

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**DB's Application [2014] NICA 56**

**IN THE MATTER OF AN APPLICATION BY DB FOR JUDICIAL REVIEW**

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**Before: Morgan LCJ, Girvan LJ and Weir J**

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**MORGAN LCJ (giving the judgment of the court)**

[1] The appellant appeals against the decision of Mr Justice Treacy given on 28 April 2014 whereby he granted the respondent's application for judicial review of the policing by PSNI of certain parades which had not been notified in accordance with the requirements of the Public Processions (Northern Ireland) Act 1998 ("the 1998 Act"), finding that the PSNI had facilitated illegal and sometimes violent parades with the effect, for a period of time at least, of undermining the 1998 Act in breach of their duties under section 32 of the Police (Northern Ireland) Act 2000 ("the 2000 Act") and in breach of the respondent's Article 8 rights under the Convention. The respondent submitted an amended Order 53 statement to accord with the manner in which the hearing developed.

**Background**

[2] The respondent is a resident of the Short Strand area of Belfast. On 3 December 2012 Belfast City Council decided to fly the Union flag from the City Hall on 15 designated days rather than every day. A number of protesters made their way to City Hall and there was disorder among the crowd as a result of which damage was caused to the building and injuries were sustained by police officers and security staff. When the disorderly crowd was dispersed some of their number attempted to attack homes in the Short Strand estate as they were returning to East Belfast.

[3] On 4 December 2012 the PSNI established Operation Dulcet with ACC Kerr as its Gold Commander. As a result of the decision on 3 December 2012 there were spontaneous protests in various parts of Northern Ireland some of them disorderly.

A decision was made that protesters should not be allowed to enter Belfast City Centre because of the risk that disorder would give rise to an Article 2 risk. Silver Commanders were advised that they should devise tactical plans to establish the most appropriate place to stop such protests. Between 6 and 8 December that decision was changed. It was judged that the risks associated with preventing the protesters proceeding to the City Centre were too great. The Events Policy Book indicated that it was anticipated that parades might converge on the city centre from various locations. This presented a considerable challenge to police resources. Intelligence also indicated increased Article 2 risks if such a protest were not permitted. The Events Policy Book on 7 December 2012 recorded that it was considered that there was “a need to try and facilitate some form of protest at Belfast City Hall to allow for some venting of anger and community tension on this issue”.

[4] On Saturday 8 December 2012 a group of protesters formed at the Constitution Club on the Newtownards Road intending to proceed into Belfast City Centre via Bridge End, Ann Street and the Queen’s Bridge. That route took the parade close to the Short Strand residential area. In line with the tactical decisions which had been taken in the days immediately preceding the protest no attempt was made to prevent the parade proceeding to Belfast City Hall and returning to East Belfast, after a protest demonstration, along the same route. Police gave a warning to protesters that the parade was illegal by way of a loudspeaker. Chief Inspector Dodds stated that because of the size and aggressive nature of the protesters he stayed in his vehicle while giving the warning rather than standing outside. There was no specific evidence of the use of violence affecting residents of the Short Strand on this date but there is evidence from residents that generally in the course of such marches sectarian abuse was shouted and many of the older residents in particular felt uneasy and concerned because it brought back memories of The Troubles. There is no complaint about the policing operation in respect of this parade and protest.

[5] Further parades from the Newtownards Road to the City Centre and back took place along the same route on 15, 22 and 29 December 2012. Although there have been general averments that these parades gave rise to violence, there was no specific complaint of disorder or violence in connection with those parades although the general evidence that sectarian abuse was shouted applied in those cases also. On 5 January 2013 the numbers protesting in Belfast were considerably larger than previously with at least 1000 persons involved; of these, 500 came from East Belfast, 300 from South Belfast and 200 from North Belfast. After a protest at the City Hall the contingent from East Belfast returned along the usual route. Upon arrival at the Short Strand the protesters began waving a tricolour and this was held up to the barriers between them and the nationalist residents. A number of missiles were thrown by the loyalists into the nationalist area. A small group of nationalists responded with a small number of missiles. At that point the loyalist protest stopped and had to be moved on by police past Short Strand and St Matthew’s Church. The violence against police intensified resulting in the deployment of water cannon and Attenuated Energy Projectile use. One resident stated that she could not go to a

friend's house on the Albertbridge Road as there was too much disorder in the area at the time.

[6] On 7 January 2013 there was a further similar parade. On the return leg rioting by loyalist protesters occurred at the Short Strand interface as a result of which the same resident took her child to her mother's house which was in the centre of the Short Strand and therefore less likely to be affected by any protests or riots. The resident was also advised by neighbours that petrol bombs were being thrown into the area and that it was advisable to move the car. Another house was struck by missiles as a result of which a resident left the area with her son for safety. There is no evidence of the damage which was caused by these events.

[7] As a result of these incidents Chief Superintendent McCrum, District Commander for Central, South and East Belfast, and Silver Commander in Operation Dulcet, met with representatives of the unionist/loyalist community on 10 January 2013. He said that if an unnotified parade occurred on 12 January then in the interests of maintaining public safety he intended to stop the procession from returning to the lower Newtownards Road by way of Bridge End. The procession could return to the lower Newtownards Road via the Queen Elizabeth II Bridge and Middlepath Street which would maximise the distance between the flag protesters and the Short Strand community, thereby enhancing the public safety of the residents within the Short Strand. He sought the co-operation of those at the meeting to avoid a stand-off at the Queens Bridge.

[8] On 12 January 2013 a procession made its way from East Belfast into Belfast City Centre on the usual route without incident. At the conclusion of the protest at City Hall the protesters formed up to make their way back to East Belfast. Police used loudhailers to advise the protesters that they would not be allowed to return across the Queens Bridge. A total of 32 tactical support group (TSG) units were deployed in support of the policing operation and a further 102 police officers performed a range of functions including traffic management, neighbourhood support and criminal justice tasks. The parade stopped at the Queens Bridge and there was a short engagement with police officers. About a minute later a number of people broke away from the protest and ran into Oxford Street in the direction of the Markets. This caused a breakdown of the entire group. TSG units were deployed to prevent an attack on the Markets and other resources sought to move the protesters along East Bridge Street and past the Short Strand interface. There was an exchange of missiles between the flag protesters and those within the Short Strand. The respondent states that flag protesters entered the Short Strand through various entrances along the Albertbridge Road and attacked people's homes with bricks, stones, golf balls and ball bearings on this occasion. Missiles were thrown at police as they attempted to move the protesters away from the interface towards the Albertbridge Road. A police line came under sustained attack from masonry, fireworks, golf balls and other missiles and vehicles were attacked with flagpoles. Water cannon were deployed in the area to push the protesters back and police fired

six AEPs. Order was gradually restored between 5:30 PM and 8 PM and the crowd was dispersed by 9 PM. During the course of this violence 29 police officers were injured with five requiring hospital treatment.

[9] Senior police officers met with representatives of the community on 16 and 18 January 2013 in anticipation of a further protest on 19 January 2013. During that week approximately 30 police landrovers had been placed in and about the Short Strand area in order to reassure residents and provide protection. On 19 January there was a very heavy policing operation involving 600 PSNI personnel. The nature of the policing operation was explained to local representatives at meetings earlier that week. The priority was to ensure public safety and protect the Short Strand community and the Markets area. The procession passed off peacefully although police noted that disorder at the bottom of the Newtownards Road was only prevented through the intervention of 30 to 40 masked persons who were believed to be associated with loyalist paramilitaries. A further similar parade occurred on 26 January 2013 but there were no specific incidents at the interface. There was a confrontation in Bloomfield Avenue close to the Alliance Party offices.

[10] The respondent sent a pre-action protocol letter on 28 January 2013 complaining of the failure to prevent the parades. The PSNI responded on 31 January. The essence of the PSNI response was contained in the following paragraph:

“Professional policing decisions dealing with public order issues are extremely complicated and require the balancing of a wide range of competing interests. As recognised by the European Court of Human Rights in its decision on the admissibility in PF and EF v United Kingdom (23 November 2010) to require "the police in Northern Ireland to forcibly end every violent protest would likely place a disproportionate burden on them, especially where such an approach could result in the escalation of violence across the province. In a highly charged community dispute, most courses of action will have inherent dangers and difficulties and it must be permissible for the police to take all of those dangers and difficulties into consideration before choosing the most appropriate response.”

[11] On receipt of the response the respondent applied for leave to issue judicial review proceedings seeking an order quashing the PSNI's failure to provide an assurance that they would take action to prevent any parade planned to travel past Short Strand from the Newtownards Road to Belfast City Hall on Saturday 2 February 2013 or on any subsequent date from taking place. The respondent also

sought a declaration that the PSNI's failure to take steps to prevent such parades from taking place undermined the 1998 Act, was in breach of section 32 of the 2000 Act and was incompatible with the respondent's Article 8 rights.

[12] Further unnotified parades occurred on 2 and 9 February 2013. On both occasions the return was effected via Middlepath Street. On 2 February 2013 an element in the crowd stopped at the interface junction with Bryson Street for almost 10 minutes but no trouble occurred. On the following week no disorder took place. ACC Kerr stated that on 14 February 2013 as part of an ongoing strategy review it was decided that the parades should be stopped after 23 February 2013 when a notified parade in honour of two UDR men was planned. The considerations affecting this were the low numbers participating in the protest, the views of the Catholic nationalist residents' community that the protest should be stopped, the wider attitude in the Protestant Unionist loyalist communities that the protest had run its course and the assessment that the likely reaction from loyalists would not be extreme as had been anticipated from in or around 6 December 2012. The last parade on 15 February 2013 did not give rise to any disorder.

### **Statutory scheme**

[13] An Independent Review of Parades and Marches by a committee under the chairmanship of Dr Peter North reported in January 1997. The North Report was prepared against the background of very considerable public disorder and violence arising from a decision to initially restrict the route of a parade from Drumcree church to Portadown and the subsequent decision to permit the parade to walk along Garvaghy Road. At that time the Public Order (Northern Ireland) Order 1987 ("the 1987 Order") governed the holding of processions and meetings. By virtue of Article 3 (1) of the 1987 Order a person proposing to organise a public procession was required to give 7 days' written notice of that proposal to the police. The notice had to contain details of the proposed procession including its route and numbers. It was an offence to organise or take part in a procession in respect of which the notice requirements had not been honoured.

[14] Article 4 of the 1987 Order provided that a senior police officer could give directions imposing on the persons organising or taking part in the procession such conditions as appeared to him necessary to prevent disorder, damage, disruption or intimidation. The power to impose conditions was dependent upon the senior police officer reasonably believing that the parade or procession may result in serious public order, serious damage to property or serious disruption to the life of the community or that the purpose of the organisers was to intimidate members of the public. The police's entitlement to impose conditions was available whether or not the parade was notified. The power to prohibit public processions was exercisable by the Secretary of State on the basis that the powers in Article 4 were not sufficient to prevent disorder, damage, disruption or intimidation.

[15] It is clear, therefore, that primacy both in terms of the conditions on which permission to parade would be granted and the enforcement of such conditions lay with the police. It is also apparent that the overriding considerations were the issues of serious public disorder, serious damage to property or serious disruption to the life of the community. The North Report concluded that the main criticisms of the 1987 Order were that it focused on public order and failed to recognise the rights of peaceful assembly and the rights of others in the community, it placed a premium on threats of disorder and it had been implemented inconsistently with a lack of transparency and insufficient rigour.

[16] The North Report recommended the establishment of the Parades Commission which would have responsibility for determining whether permission to parade should be granted and on what conditions. There was to be an emphasis on mediation and understanding. It was recommended that there should be three means by which cases were brought to the Commission's attention, first by the police, second by the Parades Commission itself and third by the public. The North Report recognised that there would be last-minute and unforeseen developments on the day which would have to be dealt with by police and in those circumstances it was recommended that the police should retain the power to intervene on public order grounds as provided for in the 1987 Order.

[17] The North Report was implemented in part by the 1998 Act. The Parades Commission was established by section 1 of the 1998 Act. Section 6 required a person proposing to organise a public procession to give 28 days notice, or such notice as was reasonably practicable if shorter, in writing to police setting out the route, anticipated numbers and other details. PSNI were required to give a copy of any such notice immediately to the Commission. It is common case that a copy of such a notice from PSNI had to be received before the jurisdiction of the Parades Commission was engaged. It can be seen, therefore, that this was the first way in which the recommendations of the North Report were not implemented. Parades could not be brought to the attention of the Commission by the Commission itself or the public. If the parade was unnotified the Parades Commission had no role in its control or management.

[18] Section 6(7) of the 1998 Act made it an offence to organise or take part in a public procession in respect of which the notice requirements had not been observed. Corresponding provisions were contained in section 7 dealing with protests associated with public processions. Section 8 provided for the imposition of conditions on proposed public processions. Only the Commission was empowered to impose conditions and that could only arise in respect of lawfully notified parades where a copy of the notification had been given to the Commission. It is clear that the architecture of the North Report had envisaged a much wider ambit of parades in which the Commission would be involved and in respect of which it could seek to promote understanding and mediation. The recognition by the North Committee that there should be a specific role for police in the legislation in limited

circumstances was not implemented. The power contained in Article 4 of the 1987 Order, which could have been used to police unnotified parades, was repealed and not re-enacted. Section 9 provided a right of review by the Secretary of State if the Chief Constable was dissatisfied with a Commission decision and section 10 gave the Secretary of State power to ban processions of particular types for a period. We were told that the latter power had not yet been used.

[19] The North Report recognised that under its proposals there would still remain that cohort of parades that were last minute or unforeseen. It considered that in those circumstances the parades should be controlled by police using their public order powers. The problem for police, which the circumstances in this case demonstrate, is that the partial implementation of the North Report has left a larger cohort of parades outside the Parades Commission's jurisdiction. In particular, the PSNI have to deal with unnotified parades using their available public order powers including the right of arrest in respect of the organisation or participation in such parades and the prevention of such unlawful parades in accordance with the duty under section 32 of the 2000 Act to prevent crime.

### **The learned trial judge's conclusions**

[20] Treacy J said Parliament had made it explicitly clear in the 1998 Act how contentious parades should be regulated and added that a central feature of the scheme was the mandatory requirement for advance notice of a public procession. A breach of the notice requirement was plainly inimical to the will of Parliament as expressed in the statutory regime which was reinforced by the fact that it was a criminal offence to organise or take part in a procession when notice had not been given. It was common case that the regular public processions which gave rise to the impugned policing operation were not notified to the police in accordance with the provisions of section 6 of the 1998 Act and that the parades were therefore illegal. He stated that these processions had given rise to disorder on at least a weekly basis.

[21] He accepted that operational discretion was important to the police and that no court should unreasonably interfere with that operational discretion or make practical policing impossible. Operational discretion could not be invoked, however, by the police in order to give them immunity from liability for everything that they did. He accepted the respondent's submission that in the period following 8 December 2012 until in or about the start of January 2013 ACC Kerr did not address himself to the question of whether to stop the weekly parade, nor did the police behave proactively, or at all, in relation to prosecuting those organising and participating in the parades. He further accepted that at whatever stage in mid-January ACC Kerr addressed himself to the question of stopping the parade, instead of recognising that he had ample powers to deal with the parade either by stopping the parade and/or arresting those participating in the parade, he mistakenly considered that the 1998 Act hampered his ability to stop the parade and his ability to police the situation effectively.

[22] In his affidavit ACC Kerr stated that the risks associated with stopping protestors from protesting in the city centre were too great. The learned trial judge said this decision was focussed on the events of 8 December and thereafter there was a complete lack of information as to why the police repeatedly permitted violent loyalist protestors to participate in illegal marches both to and from Belfast City Centre on every Saturday between 8 December and 14 February and why they permitted those marches to pass the Short Strand given that the marches were illegal and associated with serious public disorder, serious disruption to the life of the community and were likely to have a serious adverse impact on relationships within the community. As set out above, the extent of the public disorder varied considerably over the relevant period.

[23] Treacy J considered that ACC Kerr misdirected himself in as much as he considered that either the 1998 Act and/or the human rights legislation hampered his ability to stop the parade, arrest those involved and efficiently and effectively police the illegal parades. He said that he had been told that operational reasons would not have prevented the enforcement of a Parades Commission determination imposing conditions on any parade. In that case operational reasons should not have prevented the PSNI from taking comparable measures in respect of illegal un-notified parades. The transcript of the exchange with counsel on this issue was perhaps more ambiguous. He concluded that the impugned policing operation during the period complained of was characterised by unjustified enforcement inertia.

### **The submissions of the parties**

[24] These can be fairly briefly stated. The appellant submitted that the learned trial judge had departed from the clear line of authority indicating that the police service has an area of discretionary judgement in the realm of operational decisions concerned with public order. Although acknowledging the legal principles the learned trial judge declined to apply them.

[25] Secondly, it was submitted that within the affidavits and exhibited material there was ample evidence to demonstrate that the police considered whether the weekly parade should be stopped. It was accepted that there was no express indication on each and every week as to whether the parade should proceed but reading the documents as a whole in *bonam partem* it was clear the police were consistently analysing how to respond to this difficult public order situation.

[26] Thirdly, the learned trial judge took an adverse inference from the fact that ACC Kerr had taken legal advice in relation to the powers of the Parades Commission in respect of unnotified parades. He concluded that ACC Kerr was labouring under a material misapprehension as to the proper scope of police powers and the legal context in which they were operating. The appellant submitted that the



learned trial judge relied on an incomplete portion of an article in the Irish News and misunderstood the nature of the legal advice which was being sought. In any event, none of this material justified the conclusion that ACC Kerr had misdirected himself.

[27] Fourthly, the learned trial judge had placed emphasis upon a concession on behalf of the Chief Constable that if the Parades Commission had been in a position to make a determination that determination would have been enforced come what may. On that basis he concluded that an unnotified parade should have been dealt with in the same way. The appellant submitted that the transcript demonstrated that no concession had in fact been made in the terms suggested by the learned trial judge.

[28] The respondent supported the decision on the basis of the reasoning of the learned trial judge. The respondent also appealed in relation to the refusal by the learned trial judge to allow an amendment to the Order 53 statement seeking a declaration that the failure of the PSNI to take action to prosecute those participating in marches carried out by loyalist protesters, which adversely impacted on nationalist residents in the Short Strand, contrasted with the PSNI's willingness to act promptly in prosecuting those who had participated in an illegal Republican protest. It was contended that this amounted to a breach of Article 14 read in conjunction with Article 8 ECHR and also amounted to a breach of section 76 of the Northern Ireland Act 1998. The respondent lodged a respondent's notice maintaining that the decision should in any event be upheld on this ground. The learned trial judge concluded that the application to amend came too late in the day and refused to allow it.

[29] The basis for the discrimination case was twofold. First there was an affidavit from Martin Duffy stating that he had been prosecuted for participating and organising three parades which had not been notified. For the first of those, which took place on 23 April 2011, he had been arrested approximately one month later. He says that he was charged at that time although he also says that he received a summons in respect of these matters dated 6 October 2011. He was convicted of organising and participating in the parade. In respect of a second unnotified parade on 23 April 2011 he attended for interview on 24 August 2011 approximately 4 months later and was convicted on 7 March 2012. He also refers to another charge of organising and participating in a public procession on the same day in respect of which he was not arrested but attended for interview voluntarily. He has given no indication as to the date of his voluntary attendance. The charges were withdrawn as the defendant agreed to be bound over. It is agreed that the policing approach of following up the charging and prosecution of the offenders was the same for both Loyalist and Republican parades.

[30] The second piece of evidence supporting this amendment came from a BBC radio interview on 7 March 2013 when the Chief Constable indicated that in the past three years 147 people had been convicted arising out of unnotified Republican

parades and three arising out of unnotified Loyalist parades. There was no evidence about the number of unnotified parades of either type that had taken place over the relevant period and by the time of the hearing before the learned trial judge it was indicated to him that arising from the flag protests 29 people had been arrested in respect of 56 offences under the 1998 Act and 246 people had been arrested in relation to offences generally arising from those protests.

[31] The test for the grant of leave in judicial review proceedings is whether there are arguable grounds on which there is a reasonable prospect of success (see Omagh District Council v Minister of Health, Social Services and Public Safety [2004] NICA 10). In our view the first piece of evidence in relation to Mr Duffy was of no assistance for two reasons. Firstly, the evidence on the papers in this case indicated that police were anxious in the early months of the protests to pursue those in respect of whom there was evidence that they had committed the most serious offences. There was no indication in the papers that such a circumstance arose in any of the cases concerning Mr Duffy. One was not, therefore, comparing like with like. Secondly, the evidence indicated that pursuit of those involved in unnotified Republican parades might take four months or possibly more. There was no evidence about the period of time before interview in relation to the third parade. In this case there was evidence of 29 arrests within a six-month period and there was nothing about that which indicated disparity of treatment.

[32] The second piece of evidence concerned the numbers of people from each community who had been convicted in respect of offences under the 1998 Act. Disparity could only arise in circumstances where there was some indication that there was differential treatment having regard to the number and circumstances of such parades in each community. No material was adduced to suggest that the number of convictions was disproportionate to the offences committed in connection with such parades. Indeed, by the time of the hearing the number of persons arrested in respect of offences arising from Loyalist parades substantially exceeded the numbers convicted arising out of Republican parades.

[33] We conclude, therefore, that the respondent has not demonstrated an arguable case with a reasonable prospect of success to justify leave being granted in relation to the proposed ground and accordingly we dismiss the appeal against the refusal of leave. In those circumstances we do not consider that there is any arguable basis for the ground advanced in the respondent's notice.

### **Legal principles**

[34] The appellant's case is that in making decisions as to how to deal with the unnotified parades the PSNI had to take into account the possibility of violence and disorder giving rise to Article 2 risks both in the immediate vicinity and in the wider Northern Ireland community. The central issue in this case is whether that was the

exercise upon which the police response was based. We will consider in the next section the evidence relating to that.

[35] The leading authority on the approach which the police should take when faced with such public order issues is E v Chief Constable [2008] UKHL 66. That was a case in which loyalist protesters in Belfast tried to stop Roman Catholic parents and children from taking their normal route on foot through a Loyalist area to a Catholic girls' primary school. The protest became violent and each day the parents and children were confronted by a hostile mob which shouted threats, abuse and obscenities at them and attacked them with missiles. The police decided to station police and military vehicles along both sides of the road creating a corridor along which the parents and children could walk. Shields were used to protect them from attack. The applicant alleged that the action taken by police was inadequate and that the protesters should have been arrested or forced off the road in order to terminate the protest at an early stage.

[36] As in this case the police accepted that this was not a legitimate exercise of the right to protest. The right to peaceful assembly under Article 11 of the Convention cannot be used so as to create a right to expose the community to a real risk of serious violence. Lord Carswell gave the leading judgement. He noted that Osman v UK (1998) 29 EHRR 245 established that Article 2 of the Convention may imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. At paragraph 48 of his opinion he rejected the submission that the positive obligation was absolute in nature and stated that it placed upon the authorities in an Article 2 case an obligation to do all that could reasonably be expected of them to avoid a real and immediate risk to life once they had or ought to have had knowledge of the existence of the risk. He referred to his observations in Re Officer L [2007] 1 WLR 2135 where he said that the standard was based on reasonableness, which brings in consideration of the circumstances of the case, ease or difficulty of taking precautions and the resources available.

[37] The Court in Osman recognised the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources. The obligation on the authorities must not impose an impossible or disproportionate burden. In E Lord Carswell recognised the many practical difficulties in the way of forcing protesters back and making arrests in situations of riot or near riot. He also recognised the serious danger that violence could spread and escalate giving rise to potentially dangerous consequences both for the parents and children and more widely for public order in the area.

[38] All of this feeds into the nature of the supervisory role of the court when reviewing operational police decisions. Ms Quinlivan relied on the following

passage from the judgment of Lord Dyson MR in The Commissioner of Police for the Metropolis v ZH [2013] EWCA Civ 69.

“...I accept that operational discretion is important to the police.... It has been recognised by the ECtHR (see Austin at para 56). And I have kept it well in mind in writing this judgment. But operational discretion is not sacrosanct. It cannot be invoked by the police in order to give them immunity from liability for everything that they do. ...Each case must be carefully considered on its facts.”

[39] We accept that police do not have immunity from liability in respect of operational decisions. This case, however, perhaps demonstrates something about the limits of the court’s supervisory role. It involved a 16-year-old autistic boy who was taken by his carers from a specialist day centre to go to a local swimming baths. He became fixated by water and did not move. Police were called by the pool manager. Without making any enquiry of the carers police approached and touched him as a result of which he fell into the water. He was fully clothed and unable to swim but enjoying the water. The police decided to direct the lifeguards without regard to the carers to assist them in lifting him out of the pool when he struggled and wriggled. He was clearly in great distress. He was then placed in a cage in the rear of a van in handcuffs and leg restraints in a state of agitation and distress. This was a shocking case in which operational discretion was rejected as a defence.

[40] That case does not qualify in any way the approach stated by Lord Carswell in E at paragraph 58. He noted that in Huang v Secretary Of State for the Home Department [2007] 2 AC 167 Lord Bingham said that appropriate weight should be accorded to the judgement of a person with responsibility for a given subject matter and access to special sources of knowledge and advice. Lord Carswell concluded that the police in E had such responsibility and were uniquely placed through their experience and intelligence to make a judgement on the wisest course to take in all the circumstances. They had long and hard experience of the problems encountered in dealing with riotous situations in urban areas in Northern Ireland. The difficulty of catching and arresting malefactors who had a means of retreat available through paths and gardens was self-evident. The police had available to them sources of information about what was happening in the community and what was likely to happen if they took certain courses of action which they were experienced in assessing.

[41] We consider that this is the approach that we should take in considering the police conduct in this case. It is in our view significant that the approach approved in E recognised that the obligation in section 32 of the 2000 Act to prevent crime did not impose a requirement to intervene on every occasion when an offence was in the

course of commission. The police in this type of situation had a wide area of discretionary judgement as to how they should respond.

### **The policing operation**

[42] The flag protest give rise to considerable disruption over a wide area of Northern Ireland for a substantial period. In interview with the Irish News on 14 February 2013 ACC Kerr indicated that at its height there were some 4000 people at 84 different protesting sites across Northern Ireland. Some of the protests involved members of loyalist paramilitary groups. Police resources were limited and ACC Kerr considered that there was a need to prioritise vulnerable sites and main traffic routes. That meant that on some occasions there were simply no resources to clear less impacted routes.

[43] Secondly, police had to take into account the impact of breaking up such protests. Robust police activity in certain circumstances was considered likely to lead to increased protest and more extensive public disorder. It is clear from the strategy documents exhibited to the affidavits submitted on behalf of the appellant that there was an ongoing assessment of the steps available to police to deal with any offenders and the need to engage with the community in seeking to manage any public order disruption.

[44] In respect of the Short Strand that engagement was recognised in the affidavit of Niall O'Donnghaile, a Sinn Fein councillor and former Lord Mayor of Belfast. He indicated that he had worked very closely with PSNI and was part of a Community Safety group which met regularly to discuss issues in the area. Since 3 December 2012 he had been in daily contact with PSNI personnel and he indicated that there was a general sense within the Short Strand that the PSNI had been doing a reasonable job in terms of protecting the Short Strand and preventing incursions.

[45] The evidence indicates that the events on 5 and 7 January 2013 referred to at paragraphs 5 and 6 above indicated a deterioration in the conduct of the protesters and that was consistent with the fact that on 8 January 2013 Mr O'Donnghaile wrote to Chief Superintendent McCrum seeking information in respect of the legality of the parades.

[46] The learned trial judge concluded that in the period from 8 December 2012 until the start of January 2013 ACC Kerr did not address himself to the question of whether to stop the weekly parade. Apart from the fact that Mr Kerr was on leave for part of that period the strategy documents indicate that there was ongoing consideration of the manner in which this situation, which at that time extended throughout Northern Ireland, should be managed. The learned trial judge accepted that no criticism could be made of the police decision to permit the march on 8 December 2012 and indeed the respondent in this appeal took no issue with that. It is clear, however, from paragraph 16 of Mr Kerr's affidavit sworn on 14 March 2013

that the decision not to prevent the march coming into the city centre but rather to engage with the protesters and manage the disruption was part of a strategic approach to prevent public disorder and violence based on intelligence and resources which applied generally rather than simply to an individual protest. What was apparent from a consideration of the Criminal Justice Strategy and other strategy documents during this period was a clear commitment to the securing of the best evidence of the worst offenders for the most serious offences through the optimum use of resources and technology.

[47] The learned trial judge was satisfied that ACC Kerr mistakenly considered that the 1998 Act hampered his ability to stop any parade and his ability to police the situation effectively. There were essentially two reasons for that conclusion. The first was the reported suggestion in an Irish News article on 16 February 2013 which suggested that ACC Kerr stated that he had no power to stop an unnotified parade. The interview on which the article was based explored a number of aspects of the unnotified parades. ACC Kerr sought to promote the primacy of the Parades Commission in the regulation of all parades. He indicated that police did not want to find themselves in the situation they were in prior to the 1998 Act. It was against that background that he noted that police did not have power to stop an illegal parade under the 1998 Act. He was correct about that. Such power lay only with the Secretary of State. He noted that the offence under the Act was taking part in an unnotified parade. That again was correct. He went on to indicate that police were faced with having to make decisions about the appropriate response to such parades on the basis of a risk or threat to life. We do not consider that any criticism can be made of that.

[48] We do not consider that the article supported the view that ACC Kerr felt inhibited by the 1998 Act from properly policing these protests and parades. He had initially decided on 6 December 2012 to prevent the parade coming into the centre of Belfast, which itself was an indicator that he recognised his power to stop it. His complaint in the article was that these were decisions which were likely to politicise the police whereas an object of the 1998 Act had been to remove the police from such a perception.

[49] The judge's second reason also emanated from the same article. Because of his concerns about politicisation of police ACC Kerr met with the Parades Commission on 15 January 2013. He hoped to persuade them that there was some mechanism by which they could become involved in the determination of the action to be taken in respect of such parades. That certainly was the intention of the North Committee. It is, however, agreed that there is no mechanism by which the Parades Commission can take decisions for unnotified parades. The management of such parades is the responsibility of the police on the basis of their general public order powers and their obligation to prevent crime including crimes under the 1998 Act.

[50] At paragraph 129 of his judgement the learned trial judge was highly critical of the fact that ACC Kerr was seeking legal advice in relation to any role there may be for the Parades Commission. He considered that the fact that he was seeking legal advice about the possible involvement of the Parades Commission supported the conclusion that ACC Kerr felt inhibited by the 1998 Act from taking action against parades or protesters. We do not accept that there is any support for that conclusion particularly when one analyses the continuing development of the criminal justice strategy through January and February 2013 to deal with the continuation of the parades and protests. We were provided without objection with material indicating that there were 34 notified flag parades in the period between 7 December 2012 and 28 February 2013 throughout Northern Ireland as well as unnotified parades, all of which required policing.

[51] The learned trial judge also drew an adverse inference from the fact that it was not until 25 February 2013 that a decision was made to prioritise action against high-profile organisers of the parades. This was dealt with at paragraph 4 of the affidavit of Mr Kerr sworn on 14 March 2013 where he explained that the standard procedure was to investigate and charge those involved in the more serious offences with less serious offences being investigated concurrently. We see nothing in that approach which supports the view that police were dealing inappropriately with these parades.

## **Conclusion**

[52] In the course of this hearing we were provided with a full transcript of the interview given by Mr Kerr to the Irish News which was not available to the learned trial judge. The context of that interview was important in understanding the article that was published arising from it. We were also taken through the Criminal Justice Strategy documents and revisions, the strategy associated with Operation Dulcet and the decisions made within the Events Policy Book in the kind of detail which was not opened to the learned trial judge.

[53] The issues facing those policing this major public disruption, which extended far beyond Belfast to all parts of Northern Ireland, demonstrated the enormous difficulties for those policing modern societies in circumstances of community conflict and heightened tension. We consider that the decision to manage disruption and pursue a subsequent criminal justice charging policy was well within the area of discretionary policing judgement which such situations require in light of the challenges posed by the circumstances set out above.

[54] We note that the manner of implementation of the North Report left the management of unnotified parades outside the competence of the Parades Commission. It also left the police to manage such parades using public order powers rather than providing a tailored legislative scheme. We do not consider that there is anything in the management of the issues arising from these parades by

police to suggest that the 1998 Act or section 32 of the 2000 Act were undermined. This was a difficult situation in which proportionate steps were taken to protect the Article 8 rights of the applicant and the other residents of the Short Strand.

[55] For the reasons given the appeal is allowed.