

Neutral Citation No.: [2009] NICA 13

Ref: **GIR7144**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **26/02/09**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN
IRELAND**

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Tweed's Application (No. 4) [2009] NICA 13

**AN APPLICATION FOR JUDICIAL REVIEW BY DAVID TWEED ON HIS
OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF DUNLOY
LOL 496 (No. 4)**

**AND IN THE MATTER OF DECISIONS OF THE PARADES
COMMISSION FOR NORTHERN IRELAND**

GIRVAN LJ

Introduction

[1] The opening sentence of the report of the Independent Review of Parades and Marches ("the North Report") prepared by a team comprising Dr Peter North, Father Oliver Crilly and the Very Reverend John Dunlop succinctly sets the issue of contentious parades in Northern Ireland in context: "We all have a problem." The issue of marching in Northern Ireland does indeed give rise to a problem or rather a myriad of problems. They are inextricably linked to the divisions that exist within Northern Ireland society. The North Report provides a detailed and painstaking analysis of the complex historical legal and societal questions raised by the issue. Whilst the issue raises problems province wide, it also gives rise to problems which give rise to localised difficulties and tensions. This is evident in this case involving

a small village with a largely Catholic population within a wider area with a predominantly Protestant population. Localised tensions and disorder have a tendency in Northern Ireland to spread out and manifest themselves elsewhere in the province. With a clear insight into the problems, the North Report at paragraph 1.52 pointed out that since the difficulties lie in the areas of flawed communal relationships neither the law nor the Report's proposals could themselves resolve the underlying difficulties though the law is an important mechanism that provides a basic framework within which the competing and conflicting interests can be measured and reconciled. In this case the applicant effectively argues that the mechanisms of the law have not been operated in such a way as to properly measure and reconcile the competing and conflicting interests of the members of the Dunloy Loyal Order Lodge 496 ("the Lodge") and the local community in Dunloy.

The Commission's determination

[2] The proposals put forward by the Lodge in their notice of intention to organise a public procession served under section 6 of the Public Processions (Northern Ireland) Act 1998 ("the 1998 Act") named the applicant as the person organising the parade. The details of the procession specified that the purpose of the parade was to "manifest our faith in God as revealed in the Holy Scriptures on the occasion of the day of celebration of the resurrection of the Lord Jesus Christ through peaceful means during a peaceful procession". The anticipated number of participants (including band members) was 200-300 with one band. Regalia was to be worn but no banners or flags were to be carried. The procession was to go from the Dunloy Orange Hall in Station Road, Dunloy to Dunloy Presbyterian Church in Main Street. The procession was to start at 14.15 and the return procession was to start at 15.30. The band was to comprise the Dunloy Accordion band composed of 30 members. The parade distance was some 315 yards.

[3] The determination made by the Parades Commission ("the Commission") placed restrictions on the organisers and participants limiting the parade to the portion of Station Road running adjacent to the grounds of the Orange Hall along the perimeter fence marking the edge of the Orange Hall. Only the members of the Lodge, County and District Officers and the band notified on the Form 11-1 were permitted to participate. The parade was to last from 2.15 pm to 2.30 pm with no undue stoppages and keeping close to the rear side of the road. Adequate stewarding was required.

The Procession

[4] On Easter Sunday 11 April 2004 at 2.15 pm the members of the Lodge and band assembled in front of the Orange Hall. It started to walk in good order towards the church. At the limit of the perimeter fence it stopped in front of a senior police officer while the band continued to play hymns. A

statement of protest was handed to the officer having been read by the applicant. The National Anthem was played and the procession dispersed at 2.25. The members of the Lodge returned to the grounds of the Orange Hall where a psalm was read and a prayer was said. The police District Commander complimented the applicant on his co-operation during the procession. Before, during and after the event Station Road and Main Street remained practically deserted with no residents or objectors to be seen on the streets. The police were present according to the applicant in considerable numbers including 20 police officers in yellow jackets as well as 6 land rovers and other unmarked police cars one of which contained police dogs. There is nothing to contradict the applicant's contention that the procession was orderly dignified and peaceful and was well marshalled.

The legal challenge

[5] The applicant's challenge to the Commission's determination and its decision not to change it after review raises a number of legal questions. These relate to the compatibility of section 8(6)(c) of the 1998 Act with articles, 9, 10 and 11 of the Convention, the validity of paragraph 4.4 of the Guidelines published by the Commission ("the Guidelines") and the validity of rule 3(3) of the Commission's Rules of Procedure. The challenge also raises wider questions as to the proportionality of the actual decision on the facts of the case, the fairness of the Commission's procedures in dealing with the applicant's notice and as to the question whether the Commission was acting for a legally improper or impermissible purpose in issuing the determination which it did.

The incompatibility question

[6] Under section 8(1) of the 1998 Act the Commission may issue a determination in respect of a proposed public procession imposing on the persons organising or taking part in it such conditions as the Commission considers necessary. Section 5 provides that the Commission shall issue a set of guidelines as to the exercise by the Commission of its functions under section 8. Section 8(6) provides that those guidelines shall in particular provide for the Commission to have regard to -

- (a) any public disorder or damage to property which may result from the procession;
- (b) any disruption to the life of the community which the procession may cause;
- (c) any impact which the procession may have on relationships within the community;

- (d) any failure of a person of a description specified in the guidelines to comply with the Code of Conduct (whether in relation to the procession in question or any related protest meeting or in relation to any previous procession or protest meeting); and
- (e) the desirability of allowing a procession customarily held along a particular route to be held along that route.”

[7] Mr Hanna QC on behalf of the applicant argued that section 8(6)(c) must have been intended to require the guidelines to deal with something different from what was required by paragraphs (a) and (b). He contended that section 8(6)(c) cannot have been intended to deal with the avoidance of public disorder, damage to property or disruption to the life of the community. He argued that section 8(6)(c) appears to be aimed at preventing or restricting the possibility of offence and annoyance which is not a Convention compatible aim. There is no right not to be offended or annoyed by the manifestation of another’s religious beliefs, by the expression of another’s opinion or ideas or by the peaceful assembly and freedom of association of others, no matter how much one may dislike or disagree with them.

[8] If any restriction of the Convention rights set forth in articles 9, 10 and 11 is to be justified it must be prescribed by law and be such as to be necessary in a democratic society for one of the specified reasons set out in the articles. It must be for one of the legitimate aims. Article 18 makes clear that restrictions permitted by the Convention may only be for one of the prescribed purposes. If section 8(6)(c) could only be applied in furtherance of the attainment of a purpose other than one of the prescribed purposes then it would not be compatible with the Convention. However, if as the Secretary of State contends, section 8(6)(c) could be properly applied for the attainment of one of the prescribed purposes it would be compatible.

[9] Under section 6 of the Human Rights Act 1998 it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Section 3 requires primary legislation to be read and given effect in a way which is compatible with the Convention rights. The Commission as a public authority must act in a Convention compliant manner in exercising its powers under section 8 of the 1998 Act having regard to the guidelines required to be made under section 5. Those guidelines must contain what is set out in section 8(6)(c). If the Commission were to have regard to an impact on relationships within the community having no rational connection with the prevention of disorder or with the protection of the rights and freedoms of others to which it may properly have regard it could not be said to acting with a legitimate aim in view since none of the other prescribed aims would

appear to be in play. It would thus be acting in a manner that would not be compatible with the Convention. However, where the impact on relationships within the community brings into play enhanced risks of public disorder, damage to property, criminality (which may fall short of public disorder but of its nature impacts on the rights and freedoms of others) or other types of interference with the legitimate rights and freedoms of others then that impact on relationships within the community would be a proper matter to which the Commission could have regard when exercising its section 8 powers. In this context it must be said that Strasbourg and domestic case law has not fully or finally established the full parameters of what constitute rights and freedoms to which regard may properly be had.

[10] Section 8(6)(c) refers to a consideration of both intra-community relationships and relationships between what can in certain contexts be regarded as the separate communities within Northern Ireland. The North Report referred to these relationships using the convenient composite term “communal relationships.” In Northern Ireland, itself a relatively small jurisdiction, it is evident that the effect or outcome of events in one locality may radiate out and have consequences province wide. Deterioration in communal relationships can produce public disorder in the short or long term locally or on a wider scale. It can foment individual acts of violence that may fall short of public disorder but which may infringe the rights and freedoms of others. In Northern Ireland the consequences of a contentious parade may affect or impinge on not only those proposing to march and those in the locality who are opposed to the proposed march but also on those who may be caught between those two groupings and who may have to face and deal with the consequences that flow from the conflict or potential conflict between them. As noted Strasbourg and domestic case law has not fully or finally established the full parameters of what constitute rights and freedoms to which regard may properly be had. These rights and freedoms clearly cover convention rights and freedoms but the concept goes wider than that. Thus, for example, in Otto Preminger Institute v Austria (1994) 19 EHRR 3 in the context of religious opinions and beliefs it was pointed out that there is under article 10 an obligation to avoid as far as possible expressions that are gratuitously offensive to others “and thus an infringement of their rights”. In Moreno-Gomez v Spain (16 Nov 2004) the ECtHR made clear that the duty of the state under article 8 of the Convention extends to taking steps to protect the citizen against anti-social behaviour or nuisances which subject the citizen to significant interference with the enjoyment of his home environment:

“The individual has a right to respect for his home, meaning not just the right to the actual physical area but also the quiet enjoyment of that area.”

It held that breaches of the right to respect of the home are not confined to concrete and physical breaches such as unauthorised entry into a person’s

home but also include those that are not concrete or physical, such as noise, emissions, smells and all forms of interference. In Re The Landlord's Association for Northern Ireland [2006] NI 16 at Para [3] the court discussed the Strasbourg case law relating to the state's obligations to deal with anti-social behaviour impacting on the private lives of citizens and I pointed out that "There is no question that people have the right to be protected from harassment, alarm, distress and anti-social behaviour." In the context of contentious parades where there is a real risk that a parade will generate disorder and violence this will carry with it the real risk of interference with innocent individuals' enjoyment of their home environment and of their private lives. Communal tensions that carry with them the risk of disorder and violence are closely linked to the question of the right of individuals to be allowed to get on with their lives free from unjustifiable interference that flows from disorder, criminality or anti-social behaviour, from whatever source that may come, all of which can be triggered by, contributed to or increased by communal tensions. The statutory imperative of considering the impact of a parade on communal relationships focuses attention on a relevant consideration and reminds the decision maker that its decision must be taken in the light of the wider impact of its decision on the right of individuals to be able to live their lives free from threat of exposure to the social ills mentioned above.

[11] Furthermore whatever else is clear the degree of communal tension created by a particular march to which there is local opposition will be a factor to which the Commission may have regard in determining the proportionality of his decision. In Re Tweed (No. 1) [2001] NI 165 the Court of Appeal concluded that the Commission's decision in that case was firmly based on the prevention of disorder. Referring inter alia to the consideration referred to in section 8(6)(c) Carswell LCJ said

"The other considerations come into play in that part of the Commission's decision which was concerned with the issue of whether those restrictions were necessary in a democratic society and proportionate."

From this passage it is clear that section 8(6)(c) is a consideration at least at the stage when the Commission is considering the proportionality question.

[12] For these reasons Weatherup J correctly rejected the applicant's challenge to the compatibility of section 8(6)(c).

Para 4(4) of the Guidelines

[13] Paragraph 4.4 of the Guidelines as they stood at the time of the impugned determination provided:

“Communication with the Local Community: The Commission will also take into account any communications between parade organisers and the local community or the absence thereof and will assess the measures, if any, offered or taken by parade organisers to address genuinely held relevant concerns of members of the local community. The Commission will also consider the stance and attitudes of local community members and representatives.”

This paragraph must be read in the overall context of the Guidelines and in particular in the light of paragraph 4.1 which provides:

“As the past has shown, there is a huge potential for unresolved disputes over processions to create major and lasting risks in relationships between communities in Northern Ireland. Often these disputes are symptoms of more deeply rooted conflict but they can provoke a violent response which only serves to tear communities further apart. In assessing the impact, if any, which a proposed parade may have on relationships within the community, the Commission will have regard to the following principal factors.”

This introductory paragraph clearly identifies the underlying problem and danger presented by contentious parades, namely the provoking of violence that exacerbates underlying tensions within society. This clearly points to the issues of crime and disorder the prevention of which is within the legitimate aim of possible restrictions and of the relevant articles.

[14] Paragraph 4.4 cannot be regarded as incapable of being applied in a Convention compliant manner. The true question is not whether Article 4.4 was irredeemably bad in Convention terms but rather whether the Commission, taking its provisions into account in arriving at its determination, failed to act proportionately in the result.

[15] Accordingly the applicant’s challenge to the lawfulness of paragraph 4.4 of the Guidelines must be rejected.

Acting for a proper purpose

[16] Mr Hanna contends that on a fair consideration of all the available evidence it has been shown that the true reasons why the Commission made its determination were not those asserted, namely the prevention of disorder

and protection of the rights and freedoms of others. He argued that its real motivation was to restrict the possibility of offending or annoying local residents; to allow local residents to veto the exercise by Lodge members of their Convention rights; and to put pressure on the appellant and the Lodges to “engage” with local residents. The Commission was effectively underpinning the stance and attitudes of the local community members. Counsel argued that from a reading of the police report it is clear that the police failed to properly assess the likelihood of public disorder occurring. In any event there was no suggestion that the police would be unable to deal effectively with any public disorder that might occur. If there was no disorder then the parade would have no significant impact on the rights and freedoms of others. The second situation report dated 2 April 2004 showed the attitude of the local residents who did not object to a symbolic parade from the Orange Hall proceeding as far as the perimeter of the Orange Hall grounds. They objected to any further progress towards the centre of the village which they contended would create a strong adverse reaction from Dunloy residents unless the Order first engaged in dialogue with the residents. If the police were to be deployed in forcing a parade beyond the limits stated relationships with the police would be set back a decade. Mr Hanna argued that the Commission gave into the residents and made a determination which mirrored precisely what the residents were proposing. Counsel took issue with paragraphs 24-27 of Sir Anthony Holland’s affidavit. In paragraph 26 the Chairman of the Commission pointed out that the Commission looks for evidence of a real attempt to address the legitimate concerns of others and a preparedness to accommodate those concerns. Mr Hanna pointed out that the Chairman did not specify what he meant by legitimate concerns. Only public disorder and possible interference of the rights and freedoms of others could be regarded as legitimate concerns.

[17] It is to be noted that the applicant did not seek to cross-examine the Chairman on his affidavit. A fair reading of the determination and of the Chairman’s affidavit leads to the conclusion that the aim of preventing the real risk of public disorder was the aim and purpose which the Commission had in mind when exercising its powers. If there had been no history of disorder at Dunloy as a result of marches or if relationships between the residents and the marchers had reached a point where it could be said that disorder could be reasonably ruled out or could be regarded as of minimal significance and easily contained with no wider risk implications there would have been no justification for a determination such as the determination here. Had those been the prevailing circumstances there is nothing to suggest the Commission would have sought to impose the kind of conditions which it did. However, the police material presented to the Commission and the history of the relationship between the marchers and the local community clearly laid an entirely rational logical basis for the Commission’s conclusion that restrictions on the march were necessary to achieve the legitimate aim of preventing disorder. Even if the Commission took too wide a view of the

legitimate rights and freedoms of the local residents (of which I am not persuaded), the protection of the public order was nevertheless at the forefront of the Commission's mind and was a legitimate aim. In words that appear to apply aptly to the present case Carswell LCJ in Tweed (No.1) [2001] NI 165 stated:

“It seems to us clear from the terms of the Commission's determination that the basis for its conclusion was the risk that public disorder would ensue if the parade went ahead. It was bound to have regard to the other all matters specified in section 8(6) of the 1998 Act but they did not form the ground for its decision to impose the restrictions which was placed firmly on the prevention of public disorder.
...”

Accordingly the applicant's challenge to the judgment of the Commission on the basis that it did not exercise its powers for the proper purpose must fail and the reasoning of Weatherup J upheld.

Proportionality

[18] The decision of the Commission did limit and qualify the article 9,10 and 11 rights of the applicant and the other members of the Lodge. The task of the court in assessing the justification put forward for the interference was described by Lord Clyde in De Freitas v Permanent Secretary of The Ministry of Agriculture and Fisheries Land and Housing {1998} 1 AC 69 approved by Lord Hope in R v Shayler [2003] 1 AC 247. It is the three stage test. The first question is whether there is a pressing social need of sufficient importance to justify limiting the fundamental right. The second question is whether the means chosen to limit the right are rational, fair and not arbitrary. The third question is whether the means used impair the right as minimally as is reasonably possible. One must also bear in mind what Lord Bingham said in R (Razgar) v Secretary of State for the Home Department [2004] 2 AC 368 in which it was stated that the judgment on proportionality “must always involve the striking of a fair balance between the rights of the individual and the interests of the community inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage.”

[19] Mr Hanna QC argued that on a review of the proportionality of a decision which restricts the exercise of Convention rights the court is carrying out an exercise which is effectively or, at least, almost a merits review. In consequence he contended that relatively little latitude should be given to the Commission in reviewing its decision. The court, he argued, are as well

qualified as the members of the Commission to assess what dictates the proportionality demand in a case such as the present.

[20] The court's approach to an issue of proportionality under the Convention requires the court to make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time and proportionality must be judged objectively by the court. The court is concerned with the practical outcome not the quality of the decision-making process that led to it. The intensity of the review is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society in the sense of meeting a pressing social need and the question whether the interference was really proportionate to the legitimate aim being pursued. (See R (SB) v Governors of Denbigh High School [2007] 1 AC 100, 116 paragraph 30 per Lord Bingham, R v Dally v Secretary of State for Home Department [2001] 2 AC 532 at paragraph 27 and Re E (a child)[2008] UKHL 66 per Lord Carswell at paragraph 52 and 53).

[21] In Re E (a child)[2008] UKHL the House of Lords had to consider the question whether the state and its emanation the police force had failed to take appropriate steps to discharge their positive obligation under article 3 of the Convention to protect the appellant and her young daughter against the infliction of human and degrading treatment in a context of the Holy Cross dispute. The police view was that a negotiated community solution would end the protest and that more intrusive intervention would have led to further trouble. Lord Carswell recognised that it is proper to accord a measure of discretion to the police as a body with expertise in handling matters of public security. He referred to what Lord Bingham described in Huang v Secretary of State for Home Department [2007] 2 AC 167, 185 paragraph 16 as:

“performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with a responsibility for a given subject matter and access to special sources of knowledge and advice.”

In Re E (a child) Lord Carswell at paragraph 58 said:

“The police had such responsibility and were uniquely placed through their experience and intelligence to make a judgment on the wisest course to take in all the circumstances. They had long and hard experience of the problems encountered in dealing with riotous situations in urban areas in Northern Ireland..... The police had available to

them sources of information about what was happening in the community and what was likely to happen if they took certain courses of action, which they were experienced in assessing.”

[22] The democratic process has determined that it is the Commission as established by the 1998 Act and constituted in accordance with its provisions which is to be charged with the duty of deciding the question whether conditions should be imposed on contentious parades. The Commission must exercise a judgment. In Re Pelan (No. 2) (12 April 2001) Kerr J at first instance stated and appropriate weight must be accorded to its judgment:

“It seems to me that a body such as a Parades Commission pre-eminently must be afforded a margin of appreciation. It is a body charged with a specific responsibility for researching, assembling material, taking representations, evaluating those representations on the topic of disputed marches. Moreover the Commission is in a unique position in bringing to bear on these contentious issues the collectively experience of its members and the decision that it reaches is as this case exemplifies one that is arrived at after comprehensive and informative debate. It seems to me therefore that this court should be slow to intervene and the resolution by the Commission of the tension that arises in relation to the human rights asserted by the applicant and the residents of the area.”

In that case in the Court of Appeal the judgments make clear that this approach was accepted although it was recognised that the matter had not been fully argued in that case. What Kerr J and the Court of Appeal said in that case accords with the more recent House of Lords authorities.

[23] Deciding whether an act is proportionate necessitates a careful weighing and balancing of factors. Provided the decision-maker has properly addressed the relevant questions and factors and has anxiously and carefully scrutinised the issues which fall to be addressed in arriving at a proportionate decision the court must give the judgment of the decision-maker respect. For its part the court in approaching its task must subject the Commission’s decision to close and penetrating examination as to the legal and factual justification for the restrictions. It must carry out a rigorous and intrusive review of the Commission’s decision and satisfy itself of the proportionality of the decision taking account of the Commission’s own special experience and its representative nature.

[24] Mr Hanna contended that in arriving at its decision the Commission put excessive and unfair emphasis on (a) the issue of engagement; (b) the impact of the proposed procession on community relations in the absence of local agreement; and (c) the apparent desire to give effect to the illegitimate views of local residents who did not wish the procession to take place except in accordance with the very conditions which were in fact ultimately imposed. He argued that there was a complete absence of any attempt to assess the likelihood of disorder occurring or the likely nature and extent of such a disorder if it did occur or the ability of the police to contain or restrict such disorder. He argued that there was nothing to suggest the Commission gave any consideration to the question of the proposed restrictions representing the minimal possible interference with the Lodge members' rights. He further argued that the procedure followed was procedurally unfair. That is an aspect of the matter to which I will turn later.

[25] As to the question of minimal interference Convention law does not explicitly recognise "the least restrictive means" test as an aspect of proportionality although it is a recognised part of the doctrine of EU law. Nevertheless, the European Court of Human Rights has often in practice decided questions of proportionality by asking whether particular measure could be achieved by less restrictive means (see for example Campbell v United Kingdom (1992) 15 EHRR 137). When the decision maker concludes that the circumstances necessitate a limitation or qualification of a relevant right he must fashion the limitation or qualification in such a way that it is not overly broad going beyond what the situation necessarily demands. In other words it must not be disproportionately intrusive in the restriction imposed. A restriction will not be struck down as disproportionate simply because another decision maker might have tinkered with the conditions imposed or worded them slightly differently. The margin of appreciation of the decision maker in this context must be duly and properly recognised. In the circumstances of the determination in this case it could not be said that the restrictions which in fact permitted a limited form of parading were overbroad, irrational or unfair having regard to the legitimate aim which the Commission had in view.

[26] The police report recorded the history of previous determinations in relation to marches at Dunloy. Dunloy was a recognised troubled spot in relation to Orange parades and the police report correctly pointed out that the parade in Dunloy had the potential to lead to communal conflict. According to the police report the possibility of opposing factions coming into contact in a disorderly manner created the potential for a real and serious risk of life. The Commission was alive to the impact on relations between the local community and the police which would result from the police having to act in such a way as to be perceived as forcing an Orange march along roads in the village against the desires of the local residents. The Commission's concern as to public disorder implications if it acceded to the applicant's

request were both genuine and justified. The suggestion that the police failed to quantify the risk of disorder or failed to quantify the risk of the extent of that disorder fails to recognise that such an assessment is notoriously difficult to make in the absence of specific intelligence. What the police could rely on was the history of past events, the prevalence of tension and ill-feeling in the area and in other parts of Northern Ireland and the knowledge that events can unfold in an inflammatory situation unpredictably both within the locality and on a wider basis. As the passage from Lord Carswell's judgment in Re E (a child) referred to at para [21] above makes clear the police had responsibilities and were uniquely placed to make such a judgment and had access to information about what was happening in the community.

[27] The applicant's argument essentially comes to this. Notwithstanding genuine and entirely justifiable concerns about the real risk of disorder with unforeseeable and possibly wide-ranging consequences the Commission was bound, nevertheless, to conclude that the procession should continue and that the police should cope with the potential problems. The local community should be exposed to the real risk of disorder either from within or without the village. The wider community should also be exposed to the potential consequences of increased tension or violence in the Dunloy area. The real potential for damage to communal relationships and to the relationship between the communities and the police should be accepted as a justifiable consequence of ensuring that the march proceeded without restrictions. The applicant's argument is, in effect, that none of the risks and concerns, genuinely and justifiably held by the Commission, justified an interference with the albeit qualified rights of the applicant and the Lodge members under Article 9,10 and 11.

[28] It is true that there are cases in which notwithstanding the risks of violence and disorder the ECtHR has held that the state authorities must uphold the Convention rights under article 9, 10 and 11 and face down potential troublemakers. An example can be seen in Oellinger v Austria (2006) EHRR 76900 in which the court held that the unconditional prohibition of a counter-demonstration was a far reaching measure that required particular justification. See also Ouranio Toxo v Greece (2007) 45 EHRR 8 in which the court held that the police should have taken steps to prevent and contain violence against members of the Macedonian minority which suffered violence and abuse by members of the majority population. Every case must, however, be considered within its own matrix of facts.

[29] In considering the overall proportionality of the Commission's decision in this case it is necessary to bear in mind that the applicant and members of the Lodge were free to assemble, they were free to meet at the local Orange Hall and they were able to manifest their views publicly by leaving the Orange Hall and marching as an assembly in regalia on part of the highway outside the Orange Hall. They were able to conduct a religious

ceremony in the open air in front of the Orange Hall within the sight and hearing of members of the public. They could have had a church service by walking or travelling as individuals to the church. The actual interference of the exercise of the freedom to manifest their religion was thus limited as was the restriction on the right to assemble and to express their views.

[30] Turning to Mr Hanna's argument that the Commission's determination pointed to a penalisation of the applicant and the Lodge for failing to "engage" with local residents the determination shows that the Commission did have regard to the issue of engagement. It points out that one of the core principles identified by the North Report is that all those involved should work towards a resolution of difficulties through local accommodation. It considered the essence of engagement to be attempts at genuine communication between protagonists. In paragraph 12 of its determination stating:

"As stated in paragraph 4.4 of the Guidelines, the Commission takes into account any communications between parade organisers and the local community or the absence thereof. Further, the Commission will assess the measures, if any, offered or taken by parade organisers to address genuinely held relevant concerns and members of the local community."

The Commission considered that the communication strategy adopted by the Lodge fell short of meaningful engagement with the local community but it welcomed the strategy as a step with a potential for engagement.

[31] If the Commission is suggesting that any failure to carry out direct talks with representatives of the local community will be held against the organisers of a parade then its approach would be flawed. The concept of proper engagement has not been clearly defined. Nowhere is it established what constitutes proper engagement. Organisers of such a march cannot reasonably be expected to enter into face to face dialogue with self-appointed *soi disant* "representatives" who are not selected by any proper democratic method, who may have their own political agendas, who may operate on the edges of legality or who may in fact be encouraging vociferous and threatening opposition. If engagement is to be a proper factor to be taken into account there would need to be a clear and transparent system for ensuring that local "representatives" are indeed properly representative and not self-appointed and that they operate on the basis of seeking a genuine *modus vivendi*.

[32] If the Commission approach on the question of engagement were shown to be wrong in this instance (a point which it is not necessary to decide) the court's function is to determine whether the decision in fact was

disproportionate. One improper factor taken into account does not invalidate the decision of itself. In Re Tweed(No 1) [201] NI 165 Carswell LCJ stated:

“Even if it can be said the Commission in reaching its decision had regard to factors other than those specified in Article 11(2) of the Convention, that does not necessarily invalidate it. In domestic law the decision must be made by reference to the correct factors, and this requirement was satisfied in the present case. When one has to consider the impact of the Convention, however, the focus is not on the process of decision-making, but on the substance of a decision itself. The issue then is whether the restriction imposed on the parade can properly be said to be justified on one of the grounds specified in article 11(2), whatever factors the Commission may have taken into account in reaching its decision. We are quite satisfied that the restrictions in the present case were necessary in a democratic society for the prevention of disorder and they were proportionate.”

This decision predated but prefigured the decision of the House of Lords in R (Begum) v Denbigh High School [2006] 2 All ER 487 where Lord Bingham at 500 stated:

“It is clear that the course approached to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting. ... There is no shift to a merits review, but the intensity of review is greater than was previous appropriate, and a greater even than the heightened scrutiny test adopted by the Court of Appeal in R v Ministry of Defence ex parte Smith (1996) QB 517 at 544. The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time ... Proportionality must be judged objectively by the court. It is in my view clear that the court must confront these questions however difficult.”

Lord Hoffman at 510 pointed out:

“The fact that the decision-maker is allowed an area of judgment in imposing a requirement which may have the effect of restricting the right does not entitle a court to say that a justifiable and proportionate

restriction should be struck down because the decision-maker did not approach the question in a structured way in which a judge might have done. ... The most that can be said is that the way in which the decision-maker approached the problem may help to persuade a judge that its answer fell within the area of judgment accorded to it by the law.”

[33] The fact of a lack of agreement between the would-be marchers and the local community is relevant to the question of the risk of disorder and of wider spread tension or effects. In the circumstances of this case there was a lack of agreement or understanding. Irrespective of whether that was the fault of the Order or of the local community or both, the lack of consensus forms a significant factor in the context in which the determination had to be made. A concentration on the question of who is to blame in the conflict between these two parties distracts attention from the significant point that the problem in that relationship impacts on other parties, both those within the general area and beyond in the wider community who may suffer from the consequences arising from conflict within Dunloy, whoever is to blame for it. As pointed out in para [10] above the rights of those third parties to lead their lives without being exposed to tensions, trouble and potential criminal activity and violence engendered by tensions and trouble in Dunloy must properly be taken into account.

[34] In paragraph 18 the Commission stated that it was pursuing the legitimate aims laid down in articles 10(2) and 11(2) of seeking to prevent disorder and to protect the rights and freedoms of others. In paragraph 7 the Commission had earlier recognised that the Convention rights engaged included those in article 9. Considering the decision as a whole the logic of the Commission’s conclusions applied equally to the engaged provisions of article 9 which, it was common case on the appeal, was indeed engaged. Accordingly the omission of a reference to article 9 in paragraph 18 does not mean that the Commission’s determination failed to consider the effect of article 9 or resulted in a decision that was in fact disproportionate. As Begum makes clear the question for the court is whether the determination was in fact and in the circumstances disproportionate.

[35] Subject to the question of the fairness of the procedures followed I conclude for the reasons adumbrated that the determination reached by the Commission satisfies the requirements of proportionality.

Procedural fairness

[36] The appellant argued that the procedure adopted by the Commission in considering whether or not to impose restrictions on the Lodge’s notified

procession was procedurally unfair and thus in breach of common law standards of fairness and/or procedural guarantees implied by Articles 9,10 and 11 of the Convention. There are two main areas of attack, firstly the failure to inform the appellant of material which was likely to weigh against an unrestricted procession in the mind of the Commission and, secondly, the failure to give adequate reasons for the restrictions imposed. Mr Hanna challenged the vires and validity of procedural Rule 3(3) which he argued prevents a fair procedure and precludes the divulging of evidence and information to a party such as the applicant which fairness would require.

[37] Rule 3(1) makes provision for formal evidence gathering by the Commission. In addition to such gathering of evidence Rule 3.2 provides that the Commission will receive information and representations whether oral or in writing from any interested party organisation at any time prior to the notified date of the parade. Rule 3.3 provides:

“All evidence provided to the Commission, both oral and written, will be treated as confidential and only for the use of the Commission, those employed by the Commission and authorised officers. The Commission however reserves the right to express unattributed general views heard in evidence but only as part of an explanation of its decision.”

[38] Mr Maguire QC correctly pointed out that the true question in this case is whether the applicant suffered actual unfairness in the way in which the Commission’s determination was reached. He also correctly pointed out that what fairness demands in individual cases is not to be determined by rigid or immutable rules. In this instance, as he correctly argued, one must bear in mind that the decision which fell to be made by the Commission was one in a series of cases involving proposed marches in Dunloy. The applicant would have been aware of the main issues which fell to be addressed. He was free to make representations and submissions and to seek a meeting with the Commission to discuss the application or seek clarification on any point. He could have obtained a gist of the matters put forward by way of challenge to the parade. The applicant was in receipt of a reasoned determination which he could and did ask to be reviewed and at that stage he could have put forward submissions and made representations in light of that reasoned determination. The Commission’s reasoning in this and earlier decisions was clear.

[39] Counsel for the Commission argued that Rule 3.3 was clearly intra vires the rule making power to the Commission and such a Rule could not be regarded as ultra vires even if it were procedurally unfair. It was also argued that in the light of cases such as Re Fayed [1998] 1 WLR 763 the presumption would be that the rule would fall to be applied fairly.

[40] Inasmuch as the Commission will be exercising its powers so as to ensure a proportionate determination it must conduct the process “in a manner that in all the circumstances is fair and affords due respect to the interests protected” (W v United Kingdom (1998) 10 EHRR 29). Although that was a case involving rights protected by article 8 there would appear to be no reason why a similar approach would not apply in relation to rights protected by articles 9, 10 and 11. Rule 3(3) must be read in such a way as to be compatible with the Convention duty. The duty to treat as confidential all evidence obtained by the Commission even where the provider of the information is not requiring it to be provided on a confidential basis goes beyond what is necessary to ensure the effective operation of the Commission’s evidence gathering role. Thus, for example, the PSNI in formulating the police reports and information may well be perfectly content to allow its views to be shared with the applicant. One can see no reason why it should refuse to divulge such information unless it contains information which in the public interest should not be divulged. There is force in the contention that in many circumstances confidentiality is necessary to ensure a frank disclosure of information. The provision of a gist of the material will often ensure a fair procedure and Rule 3.3 must be read and applied as being subject to that power. Furthermore, if evidence prejudicial to the applicant is regarded as so confidential that not even a gist of it can be provided fairness may require that it is left out account. Reading and applying Rule 3(3) in this way avoids injustice. On the facts of this case it has not been demonstrated that the determination upheld on review was reached as a result of procedural unfairness.

[41] The Commission’s determination maintained on review clearly gave reasons which enabled the applicant to be aware as to the motivation of the Commission’s determination and there is not substance in the suggestion that it had failed to give adequate reasons.

[42] I would dismiss the appeal.

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 26/2/09

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN
IRELAND**

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**AND IN THE MATTER OF DECISIONS OF THE PARADES
COMMISSION FOR NORTHERN IRELAND**

**IN THE MATTER OF AN APPLICATION BY DAVID TWEED ON HIS
OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF DUNLOY
LOL 496 FOR JUDICIAL REVIEW**

Sir Anthony Campbell

Background

[1] On 9 March 2004 David Alexander Tweed, as Master of Dunloy Loyal Orange Lodge 496, gave advance notice to the Police Service of Northern Ireland, under s 6 of the Public Processions (Northern Ireland) Act 1998, of an intention to organise a public procession. The notice stated that the procession was to take place on Easter Sunday 11 April 2004 when members of the Lodge would assemble at the Orange Hall in Dunloy and process to Dunloy Presbyterian Church where a religious service would be conducted. Following the service it was their intention to process back along the same route to the Orange Hall where they would disperse. It was anticipated that 200-300 people would take part accompanied by Dunloy Accordion Band. The purpose of the procession was stated to be to "Manifest our faith in God as revealed in the Holy Scripture on the occasion of the Day of the Celebration of the Resurrection of the Lord Jesus Christ, through peaceful means during a peaceful procession". The statutory notice was accompanied by a letter from Mr Tweed in which he referred to letters that had been distributed by the Lodge to the inhabitants of Dunloy, and in particular to those living along the route of the proposed procession, explaining its purpose and inviting them to an open day. The letter to the Police Service concluded with a request that it should take all necessary measures to enable the procession to take place in

accordance with Article 9 (Freedom of thought, conscience and religion), Article 10 (Freedom of expression) and Article 11 (Freedom of assembly and association) of the European Convention on Human Rights.

[2] Mr Tweed has made an affidavit in these proceedings in which he describes Dunloy as a small rural village with twenty-five properties and three shops along the proposed route. He estimates that the procession would have taken no more than fifteen minutes to pass from the Orange Hall to the Presbyterian Church, a distance of approximately 325 yards.

[3] In due course the Parades Commission received the notice from the Chief Constable and issued a determination, under s 8 of the Public Processions Act, imposing conditions on the organisers of the procession and on those taking part in it. The determination, which is dated 5 April 2004, restricted the procession to a part of the public road adjoining the frontage of the Orange Hall. The effect of this was to prevent the procession from passing through the centre of the village of Dunloy on its way to and from the Presbyterian Church. Mr Tweed asked the Commission to review this determination but it declined to do so. In the event the religious service took place not in the Church as had been planned but in grounds of the Orange Hall.

[4] Mr Tweed applied both on his own behalf and that of members of the Lodge for leave to issue proceedings for judicial review of the decision by the Commission to issue a determination and its subsequent decision not to review the determination. The court was asked also to declare that s 8 (6)(c) of the Public Processions (Northern Ireland) Act 1998 is incompatible with Articles 9, 10 and 11 of the European Convention on Human Rights.

[5] Leave was granted on 10 June 2007 and after the court had issued a notice of incompatibility under s 4 of the Human Rights Act 1998 the Secretary of State was joined as a party in respect of this issue. The application came on for hearing before Weatherup J. and he dismissed it on 12 September 2007. Mr Tweed and the members of the Lodge ("the appellant") now appeal against the judge's decision.

Incompatibility of s 8(6) of the Public Processions (Northern Ireland) Act 1998

[6] The first and second grounds of appeal concern the compatibility of s 8(6) (c) of the Public Processions Act and the validity of paragraph 4.4 of the Commission's Guidelines, issued under the 1998 Act, with Articles 9,10 and 11 of the European Convention on Human Rights and Fundamental Freedoms.

[7] Section 8 of the Public Processions Act empowers the Parades Commission to issue a determination and impose conditions in respect of a

proposed public procession. The Commission is required under s 5 to issue guidelines as to the exercise by it of its functions under s 8. It is provided in s 8(6) that these guidelines shall in particular provide for the Commission to have regard to various matters including, at s 8(6) (c) “any impact which the procession may have on relationships within the community”. The submission made on behalf of the appellant is that it is not possible to read s 8 (6) (c) in a way that is compatible with Articles 9, 10 and 11 of the Convention. It is argued that when read in the context of the other provisions contained in s 8(6) the sub-section must have a meaning that is different to “public disorder or damage to property” in s 8(6)(a), or “disruption to the life of a community” in s 8(6)(b). It is suggested that any impact which the procession may have on relationships within the community can only mean “any effect on the way in which members of the community (whether as individuals or as sub-groups thereof) relate to one another” and this does not come within any of the legitimate aims referred to in Articles 9, 10 and 11 of the Convention.

[8] In the introduction to its determination the Parades Commission refers to Articles 9, 10 and in particular to Article 11 as being engaged from the perspective of the organisers and to Article 8 and Article 1 of the First Protocol as being engaged in so far as those who live and work in the locality are concerned. In a passage marked “Consideration” the Commission states that its decision [in para.14]:

“...is set against the background of continuing, though decreasing, local community tension. It recognises the real possibility of damaging community relations with a consequent effect on the likelihood of public disorder should the parade proceed along the entirety of its notified route. Whilst recognising the fundamental importance of the right to freedom of assembly, the Commission finds it necessary to exercise its powers under section 8 of the Public Processions (Northern Ireland) Act 1998 to place restrictions on the parade.”

It states its belief [at para.15]:

“...that community relations in Dunloy would be significantly damaged by the passage of this parade should it proceed without restriction. This would cause increased tension and disaffection, which would work against the building of an understanding that could support a long-term pattern of parading.”

[9] The impact of the procession on community relations was a significant consideration for the Commission in making its determination. This is apparent from the determination and it is not disputed by the parties. The question is whether the Commission was entitled so to regard it. In his judgment [at para 29] the judge dealt with the issue of the compatibility of s 8 (6) (c) as follows:

“Consideration of relationships within the community may bear on the prospect of disorder. The prevention of disorder as a legitimate aim under Articles 9,10 or 11 of the Convention may therefore have a wider reach than the prospect of public disorder resulting from the procession that is considered under section 8(6)(a). The ramifications of disputes over processions are apparent from the North report and in the wider, longer term, indirect sense there may be the prospect of public disorder that may not be said to “result from” the procession for the purposes of section 8(6)(a). I do not accept the applicant’s contention that consideration of all public order issues is confined to section 8(6)(a).”

He continued at para. [30]:

“Further consideration of relationships within the community may bear on the rights and freedoms of others. The rights and freedoms of others may extend to the continuation of the lawful activities of the residents, traders and visitors, all of which may in turn have to be limited by a procession. The rights and freedoms of others may also extend to the maintenance of an harmonious community, a peaceful and stable society and to mutual respect between the members of that society. A balance of the respective interests will be required.”

[10] With reference to paragraph 4.4 of the Guidelines the judge said that the context in which parade disputes take place is relevant. He referred to parades in Northern Ireland as being perceived by different members of the community as reflecting religious, cultural, social, sectarian, political or other matters. He added, “they may be seen as a traditional feature of religious expression or may give rise to a sense of community offence or annoyance that is not simply a response to a purported manifestation of religious belief but to more deep-seated community grievance. So while it may be accepted that there is no right not to be offended that is an inadequate response to what may be happening. The offence and annoyance generated may be of

such a degree that it may impact on relationships within the local community and the wider community, which in turn may impact on the prevention of disorder and the rights and freedoms of others.”

He held that paragraph 4.4 of the Guidelines was not incompatible with the legitimate aims of restrictions on Convention rights.

The appellant's case

[11] Mr Hanna QC (who appeared with Mr Scoffield for the appellant) submitted that the purpose of s 8 is to permit the Commission to curtail and restrict rights under Articles 9, 10 and 11 of the Convention. Where it is required under the Act to issue guidelines as to the exercise of such functions these have to provide, in particular, for the Commission to have regard to various matters including, (at s 8(6) (c)), “any impact which the procession may have on relationships within the community”. Mr Hanna submitted that it is impossible to read this sub-section so that it is compatible with Articles 9, 10 and 11 of the Convention. In support of this contention he advanced the following points;

- (i) When read in the context of the other provisions contained in s 8(6) the sub-section must have a meaning that is different to “public disorder or damage to property” in s 8(6)(a), or “disruption to the life of a community” in s 8(6) (b).
- (ii) Any impact that the procession may have on relationships within the community can only mean “any effect on the way in which members of the community (whether as individuals or as sub-groups thereof) relate to one another” and this does not come within any of the legitimate considerations referred to in Articles 9, 10 and 11 of the Convention.
- (iii) A concern that a procession may cause disharmony in the community or annoyance to others would not be a legitimate aim as there is no right, tacit or otherwise, to exercise a veto over the Convention rights of others.
- (iv) Assuming that s 8(6)(c) does not pursue a legitimate aim, if ‘relationships within the community’ are taken into account together with an aim that is legitimate, such as the risk of public disorder, s 8(6)(c) remains incompatible for the purposes of the Convention. In conducting a balancing exercise only the legitimate aim may be taken into account although the Commission would be obliged under the guidelines, and therefore under domestic law, to have regard to the impact that the procession may have on relationships within the community.

- (v) In so far as the judge appears to suggest that considerations of an impact on community relations may have a bearing on the prospect of disorder occurring, the language of the sub-section read as a whole does not support this. Public disorder is dealt with fully in s 8(6) (a) so that s 8(6) (c) would add nothing.

[12] In considering this argument it is relevant to examine the approach adopted by the Parades Commission. In the introduction to its determination the Commission refers to Articles 9, 10 and in particular to Article 11 as being engaged from the perspective of the organisers and to Article 8 and Article 1 of the First Protocol as being engaged so far as those who live and work in the locality are concerned. In the passages in the determination headed "Consideration" (quoted earlier at para [8]) the Commission refers to the real possibility of damage to community relations effecting the likelihood of public disorder and causing increased tension.

[13] Section 3(1) of the Human Rights Act requires the court, so far as it is possible to do so, to read and give effect to legislation in a way that is compatible with Convention rights. This imperative means that "the role of the court is not (as in a traditional statutory interpretation) to find the true meaning of the provision, but to find (if possible) the meaning which best accords with Convention rights." Lester & Pannick, *Human Rights Law and Practice* 2nd Ed 2.32.

[14] The genesis of s 8 (6) (c) and of the guidelines is found in the Independent Review of Parades and Marches in 1997 (the North Report). The authors of the report recommended that the current statutory criteria for determining whether a parade be subject to conditions should be extended to include the impact on relationships within the community. The authors of the report saw the guidelines as covering four main areas broadly relating to the nature of a parade;

- physical location and route,
- impact on the local community, including frequency of parades, disruption to trade, traffic and everyday life,
- the purpose of the parade, e.g. whether it is commemorative, a Sunday church parade or a band parade,
- features particular to that parade, e.g. tradition, numbers, past behaviour etc.

[15] Such of these recommendations as have been enacted in s 8 of the Public Processions Act are to be read as a whole and not in isolation from the other matters to which the Commission is to have regard. The consequences flowing from public disorder or damage to property that result from a procession (s 8 (6) (a)) are likely to include disruption to the life of the

community (s 8 (6) (b) and an impact on relationships in the community (s 8 (6) (c). More than one of the considerations contained in s 8 is likely to be a component of a decision made by the Commission.

[16] Guideline 4.4 (4.5 since April 2005) states that the Commission “will also take into account any communications between parade organisers and the local community or the absence thereof and will assess the measures, if any, offered or taken by parade organisers to address genuinely held relevant concerns of members of the local community. The Commission will also consider the stance and attitudes of local community members and representatives.” When determining a request for a parade the Commission may take such matters into account but only as factors to be considered and not as providing a reason for restricting the parade. The reason for restricting the parade must be one of the legitimate aims in Articles 10 and 11 of the Convention. The fact that the Commission need only “have regard to” the Guidelines gives it a discretion. Therefore, if the only reason for restricting the parade would be because of an issue addressed in the Guidelines rather than a legitimate aim in the Convention the Commission may exercise its discretion not to follow the Guidelines, as to do so would be contrary to s 6 of the Human Rights Act 1968 and act in a manner incompatible with Convention rights. Accordingly I do not find the Act incompatible with the Convention nor do I consider para 4.4 of the Guidelines to be invalid as has been submitted.

The purpose or purposes for which the Commission exercised its power to make the determination.

[17] The Commission states at the outset of its determination (in para.6) that it has:

“cause to believe that should the parade process the entirety of its notified route, there will be an adverse effect on community relations and a potential for public disorder.”

Later (in para. 18) it states that:

“in imposing these conditions, the Commission pursues the legitimate aims laid down in article 10(2) and 11(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, of seeking to prevent disorder and to protect the rights and freedoms of others. In this respect, the Commission has carefully weighed all

representations and information received, including the views and advice of local police.”

This is confirmed by Sir Anthony Holland, the chairman of the Commission, in an affidavit where he observes (in para. 31):

“In particular any restriction on the Applicant or the Lodge’s rights under Articles 9, 10 and 11 of the Convention has been in pursuance of a legitimate aim and had been in a manner which is necessary in a democratic society and proportionate.”

The appellant challenges these assertions and claims that the Commission made its determination for reasons that are not Convention compliant. It claims that the Commission was seeking to avoid the possibility of offence or annoyance being caused to local residents and to encourage the appellant and members of the Lodge to engage with the residents and others and thereby to enhance the standing of local community representatives. In summary, it is said that those opposed to the procession were given what was in effect a veto against the procession taking place.

[18] This was refuted by Sir Anthony Holland in his affidavit where he said (in para. 24):

“It is not the case as alleged by the Applicant in his affidavit herein that the procession has restrictions placed upon it because its organisers would not engage with local residents or that the Commission required the Lodge to obtain the consent of local residents in order to process. Rather the issue of engagement is properly to be viewed as a particular factor among a range of factors which the Commission takes into account in making a Determination.”

[19] Mr Hanna was critical of the reasoning put forward by Sir Anthony in his affidavit since the only point at which he mentions Convention legitimate grounds is where, as part of a chronology of the decision making process, he quotes from a report prepared by Superintendent Corrigan, the District Commander for the locality. In this report the Superintendent noted, when dealing with the impact of the proposed parade on human rights, that there would always remain the possibility that if opposing factions came into contact in a disorderly manner the potential for a real and serious risk to life existed.

[20] It was submitted that this comment by Superintendent Corrigan together with a further passage in his report where he gave a community impact assessment and said:

“If this parade took place without a local agreement Police believe that damage would be caused to community relations within the area. Residents would mount a protest, which would result in a number of persons taking to the streets. Such protests if any would bring a potential threat to public order.”

each required to be probed by the Commission having regard to the positive obligation on the State.

[21] In a situation report of 24 March 2004 prepared for the Commission by its authorised officers the entire emphasis is placed on engagement by the Loyal Orders with the residents of Dunloy and the views of the residents as to the adequacy or otherwise of the communications strategy of the Loyal Orders. Mr Hanna referred also to the absence of any risk assessment in the report from the Police Service and to the lack of any request from the Commission to the Police Service for an assessment of the risk of trouble breaking out and of the resources available to the police should it occur.

[22] Reference was made on behalf of the appellant to the absence of any information as to the view taken by Commission of the risk of disorder and to its having carried out a balancing exercise between such risk and an interference with Convention rights.

[23] The trial judge did not accept that the Commission’s stated position was undermined and rejected the appellant’s argument that the Commission exercised its power to make a determination for an improper purpose. It is clear that the appellant understood that the Police Service had an important part to play in the assessment of the risk, if any, of disorder. He showed assiduity in keeping in touch with Superintendent Corrigan and in pointing out to him that since no notice of a related protest meeting had been given, as required by s 7(6) of the Public Processions Act, any such meeting would be illegal. Superintendent Corrigan appears to have accepted that if trouble did arise it would not have been instigated by the members of Dunloy LOL. In his application for review of the Commissions decision, the appellant said:

“Unfortunately, it appears that a small minority of residents do not accept the rule of democracy and are prepared to use violence or threat of violence to prevent others from exercising their legal rights.”

[24] The history of processions in Dunloy, such as is found in a report by International Conflict Research dealing with attempts at mediation, suggests that a change had to take place if the risk of trouble occurring was to be avoided. The North Report stressed the importance of parties from both sides of the community working to reach a local accommodation in regard to contentious parades. When the determination was made by the Commission such an accommodation had not been reached in Dunloy. If this was regarded as the key to avoiding disorder it is hardly surprising that the Commission placed considerable emphasis upon it. I accept that it was not simply for the purpose of improving relations within the community that the Commission made its determination but rather because it appreciated that in the absence of such an improvement there was a real risk of disorder occurring. In such circumstances an interference with the appellants' rights was therefore justified.

Proportionality

[25] Where there is an interference with the appellants' rights under Art 9 and 11 the principle of proportionality arises (in the case of a demonstration by way of procession the right to freedom of expression is subsidiary to the freedom of assembly and does not require separate examination—*Christians Against Racism v UK No 8440/78*).

[26] In *R (SB) v Governors of Denbigh High School* [2007] 1AC 100, 116 para. 30 Lord Bingham said:

“it is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting. The inadequacy of that approach was exposed in *Smith and Grady v United Kingdom* (1999)29 EHRR 493, para. 138, and the new approach required under the 1998 Act was described by Lord Steyn in *R v (Daly) v Secretary of State for the Home Department* [2001]2 AC 532, paras. 25-28, in terms which have never to my knowledge been questioned. There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test adopted by the Court of Appeal in *R v Ministry of Defence, Ex p Smith* [1996] QB 517,554. The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time...Proportionality must be judged objectively, by the court...”

In *Tweed v Parades Commission* [2007] NI 66 at page 81 (in para. 35), Lord Carswell (without suggesting that his statement was exhaustive) said:

“First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, ex p Smith* [1996] QB 517 at 554 is not necessarily appropriate to the protection of human rights.”

[27] Although the court must make its own assessment as to whether the Parades Commission has acted incompatibly with the Human Rights Act as Lord Bingham of Cornhill said in *Huang v Secretary of State for the Home Department* [2007] 2 AC at para [16] “appropriate weight [is to be given] to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice”

[28] Professor Jeffrey Jowell QC in “Judicial Deference, Servility, Civility or Institutional Capacity?” [2003] P.L. 592 said;

“Lord Hoffmann is right that it is for the courts to decide the scope of rights, but there is no magic legal or other formula to identify the ‘discretionary area of judgment’ available to the reviewed body. In deciding whether matters such as national security, or public interest, or morals should be permitted to prevail over a right, the courts must consider not only the rational exercise of discretion by the reviewed body but also the imperatives of a rights-based democracy. In the course of some of the steps in the process of this assessment the courts may properly acknowledge their own institutional limitations. In doing so, however, they should guard against a presumption that matters of public interest are outside their competence and be ever aware that they are now the ultimate arbiters (although not ultimate guarantors) of the necessary qualities of a democracy in which the popular will is no longer always expected to prevail.”

[29] A factor that may influence the extent of deference to be shown is whether the Court has before it the information that was before the body whose decision is under review. Following the decision of the House of Lords in *Tweed* disclosure of documents was ordered and the Court is therefore not at any significant disadvantage in this respect. Another consideration is that the Parades Commission has experience in deciding if conditions should be imposed on parades.

[30] It is necessary to consider the information that was available as to the risk of disorder breaking out if the processions went ahead as proposed and how the Police Service intended to contain it if it should occur. Superintendent Corrigan in the Community Impact section of his report of 24 March 2004 (referred to earlier) said "If this parade took place without a local agreement Police believe that damage would be caused to community relations within the area. Residents would mount a protest, which would result in a number of persons taking to the streets. Such protests if any would bring a potential threat to public order." The Superintendent went on to say in the section of his report on disruption to the life of the community that in the event of a protest taking place that leads to violence from any quarter, the disruption to the normal life of the community would be substantially increased. With reference to Article 2 of the Convention he said "During this parade the possibility will always remain that if opposing factions come into contact in a disorderly manner, then the potential for a real and serious risk to life exists". Later in the report the Superintendent referred to the fact that there has been no notice of an intention to hold a counter march or demonstration and that initially police deployment would be at as low a level as possible sensitive to local residents but sufficient to ensure the safe passage of the procession. The police response he said was to be graduated, commensurate with the developing public order situation. If violence did ensue then police would act to protect the lives of residents, marchers, protesters and police officers. If the use of force by police was deployed then such force would be proportionate to the situation but no more than absolutely necessary to defend persons from violence, or to effect a lawful arrest.

[31] A situation report dated 2 April 2004 indicated that the Resident's Group would find a symbolic parade from the Orange Hall grounds unto the road proceeding as far as the perimeter of the grounds of the hall acceptable though the source of this information is not identified. Any further progress would provoke a strong reaction from residents unless the Orange Order engaged in a dialogue with them in advance. It was suggested that if the parade was permitted without a dialogue the residents group would be effectively disfranchised.

[32] The Commission met with members of the Police Service on 5 April 2004. At this meeting the police said that any change to previous Parades

Commissions determinations could cause tension within the community. If the processions went along the notified route they felt that the numbers of those likely to protest against the parade would substantially increase. The notified route would mean deploying 14 Tactical Support Groups and over 300 police officers and soldiers. If agreement was reached it would require approximately 5 officers and closing the road for a matter of minutes. Mr Tweed claimed in a letter to Superintendent Corrigan (written between the date of the determination and the application for a review) that the Superintendent had admitted that in any case he would be fully able to control the situation and keep the peace without having to deploy an excessively large policing operation. His response was that it was inaccurate to state that the Police Service could, in all cases, implement the Parades Commission determination without the use of substantial police resources. The ECtHR in *Ozgur Gundem v Turkey* (2001) 31 EHRR 1082 said (at para 33)

“In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities (see, among other authorities, the *Rees v. the United Kingdom* judgment of 17 October 1986, Series A no. 106, p. 15, § 37, and the *Osman v. the United Kingdom* judgment cited above, pp. 3159-60, § 116).”

[33] The Commission was not empowered to ban the procession nor did it seek to do so. By imposing the conditions contained in the determination the Commission significantly reduced the potential of disorder which would have required a disproportionate number of police officers and soldiers to prevent or control. In my judgment the conditions were proportionate and necessary within the meaning of Art 11(2).

[34] *Procedural Unfairness*

It is accepted that there is a general obligation on the Commission to act fairly. The appellants claim that in two areas the Commission failed to do so. Both involve issues of procedural fairness and concern a failure by the Commission to inform them of material that was adverse to an unrestricted procession

taking place and a failure by the Commission to give adequate reasons for the restrictions that were imposed.

[35] The Commission, as required under s. 4 of the Public Processions Act, issued a set of rules regulating and prescribing the practice and procedure to be followed by it. Rule 3.3 of these Procedural Rules provides that:

“All evidence provided to the Commission, both oral and written, will be treated as confidential and only for the use of the Commission, those employed by the Commission and Authorised Officers. The Commission, however, reserves the right to express unattributed general views heard in evidence but only as part of an explanation of its decision.”

Parliament by s. 4 of the Public Processions Act gave the Commission a wide power to regulate its procedure and in my view Rule 3.3 was made within this power.

The importance of the rule to the work of the Commission is referred to by Sir Anthony Holland in his first affidavit where he comments that if the confidentiality rule were not in existence it would significantly impair the frank and uninhibited disclosure of information to the Commission. He considers that it would compromise the performance of its statutory functions and that confidentiality is crucial to the satisfactory performance of these functions.

[36] There is a reference to a need for such a rule in the North Report (at para 12.98) where it said “It would, however, be right that the Commission should also have the ability to obtain views in confidence, from organisations such as the police or indeed individuals; this would mean at least some confidential hearings. Intimidation and community pressures are realities in Northern Ireland.”

[37] Sir Anthony Holland makes the further point in his affidavit that if the appellants had attended a meeting with the Commission in connection with the proposed procession they would have been provided with a summary of the material information, views and representations that had been received by the Commission and these would have been discussed in general terms without prejudice to the operation of rule 3.3. As it is the appellants did not seek any form of disclosure of material or summary of the information before the Commission.

[38] The explanation for this given by Mr Tweed, in his second affidavit, is that they knew if they had attended a meeting with the Commission and been given a summary of the information by reason of rule 3.3. this would not

have provided them with the material information, views and representations received by the Commission. Mr Tweed added that it is well known that the Orange Order took the view that such a meeting would only condone a fundamentally flawed process, with the totality of evidence against a peaceful public procession being shrouded in secrecy.

[39] In *Reg. v Home Secretary, Ex p. Doody* [1994] 1 AC531 at 560 Lord Mustill enumerated the requirements of fairness in these terms:

“(1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which it is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.”

[40] There had been a long history of restrictions on processions in Dunloy and in the police report reference is made to twenty- seven determinations (the majority but not all in respect of applications by the Orange Order). The appellants were therefore familiar with the issues associated with processions in Dunloy.

[41] Their failure to request a summary of the information or to ask for disclosure of material inevitably detracts from their argument on this issue. When they asked for a review they indicated to the Commission that they did not intend to appear or to be represented and this would have given them a further opportunity to make representations and to seek information. After

the determination was issued they were in contact with the Police Service as was the Commission before it decided not to carry out a review of its decision.

[42] As the trial judge said [at para [63] of his judgment;

“The legislative framework applicable in the present case is a regulatory system for the control of public processions in the interests of individuals concerned to promote the procession, those affected by the holding of the procession, the police who may be deployed on public order grounds, the Commission in being fully informed so as to enable it to carry out its statutory functions and the general public interest.”

In the circumstances I cannot discern any unfairness bearing in mind that this is not litigation between parties.

[43] There was no duty on the Commission at common law to give reasons for a determination however, under Rule 5.2 of its Procedural Rules which forms part of the general rule about formal determinations it is provided that:

“Where it is reasonably practical to do so, the Commission will provide a summary of the grounds for its decision.”

The Commission has in my view more than adequately fulfilled this obligation in the determination.

[44] For these reasons I would dismiss the Appeal.