OUTER HOUSE, COURT OF SESSION

[2026] CSOH 79

P231/26

OPINION OF LORD SANDISON

In the Petition of

FIONA HIGGINS

Petitioner

for Judicial Review of decisions of

THE STANDARDS COMMISSION FOR SCOTLAND

Respondent

Petitioner: Byrne KC, R Cameron; DAC Beachcroft Claims Scotland LLP
Respondent: Reid KC; Shepherd and Wedderburn LLP

21 August 2026

Introduction

[1] By this petition for judicial review, the petitioner, who is a member of Glasgow City Council for the Canal Ward, seeks reduction of decisions of the Standards Commission for Scotland refusing to accept certain productions which she wished to lodge for use at a hearing into her conduct that had been scheduled to take place in terms of section 16(b) of the Ethical Standards in Public Life etc (Scotland) Act 2000. The petition came before me for resolution at a substantive hearing.

Background

[2] On 27 August 2024 a journalist posted a story on the social media platform "X" pertaining to a reduction in the number of teachers to be employed by Glasgow City Council, and referring to the then finance director of the council, Martin Booth, supposedly having softened the wording of relative material provided to councillors so that it talked of reform and transformation rather than explicitly about cuts in teacher numbers. On the same day, the petitioner reposted that story to the "X" account which she maintained as a councillor, and added:

> "That any Council Officer would abuse their influence to wilfully and cynically mislead Cllrs & the public is galling & I commend the Officers who have challenged this within these emails & others I have seen. I fully support the @GCParentsGroup call for an investigation into this."

[3] Mr Booth complained that the petitioner's post breached paragraphs 3.1, 3.3, 3.8 and 3.10 (Annex A, paragraphs 24 and 25) of the Councillors' Code of Conduct dated December 2021.

[4] Those provisions are in the following terms:

> "3.1 I will treat everyone with courtesy and respect. This includes in person, in writing, at meetings, when I am online and when I am using social media.
>
> 3.3 I will not engage in any conduct that could amount to bullying or harassment (which includes sexual harassment). I accept that such conduct is completely unacceptable and will be considered to be a breach of this Code.
>
> 3.8 I will not undermine any individual employee or group of employees, or raise concerns about their performance, conduct or capability in public.
>
> 3.10 I will follow the Protocol for Relations between Councillors and Employees at Annex A and note that a breach of the Protocol will be considered a breach of this Code. I will also comply with any internal protocol the Council has on councillor/employee relations.

Annex A, paragraphs 24 and 25 are in the following terms:

> 24. Councillors and employees both have a responsibility to project a positive image of the Council and should avoid making any public comments that could bring it into disrepute.
>
> 25. Councillors should not raise any adverse matters relating to the performance, conduct or capability of employees in public. Employees must ensure they treat councillors with similar respect and courtesy."

[5] Mr Booth's complaint was investigated by the ethical standards commissioner, who on 4 November 2025 reached a conclusion that the petitioner had breached the Code. That conclusion was reported to the Standards Commission for Scotland, which resolved to have a hearing about the matter. That hearing was due to take place on 26 February 2026. On 12 February 2026, the petitioner sought to lodge an inventory of productions to be relied upon at that hearing. On 13 February 2026 she sought to lodge a further such inventory. In total, 20 productions were put forward. On 18 February 2026, the Commission indicated that it was refusing to accept twelve of those documents. The petitioner invited it to reconsider its decision and a hearing on that question was arranged for 24 February 2026, at which she was represented by senior counsel. The Commission adhered to its decision.

Legislative background

[6] The Commission is established by section 8 of the 2000 Act. The Commissioner is established by section 1 of the Scottish Parliamentary Commissions and Commissioners etc Act 2010.

[7] Part 2 of the 2000 Act deals with the enforcement of standards of conduct by councillors and other persons holding certain public appointments. Section 9 provides: "It is the duty of [the Commissioner] to investigate and report to the Commission on cases in which a councillor or member of a devolved public body has, might have or is alleged to

have contravened the councillors' or, as the case may be, the members' code." It is for the Commissioner to decide, in terms of section 14(1), whether to report the outcome of any investigation to the Commission, but he may not do so unless the subject of the report has seen the proposed report and been given an opportunity to make representations upon it. Section 16 provides for the actions the Commission may take upon receipt of a report:

> "On receiving a report from the Commissioner, the Commission may – (a) direct the Commissioner to carry out further investigations; (b) hold a hearing; or (c) do neither, and, where it acts under paragraph (a) or (b) above, may do so at any time."

[8] Section 17 concerns hearings before the Commission. The procedure at a hearing is to be such as the Commission determines: section 17(1). In terms of section 17(3), a hearing is to be conducted by not fewer than three members of the Commission, and the person whose conduct is being considered is entitled to be heard and may be represented by counsel, a solicitor or any other person: section 17(4). The members of the Commission conducting a hearing are to state their findings in writing: section 18(1). Where a contravention of the Code is found, the Commission is to impose one of the prescribed sanctions, being censure, suspension or disqualification from office: section 19(1).

[9] An appeal lies against a finding under section 18 to the Sheriff Principal of the sheriffdom in which the relevant council or devolved public body has its principal office: section 22(1). An appeal against a finding under section 18 can be made on one or more of the following grounds: (i) the Commission's finding was based on an error of law; (ii) there was procedural impropriety in the conduct of any hearing held under section 16(b); (iii) the Commission acted unreasonably in the exercise of its discretion; and/or (iv) the Commission's finding was not supported by the facts found to be proved by it: section 22(3)(a). As a matter of generality, any sanction imposed continues to have effect notwithstanding the lodging of an appeal: section 22(5). Having heard the appeal, the

Sheriff Principal may confirm the Commission's finding, quash that finding, or quash the finding and remit the matter to the Commission to reconsider its decision: section 22(6)(a).

Submissions for the petitioner

[10] On behalf of the petitioner, senior counsel invited the court to reduce the decisions of the Commission dated 18 and 24 February 2026. The first issue to be dealt with was whether these proceedings could or should be entertained standing the Commission's claim that the petitioner had an effective alternative remedy for the matters she complained of, in the form of the right of appeal to the Sheriff Principal in terms of section 22(1) of 2000 Act.

[11] There was a general legal principle that it was not competent to have recourse to the Court of Session for a common law remedy when provision was made by statute for an effective form of review (which by necessary implication ousted the jurisdiction of the court) and recourse to that form of review had not been made, subject to the proviso that the principle might not operate if there were exceptional circumstances present in the case, such as averments of *ultra vires* or fraud, or where the parties agreed that there should not be recourse to the statutory form of appeal: *British Railways Board* v *Glasgow Corp* 1976 SC 224 per Lord Justice Clerk Wheatley at 237ff. One had to look to the circumstances of each case before determining whether the principle should be applied: *Tehrani* v *Argyll and Clyde Health Board (No 2)* 1989 SC 342, per the Lord Ordinary (Weir) at 1989 SC 349, 1990 SLT 118 at 124E.

[12] In the circumstances of the present case, the petition was not incompetent. Firstly, the statutory appeal did not have suspensive effect and was not a remedy for the object of the petitioner's complaint. She wished to avoid an unfair hearing and thus a potentially unlawful sanction. This petition was the only means whereby that could be achieved. It

sought to achieve a preventative rather than merely curative effect. Section 22(5) of the 2000 Act provided that: "(5) A finding made or sanction imposed by the Commission continues to have effect notwithstanding the lodging of an appeal under subsection (1) above."

[13] There was thus no remedy to protect against being subject to an unlawful finding, or sanction imposed, pending an appeal under section 22. An appeal under that provision was therefore ineffective in avoiding the consequence of an unfair hearing: cf *R (Ford)* v *Coventry Magistrates' Court* [2025] EWHC 843 (Admin), [2025] 4 WLR 55 at [33]. While section 22 provided a remedy in respect of findings and sanctions already imposed, it did not exclude a remedy being sought before either of those things had happened. As a sanction of suspension would temporarily prevent a democratically elected councillor from exercising the privileges of her office, an ouster of the court's supervisory jurisdiction in respect of hearings which would predictably be unfair should be effected by only the clearest of statutory language, which was not present. Any period of suspension might be served and complete before any appeal was heard, rendering the outcome of the appeal nugatory in practical terms.

[14] An appeal would be ineffective because the petitioner would not be prevented from suffering an unfair hearing. At best she would have to go through much further procedure before the courts vindicated her right and then the matter would have to be remitted back to the Commission before she could begin again with a fair hearing. The protection offered by judicial review would be inadequate if that were allowed to happen: *R (Redgrave)* v *Metropolitan Police Commissioner* [2002] EWHC 1074 (Admin) per Moses J at [15]. In this jurisdiction practical considerations might mean that the court would allow recourse to the supervisory jurisdiction, as in cases where statutory machinery for review was available but

in practice would be unduly protracted: *Kennedy, Petitioner* 1988 SCLR 149 per Lord Jauncey at 151. The English courts accepted that case management determinations which gave rise to procedural unfairness fell into an exceptional category which was amenable to judicial review even where an appeal lay at the conclusion of the proceedings: *Ford* at [31], [32] and [38], under reference to *R (Brighton and Hove City Council)* v *Brighton and Hove Justices* [2004] EWHC 1800 (Admin), [2005] ACD 38 and *R* v *Hereford Magistrates' Court, Ex p Rowlands* [1998] QB 110, [1997] 2 WLR 854; Eyre J noting in *Ford* at [32] that:

> "The position, therefore, is that procedural impropriety, including impropriety and unfairness arising from the refusal of an adjournment can warrant redress by way of judicial review even if a party has an alternative remedy by way of an appeal."

That reasoning ought to apply equally in Scotland.

[15] In *Re McAleenon* [2024] UKSC 31, [2025] AC 1362, [2024] 3 WLR 803 at [50] – [56] the Supreme Court had not described the alternative remedy principle in terms of competency, preferring to question whether the supposed alternative remedy addressed the precise mischief complained of, and to ask what type of claim the claimant had chosen to bring and what relief had been sought.

[16] Several illuminating observations had recently been made by the Judicial Committee of the Privy Council in an appeal concerning judicial review of disciplinary proceedings against a solicitor in Trinidad and Tobago, *Niles* v *Judicial and Legal Service Commission* [2026] UKPC 15. It had been observed that:

> "[54] Judicial review is a remedy of last resort. This is entrenched, elementary doctrine throughout the common law world. Thus, the existence of an alternative remedy can be a bar to an application for judicial review. To operate as a bar the remedy must be effective, and it must be efficient in terms of cost and convenience. As a general principle judicial review should not supplant a statutory disciplinary procedure before it is completed …
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> …

> [67] It is accepted by the parties that the Appeal Board could deal with the irregularities raised by the respondent. The Board considers that it would be unreasonable to require the respondent to go through the process of all that is entailed in a disciplinary hearing, in the hope that the irregularities canvassed by her could be successfully rectified upon onward appeal on a point of law to the Appeal Board. Such a process would not constitute an effective alternative remedy.
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> …
>
> [70] It is appropriate to highlight one particular feature of the judgment under appeal. The Court of Appeal, consistently with certain judicial dicta, characterised the question of whether an effective remedy exists as one of judicial discretion. The Board considers that this requires correction. Whether an effective remedy exists is not a matter of judicial discretion but a matter of judicial evaluation or judgment. Judicial discretion may feature in circumstances where it is determined that there is an effective alternative remedy but there are exceptional circumstances to permit a challenge by judicial review in any event. Equally, the question of discretion may be relevant to remedy should the judicial review proceed."

[17] The statutory appeal under section 22 was against "findings of a hearing … of a contravention of the councillors'...code" made under section 18. The petition did not challenge such a finding. A separate ground of appeal under section 22(3)(a)(ii) was that there had been procedural impropriety in the conduct of any hearing held under section 16(b). There was, however, no appeal against the decisions presently in question, which did not arise from a hearing convened under section 16(b). The object of the application to this court could not be achieved by any appeal and the petition was accordingly not incompetent.

[18] Before any other potential remedy might qualify as apt to exclude the possibility of review by the court, it had to confer a full and adequate jurisdiction on the appeal body to deal with the matter complained of: *Calvin* v *Carr* [1980] AC 574, [1979] 2 WLR 755 per Lord Wilberforce at [1980] AC 592C – 593H, [1979] 2 WLR 765E – 766H (in the particular context of private voluntary associations), cited in *Brown* v *Executive Committee of the Edinburgh District Labour Party* 1995 SLT 985 per Lord Osborne at 990 G-H.

[19] It had been said that the existence of an alternative remedy raised a question of the competency of judicial review, although it appeared that any rule of incompetency was subject to ill-defined exceptions: *Tarmac Econowaste Ltd* v *Assessor for Lothian Region* 1991 SLT 77 per Lord Clyde at 78 and 79A - B, I - J; *X, Petitioner* [2026] CSOH 15, 2026 SLT 239; *A, Petitioner* [2024] CSOH 106, 2024 SLT 1345; *Alagon* v *Secretary of State for the Home Department* 1995 SLT 381; *Accountant in Bankruptcy* v *Allans of Gillock Ltd* 1991 SLT 765; Clyde and Edwards, Judicial Review, 12-12 – 12-14, 12-17. It might be preferable to describe the question as one of general principle in the exercise of a broad equitable jurisdiction. The court's supervisory jurisdiction had been described as a broad and equitable one: *Eba* v *Advocate General* [2010] CSIH 78, 2011 SC 70, 2010 SLT 1047 per Lord President Hamilton at [35], and it was clear that the grant of any remedies in its exercise was discretionary: *King* v *East Ayrshire Council* 1998 SC 182 at 194C - D, 1998 SLT 1287 at 1294F.

[20] In these circumstances, the language of competency emphasised in particular in *McCue* v *Glasgow City Council* [2014] CSOH 124, 2014 SLT 891 at [32] might not fully capture the court's role. In that case, the language of competency had been used because the alternative remedies rule was seen as a means by which the courts respected the supremacy of Parliament. It was of course necessary to consider whether a proposed review would defeat a Parliamentary intention expressed through the furnishing of a potentially effective alternative statutory remedy, but it was a cardinal principle that the court's supervisory jurisdiction could only be ousted by the clearest and express words: *R (Privacy International)* v *Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491, [2019] 2 WLR 1219 at [37], [111], [120], [131] and [166]. It might be better simply to acknowledge that equity did not require the court's intervention where there was another remedy available

and that the supervisory jurisdiction was one of last resort simply because the Court of Session was the apex of the judicial system.

[21] The second question for the court was whether the proposed Standards Commission hearing engaged Article 6 of the European Convention on Human Rights, as being apt to determine a civil right or obligation. If so, the ECtHR had held in *Van de Hurk* v *The Netherlands* (1994) 18 EHRR 481 at [59] that:

> "The effect of Article 6(1) is, *inter alia*, to place the 'tribunal' under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision."

[22] The powers of sanction available to the Commission, in particular suspension and expulsion, bore on the civil right to perform the function of councillor: cf. *Tehrani* v *United Kingdom Central Council for Nursing Midwifery and Health Visiting* 2001 SC 581, 2001 SLT 879 at [33] (OH); *Le Compte, Van Leuven and De Meyere* v *Belgium* (1982) 4 EHRR 1 at [46] – [49]; *Janik* v *Standards Board for England* [2007] EWHC 835 (Admin) at [41]; *General Medical Council* v *Pembrey* [2002] EWHC 1602 (Admin), [2002] Lloyd's Rep Med 434. Moreover, disciplinary proceedings that might deprive someone of their livelihood engaged Article 6: *Selvarajan* v *General Medical Council* [2008] EWHC 182 (Admin) at [10]. The refusal to accept the petitioner's productions was a breach of Article 6 because it precluded a proper examination of the facts and issues.

[23] The third question for the court was whether, by refusing to accept the productions in question, the Commission had acted contrary to the common law requirements of natural justice.

[24] On 18 February 2026 the Commission had intimated its decision not to accept as a production a screenshot of the petitioner's "X" post (document 1), on the basis that it was

already included in productions previously lodged. It had refused to accept an email chain (document 2) covering the period 5 to 7 February 2024 amongst Mr Booth, the council's chief executive, and senior officials in the council's education department, dealing with how the budget proposal might be presented to make it more speciously acceptable to council members, on the basis that one of those emails was already included in the production and the information contained in the others did not add materially to the content of that one. It had refused to accept a set of enclosures (document 3) discussing the potential effect of cuts in teacher numbers on grant funding available from the Scottish Government, on grounds of relevancy and proportionality, adding that it did not consider it to be in dispute that the wording of the budget proposals had been amended, or that there was a dispute as to why that had happened. Those reasons were also advanced as the grounds for refusal of a further email (document 4) from the city treasurer (i.e. an elected member of the council) to a finance official on the effect of the budget on a particular programme for disadvantaged youth, and other budget proposals, documents and templates (documents 5 to 9). It refused to accept a budget document sent to all councillors several days before the budget (document 10) and an email between the petitioner and Mr Booth (document 11) about teacher numbers dated 20 June 2024 on the basis that it considered that it already had sufficient information about these matters and did not require further background on the lead-up to the budget or on the Scottish Government's additional funding package. Finally, it refused to accept an article dealing with an unrelated criticism of Mr Booth (document 19), and a report from the Accounts Commission (document 20) dealing with the same unrelated matter, on the basis that his conduct was not the subject of the hearing and that it had no remit to consider allegations against him.

[25] It had accepted an article from "Scottish Financial News" on 2 August 2026 (document 12), on the basis that it was "relevant to claims of impact" (although it is not particularly apparent quite what impact was meant), a further email from the council's director of education (document 13) dated 10 April 2025 criticising the petitioner about a seemingly unrelated matter, and five affidavits (documents 14 to 18) from members of the council (including one from the petitioner, which referred to the other productions as providing an evidential basis for her position) addressing various matters of concern to them, and not restricted to the particular issue which provided the backdrop to Mr Booth's complaint.

[26] Upon being asked to reconsider its decision on the refused productions, on 24 February 2026, the Commission stated that, for the reasons previously given, it did not consider any of the refused documents to be directly relevant to the one limited matter before it, namely whether the petitioner's comment in the sole social media post in question amounted to a breach of the Code. It added that it would not allow submissions to be made on the refused productions at the hearing, that so far as it was concerned the matter was closed, and that in making its decision, it had taken into account proportionality and fairness to the Ethical Standards Commissioner.

[27] Counsel submitted that the excluded material was important. The petitioner maintained that her "X" post was protected by Article 10 of the ECHR, which conferred on everyone the right to freedom of expression without interference by public authorities. Any restriction on that right could only be such as was prescribed by law, proportionate and necessary in a democratic society for, in this case, the protection of the reputation or rights of others.

[28] A close assessment of the facts and circumstances would be necessary in order to determine the application of Article 10 to the post. The excluded productions demonstrated the strength of the factual basis for the value judgments in the post and showed the seriousness of the issues and the acuity of the public interest in the matters to which they related. They were thus relevant: *Lombardo* v *Malta* (2009) 48 EHRR 23 at [55], [58] and [59]. Although the procedure at a hearing held under section 16(b) of the 2000 Act was, in terms of section 17(1), to be as the Commission determined, and it could more generally regulate its own procedure in terms of Schedule 1 to the Act, the procedure which was chosen required to achieve common law standards of fairness.

[29] Where an Act of Parliament conferred an administrative power, there was a presumption that it would be exercised in a manner which was fair in all the circumstances: *R* v *Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 at 560, [1993] 3 WLR 154 at 168; *Greater Glasgow Health Board* v *Chair of the Scottish Hospitals Inquiry* [2025] CSOH 12, 2025 SC 227, 2025 SLT 205 at [33] and [34]. The Commission was required to act fairly and allow productions to be admitted into process where they were relevant evidence bearing on a material issue. The seriousness of the issues raised by the post and the underlying facts to which the post referred were not the object of any agreement, and the proceedings were adversarial. By refusing to allow the productions in issue to be used at the substantive hearing, the Commission was not allowing the petitioner to be properly heard. It had shut its ears to her proposed submissions and in so doing acted unlawfully: *British Oxygen Co Ltd* v *Board of Trade* [1971] AC 610, [1970] 3 WLR 488.

[30] The fourth question for the court was whether the Commission's decisions were vitiated by error of law, irrationality or inadequacy of reasons.

[31] The decisions of the Commission had no logic to them, and were therefore irrational: *Asim* v *Secretary of State* [2018] CSIH 41, 2018 SLT 1251 at [7] (applying an observation of Sedley J in *R* v *Parliamentary Commissioner for Administration, ex parte Balchin (No.1)* [1998] 1 PLR 1 at 13). Insofar as it sought to rely on proportionality in seeking to exclude the productions, the Commission had already imposed a limit of 75 minutes upon the speaking time at the substantive hearing which would be allowed to the petitioner's counsel, and it had been made clear by him at the procedural hearing which had taken place in February 2026 that he would require no additional time were the productions to be allowed. If the excluded productions were to be allowed, no unacceptable cost would be incurred or problems caused elsewhere in the hearing system. Any restriction supposedly based on proportionality was irrational. The evidence which had been put forward had to be subject to the scrutiny of the hearing before it could be evaluated. The only basis upon which it could properly have been excluded would have been that it could be said *ab ante* to be plainly irrelevant: *Bank Mellat* v *HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, [2013] 3 WLR 179 at [74]. The documents could have been admitted under reservation of their relevancy. If the Commission was prepared to allow evidence on the matters covered in the affidavits, it must have regarded those matters as relevant, making it impossible for the related productions to be treated as irrelevant.

[32] Further, the Commission had stated that it did not consider any of the excluded documents to be directly relevant to the question of whether the petitioner's post amounted to a breach of the Code. The Commission's published guidance on the relevancy of evidence stated (at paragraph 2.10) that material could be excluded if it was "plainly irrelevant and [had] no bearing on whether there has been a breach of the Code of Conduct". That was a high test which the Commission had not applied to the documents in question. It was

impossible for any reasonable tribunal to have reached such a conclusion about the documents in question, and if the Commission's view was that the material was unnecessary because of the content of the affidavits which it had admitted, that did not amount to the application of the test for exclusion contained in its own guidance.

[33] Finally, the reasons given by the Commission for refusing to admit the productions were inadequate. Since the decision on 24 February referred back to that of 18 February, both were the proper subject of criticism in terms of *Paton, Petitioner* [2019] CSOH 62. Merely to state that the excluded material was irrelevant and that it would be disproportionate to admit it was to state a conclusion and not a reason. The decision to refuse the productions left real and substantial doubt as to what the reasons for it were and what material considerations had been taken into account in reaching the decision: *Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345 at 348. The reasons given were not free from confusion and ambiguity: *Brechin Golf and Squash Club* v *Angus District Licensing Board* 1993 SLT 547 at 550. The Commission appeared to consider that certain matters were not in dispute, but there was no agreement of any kind as to accepted and unaccepted facts. In order to assess the true nature of the post the Commission required to read the productions which had been proffered. The reasons advanced for refusing to do so were not coherent. All of the excluded material was relevant to the petitioner's defence. The court should grant the petitioner the relief she sought.

Submissions for the respondent

[34] On behalf of the respondent, senior counsel submitted that the 2000 Act provided a remedy in respect of decisions of the Commission, including discretionary procedural decisions prior to a hearing, in the form of the eventual appeal to the Sheriff Principal (and,

from there, to the Court of Session). The 2000 Act set out a self-contained code for the investigation and determination of complaints against councillors. It established the Commission (section 8) and the Standards Commissioner (section 9). Section 17(1) provided that it was for the Commission to determine the procedure at a hearing under section 16(1), which in turn fell to be regarded as referring to any kind of hearing (including a procedural hearing) that the Commission decided to hold after receiving a report from the Commissioner. If it was correct that the Commission's decision to refuse productions rendered the eventual hearing unfair, then the Sheriff Principal could in due course correct that outcome. That an appeal was not suspensive of any sanction in the meantime (other than disqualification – section 29, or interim suspension – section 22(1)(c)) was a deliberate choice made by Parliament. Suspension of a councillor (as opposed to suspension of a member of a devolved public body) did not involve the removal of a right to remuneration – section 19(6) – although if a councillor was not permitted to attend meetings, that might have an indirect effect on the amount of payment to which he or she might be entitled. It was obvious that continued suspension could cause prejudice to a person who ultimately had a successful appeal, but that was a choice that Parliament had made as part of establishing a self-contained code for the investigation and determination of complaints against councillors.

[35] The authorities on alternative remedies were comprehensively reviewed in *McCue* v *Glasgow City Council*, the conclusion at [60] being that the issue was one of competence, i.e. that the Court of Session had no power to hear and determine an issue where the petitioner had not exhausted effective alternative remedies. That view had subsequently been followed in *Moore, Petitioner* [2015] CSOH 182 at [95] and in *McCue's Guardian* v *Glasgow City Council* [2019] CSOH 109, 2020 SLT 41 at [13] – [18], [2020] CSIH 51, 2021

SC 107, 2020 SLT 963. It had long been recognised that there could be exceptions to that general rule in exceptional or special circumstances, eg *Tarmac Econowaste*, *British Railways Board*. A common theme to the exceptions could be found in a failure in, or a need to promote, the rule of law. No such issue arose here. The petitioner complained about a routine discretionary decision in respect of a procedural matter. If her complaint was well-founded, and if the decision following any hearing was adverse to her, she could exercise her right of appeal. If her complaint was well founded, but the decision following any hearing was not adverse to her, then the matter became academic. The fact that an appeal did not have suspensive effect did not require the Court to exercise its supervisory jurisdiction. That was simply a feature of the statutory scheme.

[36] Reliance on decisions on the judicial review jurisdiction in England and Wales should be placed in context. There, the alternative remedy principle was a discretionary bar and not a matter of competency: Fordham, Judicial Review Handbook, 8th ed., §36.2; *R (Glencore Energy UK Ltd)* v *Revenue and Customs Commissioners* [2017] EWCA Civ 1716, [2017] 4 WLR 213 at [55]. However, the observations of Sales LJ in *Glencore* reflected the underlying policy considerations of the law which arose, whether the principle was cast as one of discretion or as one of competence subject to exceptional circumstances:

> "[54] … The principle does not apply as the result of any statutory provision to oust the jurisdiction of the High Court on judicial review. … The question is whether the court should exercise its discretion to refuse to proceed to judicial review (as the judge did at the permission stage) or to grant relief under judicial review at a substantive hearing according to the established principle governing the exercise of its discretion where there is a suitable alternative remedy.
>
> [55] In my view, the principle is based on the fact that judicial review in the High Court is ordinarily a remedy of last resort, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective. However, since it is a matter of discretion for the court, where it is clear that a public authority is acting in defiance of the rule of law the High Court will be prepared to exercise its jurisdiction then and there without waiting for some other remedial process to take its course.

> Also, in considering what should be taken to qualify as a suitable alternative remedy, the court should have regard to the provision which Parliament has made to cater for the usual sort of case in terms of the procedures and remedies which have been established to deal with it. If Parliament has made it clear by its legislation that a particular sort of procedure or remedy is in its view appropriate to deal with a standard case, the court should be slow to conclude in its discretion that the public interest is so pressing that it ought to intervene to exercise its judicial review function along with or instead of that statutory procedure. …
>
> [56] Treating judicial review in ordinary circumstances as a remedy of last result fulfils a number of objectives. It ensures the courts give priority to statutory procedures as laid down by Parliament, respecting Parliament's judgment about what procedures are appropriate for particular contexts. … It minimises the potential for judicial review to be used to disrupt the smooth operation of statutory procedures which may be adequate to meet the justice of the case. It promotes proportionate allocation of judicial resources for dispute resolution and saves the High Court from undue pressure of work so that it remains available to provide speedy relief in other judicial review cases in fulfilment of its role as protector of the rule of law, where its intervention is really required."

[37] Applying that approach, the present circumstances were not exceptional, such that the court required to step in to protect the rule of law and thereby cut across the statutory scheme that Parliament had put in place for the investigation and determination of complaints against councillors. The petitioner had an alternative remedy which rendered these proceedings incompetent.

[38] Assuming the petition to be competent, the decisions complained of were not an irrational or unreasonable exercise of discretion and the reasons provided were adequate. If the matters complained of were not adequately dealt with by the common law, and could only be addressed by the application of Article 6 of the ECHR, then that raised a devolution issue. However, recourse to Article 6 was unnecessary, since the subject-matter of the petition was comprehensively covered by the common law. The Commission had a broad and, subject to ordinary common law limits, unfettered discretion to determine procedure at a hearing: section 17(1) of the 2000 Act. It had made a discriminating decision about productions and that decision could be justified in terms of its own guidance document on

the subject. The question of the relevancy of the proposed productions was one for the Commission. The decision it had made was within the bounds of reasonableness, even if the court might well not have made the same decision when confronted with the same questions. Seven of the proposed documents were allowed, including five affidavits. Those affidavits fully set out the background. The petitioner described the other documents as providing the evidential basis for what she described in her own affidavit, but in the absence of any obvious challenge to the terms of that affidavit, the underlying documents were unnecessary. The other affidavits set out concerns about how the planned cuts were presented. In those circumstances, the Commission could not be said to have shut its ears to the petitioner's proposed submissions. Her position was clearly set out in the affidavits and other productions which had been lodged and she could make submissions on those.

[39] There was no obligation to allow productions to be admitted into process when the documents were relevant evidence bearing on a material issue. *Greater Glasgow Health Board* v *Chair of the Scottish Hospitals Inquiry* did not vouch such a proposition. What was held there at [33] was that fairness would ordinarily require consideration of material evidence on the core issues. Given the admission of the affidavits, and the absence of challenge to their terms, the underlying documents were not material. The petitioner's position would clearly be before the Commission as a result of the productions which had been allowed, as her declared position that no further time would be required to deal with the disallowed productions implied. In any event, the view that the disputed documents did not materially add to her position was one that was reasonably open to the Commission.

[40] Separately, the reasons provided by the Commission were adequate. Reasons did not need to be lengthy or elaborate: *West Lothian Council* v *Scottish Ministers* [2023] CSIH 3, 2023 SLT 175 at [24]. They fell to be considered in context, and in particular on the basis that

the parties to whom they were directed would be familiar with the arguments that sat behind them: *Uprichard* v *Scottish Ministers* [2013] UKSC 21, 2013 SC (UKSC) 219, 2013 SLT 1218 at [44] – [48]. What was required was that the informed reader was left with no real and substantial doubt as to what the reasons for the decision were: *Wordie Property Co*. It was clear why the disputed productions were not admitted: either the item in question had already been lodged, it did not relate to an issue in dispute, there was already sufficient information available about the issue, or it related to conduct of the Mr Booth which was not the subject of the hearing. While the petitioner might take issue with the substance of the decision, adequate reasons had been provided. In all those circumstances, the decisions taken were reasonably open to the Commission in the exercise of its broad discretion and, separately, the reasons provided for them were adequate. The petition should be dismissed.

Decision

Competency of the Petition

[41] Although it is eminently possible to imagine a different course having been taken, it is by this point in the development of the law quite clear that the suggestion made by Lord Justice Clerk Scott Dickson in *Dante* v *Assessor for Ayr* 1922 SC 109 at 121, 1922 SLT 74 at 79, to the effect that a party complaining of what had been done under some statutory procedure and who had not availed himself of statutory forms of review provided, could not have recourse to what would now be recognised as the supervisory jurisdiction of this court, has uniformly been interpreted as propounding a general test for the competency of proceedings for judicial review and (not least since and in consequence of the decision in *British Railways Board*) has been understood as advancing the proposition that recourse to the supervisory jurisdiction is a remedy of last resort, regardless of the existence of any express

or implicit ouster of that jurisdiction by any relevant statutory provision, and indeed regardless of the source of the putative alternative remedy.

[42] The language of competency is, however, difficult to reconcile with the undenied existence of what has come to be regarded as an undefined (indeed, sometimes said to be indefinable) discretionary power in the court to grant access to the supervisory jurisdiction in exceptional or special cases notwithstanding the existence of an alternative remedy of one kind or another. Competency is usually, and rightly, seen as a pure matter of law rather than as something which pertains or may be avoided in the exercise of any discretion enjoyed by the court, and the apparent inability to describe what makes a particular case exceptional or special for these purposes is at the very least suggestive of a lack of clarity as to the rationale for the exception rather than of a want of the means to express or delineate its conceptual limits. Moreover, in *Eba* at [54], the Lord President expressed the view that no question of discretion applied to the court's jurisdiction in judicial review, and in *R (Cart)* v *Upper Tribunal* [2009] EWHC 3052 (Admin), [2010] 2 WLR 1012, Laws LJ noted at [98] that the inherently and pervasively discretionary nature of the judicial review jurisdiction in England and Wales "has an elusive quality … the distinction between a legal place where the jurisdiction cannot go, and a legal place where as a matter of discretion the High Court will not send it, is permeable: even unprincipled", adding notably that "Ultimately the court is simply concerned to give the jurisdiction the reach, or edge, which the rule of law requires".

[43] One clear aspect of the law as it is currently understood is that, in order to bar recourse to the supervisory jurisdiction, the alternative remedy must be "effective" or, as the same notion was expressed rather more fully in *Niles* at [54]: "To operate as a bar the remedy must be effective and it must be efficient in terms of cost and convenience." In other

words, the remedy must be one that is apt to deal with the mischief which is properly complained of. A mischief is properly complained of in this context if it posits a situation in which there is a risk of a failure in the rule of law of the kind which the supervisory jurisdiction exists to prevent or cure, that is to say, where an inferior judicatory or administrative body requires to be kept within the proper limits and conditions of its powers or requires to be compelled properly to put them into execution (cf the well-known formulation in *Moss' Empires Limited* v *Assessor for Glasgow* 1917 SC(HL) 1, per Lord Shaw of Dunfermline at 11, 1916 2 SLT 215 at 220). One of the valuable contributions made by *Niles* at [70] was to make it clear that the question of whether an effective remedy exists is not a matter of judicial discretion, but rather "a matter of judicial evaluation or judgment". It may well be that, if it is once understood that the question of the sufficiency of the putative alternative remedy is a question of law which falls to be dealt with by reference to the claimed needs of the rule of law in the context just discussed, the need (or even the room) for an additional layer of discretionary decision-making in Scots law disappears.

[44] Be that as it may, in the present case, the mischief which is complained of is that the petitioner is to be subject to a hearing before the Commission which, she maintains, would contravene the principles of natural justice or would follow a procedure which is unlawful or at least has been arrived at irrationally. There is no dispute that she has no remedy of appeal to the Sheriff Principal at this stage, but would have to wait until after the *ex hypothesi* defective hearing had taken place and reached an adverse conclusion. That situation is not an unfamiliar one in the English authorities. It was most recently addressed in *Niles*, where the Judicial Committee stated:

> "[67] It is accepted by the parties that the Appeal Board could deal with the irregularities raised by the respondent. The Board considers that it would be unreasonable to require the respondent to go through the process of all that is

> entailed in a disciplinary hearing, in the hope that the irregularities canvassed by her could be successfully rectified upon onward appeal on a point of law to the Appeal Board. Such a process would not constitute an effective alternative remedy."

[45] Effectively the same issue was dealt with, and the same conclusion reached, in *Redgrave*, where Moses J noted:

> "[15] At the heart of the complaint of delay lies the allegation that it is a manipulation of the process of disciplinary hearings to bring disciplinary charges before a disciplinary board after an unjustified lapse of a substantial period of time. If that is well-founded, courts should surely protect a claimant from that injustice. That protection is wholly inadequate if a claimant is compelled to go through the laborious stages of appeal before the courts vindicate his right not to have to undergo an unjust hearing at all …"

[46] Those observations, with which I respectfully entirely agree, apply to the present case and entail the conclusion that the petition is indeed competent. The supposed alternative remedy is not effective in the relevant sense to address the mischief of which the petitioner properly complains. I add only that the lack of suspensive effect of an appeal to the Sheriff Principal in most circumstances has not influenced that conclusion; at the moment there is nothing that might need suspension, and there may never be. If there is, it ought to be possible for the issue to be dealt with promptly by the Sheriff Principal, and if for any reason that did not prove to be the case, the availability of the statutory appeal might well be deemed insufficient to prevent application to this court at that stage for the provision of a suspensive remedy. I understand that line of thought to have been the one underlying the decision in *Kennedy* noted above.

Article 6 of the European Convention on Human Rights

[47] I consider that the right to participate as an elected member of a representative assembly is as a matter of principle a civil right within the meaning of Article 6, as a fundamental element of the ability to participate fully in a democratic society. I was not

particularly assisted in reaching that conclusion by any of the authorities to which I was referred. I do not consider that acting as a councillor is directly comparable to the exercise of a profession, being the issue to which those authorities were addressed. The former position is achieved as a result of the making of a choice on the part of fellow citizens acting for whatever reasons may appear good to them, and the earning of allowances and the receipt of other emoluments is but an incidental aspect of the role and (it is at least to be hoped) not a material reason for seeking to obtain it. The exercise of a profession is, at least in the usual case (and in the circumstances considered by the authorities) a chosen way of earning a living by the deployment of one's skills and experience in a particular field of human endeavour, and although participation in a profession is usually subject to disciplinary rules and principles which may to some extent be compared with the Councillors' Code of Conduct, I do not consider that that analogy sufficiently justifies the equation of the two situations for the purposes of Article 6; the background circumstances against which the respective roles are performed and the basis upon which payment in respect of them is received differ to such an extent as to make any such comparison inapposite.

[48] I deal with these matters briefly because it was acknowledged that the sole reason for seeking to appeal to Article 6 in the present case was to enable resort to the observation in *Van de Hurk* noted above, that a tribunal conducting proceedings subject to the Article is under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties. However, in my view it cannot seriously be doubted that a judicial or quasi-judicial tribunal subject to the common law of Scotland is subject to a like duty, and that there is no reason to suppose that any greater content is given to that duty by Article 6 than by the common law.

Substantive criticisms of the Commission's decisions

[49] The core criticism of the Commission's decisions in this case is that they will have the effect of depriving the petitioner of the opportunity to be heard in relation to matters upon which she wishes to be heard in connection with the proceedings against her, without adequate justification. The evidence which she wishes to put forward has been refused by the Commission on the ground of its supposed irrelevancy to the matters which are properly the subject of those proceedings. Although the Commission has published guidance as to how it may deal with matters of evidential relevancy, it should not be forgotten that the question of whether particular evidence is relevant to an issue which the Commission has to determine is in the final analysis a matter of law and as such cannot merely be one to be dealt with entirely as the Commission sees fit.

[50] The Commission guidance document (the full text of which appears as an appendix to this opinion) correctly identifies the concept of relevancy as follows:

> "2.1 The concept of relevancy is fundamental to the law of evidence. Material which a party intends to present as evidence must have a close and logical link with the issues being determined in the case at hand. The ultimate test of relevance is whether the material presented has a reasonably direct bearing on the subject or makes a matter which requires proof more or less probable."

[51] Although section 17(1) of the 2000 Act gives the Commission a discretion as to the regulation of procedure at a hearing under section 16(b), a discretion as to procedure (which would cover such things as when and in what manner decisions as to relevancy will be taken) cannot be taken as extending to a substantive right to refuse to hear or consider evidence which, in point of law, is clearly relevant to the matter requiring determination and thus constitutes material which the party putting it forward is entitled to have taken into account. It follows that the opening sentence of paragraph 1.3 of the relevancy guidance ("The issue of relevancy of evidence is a matter for the Hearing Panel's discretion and it is

up to the Hearing Panel alone to determine what evidence, if any, must properly be excluded as irrelevant") states the room for manoeuvre lawfully available to the Commission rather too widely.

[52] That said, views may reasonably differ as to whether a piece of evidence is relevant or irrelevant in any particular case. There can be degrees of relevance, and the nature of the underlying substantive decision that has to be made and the proportionality of admitting substantial quantities of peripheral evidence are all matters that require to be factored in to what may well be a difficult question in at least some circumstances. The degree of scrutiny which the rule of law requires to be applied to a decision of the Commission does not extend to the court simply substituting its views on relevancy for those of the Commission. The questions on review will be whether the Commission proceeded on a proper basis as to the basic legal principles to be applied, and then applied them; whether it explained its reasoning satisfactorily; and ultimately whether it reached a decision falling within the relatively generous ambit of decision-making open to it.

[53] At the outset, some basic ground rules for decisions on relevancy in a case like the present can be identified and briefly stated. A primary matter which requires carefully to be taken into account when excluding material from consideration at a substantive hearing of the kind in question here is the trite but fundamentally important issue that justice should not only be done, but should manifestly and undoubtedly be seen to be done. In this context, that means that any doubt of substance about the relevancy of proffered material should, subject to the issue of proportionality shortly to be discussed, be resolved in favour of admitting it. While it is too optimistic to suppose that all interested parties will agree with the ultimate decision to be made by the Commission even if the procedure adopted to arrive at it is beyond reproach, a determination of any judicial or quasi-judicial tribunal

gains objective legitimacy by being the product of consideration of the material which parties wish to put before the tribunal rather than by being the result of the exclusion of such material. Further, the exclusion of material which might or might not be relevant to a live issue before a decision-making body risks creating the impression, accurate or not, that the issue has been pre-judged, a situation which is strenuously to be avoided. There is no express indication that the Commission had any such considerations in mind in making its decisions as to relevancy in the present case, and its refusal to admit various documents of at least arguable materiality suggests that it did not.

[54] The exclusion of documents which on no reasonable view are relevant to the matters for determination by the tribunal requires no further justification. If, however, documents are of arguable materiality, they should be admitted for the reasons already given unless to do so would involve the creation of detriment (most obviously in terms of time and expense) which would be disproportionate to the potential benefits, tangible and intangible, flowing therefrom. Although the Commission's decisions referred to proportionality, no very obvious indication of where and why the balance between these considerations was struck, either in general or in relation to particular documents, was provided.

[55] Finally as a matter of general observation, in a case where Article 10 of the ECHR is engaged – and there is no dispute that it is engaged in the petitioner's case – the exercise which will be required of the Commission in determining the potential relevancy of material which a party wishes to place before it will necessarily involve a careful consideration of the possible impact of that material on the detailed examination of the background circumstances to the form of expression which is the subject of the complaint that will inevitably be necessary, not least in the context of determining the proportionality of any interference with the fundamental right to freedom of expression. Unfortunately, there is

nothing in the Commission's explanation of its reasoning which suggests that it took account of this aspect of the particular relevancy issue before it, despite it having been the subject of express submission by counsel between the initial decision and its ultimate confirmation.

[56] Turning to the specific documents which were refused as productions with the foregoing observations in mind, recalling that the Commission undoubtedly enjoys a certain margin of appreciation in determining questions of relevancy within the framework identified, and refraining from commenting in any more detail than is entirely necessary as to quite how matters may transpire in the course of the substantive hearing before the Commission: document 1 already formed part of the production before the Commission and it was thus quite justified in refusing to accept it again in duplicate form. Document 2, the email chain amongst officials discussing the presentation of the budget, objectively appears to be potentially relevant to demonstrating exactly what happened and who contributed in what way to the decision as to how to present the proposed budget to council members, being issues which must inevitably feed into the Article 10 aspects of the question which the Commission will have to address. The view seemingly reached by the Commission, that one email in the chain had already been produced and the others did not fall to be regarded as materially adding to its content, is not possible to accept as sufficient when the matter is viewed in that context. Document 3 is eminently capable of informing the Commission of the potential significance of the proposed budget cuts, and is in turn thus of evident potential use in at least the proportionality element of the Article 10 assessment of the petitioner's actions. The same applies to document 4.

[57] Documents 5 and 6, which together extend to over 70 pages, are copies of the overall City Government Budget Proposals 2024 - 27 and the Joint City Government and Scottish

Green Party Budget Proposals 2024 – 27 respectively. Although it appears that the petitioner's interest in them is restricted to certain very limited passages, it is not apparent that any point relevant to the matters before the Commission which emerges from these documents could not be made with equal or indeed greater force by reference to documents 7 to 10, which are respectively pre- and post-"softening" budget templates specific to education services, a document estimating cuts to education, and a document sent to councillors generally shortly before the budget, all of which appear to be of obvious potential relevance to exactly what happened and the importance of the proposed cuts, being matters with which the Commission will have to deal if it is adequately to consider and dispose of the questions before it. In those circumstances the Commission was entitled, on proportionality grounds at least, to reject documents 5 and 6, but not documents 7 to 10.

[58] Document 11, the email exchange between the petitioner and Mr Booth, is concerned with the latter's views as to whether the budget was deliverable in the sense that it would leave schools operationally viable. Although the general subject matter of the exchange is cuts to teacher numbers consequent upon the budget, the petitioner's post under examination did not suggest that Mr Booth had put forward a budget which either was incapable of implementation or which he believed had that character, and it is accordingly not possible to see what relevancy the exchange has to the matters properly before the Commission, although it is fair to observe that its rejection by the Commission was on the ground that it was surplusage about relevant matters rather than that it was irrelevant in itself. In any event, it lay within the lawful powers of the Commission to reject the document. Documents 19 and 20 deal with matters which are plainly entirely collateral at best to the criticism of Mr Booth advanced by the petitioner in her "X" post and the Commission was right to reject them.

[59] In summary, then, it may clearly be determined that it lay outwith the lawful powers of the Commission, properly informed as to the applicable principles (and all the while making full allowance for matters on which opinion might reasonably differ), to reject documents 2, 3, 4, 7, 8, 9 and 10, and its decision to do so falls to be reduced. Its decision to reject documents 1, 5, 6, 11, 19 and 20 fell within the ambit of its powers as they require properly to be understood.

[60] The subsidiary criticisms of the Commission's decisions may be dealt with briefly. The suggestion that it erred in law by not following its own relative guidance cannot be sustained, essentially because the document is couched in such discursive terms that, when read as a whole (as it must be) one or other of its passages could be found to justify almost any decision on relevancy which the Commission chose to take. I have already indicated that the guidance document cannot, in any event, be regarded as setting out correctly the lawful ambit of the Commission's powers to admit or refuse tendered productions. Whether it is actually capable of performing its intended function as "guidance" in its present form is another and wider question, but one which the court does not require to answer.

[61] As to the challenge to the reasons stated by the Commission for its decisions, there is certainly something of an apparent lack of internal logic in those statements, most notably emerging from the acceptance of the affidavits put forward by the petitioner but the rejection of documentary material no less relevant to the Commission's substantive task than some of the issues raised in those affidavits. It may be, however, that the Commission regarded material effectively in the form of witness statements as forming a different category of production which it was less easy or appropriate to reject out of hand (although, again, it did not in terms say so). Some observations about the refusal of particular documents cannot be reconciled with a true understanding of the potential significance of

those documents or the extent to which the matters to which they related were clearly uncontroversial. Other observations seem inapposite in relation to the documents about which they were made, but more applicable to other documents in relation to which they were not stated. There is also force in the petitioner's submission that some stated reasons are simply conclusions without the reasons for those conclusions being either articulated or self-evident. Had it been necessary to do so, I would have found that the stated reasons failed the *Wordie* test, in that they left an informed reader in real and substantial doubt as to what the basis for the decisions was. However, given that the exercise necessary to identify the lawful limits of the Commission's powers of decision has indicated clearly the documents which ought to have been admitted, nothing would be gained by dealing with the reasons challenge separately as a ground for reduction of the Commission's decisions.

Disposal

[62] I shall sustain the second and fourth pleas-in-law for the petitioner to the extent of reducing the Commission's decisions to refuse to admit documents 2, 3, 4, 7, 8, 9 and 10 as productions, and repel the respondent's pleas.

Appendix

Commission's Guidance on the Relevancy of Evidence

1. THE HEARING RULES

1.1 The Standards Commission's Hearing Rules state that, while parties to a Hearing are entitled to be heard and to call witnesses, the Hearing Panel may decline to hear evidence that it does not consider to be relevant to the question of whether there has been a breach of the relevant Code of Conduct (Code).

1.2 It is in best interests of all parties, as well as in the interest of justice and the public interest, that any issues before the Hearing Panel are determined in a proportionate, just and fair manner. This means that the Hearing Panel will not wish to hear irrelevant or unnecessarily repetitious evidence and submissions, as doing so could extend a Hearing needlessly, with the associated time and cost implications.

1.3 The issue of relevancy of evidence is a matter for the Hearing Panel's discretion and it is up to the Hearing Panel alone to determine what evidence, if any, must properly be excluded as irrelevant. While the Standards Commission understands that a Respondent has a right to present a full defence, should they wish to do so, this does not mean that a Hearing Panel can or should hear or consider irrelevant or repetitive evidence and submissions that will not assist it in its decision-making.

1.4 For these reasons the Standards Commission recommends that the Respondent and the Ethical Standards Commissioner (ESC) try to agree a Joint Statement of Facts outlining the factual matters that are not in dispute. In addition, the Standards Commission will invite both the Respondent and ESC to attend a pre-Hearing meeting so that any procedural issues or questions about the relevancy of any evidence can be discussed and resolved before the Hearing.

2. RELEVANCY

2.1 The concept of relevancy is fundamental to the law of evidence. Material which a party intends to present as evidence must have a close and logical link with the issues being determined in the case at hand. The ultimate test of relevance is whether the material presented has a reasonably direct bearing on the subject or makes a matter which requires proof more or less probable.

2.2 The role of the Hearing Panel is to determine whether, on the balance of probabilities, a breach of the Code has occurred. If the Hearing Panel find the Respondent has not contravened the Code, the case will be dismissed, and the Hearing concluded.

2.3 If the Hearing Panel finds that the Respondent has breached the Code, it will proceed to hear any representations in respect of mitigation from the Respondent.

2.4 The overarching aim of the Hearing Panel is to allow the matters before it to be clarified in a proportionate, just and fair manner. The Panel's remit extends only to considering whether the Respondent has breached the Code in respect of the issues of complaint it is to determine and, if it has found a breach to determine the appropriate sanction to apply. This means the Panel has no remit to consider extraneous matters such as the conduct or performance of others.

2.5 In order to be relevant to the question of whether there has been a breach of the Code, any evidence presented by the parties and witnesses must have a close and logical link to the conduct that is alleged to amount to a breach of the Code and any facts concerning this that are in dispute.

2.6 Before a Hearing, the parties will be asked to provide information about their proposed witnesses and the general nature of the evidence that each can provide. The Hearing Panel will be provided with this information so it can decide whether the proposed evidence will be relevant to its considerations. If it declines to hear from a witness, the parties will be advised accordingly. Similarly, the Hearing Panel will be provided with written evidence that the parties have submitted for inclusion in the productions to be considered as part of the Hearing Panel's decision-making. The Hearing Panel will be provided with information about the nature of this written evidence so it can make a decision on whether the proposed evidence will be relevant to its considerations. If it declines to accept any written evidence, the parties will be advised accordingly.

2.7 If the Hearing Panel determines there has been a breach of the Code of Conduct, any evidence presented by the parties and witnesses may be taken into account in the imposition of an appropriate sanction if it has a close and logical link to the question of how serious the breach was, its impact, and whether there are any aggravating or mitigating factors.

2.8 Whether evidence is relevant will depend on the individual facts of each case. The role of the Hearing Panel is to:

- hear, assess, test and weigh witness evidence and submissions presented by the parties; and
- deal with any procedural matters which may arise in an impartial and fair way.

2.9 While it is not for the Hearing Panel to advise the parties on how they should present their case, it is for the Hearing Panel to determine whether any issues or facts in dispute have a bearing on the issue to be determined. That is a question of judgement, and will involve considering matters of proportionality, fairness and justice.

2.10 If any lines of questioning, or evidence sought to be presented, by the parties are plainly irrelevant and have no bearing on whether there has been a breach of the Code, the Hearing Panel may exercise its discretion and prevent, either in advance of or at the Hearing, such evidence being presented, on the grounds of relevancy.

2.11 If either party consider any lines of questioning or evidence sought to be presented by the other party is irrelevant, they can make submissions to the Hearing Panel as to the relevancy of such evidence to the allegation. The Hearing Panel will then decide whether to permit such evidence to be led or to continue to be led.

2.12 In determining the degree of latitude permitted, the Hearing Panel will take into consideration evidence presented by the other party. For example, in order to refute the allegation(s) made, a Respondent may adopt a position that it is necessary for them to lead their own witnesses in response to evidence led by the ESC. Similarly, the ESC may adopt a position that it is necessary to lead witnesses in response to evidence led or to be led by the Respondent.

2.13 When making decisions on relevancy, the Panel will also consider:
- the nature and seriousness of the alleged breach; and
- the extent of other evidence that has been provided or that will be led to support the party's position. This is to ensure evidence is not being led, and submissions are not being made, that are repetitious and entirely disproportionate to the issue to be considered. For example, if the Respondent does not dispute that they did not declare an interest at a meeting, and the minutes of the meeting record that they participated in the consideration of the agenda item in question, it may not be necessary to hear evidence, from other individuals present, as to whether they declared any interest. Instead, the parties may simply be asked to make submissions on whether the Respondent had a declarable interest, in terms of the Code.

2.14 Examples of evidence and submissions that may be excluded as irrelevant include (but are not limited to) information:
- relating to the Complainer's motives;
- concerning the Respondent's conduct that does not form part of the alleged contravention of the Code being considered (unless it concerns a previous breach of the Code by the Respondent or is further evidence of a course of conduct).

3. UNREPRESENTED PARTIES

3.1 It is often the case that a Respondent conducting proceedings on their own behalf will be afforded some flexibility in the way in which that case is conducted. The extent of any such flexibility should not be to the detriment of the proceedings as a whole. In all circumstances, the Hearing Panel will ensure that a case is dealt with in a proportionate, fair and just manner. 3.2 The Standards Commission has produced Guidance for Unrepresented Respondents. This Guidance and the Hearing Rules can be found on the Standards Commission's website at http://www.standardscommissionscotland.org.uk/cases/hearing-rules.