

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

DB's Application [2014] NIQB 55

IN THE MATTER OF AN APPLICATION BY DB FOR JUDICIAL REVIEW

AND

IN THE MATTER OF DECISIONS OF THE CHIEF CONSTABLE OF THE
POLICE SERVICE OF NORTHERN IRELAND AND OF THE SECRETARY OF
STATE FOR NORTHERN IRELAND

TREACY J

Introduction

[1] The applicant is a resident of the Short Strand area of Belfast and the respondents are the Police Service of Northern Ireland ("the PSNI") and the Secretary of State for Northern Ireland ("the SoS"). The applicant challenges decisions of the respondents made in the context of the policing of processions associated with protests against the decision on 3 December 2012 by Belfast City Council ("the Council") to restrict the flying of the Union flag at City Hall to 15 designated days per year rather than every day.

[2] Ms Quinlivan QC and Ms Fiona Doherty appeared for the applicant and Mr McGleenan QC and Mr Joe Kennedy appeared for the respondents. I am grateful to all Counsel for their excellent oral and written submissions.

Background

[3] Following the Council's decision on 3 December 2012 there was disorder among a crowd outside the City Hall. Regular protests against the decision ensued, many of which led to public disorder and violence. Protests in Belfast were preceded and followed by processions to and from the city centre, the largest of

which started from the Newtownards Road in East Belfast, travelling past the main entrance to the Short Strand, a Nationalist area of East Belfast. There was disorder when the processions passed the Short Strand, which occurred on at least a weekly basis, the worst incidence of which was on 12 January 2013.

Order 53 Statement

[4] The applicant sought an order quashing the PSNI's failure to provide an assurance that it would prevent any parade planned for Saturday 2 February 2013 from travelling past the Short Strand and an order of mandamus compelling the provision of such an assurance. The applicant also sought declarations that the PSNI's failure to prevent such a parade, and the disorder that would follow, would contravene the object and purpose of the Public Processions (Northern Ireland) Act 1998 ("the 1998 Act") and constitute a breach of the PSNI's duties under s32 of the Police (Northern Ireland) Act 2000 ("the 2000 Act"). The applicant also sought declaratory relief that the PSNI's failure to provide an assurance was incompatible with Art8 of the Convention and therefore in breach of s6 of the Human Rights Act 1998 ("the HRA").

[5] As regards the SoS, the applicant sought an order quashing her refusal to prohibit the procession past the Short Strand in accordance with s11 of the 1998 Act and declarations that such failure contravened the object and purpose of the 1998 Act and was incompatible with the applicant's rights under Art8 of the Convention.

Grounds of Challenge

[6] The applicant's permitted grounds of challenge listed 10 dates from Monday 3 December 2012 until Saturday 26 January 2013 on which processions to and from the city centre went past the Short Strand. Two of these were on Mondays and the remainder on Saturdays. It is common case that none of these parades were notified to the PSNI (and onwards to the Parades Commission) as required by s6 of the 1998 Act. Those planning and taking part in them were therefore guilty of criminal offences contrary to s6(7) of the 1998 Act. Further, given the serious disorder and violence as documented and the attacks on the applicant's home, people involved in the parades were potentially guilty of other criminal behaviour and there was interference with the applicant's rights under Art 8(1) of the Convention.

[7] The applicant stated that the Parades Commission was established to replace the police as the body responsible for determining whether and under what conditions parades should go ahead in Northern Ireland but that in this case the PSNI took the decision to allow parades to proceed and failed to arrest those involved in organising and taking part in them. The policing operation has, in contravention of the will of Parliament, permitted the parade organisers to reinstate the situation existing before the establishment of the Parades Commission. Further, it is submitted that, in failing to prevent the parades and subsequent disorder and

attacks on the applicant's home, the PSNI breached its duties under s32 of the 2000 Act.

Pre-action Protocol Letter

[8] On 28 January 2012 the solicitor for the applicant sent pre-action protocol letters to the PSNI seeking an assurance that any parade scheduled for 2 February 2013 would not be allowed to proceed and to the Secretary of State asking that processions past the Short Strand be prohibited for a period of time. The solicitor sent a letter on the same date to the Parades Commission asking what steps the Commission was taking in connection with the illegal parades.

[9] On 31 January 2013 the PSNI responded indicating that massive resources had been devoted to dealing with the processions; that they sought to enforce the law including the 1998 Act but that it was not possible to ensure that every possible violation of the legislation was prevented or detected; that the legislation did not specifically grant police power to prevent processions from taking place but rather created offences relating to organising and taking part in un-notified processions; that the judgment in PF & EF v UK [2010] ECHR 2015 had recognised that to require the police in Northern Ireland to forcibly end every protest would likely place a disproportionate burden on them; and that the PSNI did not accept responsibility for any violation of the applicant's Art 8 rights and that, through the significant steps taken to police the protests, the PSNI had complied with any positive obligation arising under Art 8.

Legal Context

[10] S6 of the 1998 Act provides the mechanics under which those proposing to organise a parade are required to notify the PSNI. The PSNI then notify the Parades Commission. In accordance with s6(3)(a), the SoS has prescribed under the Public Order (Prescribed Forms) Regulations (Northern Ireland) 2004 a notification form (Form 11/1).

[11] S6 states:

"Advance notice of public processions.

6. - (1) A person proposing to organise a **public procession** **shall** give notice of that proposal in accordance with subsections (2) to (4) to a member of the [Police Service of NI] not below the rank of sergeant by leaving the notice with him at the police station nearest to the proposed starting place of that procession.

(2) Notice under this section shall be given-

(a) not less than 28 days before the date on which the procession is to be held; or

(b) if that is not reasonably practicable, as soon as it is reasonably practicable to give such notice.

(3) Notice under this section shall-

(a) be given in writing in such form as may be prescribed by regulations made by the Secretary of State; and

(b) be signed by the person giving the notice.

(4) The form prescribed under subsection (3)(a) shall require a person giving notice under this section to specify-

(a) the date and time when the procession is to be held;

(b) its route;

(c) the number of persons likely to take part in or support it;

(d) the names of any bands which are to take part in it;

(e) the arrangements for its control being made by the person proposing to organise it;

(f) the name and address of that person;

(g) where the notice is given as mentioned in paragraph (b) of subsection (2), the reason why it was not reasonably practicable to give notice in accordance with paragraph (a) of that subsection; and

(h) such other matters as appear to the Secretary of State to be necessary for, or appropriate for facilitating, the exercise by the Commission, the Secretary of State or members of the [Police Service of NI] of any function in relation to the procession.

.....

(6) The Chief Constable shall ensure that a copy of a notice given under this section is immediately sent to the Commission.

(7) A person who organises or takes part in a public procession-

- (a) in respect of which the requirements of this section as to notice have not been satisfied; or
- (b) which is held on a date, at a time or along a route which differs from the date, time or route specified in relation to it in the notice given under this section, shall be guilty of an offence.

(8) In proceedings for an offence under subsection (7) it is a defence for the accused to prove that he did not know of, **and** neither suspected nor had reason to suspect, the failure to satisfy the requirements of this section or (as the case may be) the difference of date, time or route.

(9) To the extent that an alleged offence under subsection (7) turns on a difference of date, time or route it is a defence for the accused to prove that the difference arose from-

- (a) circumstances beyond his control;
- (b) something done in compliance with conditions imposed under section 8; or
- (c) something done with the agreement of a member of the [Police Service of NI] not below the rank of inspector or by his direction.

(10) A person guilty of an offence under subsection (7) shall be liable on summary conviction to imprisonment for a term not exceeding 6 months or to a fine not exceeding level 5 on the standard scale, or to both."
[Emphasis added]

[12] S1 provides for the establishment of the Parades Commission for Northern Ireland. S2(2) provides for the issue of determinations:

“(2) The Commission may in accordance with the following provisions of this Act-

- (a) facilitate mediation between parties to particular disputes concerning proposed public processions and take such other steps as appear to the Commission to be appropriate for resolving such disputes;
- (b) issue determinations in respect of particular proposed public processions and protest meetings.”

[13] S8 provides the Parades Commission’s powers to impose conditions on proposed public processions:

“8. - (1) The Commission may issue a determination in respect of a proposed public procession imposing on the persons organising or taking part in it or on any persons supporting it such conditions as the Commission considers necessary.

(2) Without prejudice to the generality of subsection (1), the conditions imposed under that subsection may include conditions as to the route of the procession or prohibiting it from entering any place.

(3) Conditions imposed under subsection (1) may incorporate or be framed by reference to-

- (a) the Code of Conduct; or
- (b) any other document-
 - (i) prepared by the person or body organising the procession in question; and
 - (ii) approved by the Commission for the purposes of this section.

(4) The Commission may, in accordance with the procedural rules, amend or revoke any determination issued under this section.

.....

(7) A person who knowingly fails to comply with a condition imposed under this section shall be guilty of an

offence, but it is a defence for him to prove that the failure arose-

- (a) from circumstances beyond his control; or
- (b) from something done by direction of a member of the [Police Service of NI] not below the rank of inspector.

(8) A person who incites another to commit an offence under subsection (7) shall be guilty of an offence.

(9) A person guilty of an offence under subsection (7) or (8) shall be liable on summary conviction to imprisonment for a term not exceeding 6 months or to a fine not exceeding level 5 on the standard scale, or to both."

[14] Under s11, the SoS has the power to prohibit proposed public processions:

"11. - (1) If, in the case of any proposed public procession, the Secretary of State is of the opinion that, having regard to-

- (a) any serious public disorder or serious damage to property which may result from the procession;
- (b) any serious disruption to the life of the community which the procession may cause;
- (c) any serious impact which the procession may have on relationships within the community; and
- (d) any undue demands which the procession may cause to be made on the police or military forces,

it is necessary in the public interest to do so, he may by order prohibit the holding of that procession.

(2) If, in relation to any area and any period of time not exceeding 28 days, the Secretary of State is of the opinion that, having regard to-

- (a) any serious public disorder or serious damage to property which may result from public processions

of a particular class or description in that area in that period;

- (b) any serious disruption to the life of the community which such processions may cause;
- (c) any serious impact which such processions may have on relationships within the community;
- (d) any undue demands which such processions may cause to be made on the police or military forces; and
- (e) the extent of the powers exercisable under subsection (1),

it is necessary in the public interest to do so, he may by order prohibit the holding of all public processions of that class or description in that area in that period.

(3) If, in relation to any area and any period of time not exceeding 28 days, the Secretary of State is of the opinion that, having regard to-

- (a) any serious public disorder or serious damage to property which may result from public processions in that area in that period;
- (b) any serious disruption to the life of the community which such processions may cause;
- (c) any serious impact which such processions may have on relationships within the community;
- (d) any undue demands which such processions may cause to be made on the police or military forces; and
- (e) the extent of the powers exercisable under subsections (1) and (2),

it is necessary in the public interest to do so, he may by order prohibit the holding of all public processions in that area in that period.

(4) An order under subsection (2) or (3) may exempt any procession, or any procession of any class or description, specified in the order.

(5) Wherever practicable the Secretary of State shall before making an order under this section consult-

(a) the Commission; and

(b) the Chief Constable,

but nothing in this subsection shall affect the validity of any such order.

(6) The power to make an order under this section includes power to revoke or amend any such order.

(7) An order made under subsection (1) in relation to a public procession has effect to revoke any previous determination made by the Commission under section 8 in relation to that procession, and an order made under subsection (2) or (3) has effect to revoke any previous determination made by the Commission under that section in relation to any public procession the holding of which is prohibited by the order.

(8) A person who organises or takes part in a public procession the holding of which he knows is prohibited by an order under this section shall be guilty of an offence.

(9) A person guilty of an offence under subsection (8) shall be liable on summary conviction to imprisonment for a term not exceeding 6 months or to a fine not exceeding level 5 on the standard scale, or to both."

[15] Turning to the general functions of the police under the 2000 Act s32 provides:

"32. - (1) It shall be the general duty of police officers-

(a) to protect life and property;

(b) to preserve order;

(c) to prevent the commission of offences;

- (d) where an offence has been committed, to take measures to bring the offender to justice.
..."

[16] The applicant also cited Art 26 of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE") which provides for general police powers of arrest, and the common law power of arrest to prevent an imminent breach of the peace.

[17] Art 8 of the Convention states:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Relevant Case Law

[18] The applicant referred to X & Y v Netherlands 8 EHRR 235 as authority for the proposition that Art 8 encompasses not just a negative obligation but also a positive obligation which means that the state can be obliged to take steps to ensure Art8 rights are not breached by the actions of private individuals:

"23. The Court recalls that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."

[19] As regards the applicability of this positive obligation to policing, the applicant referred to The Commissioner of Police for the Metropolis v ZH [2013] EWCA Civ 69 in which the Master of the Rolls said:

“90 ... I reject Ms Studd’s submission that this decision unreasonably interferes with the operational discretion of the police or that it makes practical policing impossible. I accept that operational discretion is important to the police. This was recognised by the judge. It has been recognised by the ECtHR (see Austin at [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.”

[20] The applicant also sought to distinguish the case of Re E [2008] 3 WLR 1208 which was a challenge relating to policing of illegal protests at the Holy Cross Primary School in North Belfast. The applicant says that, in Re E, the appellant had to demonstrate that her Art3 rights were engaged and that the police had a positive obligation to conduct the policing operation in such a way as not to expose her to a risk of Art3 misconduct. The difficulty for the appellant arose because, in order to establish a breach of the positive obligation to prevent Art 3 ill-treatment, the state imposes a high threshold and there was a substantial amount of evidence before the Court to the effect that policing the operation differently could have resulted in the extension of the protest to other venues and an increased risk to the lives of other civilians in the North Belfast area.

[21] The respondents raise the limitations of the positive obligations imposed by Art8 on the state, citing R (on the application of McDonald) v Royal Borough of Kensington and Chelsea [2011] UKSC 33:

“[15] Article 8 is too well known to require citation again here. There is no dispute that in principle it can impose a positive obligation on a state to take measures to provide support and no dispute either that the provision of home-based community care falls within the scope of the article provided the Applicant can establish both (i) “a direct and immediate link between the measures sought by an Applicant and the latter's private life” - Botta v Italy (1998) 26 EHRR 241, paras 34 and 35, 4 BHRC 81 - and (ii) “a special link between the situation complained of and the particular needs of [the Applicant’s] private life”: Sentges v The Netherlands (2003) 7 CCLR 400, 405.

[16] Even assuming that these links do exist, however, the clear and consistent jurisprudence of the Strasbourg Court establishes “the wide margin of appreciation enjoyed by states” in striking “the fair balance . . . between the competing interests of the individual and of the

community as a whole” and “in determining the steps to be taken to ensure compliance with the Convention”, and indeed that “this margin of appreciation is even wider when . . . the issues involve an assessment of the priorities in the context of the allocation of limited state resources” – Sentges, at p 405, Pentiacova v Moldova (Application No 14462/03 (unreported) 4 January 2005, p 13) and Molka v Poland (Application No 56550/00 (unreported) 11 April 2006, p 17).”

[22] The respondents submitted that the limits of the positive obligations in terms of policing have been affirmed in Osman v UK [1998] 5 BHRC 293 (para 116):

“116. ... bearing in mind 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, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.”

[23] The respondents also referred to PF & EF v UK Application no. 28326/09 in which the European Court of Human Rights stated:

“52...the operational decisions complained of fell within the ambit of legitimate police discretion and fully complied with the State’s positive obligations.”

[24] The respondents say this is confirmed in Austin v United Kingdom (Applications nos. 39692/09, 40713/09 and 41008/09):

“55...When considering whether the domestic authorities have complied with such positive obligations, the Court has held that account must be taken of 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 (Giuliani and Gaggio, cited above, § 245; P.F. and E.F. v. the United Kingdom, cited above, § 40).”
[Emphasis added]

[25] Should the court deem that Art 8 is engaged, the respondents refers to the qualified nature of Art 8 and the five questions posed in R v Secretary of State for the Home Department (Appellant) ex parte Razgar (FC) (Respondent) [2004] UKHL 27:

“17.

(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

.....

20 The answering of question (5), where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention....”

[26] The respondents also referred to the right to peaceful assembly protected under Art11, stating that the Court of Appeal has held in Tabernacle v Secretary of State for Defence [2009] EWCA Civ 23:

“43 Rights worth having are unruly things. Demonstrations and protests are liable to be a nuisance. They are liable to be inconvenient and tiresome, or at least perceived as such by others who are out of sympathy with them. Sometimes they are wrong-headed and misconceived. Sometimes they betray a kind of arrogance: an arrogance which assumes that spreading the word is always more important than the mess which, often literally, the exercise leaves behind. In that case, firm but balanced regulation may be well justified. ...”

Other Relevant Documents/Texts

[27] The PSNI Code of Ethics (issued under s52 of the 2000 Act) includes the following provisions:

“1.2 Police Officers shall, as far as is practicable, carry out their functions in co-operation with, and with the aim of securing the support of, the local community.

1.3 Police Officers shall carry out their duties in accordance with the Police Service attestation...which states “I hereby do solemnly and sincerely and truly declare and affirm that I will faithfully discharge the duties of the office of constable, with fairness, integrity, diligence and impartiality, upholding fundamental rights and according equal respect to all individuals and their traditions and beliefs; and that while I continue to hold the said office I will to the best of my skill and knowledge discharge all the duties thereof according to law.”

Evidence before the court

[28] The applicant swore an affidavit on 31 January 2013. Other residents of the Short Strand, KN and JM, swore affidavits on 8 March 2013. In support of the applicant’s case, affidavits were also sworn on the same date and on 8 March 2013 by Niall Ó Donnghaile, who is former Lord Mayor of Belfast and is a Sinn Féin counsellor for the Pottinger constituency, in which the Short Strand is located. He is also involved in the Short Strand Partnership, the Policing Community Safety Partnership and in the Community Safety Group and was, throughout the period under discussion, in frequent contact with senior members of the PSNI and the Short Strand community. Heavily involved also in these communications was Conor Keenan, Director of Short Strand Partnership, who swore affidavits dated 19 February 2013 and 8 and 14 March 2013.

[29] Pdraig O’Muirigh, Solicitor for the applicant, swore a number of affidavits. Martin Duffy, who averred he had been prosecuted 3 times for offences related to organising and participating in illegal Republican processions, swore an affidavit dated 11 March 2013.

[30] On behalf of the respondent, affidavit evidence was given by Chief Inspector Mark McEwan, Chief Superintendent Alan McCrum, and Assistant Chief Constable (“ACC”) Will Kerr. Affidavit evidence was also provided by Mark Larmour, Deputy Director of the Northern Ireland Office (“NIO”).

Events from 3 December 2012 to 31 January 2013

[31] The applicant averred that over the course of December, protests and subsequent malcontent moved closer to interface areas and that there were associated attacks on homes in the Short Strand, including his own home. Both he and Niall ÓDonnghaile averred that the return leg of parades ended in violence. Further, it was averred that there were also 8 illegal static protests at the interface between Short Strand at Castlereagh Street or Woodstock Link, lasting from 30 minutes to 2 hours, some of which resulted in violence.

[32] The applicant understood that prior notice of a meeting point for the parades, namely the Constitution Club on the Newtownards Road, was posted on the internet including on Facebook accounts named 'Keep the Union Flag flying over Belfast City Hall' and 'Loyalist Peaceful Protest Updater'.

[33] The applicant averred that he was informed that the parades were illegal as the organisers had not notified the Parades Commission and that he could not understand why and how the police allowed the parades to continue. On 8 January 2013 Niall Ó Donnghaile wrote to Chief Superintendent Alan McCrumm to request any information the PSNI received by way of notification of the parades and for the PSNI to comment on its legal responsibilities in relation to the parades. The response indicated that neither the PSNI nor the Parades Commission had received any notification from parade organisers. Mr Ó Donnghaile averred that this meant that no organiser was identified and that the usual code of conduct, requirements for stewarding etc did not apply.

[34] Throughout this period there was frequent contact between community representatives and the PSNI. Niall Ó Donnghaile and Chief Inspector McEwan describe frequent contact including their weekly meetings on Friday afternoons to discuss what to expect on Saturday in terms of processions/protests and the policing operation.

[35] The applicant stated that on several occasions he was given assurances from local community workers, which he understood to have come from the PSNI, that parades would not pass homes in the area and that the areas where the parades would pass would have adequate policing. He stated that as a result of what transpired he does not have confidence in the PSNI to protect his community and that he believes the PSNI are facilitating, rather than stopping, illegal parades. This is echoed in the affidavit evidence of Niall Ó Donnghaile.

[36] Inspector McEwan stated that he had given assurances that protests would not be allowed to continue at interface areas and that Short Strand residents' feelings would be fed back to the PSNI. He averred that for the most part the assurances were kept but that, on 12 January 2013, the operational demands and tactical considerations meant that it was not possible to keep the assurances, because of the way in which events developed on the day.

Saturday 12 January 2013

[37] Mr Ó Donnghaile stated that, while there was frustration with what was seen as police facilitation of illegal parades, there was a general sense that the PSNI had been doing a reasonable job in protecting the Short Strand. However, this changed on Saturday 12 January 2013 when the worst violence occurred during the return leg of a parade.

[38] Niall Ó Donnghaile stated that, because violence had occurred on the return leg of a parade on Monday 7 January 2012 (in the Markets area), he and others had sought that police direct processions away from the Short Strand to the alternative route of Middlepath Street. He was informed by the PSNI, and through contact with the PUP/UVF, that this alternative route was accepted for 12 January 2013 and that the parade would be vigorously stewarded.

[39] Inspector McEwan stated that he had discussions with representatives of East Belfast Protestant, Unionist, and Loyalist groups and that there was an appetite to take the parade along Middlepath Street, as occurs on 12 July, and to steward it. The PSNI intended to block Queens Bridge so that protestors would take the alternative route rather than going towards the Albertbridge Road. However, when he met again with the PUL group on Saturday 12 January to confirm the route, some members highlighted that a block at Queens Bridge might be contentious. It was agreed that Inspector McEwan would be available to liaise with protestors at this point.

[40] Mr Ó Donnghaile described the outward leg of the protest on 12 January as quiet and peaceful but that it returned a different route than planned. In the Short Strand people moved to various points along the Albertbridge and Mountpottinger Roads as quickly as they could. The applicant averred that a group entered the Short Strand and attacked people's homes with bricks, stones, golf balls and ball bearings. The PSNI moved in to move loyalist protestors away from the interface. Loyalist and community representatives had left the scene. Mr Ó Donnghaile further averred that approximately 300 protestors were permitted to gather at and block Castlereagh Street again that evening from 7 pm until the area was cleared at 10 pm.

[41] In a later affidavit sworn on 8 March 2013, Mr Ó Donnghaile stated that a group of approximately 250 protestors broke away from the main group including the police who were trying to prevent them from crossing the Queens Bridge and ran across the Albert Bridge, past Central Station and into Short Strand. They attacked houses and vehicles and some were masked.

Sunday 13 January 2013

[42] Mr Ó Donnghaile described a crowd of approximately 400 protestors being permitted to gather at and block Castlereagh Street from 7 pm on Sunday 13 January 2013. He said they were there for around 2 hours despite calls by himself and another person for the PSNI to disperse the crowd.

Monday 14 January 2013

[43] Mr Ó Donnghaile outlined an attack in which bricks, stones and petrol bombs were thrown at St Matthew's Church and hall near Strand Walk on the evening of 14 January 2013. A meeting involving children with special needs had to be removed from the hall. During that week around 30 jeeps were positioned around the Short Strand; there was consistent contact with the PSNI to ensure adequate protection of the area.

Saturday 19 January 2013

[44] Mr Ó Donnghaile averred that at a meeting on Friday 18 January with Chief Inspector McEwan, he was informed that the next day the alternative Middlepath Street route would be used, every other possible route would be blocked off, and that there would be an extremely heavy policing operation comprising 600 personnel and involving screens, water cannon, dog units and TSG units. Inspector McEwan states that he explained that there would be a much heavier policing presence in Belfast, which was considered proportionate to the level of violence on 12 January 2013, and that a central priority was public safety and to protect the Short Strand and Markets community.

[45] The parade passed relatively quietly though there was some jeering at residents. After the parade the PSNI prevented a group of around 30 attempting to approach the Mountpottinger Road and dispersed the crowd. Two loyalists were arrested on the Albertbridge and Newtownards Roads.

[46] In conclusion Mr Ó Donnghaile outlines that the parades and their frequency had caused considerable distress and anxiety to many residents of the Short Strand and severe disruption to freedom of movement and family life, with some families sending children to stay with relatives, and older members of the community feeling uneasy.

Affidavit Evidence of KN and JM

[47] Evidence of disruption caused to Short Strand residents was also provided by KN and JM, each of whom has two young children. KN described going to a Belfast Giant's match on 5 January 2013 with her child but being unable to attend a friend's house afterwards, as planned, because of disorder on the Albertbridge Road. She described, on 7 January, taking her toddler from the bath to her mother's house because rioting had become uncontrollable and a neighbour was banging on doors to tell everyone to move their cars as protestors were throwing petrol bombs. She

stated that when the trouble started bricks and stones were being thrown at her elder child's bedroom window. She described similar experiences on 14 January and stress caused to her children. She has now moved to an area less likely to be affected by riots.

[48] JM averred that it was a common experience from December that one of her children would be awoken by protestors throwing objects at the windows. She averred that protestors also shouted into her house including on 16 February. On one occasion in January 2013 protestors shouted at her and made rude gestures to her children through the windows. On 7 January protestors came over the bridge and hit the windows with various objects and there was a constant flow of police landrovers entering and leaving the area. She described the distress of her children and how she then ensured they would not be there at the weekend in case trouble flared up.

Liaison with the PSNI

[49] Conor Keenan's evidence focused on the contact between Short Strand representatives and the PSNI. He understood that the PSNI were approaching known protest organisers and loyalists at protests but that they refused to speak with the PSNI. On 9 January 2013 Chief Inspector McEwan told him that police would meet with protest organisers to discuss the possibility of organisers submitting Form 11/1 to the Parades Commission. The next day the Chief Inspector told him that this suggestion had been rejected but that a proposal to use the alternative Middlepath Street route had been accepted, and that there would be an attempt to steward the parade on Saturday 12 January. This intention was confirmed to him the next day by loyalist representatives. Mr Keenan describes what transpired on 12 January 2013 as one of the worst attacks on the Short Strand and said that there was no stewarding.

[50] On 16 January 2013 he, Niall Ó Donnghaile and Alex Maskey met with Chief Superintendent McCrum and Chief Inspector McEwan. He states he received assurances that the same mistake would not be made the next Saturday and that there would be a heavy police presence on the Albertbridge Road. He was informed on 1 February 2013 that there had been a meeting on 29 January 2013 between the PSNI and Loyalist Ulster People's Forum representative, Jamie Bryson, to discuss the Ulster People Forum's 'change of tactic', and that there were concerns about the forthcoming parade and protest on 2 February 2013.

[51] Inspector McEwan's evidence was that on 10 January 2013 he and Chief Superintendent McCrum met at the Skainos Centre with a range of representatives from the unionist/loyalist community. Chief Superintendent McCrum stated that if an un-notified procession occurred on Saturday 12 January he intended, in the interest of maintaining public safety, to stop the procession from returning to the Lower Newtownards Road via the Queens Bridge and Bridge End and that such a procession should return to the Lower Newtownards Road via Queen Elizabeth II

bridge and Middlepath Street. He indicated that there would be road blocks on the Queens Bridge and that if there was a standoff he would be engaging with some of the representatives to seek their co-operation in enabling the flag protesters to use the Queen Elizabeth II Bridge. On the same day he met with Mr Keenan and the Short Strand Community Forum, where he relayed that those involved in the protests had been told about the requirement to submit an 11/1 application to the Parades Commission, but that no one accepted that they were organising a procession for the purposes of the 1998 Act. He also communicated that discussions regarding the route and stewarding had taken place with members of the PUL community.

[52] Inspector McEwan further confirmed that he and Chief Superintendent McCrum met with Messrs Keenan, Ó Donnghaile and Maskey on 16 January 2013 and discussed the events of 12 January, assuring them that, having reviewed those events, there would be a much heavier police presence on Saturday 19 January and that a priority would be to protect the Short Strand and Markets. Inspector McEwan outlines further meetings including on every Friday since 18 January with Sinn Féin. He met with Mr Keenan and discussed the fact that PSNI had met with the Ulster Peoples Forum and clearly outlined what constituted a breach with regard to public order. He also referred to meetings with the Short Strand Community Forum on 7 and 14 February 2013 to listen to concerns and explain the policing approach.

Policing operation

[53] Details of the policing operation and toll on resources were provided by Superintendent McCrum. He described how, on 3 December, the protest at the rear of City Hall became disorderly leading to injury of police officers and civilian security staff and damage to City Hall. On dispersal the crowd attempted to attack homes in the Short Strand.

[54] He noted that on 5 January 2013, the protest in Belfast was considerably larger with at least 1000 people involved. Crowds from different parts of the city converged on the city centre, attempted to force their way through police lines and blocked traffic. When the crowd dispersed contingents went to South, North and East Belfast. At the Short Strand, loyalists held up a Tricolour and threw missiles into the nationalist area. A small number of missiles were thrown in response. Violence against police intensified resulting in deployment of water cannon and AEP use.

[55] Turning to the events on 12 January, Superintendent McCrum outlined the engagement with the loyalist and Short Strand communities as outlined by Inspector McEwan, and the meeting 10 January 2013 at the Skainos Centre in which he stated that, if an un-notified procession occurred on 12 January, police intended to put a roadblock at Queen's Bridge to direct protestors across the Queen Elizabeth II bridge towards the Middlepath Street route. He states that arrangements were also made with Inspector Robert Murdie, designated Bronze Commander at City Hall, for this

message to be relayed via loud-hailer to protestors. As a contingency he deployed additional resources in the form of 2 Tactical Support Groups (“TSGs”) into Oxford Street with the aim of preventing protestors from making their way towards the Markets area. He avers that 32 Tactical Support Groups or Public Support Units were deployed in addition to 102 further officers performing a range of tasks.

[56] He stated that, on the day, protestors left the centre and proceeded to Queens Bridge. A number of individuals stopped at the police line and engaged with the senior officer there for less than 60 seconds, whereupon people broke away and ran into Oxford Street towards the Markets. This precipitated a breakdown of the entire group. The TSGs sought to prevent any attack into Friendly Street and the Markets and other TSG resources were rapidly deployed to move the protestors along East Bridge Street and past the Short Strand interface.

[57] He averred that missiles were thrown at the flag protestors from the Short Strand and vice versa although this is disputed by Conor Keenan in his affidavit of 14 March 2013. Superintendent McCrum stated that missiles were thrown at police whilst they attempted to move protestors away from the interface towards Albertbridge Road. Protestors stopped at the junction of the Albertbridge Road/Castlereagh Street and Mountpottinger Road. A police vehicle line was deployed along with officers on foot with shields. They came under attack from masonry, fireworks, golf balls and other missiles. Vehicles were attacked with flag poles. He deployed water cannons to push protestors up the Albertbridge Road and Castlereagh Street. Police came under continued attack and at 14.46 he authorised the deployment of AEPs, six of which were fired. He avers that violence continued and order gradually restored between 17.30 and 20.00. He agrees with Niall Ó Donnghaile’s assessment that this protest resulted in a dangerous situation being created but does not accept that the PSNI permitted a crowd to gather and block Castlereagh Street from 7pm onwards.

[58] His assessment of 12 January 2013 was that significant resources were deployed to restore order following extensive violence, during which 29 officers were injured and 1 person was arrested. Between 7 and 9 pm officers were engaged with community representatives to gain their support in moving flag protestors away from Castlereagh Street, with limited success. He redeployed public order resources to disperse the crowd, but it dispersed at approximately 9pm.

[59] Superintendent McCrum described the protest of 19 January 2013 as passing off peacefully, but that at Queen’s Bridge it appeared that elements of the crowd considered entering Oxford Street. Officers reported that disorder was only prevented when the protest entered the bottom of the Newtownards Road through intervention of 30-40 masked persons, suspected to be associated with Loyalist paramilitaries. He says there was an extremely heavy policing operation involving 600 PSNI personnel. He refers to the meeting on 16 January 2013 with Mr Ó Donnghaile, Alex Maskey and Connor Keenan and avers that he provided them with a very detailed briefing on the operational approach.

[60] On 26 January 2013, East Belfast protestors again processed into the city centre. There were no incidents at the interface; however protestors did not stop at the Con Club but attempted to get to Alliance Party offices which led to a confrontation with police and an arrest.

[61] On 2 February 2013 the East Belfast return parade was diverted to the alternative Middlepath Street route. An officer received a head injury from a bottle thrown by a protestor. On the return of the protest to East Belfast an element in the crowd stopped at the interface junction with Bryson Street for almost 10 minutes. No trouble occurred and the protest continued past the Con Club but stopped near Bloomfield Avenue.

[62] Superintendent McCrum averred that on 9 February 2013 the protest behaved as in the previous few weeks and that no disorder took place, though concerns were raised in relation to the aggressive tone of protestors at the City Hall and patrol officers were replaced by public order officials. He avers that similar protests have occurred every Saturday thereafter to the date of swearing of his affidavit, 4 March 2013.

Operation Dulcet

[63] ACC Will Kerr detailed Operation Dulcet, the PSNI operational response to the flag-related protests. He notes that un-notified flags' protests took place across Northern Ireland from 3 December onwards, the largest of which included numbers in excess of 1000. The potential for public order disturbances across Northern Ireland was felt to be very high and this impacted on decisions taken in Belfast. He referred to the policies the PSNI had regard to in managing the public order difficulties that arose, namely (a) SP 14/2008 Service Procedure: Public Processions (NI) Act 1998 and the Parades Commission; (b) Procedure and Guidance in relation to Public Events; and (c) the Manual of Guidance on keeping the peace 2010.

[64] Referring to the 1998 Act, the ACC indicated that the PPS advised the PSNI of the evidence required to prove an offence under s6(7) of 1998 Act. Such evidence would include CCTV footage and statements from officers in respect of individual suspects. He avers that the police have been collating such evidence since the protests began.

[65] He stated that there have been previous incidents in which public disorder offences have arisen from un-notified processions and related protests and in which the PSNI took a similar course of action. The main example is the protest at the Ardoyne Shops in 2010 against an Orange march. He states that the PSNI decided, for operational reasons, not to prevent the protest from taking place and to subsequently review the evidence before deciding whether to report persons for offences under the 1998 Act. Due to PSNI officers coming under attack all but two of the protestors were released but follow-up action resulted in 96 convictions at court.

[66] Similarly, in the context of the flags protests, between 3 December 2012 and 20 February 2013 195 people were arrested of which 146 were charged to court. B District (which includes the Short Strand) accounted for 93 of the 195 arrests. A further number of other people were cautioned and reported to the PPS. Others were dealt with by way of restorative cautions or other discretionary disposals with some persons on police bail pending further enquiries. He adds that 149 police officers were injured.

[67] ACC Kerr averred that police do not have powers under the 1998 Act to ban a procession or protest and where parties engage in un-notified processions the imposition of controls on such events passes back to the PSNI. In the absence of a Parades Commission determination or prohibition from the Secretary of State, the PSNI only has recourse to general public order policing powers. The PSNI has regard to its general functions under s32 of the 2000 Act and to Arts 2, 8 and 11 of the Convention. He averred that when operational decisions were being made the PSNI took account of the interaction between these competing rights and the status of Arts 8 and 11 as qualified rights. He sought to balance the rights and interests of Short Strand residents with the rights of protestors to protest. He also took into consideration the fact that the protests were un-notified, the availability of resources, and the likely effect of operational decisions on public order.

[68] ACC Kerr explained an aim of Operation Dulcet was to manage disorder by permitting the protestors to proceed into Belfast and back while maintaining the normal life of the city for as long as safely possible. Part of the strategy was engagement with all parties, a consensual approach having been found to be the most effective operational option as regards parades. However a difficulty was absence of clear leadership or hierarchy among the protesting groups.

[69] ACC Kerr says that by the week of 25 February 2013, the Parades Commission clarified their position, an operational assessment was made on the dwindling numbers of protestors, and it was felt that the parades could now be stopped with minimum recourse to the use of force. He says that this was communicated to representatives from the Loyalist community and other political leaders in meetings on 26 February 2013.

[70] He averred that the flags' protests have involved the deployment of very significant resources comparable to those required on 12 July. The cost of policing the protests in December and January was over £15.5m. He refutes Niall Ó Donnghaile's averment that the PSNI adopted a "laissez-faire" attitude to policing. He reiterates that the role of the police is to collect evidence of persons organising or taking part in un-notified parades and to refer them to prosecuting authorities, while also employing public order and common law powers to keep the peace.

Irish News interviews with ACC Kerr and the Parades Commission and parades in February 2013

[71] Pdraig O'Muirigh, solicitor for the applicant, exhibited articles from the Irish News dated 16 February 2013 and 26 February 2013 which report interviews with ACC Kerr and the Head of the Parades Commission. ACC Kerr was reported as saying:

“There is no such thing as an illegal parade under the Public Processions Act. We have no powers to stop a parade.”

The Head of the Parades Commission was reported as saying in relation to an un-notified, and therefore unlawful and illegal, parade:

“It then becomes a policing matter very clearly under common law and the public order legislation. The police have a range of options about what to do, from stopping the parade to gathering evidence to prosecute to arresting people or other options.”

[72] Mr O'Muirigh contended in his affidavit that this indicates that the PSNI were acting on the premise that they had no power to prevent parades until the Head of the Parades Commission made this clarificatory statement. Following that, there was no march on 3 March 2013, protestors instead being bussed in to the city centre to protest. Mr O'Muirigh contends that it was the PSNI threat, for the first time, to stop the parade of 3 March 2013 that had the desired effect of preventing it. In a second affidavit sworn by Conor Keenan, he states that on 22 February PSNI indicated that they would stop attempts to march on 2 March 2013 and that this was the first time such an indication was given by police.

[73] The respondents obtained the transcript of ACC Kerr's interview with the Irish News which, they submit, does not bear the applicant's interpretation of the ACC's words. The full transcript of the Irish News interview with ACC Kerr indicates that he did not say that the police had no powers to stop parades but rather: “We have no power to stop an illegal parade under *The Public Processions Act*, the offence is taking part in an un-notified parade.” The relevant extracts of his transcript are:

- “1. We have to work within the law and the law is confused and it is complex in this area.
2. We have to work within the confines of Article 2, which is about the right to life, but where does the greater risk and the greater threat come from ...”

“People need to remember, you know, we want to facilitate republican or loyalist peaceful and lawful protest. The difficulty is it has to be peaceful and lawful. Now the European Convention makes it very clear that there is a right to a peaceful assembly under Article 11 of the European Convention and the reason it gets slightly confusing sometimes is that the European Convention is explicitly clear the Police Service has a responsibility to facilitate peaceful protests even if it is technically unlawful and that’s where it takes us in to the space of confusing right. The Public Processions Act, it doesn’t exist. We have no power to stop an illegal parade under the Public Processions Act, the offence is taking part in an un-notified parade. Now we looked at the Saturday parade and we applied the reasonable person test”.

“We have made it unambiguously clear we have said if you are standing there with your kids on the side of the road and you see 3 to 4 sometimes 12 up to 13 hundred people walk passed (sic) you, of course that’s a parade, and we said that right from the start from the outset. And it becomes sufficiently regularised on a Saturday that we thought it fell within the Public Processions Act which is why we wrote to the Parades Commission in hope that independent decision making body will take responsibility for dealing with this. It is, it is legally complex and we would actually welcome some judicial clarity on what exactly the Public Processions Act allows people to do and who has to make these decisions but our principle concern is that policing shouldn’t be placed in this position again to have to make the ultimate decision because we can only make the decision based on a risk or a threat to life, which is a clearly blunt decision making tool sometimes”.

[74] ACC Kerr also refuted, in his affidavit of 14 March 2013, the way his words were interpreted by the applicant. He further indicated that on 14 February 2013 a decision that un-notified parades should be stopped was influenced by a range of factors which included that the parades were continuing with lower numbers and the attitude in the PUL community that the protests had run their course. However, it was decided that processions would be stopped after 23 February 2013, on which date a parade in memory of two UDR officers was planned to occur along the same route; to have stopped it would have been likely to stoke tensions.

The Secretary of State

[75] Mark Larmour, Deputy Director in the NIO, averred that the SoS had not made an order under s11 of the 1998 Act to prohibit the holding of processions relating to the protests because she had not formed the opinion that the criteria for the exercise of such powers were met, but that the position would be kept under review. It is not accepted that this decision is incompatible with the applicant's rights under Art8 of the Convention in light of the existing powers of the police to manage public disorder.

Summary of Applicant's Submissions

[76] Counsel for the parties provided helpful skeleton arguments which clearly set out the main issues. The case for the applicant has been summarised into 6 main propositions.

[77] First, in failing to stop the weekly parades going to and from the City Centre via the Short Strand, and in facilitating them, the Chief Constable fundamentally undermined the 1998 Act, and the clearly expressed will of Parliament that parades be dealt with according to the 1998 Act, by taking upon himself the role of deciding whether parades should be permitted, as opposed to preventing unlawful parades. It is argued that the policing operation permitted the organisers of the parades, many of whom have high public profiles, to reinstate the situation pertaining before the establishment of the Parades Commission, with the PSNI assuming dominance in determining whether parades should proceed.

[78] In support of this argument the applicant has detailed the context in which the 1998 Act was introduced, including the disorder surrounding the policing of contentious parades in the late 1990s during which the march from Drumcree Parish Church along the Nationalist Garvaghy Road became a focal point for disorder throughout Northern Ireland. At the height of that dispute, the Chief Constable took the decision to force an Orange Order parade down the Nationalist Garvaghy Road based on the inability to secure the situation because of the extent of rioting and violence by members of the Orange Order and their supporters.

[79] The applicant describes the subsequent establishment of the Independent Review of Parades and Marches which led to the North Report and the 1998 Act. Decisions about contentious parades were taken out of the hands of the police and given to an independent Parades Commission which was sufficiently representative to command widespread acceptance in the community. The applicant submits that Parliament through the mechanisms of the 1998 Act expressed its clear view as to how parades should be regulated and that the function of the police is not to determine whether and under what conditions parades should proceed, but rather to implement Parades Commission decisions or, where illegal parades are planned, to prevent them from proceeding and arrest those involved.

[80] Secondly, the applicant contends that, in failing to take any or appropriate action in respect of the parade, the police misdirected themselves when they considered there was no power to stop parades. Thirdly, in failing to take any or appropriate action in respect of those involved in the parades, the police misdirected themselves when they considered they could not arrest those taking part. Fourthly, it is contended that the police misdirected themselves in concluding that Art 2 of the Convention required that they take no action to stop the parade or arrest protesters. Fifthly, the police's failure to act was a breach of their duties under s32 of the 2000 Act; and sixthly, failure to act was incompatible with the applicant's Art 8 rights.

[81] In support of these contentions, the applicant submits that, pursuant to s32(1)(c) 2000 Act, the police are obliged to take action to prevent the commission of offences by those who are organising and taking part in these parades. Action to stop the parades is also mandated by s32(1)(a) and (b), given that there were threats to life and property as well as serious disorder.

[82] The applicant also seeks to demonstrate that, until the statements made by the Head of the Parades Commission, published in the Irish News on 26 February 2013, the police misdirected themselves in considering that the parades were not illegal and that there was no power to stop them. The applicant also points to the ACC's comments on Arts 2 and 11 in the transcript of his interview with the Irish News:

“... we want to facilitate republican or loyalist peaceful and lawful protest. The difficulty is it has to be peaceful and lawful. Now the European Convention makes it very clear that there is a right to a peaceful assembly under Article 11 of the European Convention and the reason it gets slightly confusing sometimes is that the European Convention is explicitly clear the Police Service has a responsibility to facilitate peaceful protests even if it is technically unlawful and that's where it takes us in to the space of confusing right. ...”

[83] The applicant says this demonstrates that the ACC may not have appreciated the qualified nature of the Art 11. That the ACC asked the Parades Commission to take responsibility for dealing with the situation signified a failure to recognise that, because the parades were un-notified and consequently illegal, it was the responsibility of the PSNI to police, as opposed to facilitate, the parades. It is further submitted that the ACC erroneously thought that police could only make the decision (apparently to stop a parade) “based on a risk or a threat to life”.

[84] The applicant argues that, until the intervention of the Parades Commission, the PSNI had approached the parades as if they could not be stopped and that, during that period, steps were not taken to prevent the parade through normal

policing means, by arresting and charging those involved and arresting and charging organisers.

[85] It is submitted that the violence inflicted on the applicant's home, which can be causally connected to the illegal parades, engages the state's positive obligation to act under Art 8. It is submitted that where Art 8(1) is engaged, the onus shifts to the state to justify the interference with the Art 8 right. It would not be appropriate in this case to give particular weight to the police's decisions and decision making, given the lack of precise evidence about the operational decisions taken and reasons for taking them and the conflicting evidence about what the police considered the legal position to be. The applicant also points to the comments in the judgment in The Commissioner of Police for the Metropolis v ZH [2013] EWCA Civ 69 to the effect that operational discretion is not sacrosanct.

[86] The applicant distinguishes the case of Re E from the present case on the basis that, in Re E, there was a substantial amount of evidence before the Court to the effect that policing the operation differently could have resulted in the extension of the protest to other venues and also an increased risk to the lives of other civilians in the North Belfast area. However, in the current case the height of the evidence was the affidavits of ACC Kerr in which he referred to the potential for public disorder disturbances throughout Northern Ireland being high throughout December and January, and intelligence indicating that, had protests been stopped from going into the city centre between 6 and 8 December, the risk to life posed by the resultant disorder posed too great an Art 2 risk.

Summary of Respondent's Submissions

[87] The respondents make general submissions about the jurisdiction of the Parades Commission as conferred by the 1998 Act. Briefly, the Commission does not have a general free standing power to intervene in respect of matters of public assembly. Rather, notification is the gateway condition that confers jurisdiction on the Commission. The fact that such a notice has been given to the police will not engage the Commission's jurisdiction *per se* until that notice is sent to the Commission. Where there has been no such notice then there is no power to impose conditions on a related public protest. Further, if a parade is un-notified, anyone organising or participating in it is acting unlawfully and is guilty of an offence, as provided by s6(7). It is therefore not the case that a body can simply fail to notify the Commission and evade any legal consequences. The Parades Commission regulates notified parades but those who fail to engage with the statutory process will have their conduct sanctioned by the application of the general criminal law in the event that prosecutions are pursued.

[88] The respondents submit that the first proposition advanced by the applicant, namely that the Chief Constable has undermined the operation of the 1998 Act, is misconceived. There is no evidential foundation for the claim that the Chief Constable took 'upon himself the role of deciding whether parades should be

permitted'; rather his role was reactive and defined by the failure of any organisers to notify the Parades Commission.

[89] In this context the respondents note several approaches contemplated by the North Report which Parliament clearly did not enact. The report suggested that the police could refer a forthcoming parade to the Commission prior to the receipt of formal notification from organisers. However, this was not enacted. Secondly, the 1998 Act does not afford the Parades Commission a free-standing power to conduct investigations and impose conditions upon processions that it has good reason to believe will take place due to their regularity and predictability. Thirdly, there is no provision in the 1998 Act that allows persons opposed to a procession or affected by it to refer the matter to the Commission.

[90] Further, s10 of the 1998 Act clearly anticipates that there may be a requirement to address issues relating to protests and processions outside the framework of the 1998 Act. S10 provides:

“Nothing in section 8 or 9 or in any determination of the Commission affects the common law powers of a constable to take action to deal with or prevent a breach of the peace.”

[91] Thus, where there is a failure to engage with the processes of the Parades Commission, a procession or protest will fall to be policed by reference to either common law powers or the residual public order powers. The legislature recognised that, in the event of non-engagement with the process, common law powers provided the backstop. The consequence is that disengagement with the statutory scheme places the PSNI at the centre of the decision-making processes in respect of parades and processions. It is submitted that, in his interview with the Irish News, ACC Kerr was quite clear about the primacy of the 1998 Act.

[92] The respondent also notes that the Public Order (NI) Order 1987 formerly contained provisions empowering the police to impose conditions on public processions and protest meetings. Such powers were repealed when the 1998 Act was introduced. The PSNI are empowered to enforce any conditions imposed by the Parades Commission or enforce prohibitions ordered by the Secretary of State. As the Secretary of State has not issued any prohibition and the Parades Commission has not issued any determination the PSNI are left to deal with the matters in terms of public order operations.

[93] As regards the second contention advanced by the applicant, namely that the police misdirected themselves as to whether there was no power to stop parades, the respondents refute there was any such misdirection. They say that the PSNI has in the past dealt with un-notified processions (and related protests) and have at times permitted them to occur whilst gathering evidence, and on other occasions

prevented them from taking place. Several examples of this operational flexibility appear throughout the affidavit evidence, including that of Martin Duffy.

[94] The respondents also refute the third contention advanced by the applicant, namely that the police misdirected themselves when they considered they could not arrest those taking part. It is submitted that the PSNI took appropriate action in terms of the policy on arrests, with the policy of gathering evidence with a view to pursuing prosecutions at a later date having been followed previously. The aim was policing protests without provoking greater public disorder.

[95] The applicant's fourth contention is also refuted. The police aimed to manage the protests, balancing the rights and interests of the residents of the Short Strand, the residents of Belfast and Northern Ireland generally, and those of the protestors. The initial decision was to intervene and prevent protestors from moving into Belfast City Centre but intelligence altered the balance of considerations wherein the PSNI concluded that the risk to life posed by the resultant disorder posed too great an Art 2 risk. The PSNI strategy included working towards the cessation of the protest moving into and back from the city centre and included evidence gathering and subsequent arrests/reporting to minimise the risk of sparking further violence. The PSNI took action to prevent the protest from returning to the Lower Newtownards Road via the Queens Bridge, with their intention communicated to community representatives before 12 January 2013. That protestors broke away from Queens Bridge on 12 January illustrates the difficulties that faced the PSNI when policing the protests.

[96] As regards the applicant's fifth contention, the respondents have referred the Court to the detail contained in the Gold Command Events Policy Books in response to the un-particularised contention that there has been a breach of police duties under Art32 of the Police (NI) Act 2000.

[97] The applicant's sixth contention was that the failure to act was incompatible with the applicant's Art 8 rights. The respondents submit that the applicant's rights have been protected on the basis that offenders are being identified and prosecuted under the criminal law as a result of criminal activity, including taking part in an un-notified parade. The respondents cited R (on the application of McDonald) as authority that the positive obligations potentially imposed upon the state by Art 8 are limited. It is submitted that the positive obligations of the state in these circumstances have not been breached as the respondents have considered the impact of the protests upon the general and Short Strand community as well and the rights of the protestors, and sought to strike a balance based upon their analysis of how best to police the situation and ensure that the rights of the individuals are protected.

[98] The respondent also referred to Osman v UK as affirming the limits of the positive obligations under Art8 in terms of policing. Further, in PF & EF v UK the European Court of Human Rights found operational decisions to have fallen within

the ambit of legitimate police discretion and fully complied with the State's positive obligations. The respondent also refers to para 55 of Austin v UK submitting that account must be taken of 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.

[99] The respondent submitted that this case is essentially concerned with operational policing decisions and that the Court should defer to the discretionary decision-making of the Chief Constable unless there is an exceptional and egregious reason for substituting the view of the Court for that of the Chief Constable as to how contentious parades should be policed.

[100] Should the court find that the positive obligation has been engaged, it is contended that there has been no interference with the Art 8 rights of the applicant. The respondents argue that the specific incidents referred to in the evidence do not support the applicant's contention that 'most if not all of these events have resulted in serious disorder'. It is argued that certain of the incidents referred to were not expressly linked to the Saturday processions or else were not grounded in specific details of place or time. The applicant's evidence in terms of a connection between the actions of the respondents in response to the Saturday parades and the incidents specifically complained of by the applicant did not reveal any interference with Art 8 rights.

[101] Should the Court find that Art8 is engaged and that the right has been interfered with, the respondent refers to the qualified nature of Art 8. The respondent cites the five questions posed in Regina v Secretary of State for the Home Department (Appellant) ex parte Razgar (FC) (Respondent) [2004] UKHL 27 and, in relation to the fifth, argues that the respondents have sought to balance the rights of the individual and the interests of the community and that any interference has been proportionate and lawful when the rights and interests of the parties are properly and contextually balanced.

[102] Lastly, notwithstanding that the protests were un-notified, the respondents submit that the right to peaceful assembly is protected under Art 11. To adopt a blanket approach to all un-notified processions and prohibit them without undertaking a consideration of the rights of the protestors along with the effects on others would potentially constitute a breach of the rights of the protestors.

Discussion

Background to The Public Processions (NI) Act 1998

[103] The 1998 Act established the Parades Commission. Its establishment occurred against a background of serious community conflict and public disorder in relation to the policing of contentious parades. The loyal orders asserted a right to march down any public highway regardless of the views of or opposition from local

residents. On the other hand nationalist residents' groups objected to the Orange Order processing through nationalist housing estates.

[104] In the late 1990s the march from Drumcree Parish Church along the nationalist Garvaghy Road to the centre of Portadown became a focal point for the parades dispute throughout Northern Ireland.

[105] In 1996 the Chief Constable of the then RUC made a decision to re-route the Orange parade away from the Garvaghy Road. Following five days of serious and widespread public disorder, involving rioting, arson and blocking of roads by loyalist protestors, the Chief Constable felt compelled to reverse his decision and force the march down the Garvaghy Road against the wishes of local residents. The Chief Constable acknowledged that his decision was based on his inability to secure the situation in Northern Ireland because of the extent of the rioting and violence and his fear that on 11 July the security forces would be unable to police the situation.

[106] It was against that background that the independent review of parades and marches was established in August 1996. The 1998 Act implemented the recommendations of the North Report.

[107] The North Report addressed itself to the question of the extent to which the right of protest should be permitted and, if permitted, regulated, and whether the police should retain responsibility for the regulation of parading in Northern Ireland. The North Report concluded that a new independent body "the Parades Commission" should be established. The Parades Commission was established to replace the police as the body responsible for determining whether parades should go ahead in Northern Ireland and under what conditions. Decisions about contentious parades were thus taken out of the hands of the RUC and its successor the PSNI and given to an independent Parades Commission.

[108] Thus, when it comes to parading in Northern Ireland, particularly contentious parades, such as those which give rise to the current proceedings, the will of Parliament as to how such parades should be regulated has been made explicitly clear in primary legislation through the 1998 Act.

[109] The key features of the statutory scheme are that those responsible for organising parades give advance notice; that the Parades Commission is empowered, having consulted with those who wish to parade, and any residents affected by the parade, to put in place regulations or limitations on the conduct of the parade, including *inter alia*: its route; the timing of parades; and the numbers who can participate. The function of the police is to "police" the parade in accordance with the directions of the Parades Commission.

[110] The 1998 Act contains an elaborate and carefully calibrated statutory scheme. A central feature of the scheme is the requirement to give advance notice. S6 of the

1998 Act imposes a mandatory requirement for advance notice of public processions. In terms it provides that a person proposing to organise a public procession “shall” give notice of that proposal to a member of the PSNI not below the rank of Sergeant by leaving a notice with him at the police station nearest to the proposed starting place of that procession.

[111] The notice must be given not less than 28 days before the date on which the procession is to be held or if that is not reasonably practicable as soon as it is reasonably practicable to give such notice. The notice must be in writing in the form prescribed by regulations and be signed by the person giving the notice. The person giving the notice is required to specify in the prescribed form:

- (i) the date and time when the procession is to be held;
- (ii) its route;
- (iii) the number of persons likely to take part in or support it;
- (iv) the names of any bands which are to take part in it;
- (v) the arrangements for its control being made by the person proposing to organise it;
- (vi) the name and address of that person, if applicable;
- (vii) the reason why it was not reasonably practicable to give notice outside the 28 day period; and
- (viii) such other matters as appear to the Secretary of State to be necessary for, or appropriate, for facilitating, the exercise by the Commission, the Secretary of State or members of the PSNI of any function in relation to the procession.

[112] It is clear that such details are required, *inter alia*, to inform decisions about whether to permit a public procession and, if so, the conditions, if any, which are to be imposed. The notice requirements are to secure the orderly regulation of public processions in the public interest. Manifestly such details are also required so as to inform the operational and resource implications in respect of police deployments etc. A breach of the notice requirements is therefore plainly inimical to the will of Parliament as expressed in the statutory regime and to the obvious public interest which the requirement of notice is designed to secure. This fundamental architecture of the statutory scheme is reinforced by the fact that it is a criminal offence, punishable by imprisonment and/or a fine to organise or take part in a procession when the requisite notice has not been given.

[113] The leaving of a notice with the PSNI does not, of itself, apparently confer jurisdiction upon the Parades Commission to make a determination. S6(6) provides that the Chief Constable shall ensure that a copy of a notice given under this section is immediately sent to the Parades Commission.

[114] S6(7) provides that a person who organises or takes part in a public procession in respect of which the requirements as to notice have not been satisfied or which is held on a date, at a time or along a route which differs from the date, time or route specified in relation to it in the notice shall be guilty of an offence. (S6(8) provides a statutory defence based on lack of knowledge of the failure to satisfy the notice requirements). A person guilty of an offence under S6(7) is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine or both.

[115] The Commission's powers to engage with public assemblies is limited to parades and protest about which they have been formally notified - see, for example, S8(1) of the Act which empowers the Commission to "issue a determination in respect of a *proposed public procession*". The Chief Constable submitted and the applicant did not demure that the Commission does not have jurisdiction to impose conditions upon a procession which has not been "proposed" and about which it does not have "notice". Notification within the meaning of the 1998 Act, is the gateway condition that triggers the jurisdiction of the Parades Commission.

[116] It is common case in these proceedings 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 S6 of the 1998 Act. A number of consequences flow from this by reason of the provisions of the statutory scheme enacted by Parliament. These include the following - first, that those organising the protest (as well as those knowingly taking part) were guilty of a criminal offence under S6(7) of the 1998 Act and liable on summary conviction to imprisonment for up to six months and/or a fine; secondly, the tactic of not notifying the police had the effect of depriving the Parades Commission of jurisdiction to put in place limitations on the conduct of the parade including, amongst other things, its route, the timing of parades and the numbers who can participate. This had the effect of undermining the statutory intention of the 1998 Act to implement the North Report. As previously pointed out the Parades Commission was established to replace the police as the body responsible for determining whether parades should go ahead in Northern Ireland and under what condition. Decisions about contentious parades were thus taken out of the hands of the police and given to the independent Parades Commission. Where a parade is not notified and is therefore breaking the law it was then a matter for the police to deal with it under the various options open to them which could include stopping the parade or gathering evidence for potential prosecution.

[117] S32 of the Police (NI) Act 2000 provides:

“It shall be the general duty of police officers –

- (a) to protect life and property;
- (b) to preserve order;
- (c) to prevent the commission of offences;
- (d) where an offence has been committed, to take measures to bring the offender to justice.”

S32(5) also requires police officers “so far as practicable” to carry out their functions in co-operation with and with the aim of securing the support of, the local community.

[118] In his annual report for 2012-13 HM Chief Inspector of Constabulary at p31 stated:

“Justice is an essential part in the maintenance of peace, order and security, itself one of the oldest functions of civil society. *The prevention of crime and the successful, timely and efficient apprehension and conviction of criminals, their humane treatment and effective rehabilitation, therefore rank amongst the highest obligations of the state. The lack of efficient and effective policing – visible and otherwise – would imperil public safety, and diminish the reach and quality of public justice.* The police are therefore one of the most essential of our public services.

The founder of the modern police service, Sir Robert Peel, established nine principles for the police service in London. These principles ... hold good and apply today in all police forces in the United Kingdom. They have also been adopted in a number of other countries.”
[Emphasis added]

The first of the so-called Peelian principles states that “*the basic mission for which the police exist is to prevent crime and disorder*”.

[119] Of course, as the Court put it in Osman v UK [1998] 5 EHRC 293:

“116 ... bearing in mind 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, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities ...”

[120] And I have no difficulty in accepting that operational discretion is important to the police and that no Court should unreasonably interfere with the operational discretion of the police or make practical policing impossible. However, as the Master of the Rolls observed in The Commission of Police for the Metropolis v ZH [2013] EWCA Civ 69:

“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”.

[121] I accept the applicant’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. I accept the further submission 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.

[122] In his second affidavit at paras15-18 ACC Kerr explains that on 6 December it was decided that “known protestors would not be permitted to move *towards the city centre*”. At this stage it was not envisaged that there would be a march/parade but rather the protestors would seek to make their way, from a variety of locations, to Belfast City Hall. According to the affidavit the decision changed between 6 December and 8 December because the risks associated with stopping protestors from protesting in the City Centre were too great. This decision is documented in the events policy book from which it was clear that there were Art 2 risks identified as being associated with stopping protestors from getting to City Hall and also Art 2 risks associated with protestors being permitted to get to City Hall. I agree with Ms Quinlivan that the decisive factor in the decision to permit the protestors at City Hall was, as described in the policy book, the “*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*”. In any event, that decision was a decision focussed on the events of 8 December and had no relevance to subsequent decisions to permit the march. As Counsel for the applicant pointed out, thereafter there is 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

an interface. I have no explanation as to why the police permitted the loyalist protestors to march into the City Centre, via Short Strand, given that the march was illegal and associated with serious public disorder, and/or serious disruption to the life of the community and the likely adverse serious impact on relationships within the community.

[123] Nor is there any explanation as to why, having facilitated some form of protest at City Hall to “allow for some venting of anger and community tension” on the flags decision, they were then permitted to march back out of the City Centre via Short Strand. And this appears to have occurred in circumstances where some of those who protested at the City Hall had come from other parts of the city and who nonetheless marched back to East Belfast and when the return leg was associated with serious public disorder.

[124] Nor, as the applicant pointed out, is there any explanation as to why, although police were meeting with march organisers as far back as 9 January 2013, the decision to “prioritise” early executive action against high profile “organisers” was not made until 25 February 2013 which was after the decision had been made to stop the marches. Nor has it been satisfactorily explained as to why, on 14 March 2013, over three months after the illegal parades commenced, only six people had been arrested for offences under the 1998 legislation.

[125] The events policy book indicates a failure on the part of the Gold Commander to specifically and appropriately engage with the march from East Belfast to Belfast City Centre despite its illegality and the associated public disorder. As Counsel reminded the Court the first mention of the term parade to appear in the book is found on 22 January although they do acknowledge that there was engagement with the issue prior to that date given the meeting with the Parades Commission on 15 January.

[126] Of greater significance however is that after mid-January when police began to engage with criticisms of their handling of the weekly parade the evidence makes it clear that ACC Kerr, the Gold Commander, considered that police were hampered in their ability to act effectively and stop the parade either by the 1998 Act or human rights legislation or both.

[127] In relation to this latter issue it is evident 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.

[128] The applicant provided a table which documents the frequency with which ACC Kerr expressed his concerns about the adequacy of his powers. This is despite the fact that Mr McGleenan, on behalf of the Chief Constable, acknowledged that on the facts of the instant case, given the violence of loyalist protestors, the issue was not legally complex and was in fact straightforward and that the ACC had ample powers to effectively police the matter.

[129] If, as Counsel for the PSNI contends, the police fully understood the extent of their powers in this area, it does beg the question why ACC Kerr was repeatedly expressing doubt as to his powers and concerns as to the limitations of the 1998 Act. If the PSNI contention was right, the applicant posed the following pertinent questions:

- (i) Why was it necessary to obtain legal advice on the issue?
- (ii) Why suggest that the Parades Commission take responsibility for issuing a determination in relation to the parade, given that the statutory scheme was such that, by virtue of the absence of notification, the parade was unlawful?
- (iii) Why state to Sinn Fein, when addressing the weekly parades, that there were policy challenges caused by the ECHR and “gaps” in the 1998 Act?
- (iv) Why consider a judicial review to obtain clarity in relation to police powers and responsibilities?
- (v) Why did the Parades Commission, with whom ACC Kerr had been engaging and outlining the police position, state that the Chief Constable has “got it wrong” and that police did have power to stop the parade?
- (vi) Why tell the general public, via The Irish News that, “we have no power to stop an illegal parade under The Public Processions Act, the offence is taking part in an un-notified parade” and yet fail to communicate the fact that nonetheless police had a battery of other powers at their disposal which would enable them to stop the parade?
- (vii) Why, again in The Irish News, seek to shift responsibility for implementing the law onto the Parades Commission?
- (viii) Why call for judicial clarity as to what The Public Processions Act “allows people to do and who has to make these decisions”?
- (ix) And in the event that he considered the article misleading, why did ACC Kerr not communicate with The Irish News and correct the misapprehension that flowed from the article?

[130] These are all highly material questions and I am satisfied that ACC Kerr did misdirect 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. This was plainly wrong. The issue was not, as Mr McGleenan acknowledged, legally complex, was straightforward and the ACC had ample powers to effectively police the matter.

[131] If, on the other hand, the police were unfettered by any misapprehension as to their legal ability to effectively and efficiently police illegal marches, the Court would have expected a clear explanation for its operational decisions. The facilitation of such illegal activity over a significant period fundamentally undermined the statutory framework put in place by Parliament.

[132] Whilst the applicant does accept that the police strategy, decided upon on 14 February 2013 and acted upon on 2 March 2013 was effective and lawful, this was only after the leave hearing at which the applicant's Counsel had argued that the legislative scheme was being undermined by police inaction, a prophecy which she said became reality when the Orange Order announced their intention to disregard the legislative scheme in favour of the flags protestors strategy of refusing to notify parades. Counsel had contended that the Orange Order's announcement was a direct consequence of the police strategy of permitting violent loyalist flag protestors to march illegally and with effective impunity from sanction.

[133] During the course of the hearing, in response to questions from the Court, Mr McGleenan QC, on behalf of the Chief Constable, confirmed that had the Parades Commission been in the position to make a determination, including a determination that the march should be stopped, that determination would have been enforced come what may. If this was correct, it demonstrates that the policing decisions were not operational but rather influenced by the fact that the march was illegal, not by virtue of a Parades Commission determination, but instead by virtue of having been un-notified. Counsel submitted that this displayed a profound misunderstanding of the police's role within the legislative scheme. The legislative scheme provided that an un-notified parade was unlawful, just as a parade in defiance of a Parades Commission determination was unlawful. The legislation does not differentiate in any way between those positions. Consequently, the police response, it was submitted, should have been identical in each situation. Whether a parade takes place in defiance of a Parades Commission determination or is un-notified or takes place in defiance of an order by the SoS there is, I accept, no legal basis for distinguishing between those positions.

[134] ACC Kerr did make a distinction because he appears to have regarded stopping an un-notified parade as legally distinct from stopping a parade which took place in defiance of a Parades Commission determination. Not notifying a parade shifted the onus back to the police. This meant that the un-notified parade had the same status of illegality as the parade taking place in defiance of a Parades Commission decision. The ACC does not appear to have fully appreciated that an un-notified parade had the same status as one taking place in defiance of a Parades Commission decision. Those organising or participating in a parade which is un-notified or in breach of the Parades Commission determination are, in either scenario, guilty of a criminal offence. The former under s6(7), the latter under s8(7). In each case those convicted are liable to up to six months imprisonment and a fine or both.

[135] The illegal parades the subject of the impugned policing operation, were not only illegal but they were often accompanied by not inconsiderable violence and public disorder. They were illegal because the legislative requirement for notice was being deliberately flouted. Whether a parade was unlawful by reason of breach of a Parades Commission determination or because of a decision to flout the notice requirement, should not have led to a different police response. In each case the expectation is that the police will seek to uphold the rule of law. If, as I was informed, a Parades Commission determination would have been enforced because a procession in defiance would be unlawful so also should a procession rendered unlawful by defiance of the notice requirements. If operational reasons would not have prevented the enforcement of a Parades Commission determination then neither should it have prevented the PSNI from taking comparable measures in respect of illegal un-notified parades.

[136] The impugned policing operation during the period complained of was characterised by an unjustified enforcement inertia.

[137] Un-notified parades and those which defy a Parades Commission determination are unlawful. I accept that the starting point for policing both situations was to address that illegality. In circumstances where the police had knowledge that those participating were likely to engage in serious public disorder, damage to property, disruption to life and behaviours which would impact adversely on relationships within the community, placing themselves outside the protections of Art 11 of the ECHR, the Court would have required the clearest possible explanation and justification for not taking appropriate measures. These were not forthcoming. I consider this is because the police misdirected themselves believing that because there was no determination there was a lacuna or complexity in the applicable legal provisions which hampered their ability to efficiently and effectively police these parades. This was simply wrong and I consider that it was this misdirection which explains and led to the situation in which the police 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 S32 of the Police (NI) Act and in breach of the applicant's Art 8 rights.

Case Against the Secretary of State

[138] The case against the SoS was only faintly pursued. Insofar as the SoS is concerned the evidence filed on her behalf discloses no public law error in relation to the exercise of her powers under s11 of the 1998 Act.

[139] As Mr Larmour has set out in his second affidavit, the SoS gave due consideration to the matter and was not satisfied that it was necessary in the public interest to prohibit processions.

[140] I see no basis for holding that the SoS erred in making this judgment.

[141] For the above reasons the application against the SoS must be dismissed.

Conclusion

[142] For these reasons the application against the Chief Constable is allowed. The application against the SoS is dismissed. I will hear the parties as to the appropriate reliefs.