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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
KING'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY ALAN HYNES FOR JUDICIAL REVIEW

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

Richard McConkey KC and Emma McIlveen (instructed by Anderson Gillan Barr Ltd, Solicitors) for the applicant
Philip McAteer and Gordon Anthony (instructed by the Crown Solicitor's Office) for the first respondent, the Secretary of State for Northern Ireland
Peter Coll KC and Terence McCleave (instructed by the Crown Solicitor's Office) for the second respondent, the Chief Constable of the Police Service of Northern Ireland
Tony McGleenan KC and Mark O'Hara (instructed by the Crown Solicitor's Office) for the Parades Commission for Northern Ireland, a notice party
Denise Kiley KC and Bobbie-Leigh Herdman (instructed by Phoenix Law) for Breandán Mac Cionnaith, a notice party

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SCOFFIELD J

Introduction

[1] This case concerns a public procession which was scheduled to proceed along a contentious route in Portadown, Co Armagh, on 27 September 2026, commencing at 8.00 am and finishing at 9.30 am that day. The intended procession was arranged by members of the Portadown District Loyal Orange Lodge (LOL) No 1 ("the Lodge"). The parade did not occur as the police advised the Lodge, just before its planned commencement, that it was not safe to proceed due to a large protest blocking the Garvaghy Road which was part of the route. As matters now stand, the notified parade will not proceed at all (although that is not to say that the Lodge cannot notify similar intended processions in the future). This case is primarily about whether the decision made by the Secretary of State for Northern Ireland ("the Secretary of State") which had that result is a lawful decision.

[2] I have taken care to explain briefly below the role of the court in proceedings such as these (see paras [76]-[77]), as have other judges when dealing recently with related cases. It is not the function of the court to decide for itself whether the parade should or should not proceed, nor how it should be policed if it were to proceed. The role of the court is to determine the lawfulness of the decisions under challenge, including their compliance with human rights obligations, but not their objective correctness or advisability. In this context the primary decision-making function has been given by Parliament to the Parades Commission for Northern Ireland ("the Commission"), and in certain circumstances to the Secretary of State, who are thought to be better suited to determine such matters than the courts. As I further emphasise below, an understanding of, and commitment to, the separation of roles and responsibilities in this field is important.

[3] Formally, this is an application for leave to apply for judicial review of decisions made by the Chief Constable of the Police Service of Northern Ireland (PSNI) ("the Chief Constable") and the Secretary of State respectively, on 9 October 2026. The parties have agreed that the matter can be dealt with as a 'rolled-up' hearing, meaning that the question of leave to apply for judicial review and the substance of the full application are dealt with together at one hearing rather than separately, as is usually the case.

[4] The applicant is a member of the Lodge. He was also a notice party in related judicial review proceedings, described below, which concerned the legality of the original determination by the Commission (Determination PAR/11838, "the determination") to permit the intended procession to proceed, albeit subject to restrictions.

[5] The decisions identified in the applicant's Order 53 statement as being under challenge are as follows:

(a) An application by the Chief Constable to the Secretary of State, pursuant to section 9 of the Public Processions (Northern Ireland) Act 1998 ("the 1998 Act"), for review of the determination;

(b) An order made by the Secretary of State under section 11(1) of the 1998 Act prohibiting the holding of the procession notified by the Lodge pursuant to the determination; and

(c) A decision made by the Secretary of State under section 9 of the 1998 Act confirming the determination made by the Commission (with the qualification that the determination could not now be given legal effect).

[6] I have been assisted by a wide range of counsel instructed in this case. Mr McConkey KC appeared with Ms McIlveen for the applicant; Mr McAteer appeared with Prof Anthony for the first respondent, the Secretary of State; Mr Coll KC appeared with Mr McCleave for the second respondent, the Chief Constable;

Dr McGleenan KC appeared with Mr O'Hara for the Commission as a notice party; and Ms Kiley KC appeared with Ms Herdman for Mr Breandán Mac Cionnaith, a further notice party. I am grateful to all of them for the comprehensive written submissions provided and the more focused oral submissions advanced over the two days of hearing on 19 and 20 October 2026.

Factual background

(i) The proposed procession

[7] The Lodge notified a proposed public procession to the PSNI on 3 September 2026 which it intended to undertake on 27 September 2026 between 12.45 pm and 2.30 pm. It was required to make such a notification pursuant to section 6(1) of the 1998 Act. The PSNI shared this notification with the Commission, as it was required to do pursuant to section 6(6) of the 1998 Act. The proposed route was from Drumcree Church to Carleton Street Orange Hall in Portadown, including via the Drumcree Road and Garvaghy Road. The Lodge proposed that there would initially be 60 participants in the procession, later joined (after passing along the Garvaghy Road) by the remainder of the Lodge and two bands.

[8] There is a significant background history to parades along this route. The Lodge traditionally held an annual church parade to Drumcree Church on the Sunday immediately prior to 12 July. The return route for such parades passed along the Garvaghy Road, a predominantly nationalist area of Portadown. Generalising, there are two strongly held views about the parade by those most directly involved. Local residents of the Garvaghy Road consider it to be offensive and sectarian in nature and unwelcome in their area. The Orange Order rely upon the traditional nature of the route, say that their intent is not to offend anyone, and emphasise the limited time it will take to complete. Each side has fervent supporters. Contention over the issue was at its height in the mid-1990s. From 1995 to 1997, the parade was permitted along the Garvaghy Road but there was widespread, sustained and significant public disorder across Northern Ireland related to the dispute.

[9] Since 1998, the Commission has restricted the Orange Order from parading that route. The Lodge has protested this on a weekly basis but has complied with determinations over the last 28 years restricting proposed processions along the return route. This year, the Lodge provided notification again of a return parade along the Garvaghy Road proposed for Sunday 5 July 2026. The Commission restricted the parade again; but this decision was quashed by way of judicial review (with the Commission itself consenting to the quashing order on procedural grounds relating to the decision-making process). The notification which gave rise to the determination which is relevant for these proceedings then followed. I think it may be fair to say that the Lodge made a more concerted effort than it had done for some time to secure a favourable determination in terms of its attitude and approach to

the proposed procession; and that, in light of its earlier decision having been quashed, the Commission considered the notification more closely and carefully.

[10] The Commission issued a determination on 25 September 2026 in exercise of its powers under section 8(1) of the 1998 Act. The determination imposed several restrictions on the Lodge's proposed procession but permitted it to proceed along the notified route. The conditions included that it should be restricted to 35 participants; that it should start no later than 8.00 am and disperse no later than 9.30 am; that there be no supporters or bands; and that only the Lodge banner was to be carried on the Garvaghy Road.

(ii) The earlier legal proceedings

[11] There has been a range of litigation directed to the legality of the determination. Mr Mac Cionnaith challenged it by way of judicial review, as a local resident who opposed the march and in his capacity as a representative of a local residents' group also so opposed (the Garvaghy Road Residents' Coalition, "the Residents' Coalition"). The Residents' Coalition had apparently considered the matter settled by the Commission's consistent approach since the late 1990s. The application for leave to apply for judicial review was lodged on 25 September 2026. It was addressed at an urgent hearing on Saturday 26 September 2026. The present applicant, Mr Hynes, was a notice party in those proceedings and opposed Mr Mac Cionnaith's application.

[12] Smyth J considered that there were issues which appeared to her to meet the threshold for the grant of leave (without formally granting leave) and that it was not possible to fairly deal with the matter urgently by way of a rolled-up hearing. She granted interim relief to the effect that the procession should not proceed the following day in order to allow further time for disclosure and a fuller hearing: see *Re Mac Cionnaith's Application* [2026] NIKB 56. That decision was appealed by Mr Hynes to the Court of Appeal which also held an urgent hearing that Saturday evening. It set aside Smyth J's order for interim relief on the basis that it had effectively decided the full judicial review application without the merits having been considered.

[13] The Court of Appeal remitted the application for leave to apply for judicial review back to the High Court, since leave had neither been granted nor refused. Humphreys J then heard the remitted application for leave and dismissed it, in the early hours of the morning of 27 September, as raising no arguable grounds: see *Re Mac Cionnaith's Application* [2026] NIKB 55. That judgment was also appealed by Mr Mac Cionnaith. The Court of Appeal heard the appeal on 5 October and gave judgment on 12 October 2026, dismissing the appeal: see *Re Mac Cionnaith's Application* [2026] NICA 41. Much of the necessary background to the proposed procession and the making of the Commission's determination which allowed it to proceed (with conditions) is also to be found in the content of those judgments. The

key factual matters which form the backdrop to this application fell between the decision of Humphreys J and the decision on the appeal of that ruling.

[14] The factual starting point, however, is that those Orangemen, including the applicant, who were due to process at 8.00 am on Sunday 27 September 2026 along the notified route were lawfully permitted to do so, provided they complied with the restrictions imposed by the Commission. The subject matter of this dispute really concerns what happened between the time of the proposed procession on 27 September and the Secretary of State's section 11 order on 9 October, twelve days later, which made clear that the procession could not then lawfully proceed.

(iii) The negotiations

[15] The evidence as to what occurred during those twelve days is contained in a range of affidavits filed on behalf of the parties. The deponent on behalf of the Secretary of State is Linda Hamilton, a senior official and the Director of Security, International and Politics within the Northern Ireland Office (NIO). Her affidavit provides a commentary on the events of 9 October 2026 and some earlier matters. It also exhibits a range of documents, some of which contain confidential and sensitive information which would not ordinarily be released but which have been provided to the court to explain the Secretary of State's decisions and the information available to him.

[16] The Chief Constable has sworn his own affidavit in these proceedings, which exhibits his application to the Secretary of State for a review of the determination and a range of other police documents, including CLIO (Central Logging of Intelligence Operations) Logs relating to the policing operation surrounding the proposed procession. Those logs provide some detail of the ongoing assessment by police commanders of the situation on the ground at Drumcree Church, where the members of the Lodge were waiting to process, and on the Garvaghy Road, where there was a protest apparently designed to block the procession. The applicant relies on certain of the contents of those logs.

[17] In addition to short grounding and rejoining affidavits of the applicant himself, he has also filed an affidavit from Mr Nigel Dawson (the District Master of the Lodge) dealing with the negotiations between the Secretary of State, the Orange Order and the Residents' Coalition during the relevant time period. That was met with an affidavit in response from Mr Mac Cionnaith and a further affidavit from Ms Hamilton. There is a basic consensus between these accounts of the progress of the negotiations and the key factor that an agreement acceptable to both sides (the Lodge and the residents respectively) could not be reached. Inevitably, there are certain differences in perspective, emphasis and opinion.

[18] Turning back to the morning of 27 September, after the police advised that it was unsafe for the parade to proceed the Secretary of State flew to Northern Ireland at lunchtime that day from the Labour Party Annual Conference. He met with

officials and with respective political party leaders – from the Democratic Unionist Party (DUP), the Ulster Unionist Party (UUP), the Alliance Party and the Social Democratic and Labour Party (SDLP) – at Hillsborough Castle. Ms Hamilton avers that "Sinn Fein [sic] did not attend at Hillsborough Castle as they were on site at the Garvaghy Road …" However, the Secretary of State did speak to the President of Sinn Féin (Mary Lou MacDonald TD) and the First Minister and Vice President of Sinn Féin (Michelle O'Neill MLA) by telephone that evening.

[19] Some details of the Secretary of State's discussions with the parties are provided in Ms Hamilton's affidavits. Unsurprisingly, unionist politicians asserted that "mob rule must not be permitted to defeat lawful determinations" and warned that if unlawful actions yielded political results, unionist confidence in democratic institutions would be severely damaged; whilst nationalist politicians urged the Secretary of State to exercise his statutory powers under section 9 or 11 to 'ban' the parade.

[20] The Secretary of State appears to have correctly apprehended that he could not act under section 9 of the 1998 Act without an application to him having been made by the Chief Constable. He could act independently under section 11 but was plainly reluctant to do so in light, inter alia, of the fact that the High Court had only that morning upheld the legality of the Commission's determination.

[21] The Secretary of State (and Prime Minister) resisted further urging that he should exercise his statutory powers under section 9 or 11 of the Act. Rather, he sought to encourage the parties to reach an agreement which "would satisfy everyone's perspective and rights and could lead to a long-term resolution." To this end, he held face-to-face talks directly with representatives from the Lodge and the Residents' Coalition between Monday 28 September and Thursday 1 October, with representatives of each group in attendance each day.

[22] A range of options were discussed but it seems that there were essentially three potential compromises on the table: (i) an option described as 'one and done', where the Lodge would proceed on the notified route and agree never to apply to parade on the Garvaghy Road again; (ii) an option described as 'won and done', where the Lodge's legal right to process along the notified route was recognised but not exercised along the Garvaghy Road; and (iii) international mediation with an agreed mediator. The first respondent's evidence is that various options were considered as part of the 'one and done' scenario, including (for instance) a change to the time of day when the parade would take place.

[23] The additional affidavits filed over the two days of hearing provided some further details about the conduct of the negotiations. Mr Dawson filed an affidavit, the central purpose of which appears to have been to aver that, although various suggestions were discussed and a discussion paper was produced during the negotiations, no concrete proposal was presented to him which he understood required acceptance or rejection by the District; and that at none of the meetings was

he asked to consider any amendment to the existing determination by the imposition of different or additional conditions. He says that no such proposal was presented to him for acceptance or rejection. He has further exhibited materials from the media which suggest, from public statements, that the Residents' Coalition would accept no proposal which involved the District processing along the Garvaghy Road and that it was wholly intransigent in that regard.

[24] Ms Hamilton's affidavit in response to Mr Dawson's averred that it was correct that no proposal for any amendment of the determination was presented to him for acceptance or rejection; but that this was because "it had become clear during the course of that week that the parties' positions were so far apart that there was no point in doing so" (and there was, at that time, no application from the Chief Constable which would have prompted consideration of an amendment). However, she says that a range of suggestions were made and discussed. Had a viable solution been identified, officials would then have worked with the parties, the PSNI and the Commission to determine how to give effect to any agreement. The Secretary of State explored a number of options with the parties but to no avail.

[25] Ms Hamilton gave some further details of the Lodge's position at a number of meetings, as follows:

(i) At the meeting on 28 September, Mr Dawson had suggested that the Lodge would consider a 'two and done' solution, with the completion of the outstanding parade to bring the Lodge's banner home, alongside one final larger parade in July 2027 with a binding agreement capping future parades at fewer than five. He also confirmed that even an off-peak parade (at 4.00 am) would have been acceptable to complete the march and retrieve the banner. He rejected the suggestion of a parade escorted by young residents, who could be wearing Gaelic Athletic Association regalia.

(ii) At the first meeting on 29 September, Mr Dawson indicated that the Lodge was prepared to focus on a 'one and done' outcome which provided more finality. Ms Hamilton has averred that the 'one' parade would then have involved replacing the existing limitation of 35 members with a single full District Lodge parade of approximately 600 members (although Mr Dawson does not accept that this was the position he advanced).

(iii) At the first meeting on 1 October 2026 Mr Dawson confirmed that the Lodge could accept a document which delivered the 'one and done' framework but stated that the Lodge could not accept an agreement that involved no parade. At that meeting, the Secretary of State asked whether partial route options or a managed resident protest could be accommodated by the Lodge. Mr Dawson confirmed that it could accept a separate, authorised residents' protest, provided the parade proceeded first in order to prevent deliberate delays. He also requested that the determination be amended to allow ex-servicemen's colours to be carried. On this proposal, the parade could

remain capped at 35 members participating. In response to the Secretary of State pressing as to whether the full length of the Garvaghy Road had to be completed, Mr Dawson explained that no alternative turn-offs existed and that the route took under eight minutes to walk.

[26] Ms Hamilton's affidavit notes that at no time did Mr Dawson accept that route deviation would be acceptable and, therefore, no formal proposal that included a route deviation as a possibility was made. Mr Dawson indicated flexibility around the time of the parade but (Ms Hamilton avers) there was "no flexibility on the notified route." The Residents' Coalition were also fixed around the notified route being the main issue and were not willing to compromise on that either.

[27] Mr Mac Cionnaith also filed an affidavit in response to that of Mr Dawson, which he avers did not represent a complete or accurate reflection of the discussions at Hillsborough Castle. Mr Mac Cionnaith noted that the discussions resulted in a document being prepared by the Secretary of State on 30 September which was provided to both sides, and which was accepted by the Residents' Coalition but rejected by the Orange Order. He too exhibited public statements contained in media articles designed, in his case, to show that the Lodge would accept no proposal which did not involve processing on Garvaghy Road and that it was wholly intransigent in that regard.

[28] The Secretary of State brought talks to a close late on Thursday 1 October, confirming that the parties had been unable to reach a settled agreement and describing the position as being caught between 'a rock and a hard place.' The Lodge would accept no resolution which did not involve marching along the Garvaghy Road; and the Residents' Coalition would accept no resolution which did.

[29] The Secretary of State nonetheless indicated that, despite talks coming to an end, his door remained open. Neither the Lodge nor the Residents' Coalition sought to formally reopen dialogue. The Secretary of State nonetheless continued to engage with others: politicians, the PSNI, the Irish Government and other interested parties.

[30] Importantly, the Secretary of State remained in contact with the PSNI throughout the whole period and received regular updates on its assessment and ability to police the situation on the ground. His understanding of the police position was that the PSNI was at all times endeavouring to facilitate the notified procession but was operationally unable to do so.

(iv) The policing operation

[31] The Secretary of State's understanding mentioned in the preceding paragraph accords with the picture painted in various police documents provided to the court by the Chief Constable. The Chief Constable's evidence is that, following receipt of the Lodge's notification on 3 September 2026, the PSNI began to plan for a full range

of potential outcomes, from a peaceful procession through to serious and sustained disorder. The planning included various command structures: Gold (strategic oversight); Silver (overall tactical command); and Bronze (geographical responsibility for specific designated areas). The planning also included the identification and mobilisation of public-order and public-safety resources, specialist capabilities, evidence-gathering arrangements, arrest and custody planning, medical provision, welfare arrangements, engagement and negotiation options, and contingencies for wider disorder across Northern Ireland.

[32] The Chief Constable avers that the policing strategy was, and continued to be, directed to *facilitating* the procession allowed by the determination, whilst balancing the potentially competing human rights of all parties, protecting life and public safety. Unsurprisingly, the PSNI's principal strategic objective has been to preserve life and the protection of the public. Alongside this, the Chief Constable has emphasised the requirement on the PSNI to minimise the use of force and for operations to be planned and controlled so as to minimise recourse to force, as required by the PSNI Code of Ethics (see Article 4) and the PSNI Manual of Policy, Procedure and Guidance on Conflict Management.

[33] The Chief Constable has exhibited relevant extracts from the operational logs completed by gold and silver command for the period of 5 to 9 October 2026, which demonstrate the ongoing assessment by police of the factors and circumstances as they related to the situation at Drumcree and the Garvaghy Road in that period. Impact assessments completed by the silver command have also been exhibited. So too has the gold strategy document compiled and updated by police throughout the operation.

[34] To prepare for the full range of potential scenarios, substantial PSNI resources were identified and formed part of a significant mobilisation. The operation has at points been resourced by 24 public order units, including mutual aid units from Police Scotland and from England (with provision for 140 officers), supported by continuous command arrangements and specialised assets.

[35] From the time when the notified procession was due to take place the route was obstructed, or was assessed as capable of being immediately obstructed, up until the making of the Chief Constable's section 9 application and beyond. The Chief Constable's evidence also discusses PSNI engagement with a range of parties, again with a view to facilitation of the procession. PSNI negotiators were deployed as part of this process but were not successful, although the policing operation was assessed as having assisted in creating space and time for the talks process chaired by the Secretary of State which has been discussed above.

[36] The applicant relied upon some of the content of the CLIO Logs which have been provided. They suggest that, by the early morning of 5 October 2026, the number of protesters at the Garvaghy Road had reduced to approximately 30. However, it seemed that a 'siren' system had been installed to alert residents to any

attempts for the parade to go ahead. The Orange Order was asking to parade and was contesting the assertion on behalf of police that there were protesters blocking this. The silver commander still did not believe that he could achieve any of the strategic objectives by seeking to facilitate the parade at that time. The risk of disorder existed and it would be necessary to use force to clear the road, resulting in members of the public, protesters, Lodge members and police being put at risk. The silver commander noted that he was conscious of intelligence in relation to firearms and dissident republican activity and considered that the risk to life remained extant.

[37] A later log entry that day indicated that the numbers of persons at the Garvaghy Road campsite had increased and the silver commander confirmed his opinion that those opposing the parade were able to block the road with little or no notice and to gain substantial support to increase their numbers within a short time. There are entries as to movements which were considered highly likely to be part of an 'early warning system' to mobilise residents if the parade began to proceed. To similar effect, an entry on 7 October recorded that there were indications that large numbers could gather to block the road at short notice; and that this had previously been observed. The logs also indicate that police were conscious that the prolonged nature of the operation left them vulnerable to attack, especially at static positions.

[38] On the evening of 7 October, there were approximately 100 people at the protest site at Garvaghy. Around that time, probably because the fluctuating numbers of protestors were smaller than had been the case at the start of the stand-off, the Orange Order were pressing the police for "live risk assessments." The police assessment remained that it was inappropriate to seek to force the procession along the Garvaghy Road. The applicant has placed particular emphasis on an entry by the silver commander that evening when, commenting on information and intelligence, he made the following entry: "I have sight of 9x Intel docs received today. I am mindful of their contents particularly the presence of Dissident personalities, the feelings of the PIRA, and the potential for this matter to impact on the wider parading issue." This comment is in the midst of a much longer entry. The concluding section deals with the ongoing risk of disorder, with the commander indicating he remained conscious of intelligence in relation to firearms and dissident republican activity. He also noted that he was cognisant of how the issue was affecting police and community relations but with police actions, or inaction as it may appear to some, continuing to be evidence-based.

[39] It seems clear from the logs that the relevant police commanders were being regularly updated with intelligence materials. By way of example, there is reference to nine intelligence documents in the entry for 7 October described above and then, in the later entry on the evening of 8 October, there is reference to the silver commander having had sight of seven intelligence documents which were received that day. He indicated that the content of *those* documents was mostly related to the strength of feeling (presumably on the unionist/loyalist side) regarding what was perceived as a lack of police action against the Garvaghy protest.

[40] Mr McConkey relied strongly on the fact that, in a log entry timed at 7.44 am on 9 October, the gold commander had reviewed the overnight brief and said that there was "no material difference" in the situation, with the strategic objectives and tactical parameters remaining relevant, necessary and proportionate. He rhetorically asked what had changed between that time and the Chief Constable making an application to the Secretary of State for review of the determination around an hour and a half later. I turn to that application shortly.

[41] The Chief Constable's evidence reiterates the point made in his application that, as of 9 October 2026, all available, lawful and proportionate options to facilitate completion of the procession had been exhausted. The only remaining option was not considered to be proportionate, carrying an unacceptable risk of serious injury, disorder and a wider contagion effect across Northern Ireland.

[42] The exhibited impact assessments from A/CS Haslett also show that the police were acutely aware of criticism of their actions from both sides of the community, including with weakened confidence in policing in some quarters of unionism which perceived that the PSNI was either unable or unwilling to uphold the rule of law. This frustration was noted as being compounded by the contrasting perception that nationalists, and in particular high-profile nationalist politicians including the First Minister, appeared to be able to flout the law by blocking their lawful parade with apparent impunity.

(v) The Chief Constable's application

[43] At approximately 9.15 am on 9 October, the Secretary of State received an application from the Chief Constable under section 9 of the 1998 Act. The decision to make the application is itself one of the decisions impugned in these proceedings. The application is set out in a lengthy letter, of some five pages, split into sections with the following headings: Introduction; Background; Summary of the Policing Operation 27th September onwards; Impact on relations within the community; Demand on the Police Service of Northern Ireland; and Conclusion.

[44] Further aspects of the Chief Constable's application are cited and discussed below. However, the core of the application is in my assessment obviously contained in the first few opening paragraphs, including the following:

> "The purpose of this correspondence is to formally request that you review the determination pursuant to section 9 of the 1998 Act.
>
> This request is made on the basis of the Police Service of Northern Ireland's (PSNI) ongoing assessment, existing intelligence and the operational circumstances that have materially developed since the original determination was issued. The PSNI's position throughout has been to

> facilitate the lawful procession permitted by that determination.
>
> Notwithstanding this, PSNI's current assessment is that all available, lawful and proportionate options to facilitate completion of the procession have been exhausted. Any remaining options would require a substantial public order intervention that is not assessed to be proportionate, and which would carry an unacceptable risk of serious injury, disorder and a wider contagion across Northern Ireland.
>
> For the purposes of the application, I am providing a confidential annex which sets out the current intelligence assessment."

[45] The correspondence went on to recall the well-documented history of serious contention around the return route of the Orange Order parade at this location in the past, including the events of the late 1990s, which involved significant disorder, serious injuries to the police and public, and tragic loss of life. It then went on to give a summary of the policing operation. The crux of the position is described towards the end of that section of the application in the following terms:

> "Whilst the situation at Drumcree has undoubtedly been tense at times the policing approach has meant that there has been no violence or disorder to date. The operational situation effectively became a prolonged stand-off.
>
> Disorder has now occurred elsewhere, including incidents of petrol bombs in Derry/Londonderry. Consequently, the potential for the dispute to trigger disorder beyond the immediate area has remained a material feature of the PSNI's continuing risk assessment.
>
> PSNI has continually reviewed all available options including measures to encourage voluntary movement, engagement and negotiation, separation and containment, and physical intervention to address the obstruction and clear the route.
>
> It is our assessment that all options short of a major public-order operation have been attempted and are not capable of achieving our policing objectives. The remaining option would require substantial numbers of protected officers and specialist capabilities, with a clear likelihood of active resistance, serious and prolonged

> disorder, injuries to the public and officers, disorder spreading beyond the immediate area, and significant further impact upon policing across Northern Ireland."

[46] That section of the application then contained the following paragraph, on which the applicant places particular emphasis:

> "Any such major public order operation would in my view likely fail and have catastrophic long-term consequences for trust and confidence in policing, the Northern Ireland Executive and the peace process."

[47] The correspondence then went on to address the impact on relations within the community. It described the impact on relationships within and between communities which the ongoing policing operation and procession-related matters had had, including criticism of the police from both nationalist and unionist perspectives. The Chief Constable's view was that "The longer the operational impasse continues, the greater the risk to confidence in policing across communities."

[48] The correspondence next addressed the demands on the PSNI, noting that the operation had continued significantly beyond the time originally contemplated by the determination. The protracted policing operation had created substantial demands on the police with many officers being redeployed from their normal duties to public order or associated duties, with back-filling of essential functions then required. Albeit priority services had been protected, these personnel movements had affected routine policing and resilience. Ongoing investigations, proactive and neighbourhood policing, specialist training and community engagement had all been "postponed, reduced or cancelled" to varying degrees. There had also been substantial welfare impact due to heightened operational demand leading to extended shifts and forced changes to leave and rest-day arrangements.

[49] This section of the application also dealt with the financial cost of the operation. This was assessed at £4.6m as of 6 October 2026, with the costs continuing to increase and being estimated as at the date of the application to be approaching £5m, excluding a range of costs which could only be confirmed when the operation concluded. This arose in the context of wider budgetary pressures on the PSNI.

[50] The application concluded by summarising the main points and expressing the Chief Constable's professional judgment that it was "no longer viable to give effect to the determination."

(vi) The intelligence assessment

[51] Attached as a confidential annex to the Chief Constable's request for a review was a brief document setting out the PSNI's intelligence assessment at that point. It has been exhibited to affidavit evidence in this case and referred to in the course of the proceedings. Given the significance of certain aspects of the intelligence assessment in the submissions of the parties, and given the likely public interest in its content, I set out the substantive text of the document in full below. The underlying intelligence material which formed the basis of this assessment was not disclosed in the course of the proceedings, nor would I have expected it to be. Quite understandably, no party sought disclosure of it in the course of the proceedings and I anticipate that, had any party sought to do so, the Chief Constable would have relied upon the sensitivity of the information and the need to protect sources such that a claim for public interest immunity is likely to have arisen.

[52] The assessment provided to the Secretary of State read as follows:

- "It is ***almost certain*** that the permitted parade will continue to be accompanied by parade related protest in the Garvaghy Road area.

- It is ***highly likely*** that persons will continue to travel to Garvaghy Road from across NI to support protest activity. There continues to be significant online commentary in support of protest activity.

- It is ***highly likely*** that the protest will continue to involve significant numbers of persons and will continue to seek to block the road to prevent a parade along Garvaghy Road.

- It is ***almost certain*** that Dissident Republicans have attended the protest. It is possible that Dissident Republicans have ready access to firearms in the Garvaghy Road area. It is ***possible*** that in the event of police removing protester's [sic], firearms may be used to attack police.

- Reliable intelligence indicates that mainstream republicans are concerned about their ability to prevent disorder or control Dissident Republicans.

- It is ***highly likely*** that some of those attending may seek to cause disorder.

- It remains ***highly likely*** that police intervention will be met with serious disorder which may involve the use of petrol bombs.

- Reliable intelligence indicates that elements linked with Loyalist Paramilitaries supporting the parade are becoming increasingly frustrated with the policing operation and perceived inaction.

- It is ***highly likely*** that the prolonged situation at Drumcree Church will result in increased numbers of Loyalists attending the Portadown area in support of the parade. Disorder at Drumcree Church remains possible.

- Reliable intelligence indicates that the presence of known Dissident Republicans at the Garvaghy Road has prompted elements linked to Loyalist Paramilitaries to travel to the area.

- It remains ***highly likely*** that protest activity and/or disorder in support of residents at Garvaghy Road may occur in other parts of Northern Ireland. Police are in receipt of untested intelligence which indicates disorder may occur in other parts of Northern Ireland in order to stretch police resources.

- It is ***almost certain*** that the current situation in Drumcree / Garvaghy is adversely affecting police community relations in both the PUL [Protestant Unionist Loyalist] and CNR [Catholic Nationalist Republican] communities. It is uncertain whether this adverse impact is widespread or likely to be long lasting."

[53] The bold, italicised and underlined emphasis in the above text appears in the original document. It is designed to indicate that the phrases used constitute an assessment of likelihood and, moreover, terms of art which have a specific meaning based on the 'probability yardstick' which is set out at the conclusion of the document. Describing the content of that yardstick in writing: a "remote chance" is between 0-5% probability; "highly unlikely" is between 10-20% probability; a "realistic possibility" is between 40% to just below 50% probability; "likely" or "probable" is between 55-60% probability; "highly likely" is between 80-90% probability; and "almost certain" is between 95-100% probability.

(vii) Further events on 9 October

[54] Once this application was received, the Secretary of State requested same-day advice because (quoting Ms Hamilton's affidavit) "he did not think it was appropriate to take a long period of time to consider the section 9 review, particularly as the weekend ahead would draw additional crowds to the area and put further pressure on police and risk further community tensions."

[55] In the course of the day, and before the submission discussed below was provided to him, the Commission was consulted in relation to the section 9 application and the possibility of using section 11 powers. The Chief Constable was also consulted in relation to the possible use of section 11 powers. These steps complied with the requirements of section 9(4) and 11(5) of the 1998 Act respectively.

[56] At approximately 6.02 pm the Secretary of State was provided with a submission from his officials to assist with his decision-making. This submission and its annexes have also been disclosed in the course of these proceedings (subject to a redacted portion containing legal advice as to which legal professional privilege has not been waived). A number of the key materials which were annexed to the submission were provided to the Secretary of State earlier during the course of the day so that he could read them even whilst the submission was being prepared. The submission was lengthy (22 pages without annexes; and 63 pages with annexes) and I have quoted it only sparingly in this judgment, although it is important to note that the Secretary of State specifically recorded that his decision was based on the reasoning contained within it.

[57] The submission included a detailed timeline of recent events and summarised the Chief Constable's application. It went on to provide advice as to whether any procession could then lawfully take place on foot of the Lodge's notification and the Commission's determination; advice as to whether the Secretary of State should confirm, amend or revoke the original determination; analysis of each of the three options under section 9(2); and recommendations to confirm the original determination (whilst also confirming that it could not now be given effect) and to make a section 11 order (about which advice was also provided, including in respect of each of the matters specified in section 11(1) of the 1998 Act).

The Secretary of State's impugned decisions

[58] At 8.15 pm on 9 October, Ms Hamilton received a communication from the Secretary of State's Principal Private Secretary which confirmed that the Secretary of State had agreed with the advice given to him and which also provided his reasoning. The Secretary of State's reasoning in respect of the section 9 determination was recorded as follows:

"Having read all the relevant documents and attachments, I have come to the following conclusions in agreement with the reasoning of the submission.

1. The proposed procession could not now ever proceed on the basis of the notification and determination preceding it given the passage of time and the significant change in the background context from that considered and anticipated by the Commission.

2. Even presuming the validity of the original decision (which is still under challenge at the moment in Court of Appeal proceedings), it cannot now ever be given effect. I repeat the Chief Constable's advice that "it is no longer viable to give effect to the determination." And note the Commission's advice that "The ability of the Chief Constable to give a direction to those involved in the procession has now been significantly compromised. While ultimately a matter for the courts to determine, the Commission is of the view that, in light of this current assessment by the Chief Constable, the original determination does not now have enduring legal effect."

3. I am therefore confirming the original determination as made at the time by the Commission but simultaneously confirming that it cannot now ever be given effect. Any future proposed procession will therefore have to be the subject of a fresh notification and determination by the Commission against the relevant circumstances as they then exist."

[59] The Secretary of State's recorded reasoning then went on to address the question of his section 11 powers in the following terms:

"I have also considered the four matters I am required to have regard to under section 11.

1. With regard to public disorder, while events have thus far receded [sic] peacefully, I note that the Chief Constable has advised that "it is our assessment that all options short of a major public-order operation have been attempted and

are not capable of achieving our policing objectives. The remaining option would require substantial numbers of protected officers and specialist capabilities, with a clear likelihood of active resistance, serious and prolonged disorder, injuries to the public and officers, disorder spreading beyond the immediate area, and significant further impact upon policing across Northern Ireland." This clearly intimates that if the procession were to be enabled, there would be a significant risk to public order.

2. The serious disruption to the life of the community is self-evident as roads have been closed, a primary school has been closed, a health centre has had to work around the protest to deliver home care and large numbers of residents have felt great anxiety about the prospect of the procession.

3. Community relationships have been manifestly disturbed. People have told me repeatedly of their fears, angers and frustrations both in person and by letter and email. Large numbers have gathered at events on either side of the argument. The Chief Constable has advised as such and there have been calls for the NI Executive to be disbanded. None of this is in the interests of peaceful coexistence.

4. The demands on police time and resources have been intense, at a time of already straitened public finances, as directly evidenced by the Chief Constable's note.

Finally, I have considered the balancing and competing human rights of both communities. As noted below, the sustained possibility of a parade and associated protests has forced the people of Portadown (on both sides of the dispute) to relive past disputes and rekindled previous anger. I have attempted to find a resolution of this matter in a way that balances the competing human rights but all such attempts are now exhausted and it is clear that the equal and opposite forces of the procession and the protest are perpetuating harm to both communities. The public interest is best served, therefore, if the procession does not occur.

> I therefore conclude that it is necessary in the public interest to prohibit the proposed procession and I accordingly prohibit the said procession by order.
>
> I agree with the recommendation at paragraph 106 and am content to make the order."

[60] Correspondence communicating the decision was then sent to relevant parties; and a press statement was also issued. The decisions were communicated to the Lodge by means of a letter sent by the Secretary of State to Mr Dawson, dated 9 October 2026, which is in the following terms:

> "Dear Nigel,
>
> **PAR/11838 Portadown LOL No 1 Drumcree (the Determination)**
>
> Firstly, I want to personally thank you and Alastair as well as the wider Portadown Orange Order for your time, constructive engagement and genuine leadership in the most challenging of circumstances.
>
> My team and I wish to continue this engagement and I hope that we will be able to meet in the coming months.
>
> In terms of next steps I wish to formally update you on the current situation. Earlier today I received a request from the Chief Constable of PSNI, under section 9 of the Public Processions (Northern Ireland) Act 1998 (the Act), seeking a review of the Determination, issued by the Parades Commission on 25 September 2026.
>
> As per section 9(4) of the Act, I today contacted the Commission for its views on both:
>
> a) revoking, amending or confirming the Determination; and
> b) the potential use of powers under section 11 of that Act.
>
> I have received and carefully considered both the Commission's and the Chief Constable's views on these matters.

I am now writing to inform you that I have completed the review of the Determination as required under section 9 of the Act. Pursuant to this review, I have decided:

1. That the proposed procession could not now ever proceed on the basis of the notification and determination preceding it given the passage of time and the significant change in the background context from that considered and anticipated by the Commission;

2. Accordingly, the determination cannot now ever be given effect;

3. To confirm the original determination made by the Commission based on the information available to it at that time stressing again that it cannot now ever be given effect and any future proposed procession will have to be the subject of a fresh notification and determination by the Commission against the relevant circumstances as they then exist.

I have also separately and additionally considered the use of powers under section 11 and formed the opinion that having regard to the four matters I am required to have regard to under section 11(1), it is necessary in the public interest to prohibit the proposed procession pursuant to the said notification and determination. I have made an order prohibiting it accordingly. A copy of the order is attached for your information.

I understand that this will be incredibly disappointing for you and the wider lodge, after what has been a very difficult couple of weeks. You have served the lodge with dignity and grace and I would like to again thank you for your engagement during this period. I also want to put on record my thanks for your repeated commitment to upholding the law and for the leadership you and Alastair have shown in the most trying of times.

I sincerely hope that we will be able to meet again in the coming weeks, …"

[61] Correspondence in materially similar terms was also sent to the Chief Constable, the Chair of the Commission and the solicitor for the Residents' Coalition.

The section 11(1) order made by the Secretary of State, enclosed with that correspondence, is in the following terms:

> "**Public Processions (Northern Ireland) Act 1998, section 11(1)**
>
> **Order prohibiting the Procession notified by Portadown District LOL No.1 to take place at 8.am on 27 September 2026 and determined by the Parades Commission pursuant to determination PAR\111838**
>
> The Secretary of State for Northern Ireland, having considered the powers available to him under section 11(1) of the Public Processions (Northern Ireland) Act 1998 ("the Act");
>
> And having had regard to the considerations specified at section 11(1)(a)-(d) thereof;
>
> And having consulted with the Northern Ireland Parades Commission and the Chief Constable of the Police Service of Northern Ireland in accordance with section 11(5) thereof;
>
> Is of the opinion that it is necessary in the public interest to prohibit the procession notified by Portadown District LOL No.1 to take place at 8.am on 27 September 2026 and determined by the Parades Commission pursuant to determination PAR\111838 ("the Procession");
>
> And accordingly by this Order prohibits the Procession pursuant to section 11(1) of the Act with immediate effect."

[62] The order is signed by the Secretary of State and timed and dated 19.47 on 9 October 2026.

[63] The content of the letter (referred to in the applicant's pleadings as "the confirmation letter") may be thought somewhat curious, in that it purports to confirm the original determination and yet prohibit the procession which that determination permitted. On my reading of it, the Secretary of State was really seeking to make three, distinct points in this correspondence, namely (1) that the Commission made the correct determination at the time when it permitted the procession with restrictions, or at least a decision with which he was not minded to interfere ('the confirmation decision'); but (2) that the procession so permitted could not now lawfully occur pursuant to that determination given the passage of time

and intervening events ('the expiry decision'); and (3) that, in any event, the procession should now be prohibited to stop it going ahead (without prejudice to the Lodge's right to apply for further such processions) ('the prohibition decision'). Consideration of the submission provided to the Secretary of State confirms this reading of the letter and, further, explains why the matter was approached in this way.

Case management

[64] These proceedings were commenced late in the evening of Friday 9 October 2026, shortly after the decisions of the Secretary of State which are impugned were made public. An urgent out-of-hours sitting was arranged on Saturday 10 October before McBride LJ. She accepted that the case warranted expedition, as requested by the applicant, but did not consider it an emergency requiring a weekend hearing. The matter was adjourned to Monday 12 October 2026 and, in the meantime, assigned to me by the Lady Chief Justice for hearing. On Sunday 11 October, an agreement was reached between the parties that the case should be dealt with towards the end of the week commencing 12 October by way of rolled-up hearing. The applicant had originally sought interim relief in the form of "an interim order suspending the operation and effect of the [Secretary of State's] Confirmation Decision and the Section 11 Order pending determination of this application." In the event, the application for interim relief was not pursued.

[65] At the hearing on 12 October, which was effectively a case management review given the agreement between the parties of the preceding day, the case was timetabled for hearing. A further version of the applicant's Order 53 statement had been served the preceding night, seeking to join the Chief Constable as a proposed respondent rather than merely a notice party. Due to the impact of that amendment on the proposed timetable, in particular relating to the swearing and service of the Chief Constable's evidence, and the availability of the court and counsel, the matter was listed for hearing on Monday 19 October.

The grounds of challenge

[66] As noted above, the proceedings commenced late in the evening on 9 October 2026. The applicant's Order 53 statement has been amended and updated twice since then: first on 11 October, in order to join the Chief Constable as a second proposed respondent; and then again on 14 October, after receipt of the proposed respondents' replying evidence. Since leave to apply for judicial review had not been granted, such amendments did not formally require the leave of the court.

[67] As against the Secretary of State, the applicant's pleaded case identified nine grounds of challenge, each expounded further in the pleading but expressed in the following headings in his Order 53 statement:

(1) Illegality;

(2) Irrationality;
(3) Failure to consider the applicant's Convention rights and absence of any proportionality assessment;
(4) Failure to distinguish risk arising from the procession from risk arising from third-party obstruction, and the State's article 11 positive obligations;
(5) Failure to consult under the 1998 Act and separate breach of common law fairness;
(6) No explanation for the need to act immediately rather than await the imminent judgment of the Court of Appeal;
(7) Error of law and immaterial considerations in PSNI and SOSNI assessment;
(8) Fettering of discretion and misdirection; and
(9) Improper purpose.

[68] Each of these was directed towards the Secretary of State's decision-making. Only ground 7 was marshalled against the Chief Constable. In the course of the hearing, on further consideration and taking account of the materials submitted by the other parties, Mr McConkey helpfully indicated that the applicant was not pursuing grounds 5, 6 or 9, although he still relied upon the factual matters underlying those pleaded grounds in support of other grounds of challenge which were being maintained. Ground 7 was also pursued on a narrower basis than originally pleaded. In particular, sub-paras (a) and (b) of that ground – which appeared to seek to go behind the Chief Constable's assessment that the PSNI could not facilitate the parade in a proportionate way – were abandoned. For what it is worth, I considered the abandonment of those grounds entirely sensible. The parties' arguments on the remaining grounds are summarised and discussed below in the course of resolving each aspect of the challenge.

Relevant provisions of the 1998 Act

[69] The two key provisions of the 1998 Act for present purposes are sections 9 and 11. Section 9 is entitled, 'Review by Secretary of State of determination of Commission under section 8.' It provides as follows:

> "(1) The Secretary of State shall, on an application made by the Chief Constable, review a determination issued by the Commission under section 8.
>
> (2) On a review of a determination under this section the Secretary of State may—
>
> (a) revoke the determination;
>
> (b) amend the determination by amending or revoking any condition imposed by the determination or by adding any new condition; or

(c) confirm the determination.

(3) In considering in any particular case—

(a) whether to revoke, amend or confirm a determination; or

(b) what amendments should be made to a determination,

the Secretary of State shall have regard to the guidelines.

(4) Wherever practicable the Secretary of State shall before revoking, amending or confirming a determination under this section consult the Commission; but nothing in this subsection shall affect the validity of any revocation, amendment or confirmation under this section.

(5) A determination of the Commission which is amended by the Secretary of State under this section shall be treated for the purposes of this Act (except section 8(4)) as if it had been issued by the Commission as so amended.

(6) Where a determination of the Commission in relation to a public procession has been revoked by the Secretary of State under this section, the Commission shall not issue any further determination under section 8 in relation to that procession.

(7) The Secretary of State shall immediately notify the Commission where any determination of the Commission is revoked, amended or confirmed under this section."

[70] It can be seen from the above that a review by the Secretary of State under section 9 is triggered by an application made to him by the Chief Constable. Where such an application is made, the Secretary of State cannot ignore it but must ("shall") review the determination. In the course of doing so, there are three options open to him: revocation; amendment; or confirmation of the determination. In considering the case, the Secretary of State must "have regard" to the guidelines. The relevant guidelines, which the Commission is under an obligation to issue and keep under

review pursuant to section 5 of the 1998 Act, were last published in April 2005 and are entitled 'Public Processions and Related Protest Meetings Guidelines' ("the Guidelines").

[71] Where a determination of the Commission in relation to a public procession has been revoked under section 9, it is not open to the Commission to issue any further determination under section 8 in relation to that procession (see section 9(6)). That is to say, the Secretary of State has the final word. The Commission is not at liberty – even if there is time to do so – to countermand the Secretary of State's decision in a further determination before the procession is due to occur.

[72] Section 11, under the heading 'Secretary of State's powers to prohibit public processions', provides (insofar as material) as follows:

> "(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.
>
> …
>
> (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…

(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."

[73] Section 11 provides additional powers to the Secretary of State which are more draconian in nature. Under section 11(2) and (3), he may by order prohibit the holding of all public processions, or all public processions of a particular class or description, in relation to any area (which means the whole or any part of Northern Ireland) for a period not exceeding 28 days.

[74] Other elements of the 1998 Act are also relevant. It is important to note that the system of regulation under the Act is one of pre-notification rather than pre-authorisation. Notice of a proposed procession must be given pursuant to section 6. That allows the Commission to consider the notification and impose conditions if it considers that appropriate. If the Commission does not exercise its powers under section 8, it is perfectly lawful for a notified procession to proceed without a determination authorising it. It is an offence under section 6(7), however, to organise or take part in an unnotified public procession. Similarly, pursuant to section 7(1), there is a requirement to provide notice of a protest meeting related to a notified procession; and it is an offence under section 7(6) to organise or take part in a protest meeting which is unnotified. Where the Commission imposes conditions on a notified parade or related protest meeting, it is an offence (subject to certain defences) for an individual to knowingly fail to comply with such a condition or to incite another person to do so: see sections 8(7)-(8) and 9A(7)-(8). A defence for failing to comply with a condition of a Commission determination in relation to a procession arises where the defendant proves that the failure arose (a) from circumstances beyond his control, or (b) from something done by direction of a member of the PSNI not below the rank of inspector.

[75] Further offences are created by section 14 of the 1998 Act. It is an offence for any person who, for the purpose of preventing or hindering any lawful public procession (or protest meeting) or of annoying persons taking part or endeavouring to take part, to (a) hinder, molest or obstruct those persons or any of them; (b) act in a disorderly way towards those persons or any of them; or (c) behave offensively or abusively towards those persons or any of them. Other offences at common law or under different statutory provisions may also be relevant depending on the circumstances.

The role of the court

[76] The role of the court in a judicial review application is to conduct an audit of the legality of the actions of the respondent public body. It is not exercising an appellate function or conducting merits review. Generally speaking, the court's role is not to decide whether the decision under challenge was objectively 'right' or 'wrong.' Particularly in an area where the decision was made by a specialist tribunal or commission, established for that task or entrusted with it by Parliament, the respondent's judgment will be afforded a level of deference by the court. That is a general principle in public law but has been specifically applied in the context of the Parades Commission in this jurisdiction. By way of recent example, see Smyth J's comments at para [9] of her rulings; Humphreys J's comments at paras [11]-[13] of his judgment; and the Court of Appeal's comments in the preamble to, and paras [21]-[23] and [93] of, the judgment of the Lady Chief Justice in Mr Mac Cionnaith's recent judicial review proceedings (all supra).

[77] There has been reference in some of the written materials in this case to the courts having "supported" the Commission's determination. Strictly speaking, that is inaccurate. The High Court and Court of Appeal have determined that the determination was lawful. They did so by determining that the legal grounds of challenge mounted against it by Mr Mac Cionnaith lacked merit. Even more inaccurate are some of the public comments reported in media articles (contained in some exhibits to the parties' evidence) which seem to suggest that the courts had ordered that the procession must go ahead; or ordered that the State must ensure that this occurs. The legal right to process in accordance with the conditions imposed by the Commission was recognised by its determination. That right has been established; but it is not given added weight by virtue of the courts rejecting a challenge to the lawfulness of the Commission's determination. All that can be said, which might be relevant in certain contexts, is that the legality of the Commission's determination has been tested.

The Chief Constable's application and immaterial considerations

[78] Having set out those lengthy prolegomena, I now turn to the applicant's attack on the decision of the Chief Constable to apply to the Secretary of State for a review of the determination under section 9 of the 1998 Act. As appears from the relevant provisions (see paras [69]-[70] above), the Secretary of State can only

exercise section 9(2) powers after the Chief Constable has made an application to him to do so. Where such an application is made by the Chief Constable, the Secretary of State *must* review the determination. He is not at liberty to ignore the application. That is the only legal effect of the Chief Constable's application.

[79] The decision of the Chief Constable is the subject of the challenge set out in ground 7 of the applicant's Order 53 statement. There are really three arguments set out in the sub-paragraphs of that ground which require to be dealt with, namely: (i) that the Chief Constable took into account immaterial considerations (potential consequences for the Northern Ireland Executive and the peace process); (ii) if those considerations were legally permissible, that they were given disproportionate weight; and (iii) that the Chief Constable further erred in his assessment as to the impacts on trust and confidence in policing, since he looked at this in a one-sided way.

[80] The primary target of the applicant's complaint in this regard is the reference in the Chief Constable's application to the catastrophic consequences of the major public-order intervention which would have been required to seek to force the procession down the Garvaghy Road. The Chief Constable observed that there would be such consequences not only for trust and confidence in policing "but for the Northern Ireland Executive and peace process." The applicant says simply that these are not policing matters which it was relevant or permissible for the Chief Constable to take into account, bearing in mind core policing functions set out in section 32(1) of the Police (Northern Ireland) Act 2000 ("the 2000 Act").

[81] In his affidavit evidence the Chief Constable has commented on this factor in the following way:

> "39. This observation as set out in the letter to the Secretary of State concerning the impact on the Northern Ireland Executive and the peace process, arose solely based on my assessment of the potential outworking of police actions and any failed operation involving the disproportionate use of force. Such use of force and associated consequences would inevitably have had a significant community impact up to and including the Northern Ireland Executive.
>
> 40. The section 9 application raised that issue in that context. Separately, the stability of the devolved government is a relevant matter for the Secretary of State to consider in his public interest analysis."

[82] Mr Coll on behalf of the Chief Constable made a range of arguments in response to this ground of challenge. First, he drew attention to the wide and open-textured power of the Chief Constable to make a section 9 application. Second,

he argued that, in any event, the operable decisions in this case were those of the Secretary of State, which had overtaken any input of the Chief Constable both in fact and law. Third, he contended that the matters set out above were, properly understood, permissible considerations under the modern policing regime. However, fourth, even if this was not correct, he contended that these were not material considerations in the sense that the Chief Constable's decision to refer the matter to the Secretary of State would inevitably have been the same in their absence (relying on *R (FDA) v Work and Pensions Secretary* [2013] 1 WLR 444, particularly at paras [67]-[68] and [78] of the judgment of Lord Neuberger MR).

[83] It is right that the Chief Constable's power to apply to the Secretary of State for a review of a determination issued by the Parades Commission is a broad one. The considerations to be taken into account in doing so are neither prescribed nor proscribed by the statute. In those circumstances, it will generally be for the Chief Constable to take his own view on what is relevant, subject to acting rationally and in accordance with any other legal principles which govern the exercise of his functions generally.

[84] The effect of any decisions or actions on the Northern Ireland Executive or the 'peace process' is plainly a relevant consideration where those are effects which are relevant to policing, that is to say, where they are likely to give rise to (or increase the risk of) crime or public disorder with which the police will be required to deal. The applicant accepts as much and recognises that the policing or public order consequences of political or community instability *are* proper matters for the police to consider. That is an entirely appropriate concession. However, he contends that, in the present context, those matters were taken into consideration as a matter of pure politics, from which the Chief Constable must stand independent.

[85] Mr Coll referred me to a number of materials which relate to the modern ethos of policing in this jurisdiction further to the Belfast Agreement, the Patten Report and related policing reforms. One significant aspect of this is the ethos of community policing. The materials referred to in this regard included matters such as the Department of Justice's long-term policing objectives, one of which is the role of policing in building a more inclusive and cohesive society; and the Policing Plan 2025-2030 (to which the Chief Constable must have regard under section 33(2) of the 2000 Act) which aligns with the priorities in the Programme for Government. He submitted that the police are entitled, indeed required, to consider the impact on community relations of policing operations and that any effects on the peace process or the Executive are, in essence, simply considerations of community relations at an especially high level. On this basis, he contended that the Chief Constable had not considered anything which was not a proper consideration for him in law.

[86] I need not finally decide this issue for the reasons set out below. In either event, it makes no difference to the ultimate outcome in this case. There is a respectable argument that, as a matter of construction of the Chief Constable's letter, these factors were taken into account as ends in themselves rather than insofar only

as they represented considerations relevant to the exercise of the Chief Constable's specific policing functions. There was in my view no need for the Chief Constable to advise the Secretary of State of them since the Secretary of State was quite able, indeed probably better placed, to make that assessment himself. At the same time, it is quite possible that these considerations *could* represent relevant policing considerations if what was really being suggested was an assessment on the part of the Chief Constable that, in the event of the Executive and/or peace process collapsing over this parading dispute, there was likely to be increased public disorder or a political vacuum which may be exploited by paramilitary organisations. The Chief Constable's evidence could probably have been clearer on this.

[87] It is trite to observe that the police are not politicians; and that politicians are not the police. In our constitutional arrangements, these basic facts find expression in the legal doctrine that the police are independent of the executive and are to act impartially. This means that, as a general rule, politicians should not seek to dictate to the police how to do their job (otherwise than through the laws they create); and the police should do their job impartially and independent of political considerations. The former of these issues was considered in *Re JR168's Application* [2023] NIKB 83, at paras [91]-[92]. The latter finds expression in Articles 1.6 and 6 of the PSNI Code of Ethics, issued pursuant to section 52 of the 2000 Act, and the requirement of impartiality included within the declaration each constable must make upon attestation which is contained in section 38(1) of that Act. For its part, the judiciary, whilst providing an important check on the legality of police actions, should exercise only very light-touch review in respect of matters of operational police decision-making (see *DB v Chief Constable of the PSNI* [2017] UKSC 7, at para [71] and [76]), provided of course that those decisions are made on the basis of proper policing considerations and a proper understanding of the police's powers.

[88] Even assuming in the applicant's favour – which I have not decided – that the Chief Constable *did* take into account political considerations which were impermissible in the exercise of his functions, this does not in my judgment have any legal effect in this case. Albeit the Secretary of State could not exercise section 9 powers in the absence of an application by the Chief Constable, at this point in time the key determination as a matter of law is the first respondent's decision under section 11. If the applicant was successful in overturning the Chief Constable's section 9 application, that would not affect the section 11 order. Indeed, it would undermine other aspects of the applicant's case.

[89] Perhaps more importantly, I accept the second respondent's submission that these considerations were not material in the sense of making any difference to the Chief Constable's decision to make an application to the Secretary of State under section 9 for a review of the Commission's determination. He was simply describing anticipated knock-on effects of a potential large-scale police operation to force the Lodge's march down the Garvaghy Road. Such an operation had not been mounted and, for a variety of other reasons, was not going to be mounted. The police had

assessed that such an operation was likely to fail; that it would involve disproportionate force; and that it would carry an unacceptable risk of serious injury and disorder, including across Northern Ireland more generally (see the excerpts from the application set out at paras [44]-[46] above).

[90] In view of the fact that such an operation was not going to be attempted for sound policing reasons, and that there was no reasonable prospect of a negotiated resolution to the dispute, the Chief Constable considered that the Secretary of State should look at the determination again. The ongoing situation was draining police resources, diverting them from other important police work, and undermining confidence in policing on both sides of the traditional divide. Again, these were entirely appropriate policing considerations. In one of the impact assessments compiled by the police, the continuing demands on the PSNI were described in great detail and summarised as requiring "a substantial and sustained whole Service mobilisation." The same impact assessment (dated 8 October) noted that the policing costs then stood at some £4.6m and were likely to increase significantly as the operation proceeded.

[91] An application for review was inevitable in those circumstances, as matters had developed. The potential political fall-out of a failed police operation to force the march through was plainly not a decisive factor in deciding that such an operation should not be attempted; nor in deciding that, in policing terms, the impasse had continued long enough. For the same reason, this consideration was clearly not given disproportionate weight such as to render the Chief Constable's decision-making irrational.

[92] I am comfortably satisfied that the Chief Constable's remarks about potential political ramifications (in the event of the large-scale public-order operation he was discussing) played no significant part in the decision to refer the matter to the Secretary of State. I do not consider this to have been a significant or substantial part of his thinking when making the section 9 application. Even had it been, I am also satisfied that this factor can be disentangled from the other valid reasons for his decision such that, without it having been considered, the Chief Constable would clearly have reached the same conclusion that he should refer the determination to the Secretary of State for review. For these reasons, the applicant cannot succeed on this aspect of his challenge.

[93] Mr McConkey also sought to undermine the Chief Constable's decision on the basis that there was no explanation of what prompted it, or why the application was necessary, in view of the gold commander's observations a short time earlier in the 7.44 am entry in the CLIO Log for 9 October. There is force in Mr Coll's objection that this issue was neither pleaded nor raised in the applicant's rejoining affidavit, such as to give the Chief Constable fair notice of it. Nonetheless, it was easily answered. In their log entries, the gold and silver commanders were describing the situation on the ground in Portadown. At that point, the police response was proportionate and achieving their objectives of minimising disorder and risk to life

and property. Both sides remained in situ and the stalemate continued. The police assessment remained that it was not possible or proportionate to facilitate the parade along the notified route by force. On the other hand, the Chief Constable's perspective was wider. He was not merely looking at whether the situation on the ground was being appropriately managed but, rather, whether it was sustainable for it to continue, potentially indefinitely. He was considering the *wider* impact on policing resources and trust and confidence in policing, amongst other things. I see no inconsistency in the gold commander reporting that the operation was being appropriately managed at Drumcree and the Chief Constable determining that the Secretary of State should be asked to consider whether the situation should continue. It is also obvious, in view of the content of the Chief Constable's application, that it must have been under consideration and preparation for some time. It is not suggested, nor need it be, that some particular event on the morning of 9 October triggered it.

[94] Finally as to the challenge directed to the Chief Constable, I consider it unarguable that he looked at the question of trust and confidence in policing in a one-sided manner only, such as to irrationally exclude from his consideration the other view. It is entirely clear in my view that the Chief Constable recognised the police service to be once again caught in the middle of the two traditional communities in Northern Ireland. The section 9 application expressly referred to concerns on the part of nationalist residents both as to the PSNI's assessment which had been communicated to the Commission before its determination and as to the potential for the parade to be forced down the Garvaghy Road. However, the Chief Constable also recognised unionist concern that the police service was "unable or unwilling to uphold the rule of law and facilitate the lawful procession." The charge of permitting "mob rule" had been repeatedly and forcefully made. The Chief Constable was obviously concerned about the risk of confidence in policing (in his words) "across communities."

[95] For the above reasons, the claim against the second proposed respondent must fail. I will grant leave on ground 7(c) but dismiss the substantive case on that ground. I refuse leave on all of the other aspects of ground 7.

[96] The applicant also argued that the Secretary of State's decisions and actions were based on the assessment provided to him by the Chief Constable and, given that immaterial considerations vitiated the PSNI assessment, "it follows that the same error infected the Secretary of State's decision." That argument must also fail in light of the conclusions I have reached in relation to the challenge to the Chief Constable's actions. The political considerations of which the applicant complains were plainly permissible considerations for the Secretary of State in assessing the public interest under section 11 (and likely to fall within the section 11(1)(c) consideration of serious impact on relationships within the community, which earlier cases establish includes the *wider* community). But, in any event, they were simply a description of what might occur if the police attempted to clear the Garvaghy Road in order to facilitate the march. As noted above, the PSNI had

decided, for wholly proper policing reasons, that it was not going to do so. The Secretary of State was not in a position to second-guess that assessment or to force the police to take a different approach. The Secretary of State was plainly entitled to take into account the rest of what the Chief Constable had to say, whether as the applicant under section 9(1) of the 1998 Act or a mandatory statutory consultee under section 11(4)(b).

Illegality: the section 9 decisions and the expiry issue

[97] I next turn to the challenge to the decisions on the part of the Secretary of State. Many of the grounds of challenge relevant to these decisions overlap and are scattered throughout the applicant's numbered grounds. For clarity of analysis and ease of understanding, I have tried to break them down into the key central strands of complaint, each of which is addressed separately. The first major complaint is that the Secretary of State had no power to consider or decide that the determination of 25 September 2026 was no longer capable of being given effect.

[98] The applicant argues that the Secretary of State purported to make *three* decisions under section 9 of the 1998 Act; and that the decisions at numbered paragraphs 1 and 2 of that letter (see para [60] above) – which together represent what I have called the expiry decision – were not lawfully open to him when conducting a section 9 review, since they are not one of the permissible outcomes set out in section 9(2). In addition, he argues that the terms in which the Secretary of State purported to confirm the determination were also not open to him, since he added a qualification to that confirmation (in relation to the determination's lack of ongoing effect) which neither represented a straightforward confirmation nor an amendment of the determination.

[99] I accept Mr McAteer's submission in response that this is an excessively legalistic way of looking at the matter. The Secretary of State had to decide what to do on foot of the application which he had received for review of the determination. There was ongoing debate in the public sphere as to whether or not the determination was capable of being given effect at that point or, put another way, whether the 3 September notification would cover any procession which was then possible. The review was taking place twelve days after the time when, pursuant to the conditions in the Commission's determination, the parade should have concluded. It was wholly natural for the Secretary of State to wish to take a view on this issue (presumably with the benefit of legal advice) before deciding how to exercise the powers available to him under section 9(2). This was an important piece of context for the exercise of the Secretary of State's powers. Moreover, the issue had itself been raised by the Chief Constable in his application when he commented that in his judgment it was no longer viable to give effect to the determination for the reasons set out in the correspondence.

[100] Until the hearing, the applicant had not set out his position as to whether or not the Secretary of State was correct in his view on this issue. His contention was

simply that the Secretary of State was not permitted to decide the issue. At the hearing, Mr McConkey contended that the determination was still 'live', since otherwise there would have been no need for the Chief Constable to make the section 9 application. It was treated as still having legal effect when the application was made.

[101] The fact of the section 9 application being made is plainly not determinative of this issue as a matter of law. As noted above, there was some public debate at that time as to whether the determination was still capable of being given effect. In the absence of a court adjudication on the matter, it is entirely understandable that the Chief Constable would take the view that he should proceed on the basis that the determination was (or at least might still be) capable of being given effect. The applicant is also right to say that the Secretary of State's view of the matter was also not legally determinative of it. For the reasons mentioned above, that is not a reason for him not to consider it and take his own view.

[102] Mr McGleenan for the Commission urged the court not to seek to delve too closely into the question of precisely when the determination had timed out. His submission, which I accept, is that this is likely to be a mixed question of fact and law which, insofar as necessary, should be addressed in proceedings better suited to fact-finding than an expedited application for judicial review which proceeds without the benefit of oral evidence. The matter may require to be revisited in later criminal proceedings.

[103] Nonetheless, I can say that the Secretary of State's view on this matter appears to this court to be correct at the time when it was made. Had the Lodge's members conducted their procession without giving the required notice, or in breach of the conditions imposed by the Commission in its determination, they would have exposed themselves to potential criminal liability in that to do so amounts to an offence. However, there are a number of defences under sections 8(7) and 6(7)-(8) of the 1998 Act. In the present context, conduct of the procession outside the time window permitted in the Commission's determination would amount to an offence unless one of the defences in section 8(7) could be established (or, potentially, a defence in section 6(9)). The most significant of these for present purposes is likely to be the defence that the procession occurred at a later time as directed by or with the agreement of a senior member of the PSNI. Whatever the precise purpose and effect of the relevant provisions, at this point it was clear that the PSNI was *not* going to direct or agree that the parade proceed. Attempts had been made to facilitate the parade for some twelve days and an impasse had been reached. For the reasons set out in the Chief Constable's section 9 application, the PSNI had consistently adopted a position that it was not appropriate to seek to force the parade along the notified route (and direct the Lodge to proceed in conjunction with a major public-order operation for that purpose).

[104] In its section 9 consultation response to the Secretary of State, the Commission noted that there were very different circumstances at that stage than when it had

made its initial determination. It too raised the question of whether the original determination continued to have enduring legal effect and then answered that question in the negative, whilst recognising that this was ultimately a matter for the courts.

[105] I find no legal error in the Secretary of State considering this issue or reaching his own conclusion on it. It was wholly natural that he would do so. It is correct that a determination on such a matter is not a specified outcome of the section 9 process which is mentioned in section 9(2). That is not surprising, since one imagines that that section was drafted with the intention that – usually, if not invariably – a review of a determination would occur *in advance of* the time when the procession was scheduled to occur. The first respondent could certainly have been clearer that his 'decision' on this issue was not in purported exercise of his section 9 powers. (His letter may be thought to be a little carelessly drafted on that particular point.) Rather, it was a consideration to be taken into account prior to determining how to exercise those powers. Nonetheless, the Secretary of State properly took a view on this issue before deciding how to resolve the section 9 application; and was in my view correct to conclude on the evidence before him that, in all of the circumstances, the determination could no longer provide the necessary legal cover for the parade to proceed at that point. In those circumstances, it was open to him to confirm the determination for the reasons which he gave; but in circumstances where he anticipated that it could not be given effect. He did not consider that his expression of view on that matter was legally authoritative. However, the making of the section 11 order in any event superseded that view and provided clarity on the position.

[106] Reflecting the above, I will grant leave on ground 1, sub-paras (a) and (b) but dismiss the substantive claim on those grounds.

Irrationality: inconsistency between decisions and timing

[107] Ground 2 in the applicant's pleaded case is closely connected to aspects of ground 1 which have been considered above. The applicant contends that it was irrational and inherently contradictory for the first respondent to simultaneously decide that the parade could not lawfully proceed under the Commission's determination but to also confirm that determination. Elsewhere he pleads that it was irrational to use section 9 or section 11 powers, which are designed for use in relation to a 'live' determination, when the Secretary of State considered that the determination had 'timed out.'

[108] This is a superficially attractive argument. The first respondent's correspondence is open to the charge that it sends conflicting messages: the determination was and is correct but cannot, nor should it now, be implemented. The applicant also submits that the Secretary of State was seeking to 'cover all bases.' However, a more benign interpretation is simply that the Secretary of State was trying to explain clearly how and why he had reached the overall position which he

did; and, in particular, to explain that the section 11 order had become necessary in view of developments which post-dated the Commission's determination of 25 September. It is evident from the submission which informed the Secretary of State's decision-making that this is in fact why the decisions were structured as they were.

[109] In my judgment, there is no logical inconsistency in the decisions reached by the Secretary of State which undermines their lawfulness. As noted at para [63] above, he was seeking to explain that he endorsed the Commission's determination at the time at which it was made, but that circumstances had changed in the meantime. The changed circumstances had the result, in his view, that the determination could not now be given effect but also, separately, that the procession should be prohibited.

[110] An alternative approach, of course, would have been to simply revoke the Commission's determination under section (9)(2)(a). This possibility was specifically addressed in the submission provided to the Secretary of State which advised against that course for a number of reasons. First, the mere fact that it had not been capable of being implemented did not mean that the Commission had been wrong to make the determination permitting the parade to proceed (with conditions) in the first place. Second, it had been upheld as lawful by the High Court. In those circumstances, revocation may have appeared critical of the Commission when the Secretary of State was not. Third, revocation would only relate to the determination and not the original notification. It was feared that some may therefore make an argument that the procession could lawfully proceed (*without* the conditions imposed by the Commission in the determination) because the procession had been notified and had not been capable of being concluded through no fault of the Lodge. Those who were arguing that the determination could and should still be given effect could possibly take that course.

[111] The Secretary of State was obliged to make a decision on the review application and to do so by selecting one of the options specified in section 9(2). He did so by confirming the determination. It was rationally open to him to do so, even though he believed that it had 'expired' in the circumstances. He also did not require there to be a 'live' determination before exercising powers under section 11. As Mr McAteer correctly submitted, those powers are exercisable in respect of a specific procession (or processions more generally) when there is an intention or possibility of parading, without being tethered to any particular notification. That is the nature of the section 11 powers.

[112] The Secretary of State was faced with a complicated situation. The combination of decisions and reasoning which he provided was lawfully open to him for the reasons given above. They reflect the factual developments since the determination was granted and the fact that neither 'side' was securing an absolute victory. As it happens, they were also reflective of the position of the two statutory consultees respectively, the Commission and the Chief Constable, namely that the

original determination should be confirmed but that the parade which it concerned had not been capable of being facilitated. It was not irrational or unlawful for the Secretary of State to make the combination of decisions which he did.

[113] The applicant also asserts that the Secretary of State considered the section 9 referral "retrospectively" and "frozen in time as of 25 September" in circumstances where the PSNI assessment and referral were based upon a current assessment of the situation as at 9 October. I have little difficulty in rejecting as unarguable this further ground of challenge. The Secretary of State was briefed on and considered the position up to and including 9 October 2026. He confirmed the determination as at the time it was made for the reasons already discussed. He was aware of his power to amend the determination but declined to amend it as to its date in order to, in effect, grant a fresh determination permitting the Lodge's intended procession to proceed at some future point. The complaint that this represented a fettering of his discretion is addressed below. It cannot plausibly be argued, however, that the Secretary of State did not look at matters which had arisen since the initial determination.

[114] I refuse leave on ground 1(d) and ground 2(a)-(c).

Material considerations: the Guidelines and incentivising unlawful conduct

[115] The next major theme of the applicant's challenge is that the Secretary of State must have regard to the Commission's Guidelines and has not done so, in particular by having failed to have regard to para 1.5 of the Guidelines in respect of the requirement not to incentivise the threat of violence or disruption. Relatedly, the applicant contends that the Secretary of State has failed to consider the impact on the public interest of incentivising unlawful conduct.

[116] Para 1.5 of the Guidelines, on which the applicant relies, is in the following terms:

> "The right of peaceful assembly, underpinned by the European Convention on Human Rights and the United Nations International Covenant on Civil and Political Rights, while important, is not absolute. It is subject to limitations which are to be found both in the international documents and in the general law to protect the rights and freedoms of others or for the prevention of disorder or crime. The North Report, from which the creation of the Parades Commission arose, recommended that the following principles should underpin the community's future approach to public processions and related protest meetings:

a) the right to peaceful free assembly should (subject to certain qualifications) be protected;

b) the exercise of that right brings with it certain responsibilities; in particular, those seeking to exercise that right should take account of the likely effect on their relationships with other parts of the community and be prepared to temper their approach accordingly;

c) all those involved should work towards resolution of difficulties through local accommodation;

d) in the exercise of their rights and responsibilities, those involved must not condone criminal acts or offensive behaviour;

e) the legislation and its application must comply with the Government's obligations under international law, and provide no encouragement for those who seek to promote disorder;

f) the structure for, and process of, adjudication for disputes over individual public processions should be clear and applied consistently with as much openness as possible;

g) any procedures for handling disputes over public processions or related protests and the enforcement of subsequent decisions should be proportional to the issues at stake.

In considering whether to subject a public procession or related protest meeting to conditions and, if so, what conditions, the Commission will have regard to these principles."

[117] The Secretary of State was expressly advised by his officials in the submission that in considering whether to confirm, amend or revoke the original determination, he was required to have regard to the Guidelines. The Guidelines were an annex to the submission provided to the Secretary of State. In addition, there is an express averment that they were part of the documents provided to him during the course of 9 October "which he read" whilst the submission was being prepared. The applicant has not surmounted the requirement to show in some fashion that the first respondent did not have regard to the Guidelines, or any part of them, by evidence

or sufficient inference (see *Re SOS (NI) Ltd's Application* [2003] NIJB 252, at para [19]). Indeed, the evidence suggests the contrary.

[118] The Secretary of State was also specifically advised that the protest since the early morning of 27 September was "not a lawful protest", since the Residents' Coalition had withdrawn its Form 11/3 (the notification required for a protest meeting related to a notified procession under section 7(1) of the Act). He was further provided with detailed advice about the risk of disorder in the Chief Constable's section 9 application, along with the PSNI's intelligence assessment which addressed these matters. Moreover, in the course of the negotiations which the Secretary of State had hosted, and in the media materials to which he was referred by his officials, unionist politicians and Lodge representatives had repeatedly emphasised the risk of rewarding, or capitulating to, "mob rule."

[119] The claim that the Guidelines were left out of account, or that the Secretary of State did not consider the impact on the public interest of incentivising unlawful conduct (or being perceived to have done so), is unarguable. In truth, this is an aspect of a merits challenge as to the weight given to that factor, which is better addressed in the context of the applicant's Convention grounds. I refuse leave on grounds 1(c) and (e).

Convention rights

(i) Absence of an appropriate Convention analysis

[120] A major strand of the applicant's case involves the question of his rights under the European Convention on Human Rights. In a number of places in both his pleadings and written argument, the applicant criticises the "Convention analysis" of the first respondent, purporting to identify errors in the required decision-making steps necessary for a human-rights compliant decision. The applicant has a range of complaints about how the human rights balancing exercise was conducted and the absence of "a full Convention analysis", which he says was required afresh of the Secretary of State. He complains that the first respondent has failed (both in the section 9 and section 11 decision) to refer to his rights under articles 9, 10 and 11 ECHR and has not conducted any proportionality assessment as to whether prohibiting the procession was a proportionate interference with those rights (or whether a lesser measure, such as amending the Commission's existing conditions) would have sufficed.

[121] As a preliminary matter, it is necessary to observe that the obligation on the Secretary of State as a public authority under section 6 of the Human Rights Act 1998 (HRA) is not to *act* in a way which is *incompatible* with a Convention right, that is to say, not to violate such a right. The HRA does not itself require a public authority to follow any particular decision-making methodology or structure. Where an authority fails to do so, its assessment *may* be less deserving of the deference which the court would otherwise afford it. However, the ultimate question is whether or

not the authority violated a Convention right, not whether it referred to a relevant right or consciously applied an appropriate Convention analysis before reaching its decision.

[122] That has been authoritatively determined by the House of Lords in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 and the later Northern Ireland case of *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, which endorsed and amplified the reasoning in *Denbigh High School* (see paras [12]-[15], [24]-[27], [31] and [44] of *Miss Behavin'*). As Lord Mance pointed out, the court "will not require a decision-maker to put itself through the hoops of a complex series of questions" but will assess for itself the proportionality of the ultimate decision. In the *Denbigh High School* case, Lord Bingham had rejected the "new formalism" which would be involved in requiring the decision-maker to follow a specific, detailed Convention analysis, holding that "what matters in any case is the practical outcome, not the quality of the decision-making process that led to it." In this regard, challenges regarding Convention rights may be distinguished from other areas of judicial review where the court is often concerned with whether the decision-maker reached its decision in the right way, rather than whether it got to what the court might think is the right answer. This line of authority has been consistently reaffirmed in recent years, including very recently in *Shvidler v Foreign Secretary* [2025] UKSC 30, at para [120]. In my view, this is sufficient to dispense with the applicant's complaints at ground 3(a), (c) and (d), and indeed undermines a number of others in the way in which they are pleaded. I refuse leave on those specified grounds, although certain aspects of them are in any event addressed in the discussion below.

(ii) Fettering of discretion, amendment and less intrusive measures

[123] The applicant is particularly critical of the alleged absence of any consideration on the part of the Secretary of State as to whether an amendment to the determination (including as to re-routing the procession or other amendment of the conditions) would have represented a less restrictive means which would have satisfied the legitimate aims being pursued by the section 11 order. Allied to this, he contends that the first respondent fettered his discretion under section 9 by failing to consider amendment of the determination and treating the binary option of prohibition in section 11 as the only 'forward-looking power' available. This complaint finds expression in both grounds 3 and 8.

[124] However, it is clear from his officials' submission that the Secretary of State *was* advised about the possibility of amending the determination. This was dealt with briefly, as follows:

> "56. The powers under the Act allow you to amend the determination. You could do this in relation to time, date, number of persons and could decide to impose or change conditions that applied to the procession. There would only be utility in exercising that power if you wished to

> now make a decision which in effect permitted the proposed procession along the proposed route now or some time in the future.
>
> 57. Having regard to the information provided in the section 9 application in particular and everything else set out in this submission it is suggested that there would be no reasonable basis for taking such a course."

[125] A challenge based on the contention that the Secretary of State failed to recognise that he had power under section 9 to amend the determination, including by providing a new date and/or different conditions, cannot survive the content of para 56 of the submission. He was clearly and expressly advised of, and aware of, that power. I therefore do not consider there was any fettering of discretion. The real challenge on this issue must be that it was a substantive breach of the applicant's Convention rights for the Secretary of State not to exercise that power.

[126] In view of the authorities discussed above, the mere fact that Convention rights are not mentioned in the decision letter or the section 11 order is neither here nor there. The question is whether there was a substantive breach of the relevant Convention rights enjoyed by the applicant. It is nonetheless important to note that the Secretary of State was also clearly advised in the submission that he was required to consider and balance the respective ECHR rights of those wishing to parade and the residents of the area in the context of the exercise of both his section 9 and section 11 powers (see, for instance, paras 44, 67 and 85-90 of the submission). In short, he was aware of and considered the rights of the applicant and his fellow Lodge members.

[127] The applicant appears to contend for an amended determination which updated or extended the 'expired' determination by replacing the time and date conditions with a new time and date; and which could have introduced new conditions, rather than simply prohibiting the procession.

[128] The Secretary of State's evidence is that various possible options for the march taking place along the notified route were discussed, including for instance changes to the time of day. However, none of the options secured mutual agreement. The summary of the negotiations set out above (see paras [22]-[28]) makes clear that there was one central issue of principle separating the parties, namely whether or not *any* Orange Order parade would occur *on the Garvaghy Road* part of the notified route.

[129] I am wholly satisfied that the Secretary of State examined a range of options designed to facilitate that outcome and that none was identified which would break the logjam which had developed. A fresh date or time for the parade, or further restrictions, were not going to deal with the central issue of principle between the parties, leading to the same result if the amended determination still permitted the

parade to proceed along the Garvaghy Road. That is the case even assuming that stricter conditions would be acceptable to the Lodge, which appears to have been arguing for a relaxation of certain restrictions (as to numbers of participants or emblems carried) as part of the proposals to and fro. There was nothing to suggest that the same stalemate and risk of disorder would not still have prevailed in the notified route was maintained.

[130] The applicant's riposte is essentially that, even if he or the Lodge could not be expected to agree to it, the Secretary of State was nonetheless obliged, in finding a less restrictive means of curtailing his rights for legitimate reasons, to re-route the march away from the Garvaghy Road. This submission relates to the third stage of the *Bank Mellat* proportionality assessment, namely that the court should examine whether there was "a less intrusive measure which could have been used without compromising the achievement" of the aim being pursued (see, for example, *Shvidler* (supra), at para [118]). But that submission ignores the reality of this dispute, which is that the Lodge's notification to the Commission was specifically directed to parading along the Garvaghy Road (to return its banner, *via that route*, from Drumcree Church to Carleton Street Orange Hall) and was focused on use of that particular route.

[131] The first respondent's evidence is that, in the detailed negotiations which were held, for the Lodge "no resolution was acceptable that did not involve marching down the Garvaghy Road along the notified route." They asserted in those negotiations that the specific route along the Garvaghy Road was very important and was part of their tradition. Indeed, that had been the Lodge's consistent position in respect of this proposed procession. The Commission's determination notes that the Lodge had indicated that it was willing to agree to a range of conditions in relation to the parade (for example, in relation to the timing, size and inclusion of bands), including two requests which had been made by the Residents' Coalition (namely, preventing congregation of participants or supporters at specified locations). Nonetheless, notwithstanding this flexibility on some issues, the Lodge had "stressed the huge importance to it of completing the return part of the annual Drumcree Church parade along its traditional route, which includes the Garvaghy Road." A range of reasons were given for this, including that the District was the first one founded, in 1796, and therefore the oldest District Lodge in existence; and that it had proceeded along the Garvaghy Road since 1807, with its inability to do so from 1998 (since the Commission first imposed conditions preventing this) being a continuing source of grievance and resentment.

[132] Several public statements of the Lodge's position given to media outlets during the course of the negotiations confirmed this, including for instance that the District would not be doing any deal which did not deliver on the fundamental principle that "Portadown District will walk the Garvaghy Road." Other comments on behalf the Lodge suggested that there were no circumstances whereby they would compromise upon the determination being fulfilled.

[133] As noted by Humphreys J in discussing the Strasbourg case law at para [29] of his judgment, in certain circumstances the timing and *place of exercise* of a right are crucial to its effective exercise, recognising the autonomy of the individual or individuals seeking to exercise their article 11 rights in choosing (amongst other things) the place of assembly. The Court of Appeal also recognised the importance of location in para [29] of its recent judgment in Mr Mac Cionnaith's case, citing para 405 of the judgment of the Grand Chamber of the European Court of Human Rights (ECtHR) in *Lashmankin v Russia* (2019) 68 EHRR 1.

[134] In this case, I conclude that the Lodge (the rights of whose members incorporate and are coterminous with those of the applicant) had made the inclusion of the Garvaghy Road section of their route a necessary and indispensable aspect of the intended exercise of their Convention rights in this case, certainly by the time of the Secretary of State's consideration. Put simply, they were not interested in a procession the route of which did not include the Garvaghy Road. The location was "crucial" to the participants (in the words of the *Lashmankin* case). I consider this to be supported by the Court of Appeal's discussion of the issue at paras [75]-[80] and [85] of its recent decision. Indeed, by 9 October, the crucial nature to the Lodge of the parade proceeding along the Garvaghy Road was even more clear. The choice for the Secretary of State was therefore, in effect, binary. *Either* he could amend the conditions of the determination but in a manner which still permitted the parade to proceed along the Garvaghy Road (which would have continued the stalemate on the ground and so compromised the objectives then being pursued) *or* he could determine that the specific intended exercise of Convention rights which the applicant wished to enjoy was not possible or appropriate in the circumstances. In the stalemate which had developed, there was in reality no lesser alternative measure which was available.

[135] Analysed another way, I have not been persuaded that the Secretary of State's actions actually represented a restriction on the applicant's right to process along *another* route in Portadown. The Lodge was at liberty to notify an intended procession in Portadown which did not incorporate the contentious element of the Garvaghy Road. Nothing the Secretary of State did precluded this. (He could have made a more wide-ranging prohibition by order under section 11(2) or (3) but did not do so and considered that that would be disproportionate.) Indeed, it is now a matter of public record that the Lodge did recently notify another parade in Portadown (after the hearing of this case but before this judgment was given), not incorporating the Garvaghy Road in its route, which was not contentious and proceeded without difficulty. There is also force in the first respondent's submission that to effectively issue a new determination with a new date and conditions would be to usurp the proper function of the Commission which, at least in the first instance, had been conferred on it by the scheme of the 1998 Act.

[136] Even if I am wrong in the analysis in the preceding two paragraphs, I would not in any event grant the applicant any relief on the basis of this element of his argument in the exercise of the court's discretion and would accordingly also refuse

leave on it. It appears to me to be bordering on bad faith given the stance adopted in the negotiations on the Lodge's behalf (and, by extension, on the applicant's behalf given that he derives his standing to bring these proceedings as a member of the Lodge). The 1998 Act incorporates the concept of mediation as an important means of resolving disputes (see sections 2(1)(b) and 2(2)(a)) and the Guidelines also encourage the resolution of difficulties through local accommodation (see para 1.5(c)). It became clear that the Lodge had no interest in resolving the dispute by re-routing the parade. It was of course at liberty to take that position and stand on its (then) legal rights; but it lies ill in the mouth of its members to now complain that the Secretary of State did not consider re-routing the parade himself in order to give effect to their Convention rights. I have no doubt that these proceedings would have arisen, and the remaining grounds would have been pursued, even if the Secretary of State had imposed amended conditions to that effect. The applicant's real complaint is that his Convention rights have been violated by not being allowed to proceed along the route notified and permitted by the Commission's determination. I refuse leave on ground 3(b) and ground 8 accordingly.

(iii) The State's positive obligation and the source of risk of disorder

[137] The applicant next contends that the Secretary of State failed to appreciate the positive obligations in article 11(1) ECHR by starting his Convention analysis "by treating the lawful assembly and unlawful protest as equal interests to be weighed from a neutral starting point." He argues that this "inverts the proper starting point, which is that peaceful assembly should be facilitated and not interfered with." Closely allied to this is the applicant's further complaint that the Secretary of State's decision-making discloses no assessment of whether the risk which was judged to warrant the prohibition of the procession arose from the conduct of the procession itself or the conduct of third parties opposed to it. These issues are incorporated within ground 4 in the Order 53 statement. In summary, the argument is that the lawful marchers' rights should trump – or at least be given very significantly greater weight – than those of the unlawful protesters. I consider that this element of the applicant's challenge lies at its heart.

[138] For reasons already discussed, a failure to advert to the State's positive obligations under article 11 ECHR (or allied rights) is not determinative of whether the State has violated those rights. Nonetheless, in substance, I believe the relevant issues have been considered in the course of the Secretary of State's decision-making in this case. He has recognised that the Commission permitted the notified parade to proceed (albeit with conditions) and, indeed, confirmed that determination. He has also recognised that the starting point should therefore be that the parade should be facilitated. The question for the Secretary of State was where the balance lay when the situation fell to be reconsidered by him on 9 October 2026, in light of what was known to him at that time and how the situation had developed subsequent to the Commission's determination.

[139] It is also necessary to bear in mind, of course, that under the statutory scheme the Commission's assessment and determination is not the last word. The section 9 power was conferred by Parliament for the obvious reason that there may be circumstances where it is appropriate for the Secretary of State to amend a determination or to confirm or revoke it. The Secretary of State is given the final say and is answerable to Parliament for the exercise of his or her powers. Such a review may occur, as here, sometime after the Commission's determination where there is new information which was not initially available to the Commission (although a review decision need not necessarily be based on any material change in circumstance).

[140] The essential object of article 11 ECHR is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected. However, the ECtHR has also made clear that "there may in addition be positive obligations to secure the effective enjoyment of these rights": see *Kudrevičius v Lithuania* (2016) 62 EHRR 34, at para 158. The nature and extent of the positive obligation is then explained in the following passages of the judgment of the Grand Chamber in that case, as follows:

> "159. The authorities have a duty to take appropriate measures with regard to lawful demonstrations in order to ensure their peaceful conduct and the safety of all citizens (see *Oya Ataman*, cited above, § 35; *Makhmudov v. Russia*, no. 35082/04, §§ 63-65, 26 July 2007; *Skiba*, cited above; and *Gün and Others*, cited above, § 69). However, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used (see *Protopapa v. Turkey*, no. 16084/90, § 108, 24 February 2009). In this area the obligation they enter into under Article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved (see *Plattform "Ärzte für das Leben" v. Austria*, 21 June 1988, § 34, Series A no. 139, and *Fáber*, cited above, § 39).
>
> 160. In particular, the Court has stressed the importance of taking preventive security measures such as, for example, ensuring the presence of first-aid services at the site of demonstrations, in order to guarantee the smooth conduct of any event, meeting or other gathering, be it political, cultural or of another nature (see *Oya Ataman*, cited above, § 39)."

[141] As it seems to me, lying not far beneath the surface of the applicant's case was the proposition that, where a notified parade is permitted by the Commission but impeded by an unnotified (or otherwise unlawful) related protest, the obligation on the State – in reality, the police – is to remove the protest at all costs, or almost all

costs. (Mr McConkey was at pains to point out that this was not his case and, in his oral submissions, he distanced the applicant from the suggestion that this was the only lawful outcome. However, much of the applicant's written materials seemed to me consistent with the position that this was what was required by the Convention in the circumstances of this case.) That proposition is no part of the law, whether as a matter of domestic law or the European Convention. There *is* an obligation to facilitate a lawful parade, and in certain circumstances that might extend to clearing the path for a parade, but not at all costs. That is clear from the ECtHR's description of the positive obligation under article 11. It is to take "appropriate" measures with regard to lawful demonstrations; appropriate both for the purpose of ensuring the demonstration's peaceful conduct and the safety of all citizens. Unsurprisingly, public safety is a key objective of the measures which the State may be required to take. Moreover, that is not simply to ensure the safety of those exercising their article 11 rights but, rather, the safety of "all citizens."

[142] The Grand Chamber made three further points in the passages from the *Kudrevičius* case which are cited above which may be thought to be of particular importance in the present case. First, it stated expressly that the facilitation of a lawful demonstration cannot be absolutely guaranteed (it is an obligation of means, rather than result). Second, it emphasised that the State authorities have a wide discretion in the choice of means used to facilitate such demonstrations. Third, it emphasised the importance of preventive measures. The first two limitations were noted and emphasised by Stephens J in his decision in *Re JM's Application* [2014] NIQB 102 relating to conditions imposed by the Commission on a protest meeting related to an anti-internment parade in Belfast, at paras [11]-[12].

[143] As to the State's positive obligation to take reasonable steps within its power to secure the peaceful enjoyment of article 11 Convention rights, including by protecting citizens against interference with those rights by third parties, it cannot be said in this case that the authorities lost sight of that obligation. The second respondent has been at pains to point out in his evidence that the policing strategy was directed at *facilitating* the procession allowed by the determination. That is borne out both in contemporaneous documents and what happened on the ground.

[144] Part of the overarching strategic aim of the police operation which is set out in the Gold Strategy document is to *facilitate* the lawful public procession. Partly due to the limited time between the determination and the scheduled parade (with the initial legal challenge taking place in between) the PSNI's opportunity to prepare effectively was constrained and it "faced immediate and significant challenges in seeking to facilitate the parade." The PSNI was (in the Chief Constable's words) "required to respond to a large, organised and evolving unlawful protest, the risk of disorder and wider mobilisation, and the competing rights and safety interests of all affected persons." On the day of the procession, at its height, there were more than 1,000 persons estimated to be involved in the unlawful protest on and around the Garvaghy Road. Thereafter, the police continued to assess that it was not possible to facilitate the march in a proportionate way. Nonetheless, that was what the police

operation on the ground was directed towards. The Chief Constable's application to the Secretary of State repeatedly emphasised that the police had sought to facilitate the procession from 27 September up until 9 October. In Mr McAteer's pithy submission, they had spent £5m trying to do so. The PSNI also actively engaged with a range of parties in order to seek to facilitate the procession in a controlled and peaceful manner.

[145] The Chief Constable's section 9 application makes clear that all available options had been continually reviewed, including "physical intervention to address the obstruction and clear the route." An update to the Gold Strategy document relating to 27 September notes that the level of force required to facilitate the parade proceeding down the Garvaghy Road on that date would "most likely [involve] public order tactics of public order dogs, water cannon and potentially use of [Attenuating Energy Projectiles]" which was considered to be "disproportionate to the lawful policing objective for doing so." The parade attempted to proceed along the notified route on several occasions but was prevented from doing so by police due to legitimate concerns for potential breach of the peace and subsequent public disorder along the route.

[146] A key averment on behalf of the Chief Constable, which elucidates the content of his application to the Secretary of State, is as follows (with my underlined emphasis):

> "In the circumstances that pertained, PSNI considered that the remaining option of a large-scale public order operation to remove the protesters to facilitate the safe passage of the procession would have required substantial numbers of protected officers and specialist capabilities, with a clear likelihood of active resistance, serious and prolonged disorder, injuries to the public and officers, disorder spreading beyond the immediate area, and significant further impact upon policing across Northern Ireland. Any such major public order operation would <u>have been likely to fail both in terms of being operationally unachievable</u> and when viewed against the strategic objectives as set out in the gold strategy and in particular the principal strategic objective of preserving life and protecting the public."

[147] The Secretary of State's evidence is also that he was aware at all times that the PSNI were endeavouring to facilitate the notified procession but operationally was not able to do so.

[148] This is an area where the judgment of the police is to be accorded a significant degree of respect, given their expertise in handling matters of public security in such situations and their experience and intelligence in making a judgment on the wisest

course to take: see, by analogy, the discussion in the opinion of Lord Carswell in *E v Chief Constable of the Royal Ulster Constabulary* [2008] UKHL 66, at paras [58]-[59], in relation to the policing of the Holy Cross dispute and arguments about the positive obligation imposed by article 3 ECHR. Other decided cases make similar points as to respect for the police's judgment in relation to commitment of resources and potentially serious breaches of the peace (see *R v Chief Constable, ex parte ITF Limited* [1999] 2 AC 418, at 430, in the context of protecting ferry operators from animal rights protests) and the difficulties of managing protests and counter-protests (see *R (Simon) v Commissioner of the Metropolitan Police* [2026] EWHC 2427 (Admin), at paras [30] and [35], involving anti-Zionist demonstrations in North London).

[149] This was a case where, contrary to the position which had been taken at the time of the initial determination, there was now a clear and objective indication that the parade and protest could not "be managed in an appropriate manner through the exercise of policing powers" (cf. para 422 of the *Lashmankin* case). The Chief Constable's application said as much. The factual position had therefore materially altered from that which pertained at the time of the initial determination (and which was considered by the Court of Appeal: see paras [86]-[87] of its decision).

[150] In all of the circumstances of this case, I am satisfied that neither respondent lost sight of the obligation to seek to facilitate the procession, which had been permitted by the Commission, in furtherance of the applicant's and other Lodge members' rights under articles 9-11 ECHR. I am further satisfied that in terms of the substantial police operation, which was mounted to seek to facilitate the procession, the Secretary of State's efforts to reach a negotiated resolution which would resolve the stalemate on the ground, and the ongoing criminal justice operation which is described below, the relevant positive obligation was discharged within the authorities' margin of discretion in this regard.

[151] Turning then to the applicant's twin concerns that the Secretary of State did not differentiate between the lawful marchers on the one hand and the unlawful protesters on the other, or between the peaceful marchers on the one hand and the potentially violent opposition to the march on the other, I consider those complaints to lack a sound evidential basis (other than by seeking to draw an unwarranted inference from the ultimate outcome of the decision-making). There is a reference in the Secretary of State's reasoning to the "equal and opposite forces of the procession and the protest" (see para [59] above). However, it is far from clear that this phrase carries the precise or technical meaning the applicant may wish to ascribe to it in support of the particular grounds of challenge under discussion. Read naturally and in context, it is simply a statement that neither side was for backing down, with the additional observation that the result was a stand-off which was harming both communities.

[152] The Chief Constable's section 9 application made a point of expressly stating that the Lodge had engaged with the Parades Commission process and that, throughout the police operation, the participants at the Drumcree Church had been

peaceful and responsive to police direction. The application also referred on a number of occasions to the protest which was marshalled in opposition to the parade being an unlawful protest. It was initially hostile to police, although that hostility dissipated and the protest thereafter was peaceful, albeit "unlawful including with the blocking roads." The submission from the Secretary of State's own officials also made clear that the Lodge members were acting peacefully and that those protesting were acting unlawfully.

[153] This point was clearly not lost on the Secretary of State. His evidence in these proceedings makes clear that, in the course of his discussions with political leaders and others, it was emphasised to him that "mob rule must not be permitted to defeat lawful determinations" and that "if unlawful actions yielded political results, Unionist confidence in democratic institutions would evaporate." That this was obviously a matter which was taken into account is also evident from the Secretary of State's press statement announcing his decision. In that statement he expressly thanked the Lodge for their peaceful and law-abiding approach and their cooperation at all points with the PSNI. He emphasised the importance of the rule of law and also rightly said that those who had acted unlawfully should face the consequences of their actions. The Secretary of State was aware of, and referenced, the distinction between those acting lawfully and those acting unlawfully in the situation.

[154] The applicant's analysis, at least in his pleaded case, appears to go further and be much more binary in nature, amounting to a suggestion that those in support of the parade were all peaceful and benign and those against the parade were all lawless and violent, thus forfeiting any Convention protection. That is an unduly simplistic analysis both as a matter of fact and law. In his oral submissions, Mr McConkey significantly refined the submission, recognising that there were different categories of persons opposing the parade, each of whose positions had to be looked at individually.

[155] As a matter of fact, the residents' protest was peaceful, albeit unlawful (because unnotified). It is true that the police assessment was that it was almost certain that dissident republicans had attended at the protest. The assessment was also that, in the event of police seeking to remove protesters, it was "possible" that firearms may be used to attack the police (although, I also note that in an update to the Gold Strategy document it is stated that, "High grade police intelligence indicates that dissident republicans have now secreted firearms in and around the Garvaghy Road area and intend to use them against police in the event of public disorder breaking out."). It was "highly likely" that some of those attending may seek to cause disorder and that police intervention would be met with serious disorder (which may involve the use of petrol bombs). In summary, if the parade was to proceed, backed by a major police intervention, it was highly likely that some on the nationalist/republican side would engage in serious disorder. That would plainly be deplorable.

[156] On the other hand, reliable intelligence also indicated that loyalist paramilitaries supporting the parade were becoming increasingly frustrated; it was "highly likely" that increased numbers of loyalists would attend in the area in support of the parade if the situation was prolonged; and disorder at Drumcree Church, on the unionist/loyalist side, was also possible. Reliable intelligence further indicated that the presence of known dissidents on the nationalist/republican side had prompted "elements linked to loyalist paramilitaries" to travel to the area. In the event of serious disorder, therefore, it seems unlikely that this would have been confined to one side of the community only. The Chief Constable's pithy summary of the intelligence assessment in his affidavit is simply that it "demonstrated that genuine and identifiable risks of both violence and public disorder existed."

[157] Ms Kiley argued forcefully and with some justification from the Strasbourg jurisprudence that, provided that protest is peaceful, those protesting still retain the benefit of their article 11 rights even if they have failed to comply with notification requirements or disrupt the rights of others, at least in certain circumstances. In view of this, the applicant's analysis – that any resident protesting in a way which was unlawful loses the benefit of their own Convention rights – is too sweeping. Although accepting that those with violent intentions could not rely on article 11 rights (see *Kudrevičius*, at para 92) Mr Mac Cionnaith also relied upon a decision of the European Commission of Human Rights, *Ezelin v France* (1991) 14 EHRR 362, in support of the submission that an individual does not cease to enjoy the right to freedom of peaceful assembly simply because sporadic violence or other punishable acts take place in the course of the assembly, provided the relevant individual himself or herself remains peaceful in his intentions and behaviour. That was approved by the Grand Chamber in its decision in *Kudrevičius,* at para 94. It is not therefore possible or appropriate to view each side in purely black and white terms.

[158] On the other hand, however, the failure to notify the counter-protest to the parade is in my view a highly significant factor, as demonstrated by the analysis of Lord Kerr (giving the judgment of the Supreme Court) in *DB v Chief Constable of the Police Service of Northern Ireland* [2017] UKSC 7. That case concerned the policing of an unnotified 'flag protest.' The police chose not to intervene to stop the parade, and simply to collect evidence for the purpose of later prosecutions, on the basis of a mistaken belief as to the extent of their powers in the circumstances. In a robust judgment, Lord Kerr emphasised that participation in an unnotified parade was unlawful; that there was a duty to prevent unlawful parades from taking place; that failure to notify struck at the heart of the effective operation of the 1998 Act; and that it was a mistake to believe that the police were obliged to facilitate peaceful protests even if they were "technically illegal" (see paras [10], [42] and [61]-[63] of his judgment). Of course, all of these observations apply with equal force to an unnotified protest which is related to a notified public procession.

[159] The ECtHR has confirmed that notification and authorisation procedures are not in principle contrary to the spirit of the article 11 and that they serve the important aims of preventing disorder and crime, amongst others (see *Kudrevičius*, at

paras 147-148). Since States have the right to require authorisation, they must also be able to impose sanctions on those who participate in demonstrations which do not comply with such a requirement (see *Kudrevičius*, at para 149). Whether or not a sanction for such participation will be Convention-compliant will depend to a large degree on whether the individual's conduct on such an occasion constitutes or includes a "reprehensible act." The intentional serious disruption by protesters of ordinary life and/or of *the activities carried out by others* might be considered a reprehensible act within the ECtHR's case law (see *Kudrevičius*, at para 173). Obstruction of highways amounted to such conduct in that case (see *Kudrevičius*, para 174). In App No 10126/82, *Plattform "Ärzte für das Leben" v Austria*, the ECtHR stated simply, at para 32, that: "In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate."

[160] In the present case, the residents' protest could have been notified to the Commission and appropriately controlled by way of conditions under section 9A of the Act. The residents and their supporters could also have exercised their article 11 rights to protest against the march in a way which did not obstruct it from proceeding, for instance by protesting at the side of the road as the parade passed. Instead, it seems to have been deliberately calculated to thwart the exercise of the article 11 rights of the applicant and other members of the Lodge, in circumstances where the Commission had already considered the residents' objections and their rights under article 8 ECHR. In those circumstances, I have considerable sympathy for the basic point made by the applicant that the article 11 rights of the protestors should properly be given little, if any, weight.

[161] However, what is wholly missing from the applicant's analysis is any discussion or recognition of the rights of *other* citizens, neither Lodge members nor protestors, who were being or might be affected by the dispute. Section 11 of the 1998 Act provides a helpful reminder that the rights of such third parties, not directly participating in the parading dispute, require consideration. It does so by the overarching reference to the public interest and the more specific reference to "serious disruption to the life of the community" and "serious impact… on relationships within the community." The qualified rights under articles 9, 10 and 11 ECHR can be lawfully restricted in order to protect the rights and freedoms "of others", as well as in the interests of national security or public safety. The Secretary of State was both entitled and obliged to take into account the wider implications of the dispute, rather than viewing it simply (as the applicant appears to do) as a straight balancing exercise between the rights of the marchers and protesters.

[162] The Secretary of State was given specific advice by his officials in relation to all of the factors he was required to consider pursuant to section 11(1). The summary of his reasoning in relation to these is set out at para [59] above. Seeking to facilitate the march by force would likely have resulted in serious and prolonged disorder, not limited to the immediate area of Portadown but extending elsewhere in Northern Ireland. That would inevitably affect the rights and freedoms of others, including potentially their article 2 rights, as well as their rights under article 8.

There had already been serious disruption to the life of the community by roads being closed and essential public services being impacted. That would continue, or increase, whether the stand-off was perpetuated or a major public-order policing operation ensued to seek to facilitate the march. The Secretary of State was advised of the high degree of practical disruption in the area. Community relations were being damaged. The demands on police time and resources – which inevitably impact the rights of others seeking to avail of police assistance, including in situations of emergency – were intense. In these circumstances, the Secretary of State's focus was on "both communities" rather than merely the rights and sectional interests of the Lodge members on the one hand and the protesters and/or residents on the other.

[163] The other matter which, in my view, is not given sufficient weight in this strand of the applicant's argument, is the criminal justice operation which is ongoing in order to identify and take appropriate action against those who may have broken the law in the course of the events at Drumcree and Garvaghy Road over the relevant period.

[164] On 27 September the Chief Constable made a statement including that the PSNI had "an evidence-gathering operation in place to detect any offences", warning that this would continue throughout the day. He further urged those with influence to encourage people to comply with the law. A further statement the following day from Assistant Chief Constable Ryan Henderson reiterated that the police would take appropriate and proportionate action in respect of any breaches of the law, commenting that the Lodge had been unable to exercise their lawful right in accordance with the Commission determination "because of an unlawful and unnotified protest." Again it was noted that, during the course of the day, an evidence-gathering operation was in place and warnings had been issued on multiple occasions. The police had by then established a dedicated enquiry team who were reviewing the evidence. The following day it was announced that that enquiry team was continuing to review evidence gathered to ensure an effective criminal justice strategy.

[165] The following day, on 30 September, there was a further public statement in which the Chief Constable emphasised that the police continued to seek to achieve compliance with the Commission's determination. He noted again that "a large-scale criminal investigation is underway regarding unlawful protest on the Garvaghy Road", with the Chief Constable having given a clear direction regarding prioritising the evidence gathering and criminal justice process. On 3 October Assistant Chief Constable Anthony McNally made a statement in relation to a large gathering of people on the Garvaghy Road which could cause significant traffic disruption. He said that the police wished to remind people that anyone blocking the Garvaghy Road would "still be treated as participating in an unnotified and therefore illegal protest" with police evidence gathering remaining ongoing. He warned that anyone found to have broken the law would face criminal justice consequences. On 8 October Assistant Chief Constable Davey Beck confirmed that

the police were moving to the next phase of their investigation and that a large-scale investigation had been progressing, led by an experienced senior investigating officer. The team had been methodically working through the evidence collected by police, building it into evidential packages in respect of the persons reasonably suspected of committing offences who were soon to be interviewed. It is a matter of public record that some such interviews have now taken place. In his evidence the Chief Constable has described that a phased investigation prioritisation framework has now been implemented in this regard in order to ensure that decisions are based on the seriousness and impact of alleged conduct, the quality of available evidence, risk, safeguarding situations and investigative necessity.

[166] Stephens J's judgment in the *JM* case, at para [12], recognised that the State's positive obligation under article 11 could be discharged in a variety of ways:

> "The means to be used to discharge the positive obligation are diverse. They include, for instance, appropriate criminal laws, appropriate criminal proceedings, appropriate methods of gathering evidence to bring criminal proceedings against anybody who is alleged to have broken the law, setting up and maintaining an appropriate police force, a requirement on the police force to plan for and then to deal with anticipated problems that may arise. The State's positive obligations are discharged through a number of institutions including in Northern Ireland the Commission and the PSNI. The discharge of the positive obligation is also to be seen in the context of there being a Police Ombudsman who can deal with complaints and monitor appropriate standards. All those are methods by which the State discharges its positive obligations …"

[167] A major police operation to clear the Garvaghy Road is not the only means by which the State's positive obligation under article 11 can be discharged. The *DB* case discussed above, notwithstanding the robust judgment about the duty to prevent unnotified parades, also made clear that this obligation "had to be tempered by operational constraints" (see para [62]). In the present case, the means by which the PSNI has policed the situation, including the ongoing investigative efforts described above, also go towards the discharge of the State's positive obligation.

[168] A wide margin of appreciation is generally appropriate in situations where it is necessary to strike a balance between competing Convention rights, especially in contexts which raise sensitive and controversial questions (see *In re Abortion Services (Safe Access Zones) (NI) Bill* [2022] UKSC 32, at [131], albeit in respect of the clash of article 8 and article 11 rights in another context; and *In re JR123* [2025] UKSC 8, at [54]). In the specific area of public processions, the courts of this jurisdiction have emphasised the wide margin of appreciation which will be given to the Commission

in making determinations about contentious parades: see the Court of Appeal's recent judgment in Mr Mac Cionnaith's case (supra), at paras [21]-[23]; and the cases there cited, including *Re Pelan's Application (No 1)* [1998] NIJB 260, *Re Pelan's Application (No 2)* [2001] NICA 35, and *Re Tweed's Application (No 5)* [2009] NICA 13. The same margin must also be afforded to the Secretary of State in exercising his section 9 and section 11 functions conferred by the 1998 Act.

[169] It is also striking in this case that, by the time of the impugned decisions, each of the three key bodies or individuals afforded a role under the 1998 Act – the Commission, the Chief Constable and the Secretary of State – were all essentially agreed on the key issues, namely that (i) the determination could no longer be given effect; (ii) a negotiated resolution could apparently not be found, at least in the short to medium term; (iii) it was not proportionate to seek to facilitate the intended procession by force in view of how the situation on the ground had developed since the Commission's original determination; and (iv) it was not in the public interest for the ongoing situation to continue. In its consultation response, the Commission specifically expressed the view that a section 11(1) order may now be necessary in the public interest.

[170] In all of the circumstances, I do not consider that there has been any breach of the State's positive obligation under article 11 established in this case. In reaching his decision under section 11 of the 1998 Act, the Secretary of State appreciated that the Lodge members had acted peacefully and that the threat of disorder arose primarily, albeit not exclusively, from those who were opposed to the peaceful conduct of the procession and would seek to thwart it in the event that the police sought to facilitate the procession by force. Nonetheless, it was open to the Secretary of State to conclude that the proposed procession should be prohibited in the public interest, reflecting the interests of national security or public safety, the prevention of disorder or crime and/or for the protection of the rights and freedoms of others. The rights relevant for this purpose were not limited to, nor were they even principally, the rights of those protesting.

[171] Reflecting the above, I refuse leave on ground 4(a). I will grant leave on ground 4(b) but dismiss the substantive claim on that ground.

(iv) Restriction not "in accordance with law"

[172] The applicant finally contended that, if he succeeded in relation to any aspect of his case on illegality as to the first respondent's decisions under sections 9 and 11 of the 1998 Act, any interference with his rights thereby occasioned would also not be in accordance with law for the purposes of justification under article 11(2) ECHR. As I have not found any of those grounds made out, this further aspect of the applicant's Convention challenge does not arise. I refuse leave on ground 3(e) accordingly.

Summary of main conclusions

[173] A brief summary of the main factual and legal conclusions reached in this judgment is as follows (although this is no replacement for the full analysis set out above):

(a) The applicant and other members of the Lodge enjoyed the legal right to undertake their notified procession, including by processing along the Garvaghy Road, in accordance with the Parades Commission's determination of 25 September 2026.

(b) The applicant has not been able to exercise his right to process, which also involves the exercise of his rights under article 11 ECHR, as a result of a significant protest which has been mounted with the purpose and effect of thwarting the exercise of those rights.

(c) The assessment of the police (which it is not for the court to look behind) was that at no point – from the time of the proposed parade on 27 September up to the time of the Chief Constable's application to the Secretary of State for review of the Commission's determination on 9 October – was it possible for the parade to proceed safely along its notified route. Seeking to clear the Garvaghy Road and facilitate the parade along that route by force (i) would not have succeeded; and (ii) would not have been proportionate or consistent with the primary policing objective of the protection of public safety.

(d) The police operation, at very significant cost, which was designed to facilitate the parade in accordance with the Commission's determination – allied with the later efforts on the part of the Secretary of State to facilitate the parade by negotiated resolution and the ongoing criminal investigation of those who may have acted unlawfully in seeking to obstruct it – discharges the State's positive obligation under article 11 to seek to ensure the peaceful enjoyment of the applicant's rights. That obligation required the taking of *appropriate* measures to facilitate the parade but did not require it to be facilitated at all costs.

(e) There was nothing unlawful in the Chief Constable's decision to refer the Commission's determination to the Secretary of State for review under section 9 of the 1998 Act. There are arguments on each side as to whether comments made by the Chief Constable (about the potential political implications of a major police operation to seek to force the procession along the contested route) were relevant policing considerations. However, even assuming that issue in the applicant's favour (which the court has not decided), those were not material considerations in the decision to refer the matter to the Secretary of State. The police had decided not to mount the large-scale operation to clear the Garvaghy Road for valid policing reasons and, as matters had

developed, the referral of the matter to the Secretary of State for review would inevitably have occurred in any event.

(f) By the time the Chief Constable asked the Secretary of State to review the determination on 9 October, and in the circumstances which had arisen, there was no error of law in the Secretary of State considering that it was no longer possible for the determination to be given effect under the 1998 Act. Moreover, the Secretary of State was entitled to take a view on that issue as background context to the consideration of the exercise of his powers under sections 9 and 11 of the 1998 Act.

(g) The Secretary of State properly appreciated that, acting under section 9, he could not only revoke or confirm the Commission's determination but could also amend it. He did not violate the applicant's Convention rights by declining to amend the determination as to date, conditions or route. In reality, at that point the Secretary of State was faced with a binary choice given the central issue of principle in dispute between the Lodge and the Residents' Coalition. Having determined that he should not 'refresh' the Lodge's right to proceed along the notified route, which (with whatever conditions) would simply have resulted in the impasse continuing, there was no breach of the applicant's rights in the Secretary of State declining to himself re-route the march. The Lodge had made clear that proceeding along the Garvaghy Road was crucial to the exercise of its members' article 11 rights in this instance. It remains free to notify further intended processions not including the contentious element of the route as and when it wishes.

(h) Although the series of decisions made by the Secretary of State were complex, there was nothing unlawful or irrational about the way in which he resolved the issues before him. He was entitled to confirm the Commission's determination in order to indicate that he was not seeking to undermine or challenge it on the basis of the Commission's reasoning at the time it was made. That is the case even though he was of the view that it was no longer capable of being given effect. He was also entitled not to revoke the determination and declined to do so on rational grounds.

(i) The key decision in the case was the making of the order under section 11 of the 1998 Act which prohibited the intended procession along the Garvaghy Road. Assuming that represented a restriction of the applicant's Convention rights (notwithstanding that the determination had effectively expired), or that declining to amend the determination by refreshing the date of the permitted parade did so, that was within the margin of discretion available to the Secretary of State and not unlawful. The Secretary of State was entitled to, and did, take into account the factual picture which had developed since the Commission's determination of 25 September.

(j) The Convention analysis to be undertaken by the court in assessing the legality of Secretary of State's decision is not as straightforward as weighing only (on the one side) the rights and interests of peaceful marchers against (on the other) the rights and interests of unlawful and violent protesters. There are a number of reasons for this. First, protesters acting unlawfully but *peacefully* may still be entitled to rely on their own Convention rights. Second, although those with violent intentions are not entitled to have their rights weighed in the balance, their involvement in a protest does not necessarily remove or negate the rights of other protesters with no such intentions. Third, and most importantly, in weighing the competing rights, the applicant's rights are to be weighed against the rights of *others* – neither marchers nor protesters – whose rights and freedoms would be significantly affected by the ongoing impasse or the public order situation arising from an attempt to facilitate the march by force.

(k) For my part, I consider that, in the present context, the rights of those protesting unlawfully and with the object of thwarting the exercise of the rights of the members of the Lodge should be given little (if any) weight. Their right to protest could in principle be accommodated alongside the Lodge's right to process. However, the rights of others – incorporated within the public interest test in section 11 of the Act – were sufficient to warrant any restriction of the applicant's rights brought about by the Secretary of State's section 11 order in all of the circumstances of this case.

(l) The legal provisions in the 1998 Act contain the powers in sections 9 and 11 as a safety valve for circumstances where the Secretary of State disagrees with the Commission's determination or, as here, where circumstances have developed to such a degree that it is in the public interest to reconsider the determination.

(m) The Secretary of State's decision was lawful, and within the margin of discretion properly afforded to him, although it is highly regrettable that it was required in the circumstances in which it arose.

Some concluding remarks

[174] Those who opposed the Commission's determination in this case and who opposed the procession permitted by it should, in my view, take no particular joy in the outcome of this case. The Secretary of State's decision was lawful but the position which has now been reached has been brought about at very significant cost to the people of Northern Ireland – financially, through the diversion of police resources, and in terms of community relations. Depressingly, the threat of serious and widespread disorder has loomed large in the matters under consideration. Those opposed to the procession may well point to the Lodge's decision to process along a route where they knew they were neither welcome nor wanted. There may be force in that point: the existence of a right does not require its exercise. But the

Convention case-law is clear that it protects freedoms of assembly and expression which others may find offensive or unwelcome. In this case, after a lawful decision-making process, the Lodge's right to process along the notified route had been established, subject to conditions deemed appropriate by the Commission. As a result of the events of the following weeks, significant concerns have now been expressed about respect for the rule of law in this jurisdiction. That includes amongst some elected representatives, by reason of their participation in the unnotified protest.

[175] There may perhaps be some, on the side of those who support the parade and who have expressed concerns about the rule of law in this instance, who should also have cause for reflection. Albeit in a different context, but not that long ago, this court had occasion to deprecate the flouting of legal obligations in pursuit of electoral gain. All those holding public office have an obligation to uphold the rule of law, including in particular those who pledge to do so. That obligation does not apply only when it suits; or only when the law in question is one they like: see *Re Napier's Application* [2021] NIQB 86, at paras [41]-[42]; and *Re Napier's Application* [2021] NIQB 120, at paras [79]-[80]. In the second of those judgments, in a case where DUP Ministers were refusing to engage in the arrangements established by the Northern Ireland Act 1998 for the North-South Ministerial Council by reason of their opposition to certain aspects of the Northern Ireland Protocol, the court said this:

> "[81] It is no answer that the respondents wish to protest what they perceive as a political injustice. For present purposes, the court is entirely unconcerned with the merits of the respondents' criticisms of the Northern Ireland Protocol. The *de Brun* case established that, no matter how worthy one's political goal, and even assuming it relates to the full implementation of other aspects of the Belfast Agreement, a Minister cannot act in clear violation of the ministerial obligations which they have assumed.
>
> [82] In recent months there have been – thankfully, sporadic – acts of violence claimed by or attributed to those who, like the respondents, oppose the operation of the Northern Ireland Protocol. These actions have been justly condemned by, amongst others, the respondents' party leader. The actions of those who choose to flout the criminal law for political ends, particularly where the use or threat of violence against person or property is concerned, are of course particularly extreme and wholly unacceptable. However, it is incumbent upon those in political leadership to reflect on the example set when they choose to wilfully ignore clear legal obligations to

> which they are subject. It is not difficult to conceive that condemnation of others' law-breaking may be less influential when political leaders are themselves content to publicly disregard the law in instances of their own choosing."

[176] By the same token, it was not difficult to conceive that others may be emboldened to break the law where their political rivals had previously done so. That case did not involve alleged breach of the criminal law; but the slope is a slippery one.

[177] Those who wish to break the law because of their strength of feeling on a particular issue are, of course, free to do so as a matter of fact. However, they must face the consequences of that choice. Where there is a sufficient case that they have breached the criminal law, they are liable to prosecution in the usual way and, if convicted after a fair trial, must expect condign punishment. Unless they can establish a defence in law, the perceived rightness of their cause is no answer.

[178] Whatever one's standing or strength of conviction, the law does not apply only when you agree with it or with the outcome of a particular legal process. That is one thing which the court is both entitled, and in my view duty bound, to point out in the circumstances of this case. It is a lesson for those on *all* sides of the debate in our society, which at least for some remains (as the subject matter of this case demonstrates) deeply divided along traditional faultlines. Such divisions enhance, rather than undermine, the need for respect both for the rule of law and for the decisions of the legal mechanisms established in our democracy to resolve deep-seated disputes.

Disposal

[179] For the detailed reasons set out above, I refuse leave to apply for judicial review on the following grounds on the basis that the relevant ground is unarguable, namely: ground 1(c)-(e); ground 2(a)-(c); ground 3(a)-(e); ground 4(a); ground 7(d)-(e); and ground 8. I further refuse leave to apply for judicial review on the following grounds which were not pursued, namely: ground 5(a)-(b); ground 6(a)-(b); ground 7(a)-(b); and ground 9.

[180] I grant leave to apply for judicial review on the following grounds, namely: ground 1(a)-(b); ground (4)(b); and ground (7)(c). These grounds are, in my view, where the proper core of this challenge lay. I nonetheless refuse the substantive application for judicial review on those grounds.

[181] In summary, therefore, the applicant's claim is dismissed.