrote to faith leaders urging them to suspend communal worship and prayer in places of worship. The CMO and the Cabinet Secretary for Justice wrote on 19 March 2020 to Muslim communities, encouraging the closure of mosques. Most if not all places of worship closed on or around 20 March 2020 on a voluntary basis.

[27] On 26 March 2020, legal restrictions on movement and gatherings came into force: The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 (SSI 2020 No 103). As a result of regulation 4(6) of those regulations, places of worship were required by law to close except for certain permitted uses (funerals; broadcasting an act of worship; or providing essential voluntary services or urgent public support services: regulation 4(7)) subject to minimum distancing requirements. Similar provisions (including criminal sanctions) were in force as regards places of worship for similar periods in England, Wales, and Northern Ireland. Regulation 5(1) of SSI 2020 No 103 put the 'stay at home' requirement into law. On 23 April 2020, the Scottish Government published its *Framework for Decision Making* setting out its approach to making decisions about transitioning out of the lockdown restrictions then in force. The Scottish Government published *Further Information and Supporting Evidence* on 5 and 7 May 2020 respectively.

[28] On 22 June 2020, an amendment to regulation 4(6) of SSI 2020 No 103 inserted a provision permitting use of, and so attendance at, a place of worship for private prayer and contemplation, notwithstanding the requirement to otherwise stay at home. Similar provisions were made at similar times in England and Wales. Slightly earlier provision was made in Northern Ireland.

[29] On 10 July 2020 in Scotland, the 'stay at home' requirement imposed by regulation 5(1) of SSI 2020 No 103 was revoked. On 15 July 2020, regulation 4(6) was also revoked. From that date, the right to communal worship at places of worship in Scotland was reinstated, subject to various 'reasonable measures' requirements being imposed with regards to distancing measures and the number of persons being admitted at any one time.

[30] On 14 September 2020, SSI 2020 No 103 was revoked in its entirety, and replaced by the Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020 (SSI 2020 No 279). Places of worship were not closed by those regulations, although mitigation requirements were imposed. On 9 October 2020, SSI 2020 No 279 was replaced by the Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Regulations 2020 (SSI 2020 No 318). Again places of worship were not closed, including in the "protected area" (covering the Central Belt of Scotland) which was subject to stricter measures, although, again, mitigation requirements were imposed.

The Strategic Framework and the 'Local Levels' approach

[31] On 23 October 2020, the Scottish Government published *Scotland's Strategic Framework*, above. It records the Scottish Government's recognition of the important role of congregational worship in supporting spiritual wellbeing and its hope at the time of

publication that "places of worship can safely remain open with restricted numbers", subject to evidence-based review: page 47. It states, at page 3: "There is no acceptable number of people we are willing to let become infected", although this phrase has been dropped from the February 2021 version.

[32] On 2 November 2020, SSI 2020 No 318 was revoked and replaced by the Local Levels Regulations. In *Scotland's Strategic Framework*, Level 4 is described as entailing "measures [which] would be designed to be in place for a short period, to provide a short, sharp response to quickly suppress the virus". None of the levels of protection provided for the closure of places of worship. In contrast, in England and Wales during what is commonly referred to as the 'second lockdown', places of worship were closed for communal worship from 5 November 2020 to 2 December 2020. As with the first lockdown, similar criminal sanctions for breaches of the relevant public health regulations applied there.

The new variant

[33] In December 2020, evidence began to emerge of a new variant of SARS-CoV-2 with increased transmissibility. Information was received by the Scottish Government from SAGE (number 7/10 of process, discussed below) which identified that the new variant (B.1.1.7) was estimated to have an increased rate of transmission of between 40-70%. At a meeting attended by, among others, the First Minister and Professor Leitch on 16 December 2020, advice was received from Professor Sir Jeremy Farrar, a British Medical researcher, who is currently part of SAGE, that, whilst much was unknown about the new variant, what was known showed that there was clear justification for strong measures - closing down as many premises as possible as soon as possible - being taken at the earliest point. The minutes of this meeting have not been produced.

[34] The increased transmission risk from the new variant led to an assessment by the Scottish Government of all activities that involved different households meeting, including attendance at places of worship. The outcome of that assessment is recorded in a Scottish Government paper entitled "*Harm 1 The Direct Impact of Covid - focus on transmission risk and impact of R*" dated 21 December 2020 (number 7/11 of process). Particular risks in relation to duration of contact; regularity of attendance; and aerosol and droplet transmission were identified.

[35] On 23 December 2020, a paper was received from the SAGE Environmental and Modelling group (SAGE-EMG) and the Independent Scientific Pandemic Insights Group on Behaviours (SPI-B) titled *Mitigations to Reduce Transmission of the new variant SARS-CoV-2 virus* (23 December 2020) (number 7/10 of process). That paper identified that previous mitigations continued to be appropriate but were unlikely to be sufficient in relation to the new variant, especially in winter; and that the appropriate strategy required to include "reducing indoor contacts to the lowest level possible": page 1. Despite the lack of evidence for the precise mechanisms involved, the paper suggested that "for a given exposure there is a greater likelihood of infection, and hence there is a need to take further actions to reduce exposure to the virus in order to mitigate risks": page 2, §3. The possibility of a higher viral load, which could increase the amount of virus generated by respiratory activity, was also identified: §4. There was undeniably a worsening of the problem posed by COVID, the scale of which can be seen from the numbers of COVID-related deaths in Scotland since 2 November 2020. On that date there had been 2,849 such deaths registered in Scotland since the start of the pandemic 8 months before; by 4 January 2021 the figure had reached 4,622. As recorded above, the present figure stands at over 7,500.

[36] Also on 23 December 2020, the Faith and Belief Team sent an internal email (number 7/33 of process) in response to a request to advise on the implications of the First Minister deciding to opt for full closure of places of worship. After noting that the projected move of most of Scotland into Level 4 on Boxing Day would in any event entail a significant reduction in gatherings at places of worship, the recommendation was that the extension of Level 4 and associated reduction of the cap on places of worship across Scotland from 50 to 20 (a cap which existed only in guidance) would on a Four Harms assessment represent the most proportionate response to concerns around the exponential growth in COVID infections. The reasons given were: an absence of any evidence of COVID transmission at a place of worship in Scotland capped at 50, let alone 20; the restriction of the right to religious freedom was recognised to be a significant step; and what is described as "stakeholder pushback" on existing caps from certain faith groups.

[37] Also on 23 December 2020, a weekly report from Public Health Scotland was published (number 7/13 of process) reflecting data as at 21 December 2020. The weekly reports from Public Health Scotland include information from contact tracing 'Test and Protect' interviews which seek to identify the places which an individual who has tested positive has visited in the 7 days prior to symptom onset (or date of test if asymptomatic). The information is primarily used for tracing purposes and cannot positively identify where transmission took place. It can, however, be used to identify potential sources of exposure. The data from the 23 December 2020 report identified that, in the week ending 20 December 2020, 45 individuals who had tested positive had visited a place of worship and prayer: page 20. The equivalent information published on 7 January 2021, reflecting data as at 4 January 2020 and so the period after Christmas, showed that figure had increased to 110: number 7/14 of process, page 20.

[38] To put the figure of 45 into context, it is instructive to look at the entire table in which that figure appears, and at the two following tables. They are as follows (the corresponding figures for 7 January 2021 are shown in parentheses):

Table 13 - Events and Setting - Events and Activities (week ending 20 December)

Shopping	1,794	(4,561)
Eating out	674	(1,171)
Personal Care	511	(2,387)
Visiting a health or social care setting	502	(669)
Exercising	271	(501)
Visiting friends or relatives	235	(1,960)
Entertainment and day trips	136	(269)
Sport events	64	(68)
Private events and celebrations	63	(250)
Worship and prayer	45	(110)
Other	44	(19)

Table 14 - Events and Setting - Household or Accommodation (week ending 20 December)

Event Category	**Event Cases**	
Your own home, or family home	838	(2,227)
Other accommodation	127	(319)
Shared accommodation	67	(79)
Supported living	49	(88)
Holiday accommodation	28	(21)

Table 15 - Events and Setting - Travel and Commuting (week ending 20 December)

Event Category	**Event Cases**	
Public transport - bus	188	(295)
Car share	140	(603)
Taxi	112	(255)
Train - domestic	63	(94)
Other	133	(148)

[39] In passing, I comment that there does not appear to have been discussion of the comparative aspect of these figures; for example, that of all the single activities undertaken in the week to 20 December 2020, the one which had the lowest incidence of Covid-19 was worship and prayer ("other" presumably comprising a panoply of activities). That cannot quite be said for the figures for 7 January 2021, where fewer people with COVID had

attended a sports event or caught a train than had gone to a place of worship, but in that week the figure for worship and prayer remained low in comparison with other activities.

[40] On 29 December 2020 a Scottish Government internal memo (number 7/34 of process) was submitted to the Cabinet Secretary by the Connected Communities team, its stated purpose being to outline the options for tightening of restrictions on places of worship at protection Level 4. The memo recorded (at paragraph 16) that the Scottish Government had been notified of only one small outbreak with a church in Lanarkshire, involving two individuals. A caveat was given, that there may have been more outbreaks of which the Government had not been notified, but the caveat was itself qualified by a recognition that even if there had been more outbreaks, they remained low, officials believing that there was a strong adherence to the guidance already in place since July 2020. Four options were set out. Option A was for no change to the current Level 4 position, which would result in restricted numbers of up to 20 people being able to attend a place of worship in Level 4 areas. This option, it was said, would reduce the (already low) risk of transmission still further, and was the recommended option. Option B was to restrict the number of people permitted to attend. This option was not recommended, on the grounds that it would lead to confusion, would potentially discriminate against places of worship that usually catered for larger congregations and that 20 was assessed to be the minimum number that stakeholders were likely to accept for meaningful attendance. Option C was to restrict attendance at places of worship to individual prayer. This option was not recommended, on the grounds that it could lead to accusations of bias. Option D was to fully restrict the operation of places of worship. It was recommended only in the instance that there was agreement that to do otherwise would:

"(i) compromise the integrity of the 'stay at home' message, and/or
(ii) create insurmountable inconsistencies as level 4 guidance is further tightened for similar-sized gatherings and arrangements with similar transmission risks; and/or
(iii) run counter to the protection of public health."

[41] The memo goes on to state:

> "If the decision is made to restrict level 4 further or to move to a 'stay at home' message, in the first instance officials recommend **option A** is implemented. A significant reduction in numbers of those who can attend places of worship is already taking place on 26 December as most of the country enter into level 4 restrictions. If a further tightening of the level 4 restrictions specifically for places of worship is deemed necessary, officials would recommend **option D** be pursued. Option B - whilst of course reducing numbers and thus the chances for the virus to transmit - is assessed as unlikely to make much of a difference in public health terms. However, *Options B + C would pose a risk to stakeholder relations and would be more difficult to justify from a faith policy perspective than option D* [emphasis added].
>
> We have consulted clinical advisers and their preference is option A in almost all occasions but option D in extremis."

[42] Although the date it bears is misleading (since it wrongly bears the date 21 December 2020, a throw-back to an earlier incarnation) another Four Harms assessment (number 7/60 of process) accompanied the memo of 29 December 2020. This assessed the options of private worship only, and complete closure, against each of the Four Harms. Among other things, it commented that while places of worship gave rise to moderate to high risk, "places of worship have introduced strong mitigations…hence the benefits from closure may be lower"; further, that from a new Four Harms perspective, the impact from option B - reducing the numbers - would be marginal.

[43] On 31 December 2020, the Head of COVID Analysis sent an internal email (number 7/35 of process) commenting from a Four Harms perspective on the possible restrictions on places of worship. Reducing the numbers, it was said, would make "no real difference" so the options considered were private prayer only, or complete closure (options C and D in the memo of 29 December 2020). Closure would have a moderate to

high impact on harm 1, whereas private prayer would have a more modest impact ("quite low"). This email proceeded on the basis that 800,000 people regularly engaged in congregational worship. This asserted figure falls to be contrasted with what was stated in the Four Harms assessment number 7/60 of process, which stated that "up to" 800,000 people regularly attend places of worship (later in the same document it is said that "a decreasing proportion of the population attend places of worship").

[44] Since the assertion that 800,000 regularly engage in worship can plainly not be justified by the statement that "up to" that number do so, it is worth taking a moment to look at where that figure, whether as an estimated actual number or simply as a maximum, comes from. The issue is dealt with by Robert Marshall, at paragraph 9 of his affidavit, in which he, too, queries the 800,000 figure. He refers to a report published in 2016 (number 7/48 of process) which estimated that there were around 390,000 regular churchgoers in Scotland of the Christian faith (which represented the vast majority of those who attended places of worship). Even if one were to assume that every single person of those who professed other faiths regularly attended their respective places of worship, the total number attending places of worship regularly would still, based on the figures quoted by Mr Marshall at paragraph 8, come in at fewer than 500,000. He tells us that he sought clarification from the author of the 31 December email as to where the figure of 800,000 had come from. The answer given was that according to 2011 census data, over 2.9 million people in Scotland had affiliated themselves with a religious group, but that is a far cry from saying that between a third and a quarter of those people attend their place of worship regularly. Mr Marshall goes on:

> "whilst the exact number of practising individuals was unknown, using Census, ONS and Scottish Church Census figures that census estimated that at that time there

> were around 380,000 -800,000 individuals who regularly attended places of worship across Scotland".

[45] I find that explanation unhelpful: what is "that" census which is referred to, after the reference to two Censuses? Be that as it may, any estimate which is as broad as 380,000 to 800,000 in no way justifies the statement in the email, without qualification, that 800,000 people regularly engage in worship. This is potentially significant, since in the context of a Four Harms assessment which was considering the impact of church closures, it clearly makes a material difference to the impact if one assumes that the number of people unable to attend is 800,000 as opposed to less than half that number. The difference is greater still if one factors in that social distancing and the density requirements may reduce still further the numbers who can attend places of worship for so long as the pandemic is with us.

[46] Going back to the email of 31 December 2020, it is interesting in other regards. It also states:

> "From a harm 2 and 3 perspective we know that the mental health determent (*sic*) of restricting congregational worship or closing places of worship are potentially very significant for faith communities. Increased isolation and loneliness and a loss of community could impact on mental and potentially physical health."

On this passage, I observe that (in contrast to the Four Harms assessment number 7/60 of process) there appears to be no recognition of the *spiritual* harm caused by an inability to worship, which goes beyond increased isolation, loneliness and loss of community. The email then concludes:

> "Alternately (*sic*) it may be a relief to some more vulnerable members of the congregation if they know they cannot attend and a difficult decision on whether to risk attending is take (*sic*) out of their hands by closure."

Senior counsel for the additional party was particularly scathing about this statement which he described as "breathtakingly patronising". Whether that is so or not, insofar as the email appears to proceed on the basis that a positive benefit would be conferred by closure, which

could not be conferred by other means (such as advice from the church itself not to attend), it is surely going too far.

[47] The next significant piece of advice was contained in a submission by the Director of Outbreak Management to the First Minister dated 31 December 2020 (number 7/62 of process). Under the heading "Further measures" this confusingly states:

> "Further measures are in development and could be implemented shortly, in the light of four harms analysis, through changes to law and guidance. These have all been discussed with relevant policy leads across the SG, and most but not all, have been agreed. They include:
> - Prohibition of/ further restrictions on weddings;
> - Prohibition of/ further restrictions on funeral wakes;
> - Closure of places of worship
> - Some further business closures, such as ski centres."

The confusing aspect is that it is not clear whether the four measures listed are among those which have been agreed, or are the things which have not been agreed. In any event, nothing which has been produced by the respondents shows that closure of places of worship had been agreed by the "policy leads" by that stage. The confusion is perhaps clarified in Annexe A to the submission which lists three options for restricting places of worship (option A which previously was recommended, is not presented as an option). What was previously option B - restricting numbers - was not recommended because (a) it might cause confusion if it were different from the number permitted to attend weddings and (b) it might be "seen to" further discriminate against places of worship that usually cater for larger congregations. Option C - private worship was not recommended, because it was seen to be unfair to faiths for whom individual prayer was not established practice. The option that places of worship be unable to admit worshippers, even for individual prayer or contemplation, was recommended, the advice stating:

> "This reflects the position for places of worship during the first phase of the pandemic and would ensure that there could be no accusation of discrimination against certain faith groups".

I deal with the discrimination point elsewhere but meantime observe that there is no mention or apparent recognition of the facts, first, that during the first phase of the pandemic, social distancing was in its infancy, face coverings were on the distant horizon and the requirements which now exist in the Local Levels Regulations, and associated guidance simply did not exist; and, second, that as recognised in other advice and assessments, compliance with that guidance by all faith groups had been very good.

[48] Finally in relation to the submission of 31 December 2020, as senior counsel for the additional party pointed out, there is an interesting contrast between the approaches to places of worship and workplaces respectively at paragraph 39 in Annexe A, where it states that the transmission risk in the latter is to be left to the wide range of guidance on safe working and to existing regulations which place a range of duties on operators of premises to take steps to minimise the risk of transmission.

[49] The next development was that a report was prepared for the Scottish Cabinet by the Deputy First Minister, with a series of recommended measures, which included in relation to places of worship, the following:

> "**Closing places of worship.** Since stay-at-home rules do not allow leaving the home to attend a place of worship for a service or for private prayer, these would be closed for all purposes other than broadcasting a service or conducting a funeral or wedding."

Whatever one makes of the proposal to close places of worship, it could hardly be said at that stage already to be justified by the stay at home rules. The statement begs the question of whether those rules should allow for individuals to attend places of worship, as they

allow for other exceptions. Alternatively, if the Deputy First Minster's intention was to state the then-existing law, then his statement was inaccurate.

[50] On 4 January 2021, the Scottish Government published a paper titled *State of the Epidemic in Scotland* (number 7/9 of process). That paper identified that in the week to 4 January 2020, a step change had occurred in the incidence and prevalence of the virus in Scotland (including a doubling of daily case numbers, and a 65% increase in the cumulative 7-day incidence rate) which was anticipated to lead to increased hospital admissions and mortality, even with nationwide Level 4 restrictions: page 1. The paper stated that the rapidly increasing dominance and case rate of the new variant in Scotland was expected to increase further in line with the situation in south-east England and London, where over December the case rate per 100,000 of population had, respectively, increased by nearly four and over five times the case rate at the start of that month. Those increased rates of infection were in spite of significant public health measures to try to curb the spread having been introduced: page 2. At that stage, London and the south-east of England were already in the highest 'tier' of restrictions applicable at that time. Modelling evidence (summarised in the '*State of the Epidemic in Scotland*' paper) was prepared by Professor Roger Halliday, the Scottish Government's Chief Statistician and Data Officer. It suggested that, even under the new nationwide Level 4 restrictions, the effect of the new variant would lead to a substantial increase in cases in Scotland and an increase, beyond capacity, in hospital and ICU bed demand: (number 7/9 of process) - in short, to the NHS being overwhelmed.

[51] The proposals were subsequently approved by Cabinet on 4 January 2021 and on that day the First Minister gave a statement to the Scottish Parliament (number 7/24 of process) in which she announced the re-introduction of lockdown restrictions in Scotland

and the closure of places of worship, including for communal prayer. The First Minister's statement recorded her awareness of the importance of communal worship and the position of the Scottish Government that the restriction was necessary to reduce the risk of transmission. As we have seen the so called stay at home requirement was reintroduced on the following day.

[52] Although the measures contained in the Regulations as regards places of worship are not currently replicated elsewhere in the United Kingdom, a number of places of worship in other parts of the United Kingdom have closed for communal worship on a voluntary basis; and places of worship have been closed in the Republic of Ireland.

[53] At the Covid-19 Committee meeting on 8 January 2021, the Deputy First Minister in answer to a question about the closure of places of worship, stated:

> "That is a difficult issue, because nobody in the Government wants to restrict people's ability to take part in communal religious worship. That is the last thing on earth that I want to do. However, the point that has run through all my answers today is that we must acknowledge that human interaction - in whatever context, whether it be an early learning centre, a school, a factory, a shop, a bank, a hospital or a church or other place of worship - gives the virus an opportunity to spread.
>
> Therefore, if we cannot, as a society, confidently assume that our national health service can withstand growth in infection that results from the level of human interaction, we must take action to minimise the amount of human interaction. That is crucial if we are to reduce prevalence of the virus.
>
> Sadly - and much to my personal regret - that cannot exclude places of worship. We must acknowledge that, because they are places where people come together, there is potential for the virus to spread. If we do not take action to minimise that interaction, we will not interrupt flow and circulation of the virus."

[54] In response to a further question as to the basis for the curtailment of the fundamental human right of freedom of worship and religion, the Deputy First Minister replied:

> "I contend that a fundamental right has not been curtailed…Every Sunday morning, we sit in our house and participate in a Catholic mass that is led by one of a number

> of leaders of the Catholic church. We are able to exercise that right safely within our own home. *Therefore, our rights are in no way constrained by the restrictions* [emphasis added]."

[55] At the same meeting, Professor Leitch stated:

> "From last week's test and protect data, we know that 120 people went to places of worship during their infectious period. That creates a risk that I am unwilling to take in relation to my advice to decision makers. The decision makers then choose what to do with that advice - that is their job. However, I am afraid, particularly because of the broad demographic of people who attend places of worship - people of all ages, with all types of diseases - that we cannot protect those individuals robustly enough, so at this point in the pandemic, closing places of worship is the right thing to do."

[56] When then asked for data in relation to each area of Scotland, and what evidence there was that the virus has spread as a result of worship service being held, Professor Leitch replied:

> "I should add that the data that Mr Lindhurst seeks is impossible to get - it is unavailable. I cannot tell you where everybody got the virus. Every sector asks for exactly that data. All that I can tell you is where people were during their infectious period. I cannot tell you that they passed it on to Frank or Mary, or that they got it from Frank or Mary, because of the incubation period of the particular infectious agent. Just as the hospitality industry seeks that data, so do those who advocate - like me - for places of worship. That data is unavailable."

[57] And finally, the Deputy First Minister again:

> "It is ultimately for ministers to make decisions on the steps that we believe are appropriate in trying to interrupt circulation of the virus. Fundamentally, a range of options are available to us in terms of steps that we can take, and ministers are ultimately accountable for the steps that they take. That is what we do with the advice that is provided to us by advisers such as Professor Leitch; we reflect on that advice and we take decisions accordingly."

Events since 8 January 2021

[58] On 18 January 2021, the Cabinet Secretary for Communities and Local Government wrote to Scotland's faith and belief communities about the restrictions contained in the No 11 Regulations. The Cabinet Secretary stated that she understood and appreciated

> "the significant role communal worship plays in supporting people's mental and spiritual well-being, and its importance as a lifeline for many in preventing social isolation and loneliness".

She committed to ensuring that places of worship would be amongst the first sectors to be seriously considered for any easing of restrictions. On 16 February 2021, the First Minister in a statement to the Scottish Parliament stated that priority would be given to getting places of worship open again. *Scotland's Strategic Framework Update* of 23 February 2021 set out a proposed timescale for the re-opening of places of worship on a restricted numbers basis and subject to conditions being met, around 6 weeks after the partial reopening of schools. On 23 February 2021, the First Minister stated the intention of the Scottish Government to allow the reopening of communal worship in time for Passover and the Easter Weekend (number 7/21 of process). A review in relation to the measures contained in the Local Levels Regulations, as amended by the Regulations was carried out during the week beginning 1 March 2021. All such measures are currently said to be under review. Most recently, on 9 March 2021, the First Minister announced the respondents' intention to allow places of worship to open, if the data permits, from 26 March 2021.

Impact (what *is* worship?)

[59] In order fully to understand the impact of the closure of places of worship, and the extent to which worship is or is not impeded by the Regulations, it is necessary first to understand what worship entails; or, at least, for the purposes of this petition, what it entails for the petitioners and for the additional party. The closure of places of worship has the obvious impact that no-one can attend there in order to worship; and as we have seen, it is not currently possible lawfully to assemble anywhere else, indoors or outdoors, to worship. The respondents' position on this is somewhat ambivalent. On the one hand, they

accept that there has been an interference with the petitioners' right to manifest their religion. On the other hand they repeatedly assert that worship is possible on-line, a position which is maintained in their answers to the petition at answer 30; and they aver in answer 28 that "churches continue to engage in collective worship, prayer and pastoral care albeit by different means". See, too, the Deputy First Minister's comment to the Covid-19 Committee, referred to at para [54] above, that "our rights are in no way constrained by the restrictions". Additionally, in a submission which appeared to rile Mr O'Neill for the additional party, counsel for the respondents submitted that private prayer in a church was not required because individuals could pray alone, anywhere.

[60] In support of their respective positions, I have been presented with a welter of material on behalf of the petitioners, and the additional party. The material founded upon by the petitioners includes a report by Martin Parsons (number 6/4 of process), who I accept has the necessary experience and expertise to be an expert witness. I also have letters from several of the petitioners (numbers 6/9 to 6/17), commenting, among other things, on the essential features of the concept of worship in their faith. (I have been careful to discount any expressions of opinion on the proportionality of the Regulations, and on whether or not Covid-19 poses a risk to the health of those who catch it.) I accept from these that central to the Christian faith practised by the petitioners is the importance of physically congregating to undertake corporate worship; communion; baptism; and congregational ministering through spiritual gifts. In so far as Roman Catholicism is concerned, I have affidavits from the additional party himself, one archbishop and two bishops. Eucharistic Celebration, at a public Sunday Mass, is of particular importance. The attendance at mass is seen as an essential, not optional, element of the Catholic faith. The sacrament of confession can be administered only in the presence of a priest and baptism, which is the means by which

children enter the Catholic Church, also requires physical presence. Canon law sets down the conditions for public corporate worship, which involves, among other things the physical gathering together of Christians for prayer, proclamation of the Christian Gospel and the celebration of Holy Communion by Christians meeting together in one place. In addition, church buildings have a particular significance within Catholicism (which is why praying at home is not equivalent to praying in a church). A consecrated church building is considered to be a sacred space. The sacramental grace cannot be received from a video-recorded or video-streamed service. Again, I have been careful to disregard those parts of the affidavits which go beyond the purely factual and into the realms of expressing opinion on the closures. I have also disregarded the financial impact of the Regulations upon the additional party and others since in that regard churches are in no different a position from any other organisation whose finances have been adversely impacted by Covid-19.

[61] I accept the evidence of the petitioners and of the additional party that worship in their faiths cannot properly take place on-line, by means of internet platforms. The respondents have produced various Decrees and other documents issued to Bishops (numbers 7/43 to 7/46 of process) giving advice as to alternative means of celebration of the liturgy, but these can best be described as "work-arounds" during the pandemic (and are time-limited). The same can be said of other on-line broadcasts and services. These are best viewed as an alternative to worship, rather than worship itself. While certain church practices - the reading of prayer, preaching and teaching - may be observed, or even, in the case of live streaming, participated in to a certain extent, on a computer screen or a television whilst alone, in the solitude of one's own home, that does not amount to collective worship. The essential features of worship identified above - including communion and

baptism - cannot take place by those means. While it is true, as the respondents also submit, that care and assistance may continue to be provided to vulnerable individuals in the circumstances set out in regulations 13 and 18 of the Local Levels Regulations, such services do not amount to worship, any more than do other services which a church or other place of worship may provide to its local community, such as a lunch club. Equally, while funding has been made available by the respondents to encourage the participation in on-line services by elderly and vulnerable people, among others, to assist digital connectivity, that does not and cannot provide a substitute for worship.

[62] It is significant that the respondents do not dispute that the petitioners' beliefs (and those of the additional party) are genuinely and sincerely held. It therefore matters not, at least in the context of this discussion, that some people, among the same or other faith groups, hold different views, or that they have supported the measures as being appropriate and necessary on public health grounds. Insofar as their support is based on their views on proportionality, those views are equally as irrelevant as those of the petitioners. It is not for them, or the respondents, to dictate to the petitioners or to the additional party, that, henceforth, or even for the duration of the pandemic, worship is to be conducted on-line. That might be an alternative to worship but it is not worship. At very best for the respondents, in modern parlance, it is worship-lite.

[63] For all these reasons, I am clear that the effect of the closure of places of worship is that the petitioners, and the additional party are effectively prevented from practising or manifesting their religion, however many broadcasts or internet platforms may exist.

The constitutional issue

Introduction

[64] The petitioners' argument in relation to the constitutional issue is that insofar as the Regulations prevent worship, they are beyond the competence of Parliament, and therefore beyond the competence of the Scottish Parliament and of the respondents. They are, say the petitioners, an interference with the practice of the Christian religion in Scotland, unprecedented since the persecution of the Presbyterian church instituted by the Stuart kings.

[65] The fundamental constitutional principle relied upon by the petitioners is that, in Scotland, there is a division of authority between the church, which exercises spiritual authority; and the state, which exercises civil authority. The real issue between the parties is not so much whether that is a constitutional principle, as whether in this case the respondents have crossed the line between civil and spiritual authority. Nonetheless, to place the importance of the principle in context, it is necessary to say something of the history.

The historical background

[66] The historical background is set out in the report by Martin Parsons. It is unnecessary to repeat the terms of his report at length. He tells us that at the Reformation, Protestant Christians in Scotland adopted the "doctrine of the twa kingdoms", whereby God had ordained both civil government and the church, each having a distinct role. As both were ordained by, and subject to, God, civil government must not interfere in the church, but must be obeyed insofar as the Word of God allowed. The General Assembly Act 1592 embedded this as a public theology within Scots law. Among other things, that Act made

clear that the kirk had exclusive authority to deal with all matters of church life and worship. It also imposed on the elders of each church the legal responsibility to ensure that regular worship took place, including preaching and the ministry of sacraments. Elders were thus required by law to ensure that Holy Communion was celebrated and that baptism of infants and converts was carried out. There followed an attempt by the later Stuart monarchs to disregard the 1592 Act, as part of a move towards royal absolutism, leading to a century of religious conflict. The covenanter struggle which took place at that time was an example of the church's resistance to attempts at government interference in church life, and was widely revered as an example of Christians standing up under severe persecution. That came to an end with the accession of William and Mary to the throne following the Claim of Right Act 1689, heralding a new era of religious toleration in Scotland. The inviolability of the protections of church freedoms including the jurisdiction of the church over worship were affirmed in the Acts of Union of both the Scottish and Westminster Parliaments. The independence of the church and freedom from interference by civil authorities has for many years been central to the self-identity of the majority of protestant churches within Scotland and is understood by many to be a theological imperative.

Submissions for the petitioners

[67] Under reference to Mr Parsons' report, and the "doctrine of the twa kingdoms", senior counsel for the petitioners submitted that insofar as the Regulations criminalised the four central aspects of worship in which the petitioners believed - assembly to worship, the sacraments of communion and baptism, and congregational ministry - they were unconstitutional. It was a fundamental feature of the constitution in Scotland that the State had no authority over the worship of the church. Worship fell within the sole province of

the church. Counsel referred to the General Assembly Act 1592, the Confession of Faith Ratification Act 1690, the Act for Securing of the Protestant Religion 1706, the Union with Scotland Act 1706, and the Union with England Act 1707. In particular, the 1707 Act guaranteed to Scotland in all time coming the independence of its church (and for that matter, its legal system). The consequence was that the Westminster Parliament simply had no power to interfere in the church, nor could it confer power to do so on any other body. It followed that the Coronavirus Act 2020, insofar as it permitted the closure of premises, could not apply to Scottish churches. The Regulations threatened the independence of the church. The petitioners stood upon the shoulders of the Covenanters. The Church of Scotland Act 1921, did not legislate for the church; rather it was merely declaratory of and recognised Articles prepared by the church and removed any doubt that "matters spiritual" fell within the exclusive jurisdiction of the church. Article IV articulated the church's right and power, subject to no civil authority, to legislate and adjudicate finally, on all matters of doctrine, worship, government and discipline. In *Ballantyne* v *Presbytery of Wigtown* 1936 SC 625, the election of a minister was held to be a spiritual matter in which the court had no jurisdiction. LJC Aitchison analysed the Act, concluding, at page 654, that it did not confer rights upon the church but was a recognition by Parliament of the Articles framed by the General Assembly in the exercise of what it claimed to be its own supreme powers. Although in *Percy* v *Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] 2 AC 28 a claim by a minister for sex discrimination was held not to be a spiritual matter, that was because the parties had entered into a contract of employment binding under civil law, thereby deliberately leaving the field of matters spiritual. That could not be said of the petitioners in the present case.

[68] Closure of places of worship, thereby preventing the church from carrying out corporate worship, communion, baptism and congregational ministry trespassed into the sole province of the church. Those were all spiritual, not civil, matters. It was wrong to categorise the closure as being a civil matter, as if it were simply a law affecting a particular building or a matter extraneous to the church. The Regulations were therefore beyond the power of Parliament, and by extension, the Scottish Parliament and the respondents. It mattered not what crisis was faced by the government: it simply had no power to interfere in spiritual matters. In criminalising worship, the respondents had crossed a line which they were not permitted to cross. It may be that it was open to the state to impose other civil measures which might impact upon the right to congregate to worship (such as a 24 hour curfew) but that was not what they had done. The church could be trusted to act responsibly in relation to all matters pertaining to the pandemic (as it had done).

Submissions for the additional party

[69] Senior counsel for the additional party presented the constitutional argument from a different perspective. In his comprehensive written Note of Arguments and a wide-ranging written submission, he referred to certain Canons of Roman Canon law, and to the essential aspects of the additional party's beliefs, set out above in para [60]. From a specifically Catholic perspective to allow for weddings and funerals but to ban the use of churches for baptism was a peculiarly disproportionate restriction because baptism was the necessary "gateway" sacrament to participation and reception of the other sacraments recognised in Catholic teaching. The Regulations, by forcing the additional party to close the churches for which he was responsible, had placed him in an impossible situation. He could not comply

with his canonical obligations without being subject to the rigour of the state's criminal laws for breaching the Regulations.

[70] Senior counsel also embarked upon what he himself acknowledged to be a historical *excursus* on the principle of religious toleration and the preservation of religious pluralism in Scotland, both before and after the 1707 Union. He not only referred to the Acts of Union, but traced the historical reasons therefor, drawing a distinction between Scotland and England insofar as the relationship of Church and state was concerned. He also traced the history of the principle of religious toleration in England and Scotland respectively. The substance of his submission was that the principle of religious toleration, the right to public worship and the protection and preservation of religious pluralism were constitutional principles with far deeper roots than the subsequent constitutional principles of equality of treatment regardless of sex or race. These principles were so embedded that they imbued among other things the extent of the powers acceded to the Scottish Parliament and to the respondents. Thus the powers conferred on the Scottish Parliament and on the respondents had always to be read and applied against the background of the requirement to respect those fundamental principles. That all said, the additional party accepted, at least for the purposes of the present petition, that the respondents were entitled to impose some restrictions on the right to practise religion in general, and Catholicism in particular; and by formulating the argument as being one of a requirement for *respect for* the principles of religious toleration and pluralism, did not go so far as to argue that the state could not interfere at all with the ability of the additional party to practise his religion, irrespective of circumstances. Indeed, he accepted in terms that the public health objectives of the measure were sufficiently important in principle to justify lawful and proportionate limitation of his

fundamental rights, both under the Convention and at common law. However, his position was that the intervention by the respondents was neither.

Submissions for the respondents

[71] Senior counsel for the respondents submitted that the Regulations did not relate to spiritual matters and so did not constitute an unlawful interference with the independence of the church in Scotland. The 1592 Act conferred power and jurisdiction on the units of Church government in ecclesiastical and spiritual matters alone. The 1592 Act insofar as it remained in force had to be read in accordance with the 1921 Act, which recognised the Declaratory Articles of the Church of Scotland and established the independence of the Church of Scotland in spiritual matters alone. Spiritual matters for the purposes of the 1921 Act were matters of doctrine, worship (in the sense of the system and principles thereof), government, discipline, membership and office, constitution and membership of Church courts, the mode of election of office-bearers and the "boundaries of the spheres of labour" of its ministers and other office-bearers. Section 3 of the 1921 Act provided that nothing in that Act "shall affect or prejudice the jurisdiction of the civil courts in relation to any matter of a civil nature". The state may, and does, regulate a host of civil matters that can affect places of worship, including, for example, health and safety law, compulsory purchase and planning; and occupiers liability. These were civil, not spiritual, matters. The 2020 Act made no exception for premises used as a place of worship. The Regulations were made by the respondents acting within devolved competence under primary legislation of general application. Their objective was to protect life and public health by reducing as far as possible the incidence and transmission of the virus. Properly interpreted, they could not be said to be directed at spiritual matters. They were not directed at, and did not interfere

with the independence of, the church. The petitioners' position could not be said to be comparable with that of the Covenantors.

[72] As regards the additional party's submissions, Canon law did not provide a basis upon which the court could hold that the Regulations are unlawful. Its relevance was restricted to illustrate the impact on the additional party of the Regulations. That said, it was evident from other provisions of Canon law that there were recognised exceptions within Canon law, which did not require physical presence within church. Further the Catholic Church had specifically addressed the implications of the pandemic for its liturgical celebrations in a number of documents issued by the Congregation for Divine Worship and the Discipline of the Sacraments and in an article on the Vatican website (numbers 7/44 to 7/46 of process).

Decision on the constitutional issue

[73] There is much common ground between the petitioners and the respondents on this issue. Both accept that the effect of the series of statutes founded on by the petitioners, culminating in the Church of Scotland Act 1921, is that the church has exclusive jurisdiction in matters spiritual, and the state has exclusive jurisdiction in matters civil. To put that more precisely and in the words of Article IV of the Declaratory Articles appended to the 1921 Act, the church alone has: "the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government and discipline in the church…". That right is correspondingly acknowledged by the state in the following words of the Article, that the civil authority does not have: "any right of interference with the proceedings or judgments of the church within the sphere of its spiritual government and jurisdiction."

[74] Article IV clearly sets out the dividing line between Church and State. The question for determination in this case is, as counsel recognised, a more difficult one: on which side of the line does this case fall? Each party submits that the case falls squarely on their side of the line. There is an initial attraction in the petitioners' argument that the closure of all places of worship for worship, and indeed the criminalisation of worship should it take place in defiance of the Regulations, is a spiritual matter, for what greater interference with worship could there be than to ban it altogether? On the other hand, there is an equal initial attraction in the respondents' argument that legislation in the sphere of public health, particularly in a time of national crisis, is a matter for the state, the health of all the states' citizens being exclusively a civil matter. The problem in this case arises because, in the exercise of its undoubted civil power to enact public health legislation, the state has suspended the ability of the petitioners to worship through the cumulative effect of a range of measures imposed upon society, and other religions, as a whole; one such measure being the requirement to close places of worship, and another being the requirement not to leave home without reasonable excuse.

[75] The petitioners' argument that no intervention at all is permissible in their worship, regardless of circumstances, is significantly weakened by two, perhaps three, matters which senior counsel for the petitioners was constrained to accept. The first was that it is a necessary consequence of her argument that the only body which has legitimate authority to order the closure of church buildings for public health reasons is the church itself. Since public health, by its very nature, affects the entire public, not simply members of the church, I do not accept that proposition which, apart from any other consideration, fails to recognise that Church members may acquire an infection at church which they then transmit to the broader community. Further, the proposition not only gains no support from, but runs

contrary to, Article IV which confines the church's right to legislate to matters of "doctrine, worship, government and discipline" and public health falls within none of those categories. The second matter which weakens the petitioners' argument is the concession that the respondents did have the constitutional power to order a 24/7 curfew on public health grounds, in other words to order the entire population to remain indoors all day, every day, which would also have the practical effect of prohibiting worship albeit by a different route. If the state may constitutionally prevent worship by one draconian measure - a curfew - then why may it not do so equally constitutionally by different - and less draconian - measures? In each case, the primary aim of the legislation is to protect public health and preserve life; in each case, a consequence is that worship is prevented. The third possible weakening of the petitioners' argument is that they would accept a restriction preventing them from singing in church. Such a restriction would clearly be made on public health grounds - because singing is thought to increase the risk of transmission - but nonetheless would be a restriction on the manner in which the petitioners were permitted to worship. Of course, a restriction of being unable to sing is a much lesser restriction than one of not being able to be present in church at all, but this example does help to underscore the point that a restriction on worship, large or small, may be acceptable if imposed by the state in pursuit of a legitimate aim falling squarely within the field of civil law.

[76] However, identifying weaknesses in the petitioners' argument does not assist in identifying what test should be applied in deciding whether the respondents have acted in accordance with the constitution or not. No reported case is in point. *Ballantyne* (above) concerned the election of a minister, clearly a spiritual matter falling within the sole province of the church. *Percy* was held to involve a civil matter - namely a sex discrimination claim - because the parties had entered into a civil contract and had, in the

words of Lord Nicholls of Birkenhead at paragraph 41, "deliberately left the sphere of matters spiritual". Senior counsel for the petitioner sought to derive support from that by pointing out that the petitioners had not deliberately left the sphere of matters spiritual, but I do not consider that *Percy* can be read as supporting the proposition that a matter can be civil only where the parties have deliberately left the spiritual sphere. Senior counsel for the respondents sought to derive some support from *Gallagher* v *Church of Jesus Christ of Latter-Day Saints* [2008] 1 WLR 1852, and Lord Hope of Craighead at paragraph 31, where he said that the legislation in that case (rating legislation) was not directed at Mormons because of what they believed in. However, that comment was made in the context of considering whether Mormons had been discriminated against because of their religion, which is not precisely the issue in the present case.

[77] Nor is a complete answer to the petitioners' case provided by the respondents' argument that the state may, and does regulate a host of civil matters that can affect places of worship - both the buildings, and the churches which use them. That is to ignore that the fundamental objection to the Regulations read as a whole is not simply that they apply to places of worship, but that the effect of them is that by ordering their closure, they prevent those places from being used for worship. If the state legislated for no good reason to order the closure of every church in the land, that would clearly be unconstitutional.

[78] It is arguable that the state has not merely the power to act to preserve public health and life, but that it has a constitutional duty to do so. In this case, that duty has come into conflict with its duty not to interfere in matters which are the sole province of the church. The petitioners argue that there are no circumstances in which the state's powers could trump their right of worship, no matter the scale of the public health emergency faced by the state, but that is not an attractive outcome, and is not one supported by the additional party

albeit he approaches it from a different religious perspective. The question rather is how, where state and church come into conflict in this way, the line is to be drawn.

[79] Since the petitioners' position is that no interference at all is permissible, senior counsel for the petitioners was unable to help in answering this question. Senior counsel for the additional party, as noted above, accepted that public health objectives were sufficiently important in principle to justify lawful and proportionate interference, but did not cite any authority in support of this assertion. However some assistance is gained from Lord Reed in *Bank Mellat* v *Her Majesty's Treasury (No 2)* [2013] UKSC 39 at paragraph 68 where he discussed proportionality as an aspect of justice which can be traced back via Aquinas to the *Nicomachean Ethics* and beyond. Under reference to Blackstone's *Commentaries on the Laws of England*, 9th ed (1783) volume I page 125, Lord Reed said that the concept of civil liberty comprises "natural liberty so far as restrained by human laws (and not farther) as is necessary and expedient for the general advantage of the public". This idea then developed into the concept we know as proportionality, which came to be adopted in the case law of the European Court of Justice and the European Court of Human Rights. Accordingly, any interference in worship by the state will be lawful if (and only if) it is a proportionate and necessary response to a civil matter in which the state is entitled to legislate.

Conclusion

[80] I reject the petitioners' proposition that any interference with their right to worship, no matter how proportionate, is beyond the powers of the respondents.

[81] However since the Regulations do interfere with the constitutional right of the petitioners to worship, notwithstanding that they have as their primary purpose the protection of health and preservation of life, they will be beyond the constitutional

competence of the respondents (at least insofar as the petitioners and the additional party are concerned) if that interference is not proportionate.

[82] That said, I propose to consider the question of proportionality in the context of the Convention argument as to the lawfulness of the Regulations, and I will therefore revert to the question of constitutional competence below. It was not submitted that proportionality should be approached any differently in either context - and Lord Reed's observations would suggest that there is now no difference, if there ever was. It follows that the constitutional argument adds nothing to the petitioners' case: if the Regulations are a disproportionate interference, the petitioners will succeed; if not, they will fail.

The Convention Issue

The Human Rights Act 1998

[83] The Human Rights Act 1998 provides in section 6 that it is unlawful for a public authority to act in a way that is incompatible with a right protected by the European Convention on Human Rights ("the Convention"). The respondents are a public authority. They are bound by section 6.

[84] One immediate source of controversy between the parties is what is meant by section 13 of the 1998 Act which singles out the right to freedom of thought, conscience and religion for a special mention. That section provides:

> "(1) If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right."

[85] The petitioners argue that this means that the article 9 right to freedom of thought conscience and religion is singled out for particular protection and must therefore be

accorded a status which other Convention rights do not have. The respondents, under reference to *R (Amicus and others)* v *Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin) argue that the provision does not give greater weight to the rights protected by article 9 than they would otherwise enjoy under the Convention itself. Senior counsel for the petitioners pointed out that in *R (Amicus)* the point was conceded by counsel and not decided by the court. She submitted that the respondents were inviting the court to disregard section 13. Either section 13 had no effect, or it was intended to, and did, draw attention to the strength and importance of the article 9 right. Senior counsel for the respondents, in reply, submitted that the only other provision in the Act which uses the phrase "have particular regard to" was section 12(4) and both that, and section 13(1) were introduced following lobbying by particular pressure groups. He submitted that the wording was unusual but that the section did not read as one intended to elevate article 9 to a position of particular prominence.

[86] On this matter, I agree with senior counsel for the respondents. The requirement to have particular regard to a factor does not entail that the factor in question is to be accorded any more weight than any other factors. In a case where the very issue is whether the right has been unjustifiably interfered with, it is axiomatic that the court would in any event be paying particular regard to the importance of the right. What section 13 does do, is to underscore, if any underscoring be needed, that the rights under article 9 are important, but the section cannot be read as meaning that they are any more important than any other Convention right.

[87] In passing I mention section 14 of the 1998 Act which allows the United Kingdom to designate any derogation from the Convention. The United Kingdom has not designated any derogation and accordingly holds itself as bound by the Convention. The respondents

therefore remain bound to act compatibly with Convention rights, notwithstanding the current threat to public health arising from coronavirus.

The Scotland Act 1998

[88] Section 54(2) of the Scotland Act 1998 provides:

> "(2) It is outside devolved competence—
> (a) to make any provision by subordinate legislation which would be outside the legislative competence of the Parliament if it were included in an Act of the Scottish Parliament, or
> (b) to confirm or approve any subordinate legislation containing such provision."

Section 29(2) states that a provision is outside the legislative competence of the Scottish Parliament if it is incompatible with any of the Convention rights.

[89] Section 57(2) provides:

> "(2) A member of the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights…"

European Convention on Human Rights

[90] Article 9 of ECHR provides:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

Article 11 states:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

Submissions

Introduction

[91] Much of the applicable law was agreed by the parties. The main difference between them as to the law was in relation to the degree of margin of appreciation to be afforded to the respondents. Accordingly, I find it unnecessary to repeat the parties' submissions at length. All parties lodged written notes of argument which they adopted and upon which they expanded at the substantive hearing. I have taken all of the submissions into account. In this section, I merely record the substance of each party's position, expanding upon the respective submissions where it is necessary to do so in the analysis which follows.

Submissions for the petitioners

[92] Senior counsel for the petitioners submitted that the restrictions imposed by the Regulations were a disproportionate interference with the petitioners' right to manifest their religion. As such, they fell outwith the legislative competence of the Scottish Parliament, and of the respondents, by virtue of sections 29(2), 54(2) and 57(2) of the Scotland Act 1998, above, and were unlawful. The petitioners recognise that some restriction is necessary and in particular are prepared to abide by the lesser restrictions imposed by paragraphs 8 and 9 of schedule 5 in the Local Levels Regulations. The respondents enjoyed a narrow margin of appreciation where restriction of the right to manifest religion was concerned, and in such a

case any restriction should be the subject of strict scrutiny by the court: *Manoussakis* v *Greece* (1997) 23 EHRR 387. The greater the sanction, the greater the degree of justification required: Case of *Biblical Centre of the Chuvash Republic* v *Russia* (Application no 33203/08) 12 June 2014. In considering the margin of appreciation, the court may have regard to a consensus between states, and common values; the court could also consider whether there were effective alternatives: *Bayatyan* v *Armenia* (2012) 54 EHRR 15. The respondents had failed to recognise that manifestation of religious belief was a fundamental right and freedom, and had erred by treating it as if it were a non-essential activity, when it was not. In considering proportionality, the court should take into account that other activities or businesses, such as professional sport and banks, had been allowed to continue to operate. The courts also continued to operate, including the use of jury centres in cinemas. Churches could be operated with better regard for public safety than, say, supermarkets, which had been allowed to stay open (senior counsel was prepared to accept that they could be regarded as essential, but in her submission, no more essential than places of worship). Reference was made to an expert report of Dr Ian Blenkharn (number 6/5 of process) on the adequacy of mitigation measures. He is a healthcare, occupational and environmental microbiologist with over 45 years' experience in the NHS and University Medical Schools, and in the private sector. He has advised many organisations on risk-reduction measures since the outbreak of Covid-19. A comparison could also be drawn with England and Wales, where churches had not been required to close in response to the new variant. Additionally, there was a growing international consensus whereby restrictions on places of worship had been struck down by the courts in a number of jurisdictions across the world. In this regard, senior counsel referred to a welter of cases: *F* (1BvQ 44/20), Federal Constitutional Court of Germany 29 April 2020; *Roman Catholic Diocese of Brooklyn* v *Cuomo*,

Supreme Court of the United States, 592 US ____ (2020), 25 November 2020; *De Beer* v *The Minister of Cooperative Governance and Traditional Affairs*, High Court of South Africa, Case no 21542/2020, 2 June 2020; *Capitol Hill Baptist Church* v *Muriel Bowser, in Her Official Capacity as Mayor of the District of Columbia* (Case No 20-cv-02710 (TNM)) on 9 October 2020; and *South Bay United Pentecostal Church* v *Newsom* (592 US ____ (2021), 5 February, 2021, Supreme Court of the United States).

Submissions for the additional party

[93] The additional party, too, is prepared to accept the conditions set out in the Local Levels Regulations. The bulk of his senior counsel's submission at the substantive hearing was directed towards proportionality, and to the level of scrutiny to which the respondents' decision to close places of worship should be exposed. Only a limited margin of appreciation should be allowed to the state when it interfered in religious matters. A *Wednesbury* style approach was not appropriate. Senior counsel for the additional party placed particular emphasis on the criminalisation of worship, which he described as an extraordinary abuse of the state's power. The state should not prefer Mammon to God, as it had done. A consultative approach, involving dialogue with the churches, ought to have been adopted. Senior counsel then himself exposed the respondents' decision-making to a high level of scrutiny, submitting that there was no material before them from which it could be concluded that the measure adopted was proportionate. They had failed to establish that transmission of coronavirus happened to a significantly higher degree in places of worship than anywhere else. Professor Leitch had expressly stated that such data was unavailable. Less intrusive measures were available including all those in the Local Levels Regulations and the guidance. The respondents could not prove that, with the

adoption of less restrictive measures, in-person worship could not operate within an acceptable and tolerable risk threshold. It was wrong to say that scientific judgments were in issue. The additional party did not dispute the science. He did dispute that the science required the closure of all churches.

Submissions for the respondents

[94] The nub of the respondents' position is that the decision to close churches was ultimately a political one in which they enjoyed a large margin of appreciation. While it was true that the petitioners' article 9 rights and those of the additional party were restricted, so too were many other Convention rights, including rights under articles 2 (life), 5 (liberty and security), 6 (fair trial), 8 (respect for family/private life), and others. All of the affected rights had to be considered by government when responding to the pandemic, all were important and all had been interfered with to some degree or other. It was impossible to rank them. The respondents had to carry out a constant balancing exercise which may change from time to time. Ultimately they had reached a political decision, in which the court should not interfere. It was irrelevant what had been done in other countries, or what the courts had decided there. This court was unaware of the factual background which informed decisions elsewhere. There was no emerging international consensus that bans and restrictions on religious services were unlawful. There had been insufficient time for such a consensus to emerge. The circumstances in *Bayatan* v *Armenia* (above) were very different from those surrounding the pandemic. In that case the consensus had emerged over a period of about 70 years amongst almost all of the Member States of the Council of Europe, which was far removed from the circumstances here. However, it was relevant that the government had had dialogue with faith groups across the board and that many church leaders and

organisations agreed with the closure, and did not support the petitioners' action. The risks posed by Covid-19 are cumulative and multifactorial. Dr Blenkharn did not take into account the cumulative nature of risk or the increase in risk posed by increased opportunities for interaction. The Regulations reflected the decision taken by the respondents in light of the new variant to limit permitted activities to those which they considered essential, such as food shopping and obtaining medical assistance. They were made on the basis of scientific advice. Permitting the operation of foodbanks in churches, and permitting their use as vaccination centres, was consistent with that decision. They were a justified and proportionate response. Article 9, whether read alone or in conjunction with article 11, did not bestow a right at large for individuals to gather to manifest their religious beliefs wherever, whenever, and in whatever manner they wished. The question was ultimately not whether the decision had been reached in the right way, but whether there had actually been a violation of the rights in question. The proportionality test was predicated on substance and outcome, not process: *R (Nasseri)* v *Secretary of State for the Home Department* [2010] 1 AC 1. The respondents had committed to revoke the Regulations at the earliest possible opportunity and most recently, had stated that they would do so in time for communal worship during the forthcoming religious festivals, in particular Easter and Passover.

Decision on ECHR

Introduction

[95] It is common ground that articles 9 and 11 are engaged. For completeness, I accept the submission of senior counsel for the petitioners that the scope of the article 9 right is undeniable; that freedom of thought, of conscience and religion as safeguarded by article 9,

is one of the foundations of a democratic society; and that since religious communities traditionally exist in the form of organised structures, article 9 must be interpreted in light of article 11: *Metropolitan Church of Bessarabia* v *Moldova* [2002] 35 EHRR 13. The article 9(1) right of freedom of belief is absolute: *Williamson* v *Secretary of State* [2005] 2 AC 246. None of this is challenged by the respondents. They do not challenge the genuineness of the petitioners' beliefs, nor could they lawfully do so. As they accept, it is irrelevant that others do not share those beliefs (and so, at least in this context, any belief held by other faiths, or for that matter, by the respondents, that worship may be conducted on-line, is irrelevant).

[96] It is also common ground that there has been interference with the article 9(2) right to manifest religion. As senior counsel for the petitioners submitted, the blanket ban on opening churches for public worship constitutes interference. The petitioners have no alternative means of manifesting their religion: *cf R (SB)* v *Governors of Denbigh High School* [2007] 1 AC 100 per Lord Bingham of Cornhill at 23 and 24. In contrast to the claimant in that case (a schoolgirl who had been denied access to her school unless she wore the school uniform, and who could have chosen to attend another school) the petitioners do not have the option of manifesting their religion in another way. Although the respondents at times appear to have suggested that on-line worship is an alternative means whereby the respondents may manifest their religion, as in the Deputy First Minister's comments to the Covid-19 Committee, they do not dispute, in this petition, that there has been interference with the article 9(2) right. They found upon the fact that the interference is temporary. Nonetheless, the Regulations do give rise to interference, and, under reference to the discussion at paras [62] and [63] above on the relevance of on-line worship, the respondents are correct to accept that they do. The degree of interference

comes back into play when considering whether the interference has had a proportionate effect.

[97] As parties agree, the issue for determination is whether the restrictions imposed by the Regulations fall within article 9(2) namely whether they are prescribed by law, pursue a legitimate aim and are necessary in a democratic society in the interests (in this case) of public health.

Prescribed by law

[98] To be prescribed by law, the Regulations must both have a basis in domestic law, and be accessible to the persons concerned and be foreseeable as to their effects: *Christian Institute* v *Lord Advocate* [2016] UKSC 51, para [79]. As the Supreme Court stated in that paragraph, these qualitative requirements of accessibility and foreseeability have two elements: that the Regulations must be formulated with sufficient precision to enable any individual to regulate his or her conduct; and that they must be sufficiently precise to give legal protection against arbitrariness. On any view, the Regulations pass this test. They have been made under and in accordance with the Coronavirus Act 2020. As noted in paras [8] to [11] above, that Act permits the respondents to make regulations of a general nature, which may include provision requiring premises to close, as the Regulations do, and which may create offences (as the Local Levels Regulations which were amended by the Regulations do). The Regulations were laid before, and approved by a resolution of, the Scottish Parliament in accordance with schedule 19, paragraph 6 of the 2020 Act. Given the dangers posed by the new variant, the respondents were entitled to take the view that the Regulations needed to be made urgently. The Regulations are in precise terms and are not

arbitrary in their application. The Regulations therefore pass the legality leg of the ECHR test.

Legitimate aim

[99] Insofar as they pursue the protection of public health and preservation of life, it is accepted by the petitioners and by the additional party, albeit with a degree of reluctance, that the Regulations pursue a legitimate aim which is within the scope of article 9(2). The reluctance stems from the caveat that it would not be a legitimate aim to pursue the elimination of all death, or even all premature death, which would, as the petitioners and the additional party point out, be impossible, and it could not be a legitimate aim to pursue the impossible. That is true, but I think it is unfair to attach too much weight to the statement in the first *Strategic Framework* document to the effect that there was "no acceptable number of people" the respondents were willing to let become affected, which can perhaps be seen as employing a degree of political rhetoric. As I have observed, that phrase does not appear in the latest version. The Regulations in any event do not in fact pursue the elimination of all premature death, since they admit of exceptions. Perhaps a better way of encapsulating their aim is that they seek to reduce risk by suppressing the virus to the lowest possible level and it is certainly not for this court to question that strategy. It is beyond question that the Regulations have a legitimate aim.

Necessary in a democratic society

[100] This leads to the core issue in this case which is whether the Regulations are proportionate. Parties accepted that proportionality falls to be assessed by adopting the four-stage approach set out in *Bank Mellat*; see also *Christian Institute*, above. Lord Reed at

Bank Mellat, paragraphs 71 and 72 (pages 789-790), explained that this structured, analytical approach falls to be contrasted with that of the Strasbourg court, where the principle of proportionality is "indissolubly linked to the concept of margin of appreciation". I take from this that while margin of appreciation is still a relevant factor at several of the stages, as we will see, it is not the complete answer to a challenge that a decision or legislation is not proportionate. The four stages, as formulated by Lord Reed at paragraph 74, are: (i) whether the objective being pursued is sufficiently important to justify the limitation of a protected right; (ii) whether the measure is 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, balancing the severity of the measure's effect on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. (Lord Reed recognised that his formulation of the fourth criterion was more extensive than that of Lord Sumption at paragraph 20 (page 771) but as he pointed out, there is no material difference, and the wider formulation makes it easier to apply that criterion in an analytical manner; although Lord Reed dissented in relation to the application of the test, there was no disagreement as to what the test was.)

Importance

[101] As regards importance, nothing more need be said in this case, since it is not in dispute that the aim being pursued - reduction in risk for the protection of health and preservation of life - is sufficiently important to justify limitation of the protected right.

Rationality

[102] As Lord Reed made clear at *Bank Mellat* para [92] rationality is a causal test. The decision maker has a margin of appreciation, but that is achieved by holding that a measure is rationally connected to its objective if implementation can reasonably be expected to contribute to achievement of that objective. In applying this test, the court must not substitute itself for the decision maker. Rather, the test is an objective one, based on common sense and logic. The court is concerned with the substance of the measure, rather than the process by which it was reached: *R (SB)* v *Governors of Denbigh High School* [2007] 1 AC 100. However the reasons given for a decision may at least in some circumstances show that the measure is irrational, as the decision of the majority in *Bank Mellat* illustrates.

[103] Applying that to the facts of this case, insofar as the closure of places of worship combined with the stay at home requirement will inevitably reduce human interaction, which is a known means of transmission, it cannot be said, on an objective approach, that there is no rational connection at all between the Regulations and the aim. Much criticism was made by senior counsel for the petitioners, and for the additional party, of the manner in which the decision was reached. Senior counsel for the additional party spent some time in attempting to show that the decision was not justified by the reasoning of the respondents collectively or individually and that there was a complete absence of any data showing that persons had become infected in places of worship. There are various answers to this. First, as the SAGE document referred to in para [23] above makes clear, it is extremely challenging to determine where and how Covid-19 has been transmitted. Second, the criticism to some extent misses the point, which is that the overall risk is reduced by reducing human interaction. Simply because one cannot tell *which* people in the population will not catch or transmit Covid-19 as a result of the various different restrictive measures put in place, does

not mean that one cannot say with confidence that the restrictive measures as a whole will have the consequence that *fewer* people will catch or transmit it. It is not irrational to conclude that the more people stay at home, the less the virus will be passed on. Accordingly, the Regulations satisfy the rationality stage of the assessment. That said, there is a whiff of irrationality about the decision not even to allow places of worship to open for private prayer, when one looks at the reasoning behind that option not being recommended. I discuss this further when considering the third stage of the assessment, below.

Less intrusive means

[104] The question at this stage of the test is whether a less intrusive measure than closing places of worship (on pain of criminal sanctions) could have been used without unacceptably compromising the achievement of the objective of maintaining public health and preserving life by reducing the risk of infection from coronavirus.

[105] The approach at this stage has recently been summarised by the Court of Appeal in *R (FACT)* v *Environment Secretary* [2020] 1 WLR 3876, as follows:

(i) The decision maker has a margin of appreciation or discretion which is highly fact and context specific. The evaluation will take account of all relevant circumstances, including conditions prevailing at the time the decision was taken, and the reasons given why less restrictive measures were rejected.

(ii) A measure will be disproportionate if it is clear that the desired level of protection could be attained equally well by measures which were less restrictive.

(iii) The burden of proof lies with the decision maker.

(iv) The decision maker is not required to consider every possible alternative.

(v) The mere assertion that some other measure is equivalent and less intrusive is not sufficient; and equally the fact that some other measure can be envisaged is not enough.

(vi) It is relevant that the measure is "general, simple, easily understood and readily managed and supervised".

[106] The respondents accept that they have the burden of proof of showing that the desired level of protection could not have been achieved by less restrictive means. They also attach some weight to the importance of having a simple, easily understood "bright line" message ("stay at home"), although it is a moot point as to whether the legislation itself is simple and easily understood. As I have already observed, it is in relation to the margin of appreciation, the flip side of which is what level of scrutiny must be applied to the Regulations, that the parties differ. The respondents argue for a high margin of appreciation. They say that the following factors point to that result: a scientific judgment is involved (see *R (Surayanda)* v *Welsh Ministers* [2007] EWCA Civ 893, Thomas LT at paragraph 67); the decision was one more suitably taken by an executive subject to the scrutiny of Parliament than by the court (*Bank Mellat,* Lord Sumption at paragraph 21); the Regulations have been subject to the scrutiny of, and approved by, the Scottish Parliament (*Bank Mellat*, per Lord Sumption at paragraph 44; *R (Dolan)* v *Secretary of State for Health and Social Care, Secretary of State for Education* [2020] EWCA Civ 1605, per the Court of Appeal at paragraph 86 (this case is of particular interest since it involved a challenge to English regulations made in response to the pandemic)). No significance should be attached to the fact that churches (this time) had remained open in England and Wales: what measures to introduce depended on a range of factors, including the ability of the NHS to cope, and it should not be assumed that the prevailing conditions in England and Wales were the same

as those in Scotland. Nor could a proper comparison be made with the decision that other premises or activities remained open. A whole range of considerations had to be taken into account and a balanced judgment made.

[107] The petitioners for their part argue that where article 9 rights are involved, as a matter of principle the decision maker is subject to a high level of scrutiny and there is a small margin of appreciation: *Manoussakis* v *Greece* (1997) 23 EHRR 387 at 407, where the Court said:

> "In delimiting the extent of the margin of appreciation in the present case the Court must have regard to what is at stake, namely the need to secure true religious pluralism, an inherent feature of the notion of a democratic society. Further, considerable weight has to be attached to that need when it comes to determining, pursuant to paragraph 2 of article 9, whether the restriction was proportionate to the legitimate aim pursued. The restrictions imposed on the freedom to manifest religion…call for very strict scrutiny by the Court"

[108] The petitioners also rely upon certain passages in *Metropolitan Church of Bessarabia and Others* v *Moldova* (2002) 35 EHRR 13 in the context of a discussion by the European Court of Human Rights of general principle; and of course section 13 of the Human Rights Act 1998, discussed above. They rely too upon the decision in England and Wales not to close places of worship, justifying the conclusion, say the petitioners, that less restrictive measures could also have been imposed in Scotland. Similarly, they point to the fact that other premises in Scotland remain open. The respondents had wrongly and unjustifiably equated religion with non-essential services, when it was anything but non-essential. As regards the science, the decision to make the Regulations could not properly be categorised as a scientific judgment. The science was not in dispute. The additional party made the additional point that Professor Leitch was not a microbiologist. The respondents had not properly considered the efficacy of the type of mitigation measures described by Dr Blenkharn in his report.

[109] I consider that this question is more finely nuanced than either party would have it. As the authorities make clear, the breadth of the margin of appreciation in each case ultimately must turn on the facts: *Bank Mellat*, Lord Sumption at paragraph 26; *R (FACT)*, above. The magnitude of what is at stake is a factor to be taken into account: *Metropolitan Church of Bessarabia* at paragraph 119, where the issue at stake was said to be "the need to maintain true religious pluralism, which is inherent in the notion of a democratic society".

[110] As the respondents submit, while the present case does involve religious pluralism to the extent that the petitioners' (and additional party's) beliefs differ from those of other faiths, the facts in this case are far removed from those in the cases founded on by the petitioners. In *Manoussakis* the laws under consideration were ones which restricted the construction and use of temples by any denomination other than the Greek Orthodox Church. In *Metropolitan Church of Bessarabia*, Moldova had refused to recognise the church in question at all. In a third case, *Case of Biblical Centre of the Chuvash Republic* v *Russia* (Application no 33203/08, 12 June 2014), the issue was dissolution of a religious organisation. Those cases are of a different magnitude to the present case where the restriction is, on any view of a more limited nature and for a temporary period only.

[111] As regards whether the decision involved a scientific judgment best left to an executive armed with expertise and experience not available to the court, I do not consider that the decision can be categorised in that way. As the petitioners point out, the science is not in dispute. It is accepted that Covid-19 is an extremely serious and highly transmissible disease which can result in serious illness and death. The scientific material on which the respondents based their decision is either available to the court or ought to have been made available. It should also be pointed out that also not in dispute is that mitigating measures such as social distancing, face masks, hand washing and good ventilation are known to

reduce the risk of transmission. This emerges not only from Dr Blenkharn's report but from Scottish Government advice, such as the much publicised FACTS.

[112] With that in mind, I now turn to consider the respondents' reasoning for not adopting less restrictive measures. I consider that they have a number of difficulties in discharging the burden on them. The first is that, armed with the knowledge, in late December 2020, of the risks posed by the new variant, the recommendation given to the respondents in the memo of 29 December 2020 (para [40] above) was to maintain the status quo. Other options short of full closure were also considered. One option (option B) was to reduce the number of persons who could attend a place of worship but that was not recommended, on the basis that it would make little difference to the level of risk in public health terms - a clear acknowledgment, read in context, that the risk was already small. The second difficulty is that no real account seems to have been taken of the other factors (short of stopping people meeting) which also serve to reduce risk: low density of occupants, good ventilation, face coverings etc - see SAGE paper, para [23] above. Third, no real consideration was given to whether steps short of a compulsory closure of all places of worship might achieve the same end and in particular no consideration was given to whether guidance might suffice. The fourth difficulty is that Professor Leitch, at paragraph 36 of his affidavit, lists a number of fears about the consequences of allowing people to attend places of worship: for example, that they may use public transport; they may car share; they may congregate outside. At paragraph 79 he develops this theme by saying that there is more risk of catching or passing on the virus by going to a supermarket, a bank and a place of worship than if one only goes to the supermarket. However, the matters mentioned in paragraph 36 could easily have been covered by guidance (as car-sharing is) and it is not at all obvious why it should necessarily be assumed that the

public (particularly, that section of it which attends places of worship, as opposed to those celebrating a sporting success, say) will not pay heed to, or will disregard, government guidance. As regards the point about attending three places rather than one, it does not really add anything to the argument, if one assumes that the visit to the supermarket and bank are essential ones which will be made in any event. When one comes to consider the other option which was considered and not recommended, option C, allowing places of worship to remain open for private prayer only, the respondents run into still more difficulties. It cannot be disputed that this option would give rise to a much reduced risk of people meeting than if attending for communal worship. To turn Professor Leitch's opinion at paragraph 79 on its head, if someone is at the supermarket or bank anyway, how is the risk of transmission materially increased if that person were to pop into church for a short period of private prayer, alone? Senior counsel for the respondents submitted that such a person might meet others in the church, but that was not the reason given for disallowing even private worship. The sole justification in the advice given to ministers was that such a measure might be seen as discriminatory, since some faiths do not practise private prayer: see para [41] above. As senior counsel for the additional party submitted, without rejoinder from the respondents, that cannot be a valid justification, and indeed runs counter to the principle of religious pluralism. Further, a desire not to risk stakeholder relations (para [41]) and the taking of a difficult decision out of the hands of the vulnerable (para [46]) cannot, in my view, justify the extreme restriction which was imposed, when other options were available, and when the favoured option on public health grounds was expressly said to be preservation of the status quo.

[113] A further problem for the respondents is that the factual information upon which their decision was based was wrong, inasmuch as they were misinformed about the number

of people who regularly attended church: see paras [43] to [45]. That is relevant because it clearly had a material effect upon the likely impact of any measures imposed.

[114] Perhaps a more fundamental problem for the respondents is that as soon as they allow some exceptions to the "stay at home" rule and the corresponding requirements to close premises and restrict activities, it then falls on them to justify why other exceptions are not allowed. It is not necessarily a case of choosing to allow one thing instead of something else: if one activity is deemed to present acceptable risks, then it is legitimate to ask why another comparable activity is not. To put this a slightly different way, it would be easier to justify the closure of places of worship if the risk from the new variant was so great that no activities at all were to be permitted, including meeting under any circumstances, save (say) going to the supermarket once a week. As soon as that approach is departed from, the respondents must be taken to have acknowledged that, whatever the increased risks from the new variant, *some* indoor assembly can safely be achieved if mitigation procedures are followed. While I accept that it is difficult to draw a meaningful comparison between places of worship and some premises which are exempt from the requirement to close, such as bicycle shops, a more meaningful comparison can perhaps be drawn with the continued use of cinemas as jury centres. Like places of worship, they involve people from different households coming together repeatedly to congregate indoors in a confined area. Indeed on one view, jury centres might be thought to carry more risk because the duration of contact is longer. Many, indeed most, of the points made by Professor Leitch in his affidavit apply equally to jurors: they may use public transport, they may car share; they may congregate outside. The answer given by senior counsel for the respondents when pressed about this apparent distinction was to say that choices had to be made, that it was important that the criminal justice system continue to operate, and that the respondents were entitled to leave

the decision as to whether to use cinemas and if so which ones to the SCTS, which enjoys the resources of the state. I accept all of this, but the point, it seems to me, is that there is at the very least an implicit acceptance by the respondents that meeting indoors *can* be safe if suitable mitigation measures are adopted. The article 6 right to a fair trial within a reasonable period is important, but so, too, is the article 9 right, and nowhere have the respondents explained why in the one case, closure was considered to be necessary and in the other, not.

[115] For all these reasons, and without in any way questioning the science which underlay the respondents' decision-making, I conclude that the respondents have failed to show that no less intrusive means than the Regulations were available to address their aim of reducing risk to a significant extent. Standing the advice they had at the time, they have not demonstrated why there was an unacceptable degree of risk by continuing to allow places of worship which employed effective mitigation measures and had good ventilation to admit a limited number of people for communal worship. They have not demonstrated why they could not proceed on the basis that those responsible for places of worship would continue to act responsibly in the manner in which services were conducted, and not open if it was not safe to do so; in other words, why the opening of churches could not have been left to guidance. Even if I am wrong in reaching that conclusion, the respondents have in any event not demonstrated why it was necessary to ban private prayer, the reasons which were given for that recommendation being insufficient to withstand even the lowest degree of scrutiny.

[116] For these reasons, I have therefore concluded that the Regulations, having failed the third stage of the *Bank Mellat* test, are not a proportionate interference with the article 9 rights of the petitioners and additional party.

[117] For the avoidance of doubt, in reaching this view, I have left out of account the fact that not all countries have adopted the same measures, and that in other jurisdictions, similar and different measures have been ruled by the courts to be disproportionate. I accept that this court cannot know what factors were taken into account in such decisions. I accept the respondents' submission that there is no international consensus as to how the pandemic should be legislated for.

Proportionate effect

[118] It remains necessary to consider the fourth stage of the test, for completeness and in case I am wrong in the conclusion just reached. This stage involves a balancing of the respective interests: a weighing up of the severity of the measure's effects on the one hand, against the benefits secured by the measure on the other. A range of factors can be considered at this stage, including, in the present case, the extent to which the measure contributes to the achievement of the aim, in other words, the extent to which the risk is reduced by the Regulations; the importance of the right in issue; the severity of the measure's effects; and whether the decision maker has expertise or information not available to the court. Of course, as Lord Sumption recognised in *Bank Mellat*, there is a degree of overlap between the various stages of the test and some factors will necessarily arise here which I have already taken into account at the earlier stages.

[119] As regards the extent to which the Regulations reduced risk I have already commented on the fact that the risk was low to begin with. Notwithstanding the greater transmissibility, mitigating factors are known to reduce the risk of transmission, even indoors. Given the relatively low number of instances of persons with Covid-19 known to have attended a place of worship (in comparison with other activities) it is not clear to me

that the blanket closure of all places of worship can be said to have contributed to a material reduction in risk.

[120] Considering next the importance of the affected right, it is not clear that the respondents have fully appreciated the importance of article 9 rights. They have admittedly paid lip service to article 9 by referring to it, but there is no evidence that they have accorded it the importance which such a fundamental right deserves. The reference in the Equality Impact Assessment relative to the Regulations (number 7/8 of process) to allowing only essential activities to continue would appear to suggest otherwise (particularly when one has regard to the activities which are considered to be essential). When addressing the Covid-19 Committee, the Deputy First Minister appears to have thought that there was no interference at all (para [54]). However, there is no doubt from the authorities, here and elsewhere, that the right to manifest one's religion is an important right to which much weight must be attached.

[121] As for severity of effect, it is all too easy to argue, as the respondents in effect do, that "it doesn't really matter" that places of worship are closed because it's only for a short period, and those who wish to do so can go on-line. The first of those points is valid to an extent, although it should be pointed out that 3 weeks became 6 became 9, and that by the time the Regulations (we are told) will be revoked or amended with effect from 26 March 2021 they will have been in force for 11 weeks. I have already commented on virtual "worship". It can be seen only as an alternative to, not a substitute for, worship. While some people may derive some benefit from being able to observe on-line services, it is undeniable that certain aspects of certain faiths simply cannot take place, at all, under the current legislative regime: in particular, communion; baptism; and confession, to name but

three. It is impossible to measure the effect of those restrictions on those who hold religious beliefs. It goes beyond mere loss of companionship and an inability to attend a lunch club.

[122] The fact that the Regulations are backed by criminal sanctions is also a relevant consideration. Were the petitioners to insist on manifesting their beliefs, in accordance with their religion, they would be liable to be met with a fine of up to £10,000, a not insignificant penalty.

[123] The above factors all point towards the conclusion that the Regulations have a disproportionate effect. There are however other factors which point the other way, not least, the severity of Covid-19 and the threats posed by the new variant, which I do not underplay in the slightest. This factor deserves considerable weight. The need to avoid the NHS being overwhelmed is another factor, although, if I am correct in saying that the risk is reduced to an insignificant extent by the Regulations, this factor attracts less weight. The fact that much public opinion, including that of other faiths and church leaders, supports the closures is also a relevant consideration, which I thought initially might carry some weight. However, I have concluded that it does not, for a number of reasons. First, the beliefs of some church leaders clearly differ from those of the petitioners and the additional party as to whether on-line worship is worship; but the beliefs of the petitioners and the additional party are valid nonetheless (even if they are minority beliefs). Second, clearly some church leaders agree with the decision to close churches and consider the Regulations themselves (as opposed to their effects) to be proportionate (see, for example, letter from the Covid-19 Committee of the Free Church of Scotland dated 21 January 2021 (number 7/15 of process); but having already discounted as irrelevant the views of those who consider the Regulations to be disproportionate, I must also discount views in the opposite direction. As I have said,

proportionality is the question the court must decide. Third, it is hardly relevant that some do not object to their rights being interfered with, if others in the same position do.

[124] I also recognise the importance of the need for the so-called "bright line" message, which attracts a little, although not great, weight, given the extent to which such a message is already diluted by the other exceptions.

[125] As regards the cases from other jurisdictions, for the reasons already given I do not attach weight to them beyond the fact that they emphasise the importance of the right to manifest religion whether in reliance on article 9 or under constitutions different from ours. The American cases perhaps give rise to the best soundbites - "Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical": Gorsuch J, in *Roman Catholic Diocese of Brooklyn* v *Cuomo*, above - but they do not provide a sound basis for reaching a decision on proportionality in this jurisdiction.

[126] Ultimately the matter is finely balanced, particularly as I recognise that the decision is ultimately a political one and that the respondents do enjoy some margin of appreciation at this stage of the test as at others. Nonetheless, the apparent under-playing of the importance of the article 9 right in comparison with other activities, coupled with the blanket ban on *all* forms of worship, including private prayer, communion, confession and baptism, lead me to the conclusion that even if *some* enforced restriction on the right to worship was justified by the situation in December 2020/January 2021, the Regulations in the form they were passed did have a disproportionate effect and thus that they also fail the fourth stage of the assessment.

Conclusion

[127] For all these reasons, I have concluded that the Regulations do constitute a disproportionate interference with the article 9 right of the petitioners and others. As such, they are beyond the legislative competence of the respondents for the reasons set out above.

[128] Reverting to the constitutional issue, for the same reasons I therefore find that the Regulations are also a disproportionate interference with the petitioners' and additional party's constitutional rights.

Caveat

[129] It is as important to understand what I have not decided as what I have. I have not decided that all churches must immediately open or that it is safe for them to do so, or even that no restrictions at all are justified. All I have decided is that the Regulations which are challenged in this petition went further than they were lawfully able to do, in the circumstances which existed when they were made.

Remedy

[130] The question remains, what remedy are the petitioners entitled to at this stage? They seek declarator that the Regulations are unlawful in so far as they purport to require the closure of churches in Scotland and to criminalise public worship, and they are clearly entitled at least to the first part of that; the second part may be unnecessary if the first part is granted. They also seek reduction of the offending parts of the Regulations and a further declarator that a person living in a Level 4 area may lawfully leave the place that person is living in order to attend a place of worship.

[131] Senior counsel for the respondents invited me, in the event that I found in favour of the petitioners, to fix a further hearing so that they could address the court on the terms and timing of any remedy to be granted. This would give them the opportunity to make submissions on the desirability of the court making an order under section 102 of the Scotland Act 1998, including the potential for suspending the effect of the Court's decision for a period to allow any defect in the Regulations to be corrected. Senior counsel further submitted that the court should not reduce any parts of the Regulations without affording the respondents the opportunity of making appropriate replacement provisions in respect of places of worship according to the circumstances then applying. The respondents further argued that even if the Regulations were found to be unlawful, it would not be appropriate for the Court to grant the declarator as to reasonable excuse, that being a decision for the respondents having regard to the evidence and advice available at the relevant time.

[132] Senior counsel for the petitioners and for the additional party urged me not to follow the course suggested by the respondents. They submitted that if the petitioners were correct in their arguments then they should be able to resume worship immediately. There had already been irreparable harm; and in a reference to Gorsuch J, above, the holiday should not become a sabbatical. As regards the reasonable excuse declarator, it was necessary, so as to ensure that the other remedies were effective.

[133] The position is complicated by the respondents' present intention (at least at the time of writing) to remove the restrictions imposed by the Regulations with effect from 26 March 2021, meaning that any remedy I grant is in any event likely to have little practical impact.

[134] While I consider that the circumstances are not necessarily such as to justify an order under section 102 - the Regulations have been in place for a relatively short period; third party rights are unlikely to be affected - I can see the force in allowing the respondents a

short opportunity to consider how the Local Levels Regulations might be amended in light of my decision. However, if the restrictions are indeed removed, in any event, within the next few days, then the issue may be academic. I also wish to be addressed further on the "reasonable excuse" declarator, since I am not currently persuaded that to grant it would not be usurping the function of the legislature. However, that too may be academic if the respondents do indeed allow communal worship from 26 March 2021.

[135] For all these reasons, I will put the case out to call By Order on Thursday 25 March 2021, so that parties may address me further on what orders I should make, in light of this Opinion, and the foregoing comments.