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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY 'E' FOR JUDICIAL REVIEW

KERR LCJ

Introduction

[1] This is an application by the mother of one of the children affected by what has become known as 'the Holy Cross dispute'. The applicant seeks judicial review in the form of a declaration that the Chief Constable of the Royal Ulster Constabulary and the Secretary of State for Northern Ireland failed to secure the effective implementation of the criminal law and to ensure safe passage for her and her daughter to the Holy Cross primary school for girls on Ardoyne Road, Belfast. The applicant sought the leave of the court to be referred to as 'E' because of her apprehension that if her identity was revealed her life would be at risk. The respondent did not object to this and the court therefore permitted the application to proceed in this way.

[2] From September 2001 until mid-November 2001 children and their parents and relatives who walked along Ardoyne Road to and from the school were the target of attacks and intimidation from individuals some of whom were local residents; others have been described as loyalists. This campaign is said to have been prompted by the avowed failure of the government to provide proper services to the local community. It was claimed that the protest was designed to secure better facilities for the area. The judicial review application challenges the manner in which the protest was policed.

The evidence

[3] In an affidavit filed in support of her application E described the campaign of abuse to which she, other parents and the pupils of Holy Cross

were subjected during the period that the protest took place. One particular incident stood out from the rest. On 19 June 2001 her daughter witnessed an extremely frightening attack on a local man. A mob of about 100 to 150 people armed with hammers attacked the man in his car. The school patrolwoman had to rescue the applicant's daughter and other schoolchildren and shepherd them through the crowd to the sanctuary of the school.

[4] This was but one of a great many incidents that occurred over the period of the protest. The applicant and her daughter have been the target of specific abuse and threats on several occasions. Many of these, she claims, occurred in the presence of police officers who failed to intervene to protect her and to apprehend those who, on her account, were guilty of blatant criminal behaviour.

[5] The applicant, together with other parents, engaged in discussions with residents of the area who were involved in the protest. The purpose of these discussions was to negotiate an agreement whereby the children might be allowed to go to school peacefully. It quickly became clear that no agreement was possible and the discussions ended. The applicant is convinced that, as a result of her participation in these discussions, death threats were made to her by loyalist paramilitaries. Local police informed her of these on a number of occasions. In consequence, the applicant moved out of her house into temporary accommodation.

[6] After the discussions failed the campaign of abuse intensified. Bricks and bottles, fireworks, balloons filled with urine, excrement and other rubbish were flung at these young children and their parents as they made their way to the school. They were verbally abused and threatened. Blast bombs and pipe bombs were also thrown. According to the applicant, police measures to counteract the activities of the protesters were either non-existent or totally ineffective. A line of landrovers did not prevent protesters reaching through to the children and gaps in the line allowed them to come close to the group of parents and pupils as they tried to walk to the school. The applicant complained to police with no effect. A tiny number of protesters, according to her, were arrested although police regularly filmed the events and had evidence against a great many of the protesters readily available. Individuals who were on bail participated in the protest, apparently with impunity. When this was drawn to the attention of the police they are said to have replied that this was a matter for the courts.

[7] All of these matters have led the applicant to assert that the police have been guilty of a deliberate failure to identify, arrest and prosecute those responsible for the numerous criminal offences that protesters have committed. Moreover, she claims, the failure of the police to act encouraged the violence of the protest.

[8] Unsurprisingly, what was happening at Holy Cross attracted media attention not only in Northern Ireland but throughout the world. The notoriety of the events at the school was such that representatives of various public bodies attended the scene of the protest to observe events for themselves. Among these was the Northern Ireland Human Rights Commission. Members of the Human Rights Commission, Frank McGuinness, Patricia Kelly, Inez McCormack and Christine Bell attended the scene of the protest on various dates in October and November 2001.

[9] In an affidavit filed on behalf of the applicant, Mr McGuinness described his visit on 15 October 2001. He explained how a row of military vehicles lined the route of the parents and the children to the school. Those parents who wished to go to the school to collect their children at 3 pm were not permitted to walk along Ardoyne Road until security gates were opened and they had to congregate at a corner while awaiting the opening of the gates. This increased the sense of apprehension and fear among them. A further difficulty arose for any parent who was late arriving at the congregation point. If they were late, parents would not be permitted to walk along Ardoyne Road but would have to take the alternative route through an adjoining school's playing fields.

[10] On 15 October 2001 the security gates were opened and the parents moved en masse along Ardoyne Road. The road was lined on either side by police officers and landrovers. The line was not continuous, however, and the gaps in it permitted some protesters to get into position near the parents as they passed. Mr McGuinness walked with the parents and he described in graphic terms the sense of fear that they all experienced as protestors thrust offensive placards forward and called out threats and sectarian abuse, often personalised to individual parents. On the way back from the school this abuse and threatening behaviour was repeated. Mr McGuinness was able to hear death threats directed to named individuals in the presence of their children. The parents were not permitted by police to video record these scenes although on other occasions Mr McGuinness observed police officers themselves video the events. Although the parents were forbidden to video record the scenes, no attempt was made to prevent the protesters from doing so. Mr McGuinness described the experience as extremely frightening and intimidating. He observed that this must have been much more distressing for the schoolchildren and he witnessed a number of them crying at the end of the walk through the protesters.

[11] The other Commissioners who attended the protest on several days in October and November gave similar accounts of the frightening atmosphere generated by the activities of the protesters. In particular the fact that the protesters were able to get quite near the group of parents and children was extremely distressing and Commissioners expressed concern about the impact that the abusive language and threats uttered by the protesters would

have on the children. Some Commissioners found it disturbing that many of the security personnel faced the children and their parents rather than the protesters.

[12] On 23 October 2001, the anniversary of a particularly horrific bombing on Shankill Road, the protest was silent. Before they walked up Ardoyne Road parents were informed by Fr Aidan Troy, the chairman of the board of governors of the school, that a death threat had been received by Ulster Television, warning that anyone who walked along the road to the school that day would be killed. As the parents and children proceeded along Ardoyne Road, the protesters stood silently but with prominently displayed placards. Commissioners reported a particularly chilling and intimidating atmosphere during that particular protest.

[13] Fr Troy was been actively involved in supporting and advising the parents of the schoolchildren throughout the dispute. He has also been involved in a number of discussions with police officers as to how the dispute should be policed. He accompanied the children and the parents daily to and from the school in the latter stages of the protest. He was a particular target of the protesters, being singled out for crude and offensive abuse and having been spat on regularly. Fr Gary Donegan, a priest in Holy Cross parish since 2001, described similar experiences. He too has been targeted and attacked for his support of the children and parents. In his affidavit he described movingly his perception of the impact that these events have had on the lives of the schoolchildren. Similar evidence has been given by the headmistress of the school and the general medical practitioner Dr Tan who told of many consultations by young patients who attended the school. They displayed a wide range of nervous symptoms. Many of the young children required counselling even after the protest ended.

[14] Fr Troy has made a number of affidavits about various aspects of the protest and the experiences of the children and their parents. It is not necessary to set out all the averments that he has made in the course of those affidavits. He has recounted a particularly unpleasant experience on 3 September 2001 when police erected screens that required the school group to walk along the pavement hemmed in on one side by the screens and on the other by a line of police officers barely separating them from the protesters. He has described various contacts that he had with senior police officers and other officials about the policing of the protest. He has discussed the different tactics deployed by police at various stages of the dispute and commented on these. He has expressed views as to the motivation of those responsible for policing decisions and has given a comprehensive list of the most disturbing and frightening aspects of the dispute. I have read and closely considered all of these averments.

[15] During the contacts that Fr Troy had with various police officers there were sometimes differences of view as to how the policing arrangements should be conducted. There were also disagreements as to what had taken place and the recollection of some officers and the priest as to what passed between them did not always coincide. For the purposes of this case it is unnecessary for me to resolve those conflicts and, save for acknowledging that they occurred, I make no further comment on them.

[16] It is likewise unnecessary to set out all of the evidence of the deponents who have made affidavits on behalf of the respondents. A brief outline will suffice. Chief Superintendent Maxwell is the district commander for the area that includes Holy Cross school. He has overall responsibility for all aspects of policing in North Belfast. He claimed that throughout the dispute police had sought to do everything possible to facilitate the safe passage of children and their parents to the school. Police considered that the school should remain open and that parents should not bow to the intimidation presented by the protesters. But constraints on the policing actions that could be taken clearly existed, for instance, the risk that certain types of action would expose the children to greater risk of trauma or injury. Throughout the safety of the children remained the paramount consideration for the police. More aggressive police tactics would undoubtedly have led, Mr Maxwell believed, to even more serious public disorder and the probable involvement of loyalist paramilitary organisations. The lives of the parents and children would have been imperilled if this had happened.

[17] The chief superintendent acknowledged the failure of the 'screens strategy' on 3 September 2001 but asserted that it was immediately replaced by a 'vehicles screens strategy' which proved successful. A revision of this was introduced on 5 November 2001 whereby a greater distance between the protesters and the parents and children was maintained.

[18] Up to January 2003 a total of thirty-seven individuals had been prosecuted and all available evidence remained under consideration for further possible prosecution. The protest demanded a vast commitment of resources. When it was at its height up to 700 members of the security forces were deployed daily to police it. At the time there were other considerable demands on police resources, particularly in North Belfast. Despite this, every tactical option was considered to protect the children and parents.

[19] At the time of the protest Alan McQuillan was the assistant Chief Constable in charge of the urban region of Northern Ireland. Among other duties he was responsible for monitoring the performance of district commanders such as Mr Maxwell. He made two affidavits in which he averred that the overriding concern of the police in dealing with the protest was the safety of the parents and children but the 'real risk' of serious violence elsewhere and the risk of attacks on Catholic schools that might be

sparked by the handling of the protest had to be considered also. Police actively encouraged the two communities to resolve their differences. Although the police had to have regard to a broad range of issues and interests, they were particularly alert to the rights of the children and their parents arising under articles 2 and 3 of the European Convention on Human Rights and Fundamental Freedoms.

[20] Mr McQuillan asserted that throughout the protest police attempted to control the protest and the area generally in a manner that was both fair and professional, respecting and balancing the rights of all those involved. To this end police strategies were reviewed on a daily basis. One of the options considered was that the children should be conveyed with their parents to the school in an armoured bus. This was offered to the parents but was refused.

[21] Chief Inspector Purce was the ground commander in the policing operation on 1 October 2001 and on a number of other occasions. He described the police action taken on a number of specific dates and the change in tactics that occurred towards the end of the protest. He said that gaps between landrovers were kept to a minimum and police prevented access by protesters to the group of parents and children.

[22] One of the main areas of factual dispute between the parties related to meetings that took place between the Chief Constable, Sir Ronnie Flanagan, and members of the Human Rights Commission. On 6 September 2001 a delegation from the Commission met the Chief Constable. At that meeting, according to Mr McGuinness, he asked the Chief Constable whether he would "walk his child up the road". Mr McGuinness claimed that the Chief Constable replied that he would and that he would expect the police to "facilitate" him. Mr McGuinness claimed to recall the Chief Constable saying that the protest was a "black and white public order issue".

[23] A further meeting took place on 25 October 2001. At that meeting Mr McGuinness said that he told the Chief Constable that the protest had now become ritualised; that the road was open at all times except when the children were walking to and from school; that here was a sense of weariness on everyone's part and that this had led to laxness on the part of the police about keeping the protesters away from the parents and children; that there were noticeable gaps in the police line; that the police appeared to tolerate the obscene and degrading language that was directed to the parents and children by the protesters; and, that the children were unable to distinguish between the masked protesters and the masked policed officers in full riot gear.

[24] Mr McGuinness also gave his recollection about a concession made by the Chief Constable in relation to the need to take measures to ensure the 'best interests of the child'. This is what Mr McGuinness said on that subject: -

> "On my recollection of the meeting, the Chief Constable conceded that in organising the policing operation they had not taken into account the best interests of the child and that the security arrangements which they had made had not factored this into the equation."

In this recollection Mr McGuinness was supported by two other commissioners, Patricia Kelly and Inez McCormack.

[25] According to Mr McGuinness the Chief Constable also responded to the suggestion that there should be a more vigorous police reaction to the protest. The salient parts of Mr McGuinness's affidavit on this topic are as follows: -

> "52. The Chief Constable also voiced the opinion that increased security and an arrest policy could have, as he described it, a 'consequential impact' producing a reaction elsewhere. He raised as examples the vulnerability of other schools in the area.
>
> 53. The Chief Constable also advised that there had been nine separate initiatives aimed at resolving the dispute and that he was currently awaiting the conclusion of the final one of those, which involved MLAs. He was anxious that this be allowed to run its course before stepping up security or arrests.
>
> 54. He confirmed that by 25 October 2001 only ten arrests had taken place for offences connected with the protests. He conceded that he was not entirely happy with the situation and I understood, coming away from the meeting, that a more robust policing operation could be expected thereafter."

[26] Sir Ronnie Flanagan disputed many of these averments. In particular he suggested that while many politicians, community representatives and clergymen were describing the situation as extremely complicated involving a wide range of social issues, he viewed the question of whether the children should be able to walk to their school unmolested as a 'black and white issue'. He had not said that the protest was a "black and white public order issue". He denied that he had said that he would walk his child along the road; rather he said that he would expect police to provide the choice for parents

whether to walk along Ardoyne Road. He expressly denied that he had conceded that police had not taken into account what was in the best interests of the child. On the contrary, he claimed to have emphasised during the meeting of that everything that was being done by the police "was driven by what was in the best interests of the children". In support of this claim the Chief Constable produced letters that had passed between the Chief Commissioner, Professor Brice Dickson, and himself after the meeting. In his letter of 1 November 2001, Professor Dickson had urged that "the children's fundamental rights … be given be very great weight indeed". Sir Ronnie replied on 7 November to the effect that "the rights of the children are to the forefront of our thinking in all we do and all we are seeking to achieve".

[27] Notes of the meeting were kept by a representative of the Commission. Sir Ronnie did not accept that these accurately recorded what had been said at the meeting but he is noted as having said that his "paramount consideration was the welfare of the children, in that if the situation worsens not only the children from Holy Cross may be kept from school, but children in other schools in North Belfast may also be affected". The following paragraph of the notes reads: -

> "However, the Chief Constable agreed that the current human rights and legal advice from video evidence and reports probably is not taking into consideration the best interests of the child principle."

[28] On 31 October 2001 a meeting took place between the security minister, Jane Kennedy MP and members of the Human Rights Commission. Mr McGuinness was one of the commissioners who attended this meeting. He gave the following account of it: -

> "61. The description of what occurred at the meeting, which I provide below, is based on my personal recollection of the meeting on 31 October 2001.
>
> 62. I raised the following issues with the minister:
>
> (i) the proximity of the protesters to the parents and children, particularly given that there had been two bomb attacks, one injuring a police officer and the other injuring a soldier. The second appeared to have involved a more dangerous device as the soldier involved sustained life threatening injuries. In response to this she

replied that , "in the interim it had been noted that bombers were able to throw pipe bombs across the houses in Newington and hit a child." I felt that this was an argument in favour of having the protesters further from rather than closer to the parents.

(ii) I also raised the poster referring to Fr Troy as a paedophile. She informed me that, as far as she was aware the poster was not on display every day.

63. I also recollect that the minister was advised of our concern that 'the best interests of the child' principle did not appear to have informed the policing operation.

64. In response the minister tried to impress upon myself and the other commissioners the steps that had been taken to resolve the dispute and advised us of the current attempts to negotiate a settlement which involved MLAs acting under the authority of the Office of First Minister and deputy First Minister.

65. I also recollect that she was advised that the Chief Constable appeared frustrated that all of these initiatives were failing and she advised that the Chief Constable did not know the extent and detail of what was going on.

66. She advised me that police were arresting and charging people with offences, which occurred during the protests, yet at that stage, to the best of my knowledge, approximately 12/13 arrests had taken place over the entire period, a number of arrests having taken place on 26 October subsequent to our meeting with Ronnie Flanagan on 25 October."

[29] A replying affidavit on behalf of the minister was supplied by David Watkins who is the senior director (Belfast) and the director of policing and security in the Northern Ireland Office. He stated that during August 2001 the difficulties relating to the school were the subject of discussion a wide range of meetings involving, among others, officials of the Northern Ireland Office, local politicians, community representatives, mediators and others with an interest in the dispute. In September 2001 the security minister held

meetings with local politicians with the aim of resolving the dispute. On 6 September 2001 she met the school principal and Fr Troy. The following day she met two local MLAs and as a result a joint press release was issued on behalf of the Secretary of State for Northern Ireland and the Ulster Unionist party and the Social Democratic and Labour party.

[30] In acknowledgment of the gravity of the situation it was decided to institute a formal mechanism to address issues surrounding the dispute that required to be dealt with quickly. An interdepartmental group comprising representatives of the devolved administration and the NIO was formed. Officials from NIO liaised with representatives of the local community in an effort to bring the protest to an end.

[31] It was against this background that the meeting with NIHRC took place on 31 October. The security minister did not accept the accuracy of Mr McGuinness's account of the meeting and protested (in a letter to the Chief Commissioner) that none of the commissioners present at the meeting had disclosed that what passed between them and the minister would be included in an affidavit in these proceedings. Mr Watkins asserted that, while the Secretary of State is accountable to Parliament for law and order in Northern Ireland and is responsible for the statutory framework for policing and security, all operational measures and decisions were matters for the Chief Constable.

The arguments

[32] For the applicant Mr Treacy QC advanced a series of comprehensive and wide-ranging arguments. These can perhaps be summarised as follows: -

> 1. The policing operation failed to adequately protect the rights of the children and parents arising under various articles of the European Convention on Human Rights and Fundamental Freedoms.
>
> 2. The police approach to the handling of the protest should have been informed by the United Nations Convention on the Rights of the Child.
>
> 3. The Police (Northern Ireland) Act 2000 imposes a general duty on police to protect life and preserve order. These statutory obligations require to be read compatibly with ECHR. The police were in default of the requirements of the legislation.

4. The police strategy was fundamentally flawed in that it dealt with the protest in a manner appropriate to a contentious parade rather than analysing the requirements for the protection of the human rights of the children and their parents.

5. The guiding principle for the proper handling of the dispute ought to have been 'the best interests of the child'. This principle did not inform the police strategy.

6. The respondents failed to ensure the effective implementation of the criminal law.

[33] The principal arguments made by Mr McCloskey QC for the respondents were these: -

1. This was not a representative action and any claim for violation of Convention rights fell to be judged on the basis of the applicant's rights exclusively.

2. There was no breach of the applicant's Convention rights. In particular the police were not aware of any real or immediate threat to the applicant's right such as would be required to give rise to a duty under article 2 of ECHR; the applicant failed to meet the 'minimum threshold' test required to establish a breach of article 3; in any event, the obligation on the respondents was to take reasonable steps to prevent the offending treatment and this had been done. Article 8 of the Convention was not engaged. Article 14 did not arise because the applicant failed to satisfy the 'ambit' test set out in *Rasmussen v Denmark* (1985) 7 EHRR 372. Article 2 of the First Protocol could not be invoked by the applicant.

3. Reliance on the United Nations Convention on the Rights of the Child was misconceived because it was an international treaty to which resort could not be had in domestic law. In any event, the requirement of the Convention was that the best interests of the child be 'a primary consideration' and there was no evidence that this had not been observed.

> 4. The police were obliged to be alert to the potential rights of protesters under articles 10 and 11 of the Convention. While much of the conduct of the protesters could not be justified, it was simplistic to suggest that no balancing exercise required to be performed.
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> 5. There was insufficient evidence to support the applicant's claim that there had been a breach of any of the respondents' legal obligations and in particular the duties impose on the first respondent under the Police (Northern Ireland) Act 2000.

Article 2

[34] So far as is material article 2 of ECHR provides: -

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

[35] The jurisprudence of the European Court of Human Rights has for long recognised that this provision gives rise to positive as well as negative duties. In particular where the state has reason to apprehend that there is a threat to the life of an individual it must take appropriate steps to protect the person threatened against that risk. Lester and Pannick *Human Rights Law* 2nd edition puts the matter thus: -

> "The ECtHR continues to recall that the first sentence of article 2(1) enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. A state is therefore obliged by article 2 to put in place effective criminal law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It may also, in appropriate circumstances, be under a positive obligation to take preventive operational measures to protect an individual or individuals whose life

> is at risk from the criminal acts of another individual."

[36] Not every perceived threat will give rise to an obligation under article 2. In *Osman v United Kingdom* (2000) EHRR 245, [1998] ECHR 23452/94 ECtHR said at paragraph 116: -

> "116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation [*i.e.* an obligation to protect life under article 2 (1)] must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. …
> In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see para. 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. … For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case."

[37] The actions of many who engaged in this protest were disgraceful. The intimidating, threatening and oppressive behaviour of several of the protesters towards innocent schoolchildren and their parents was

indefensible. Mr McCloskey is, however, unquestionably right in his claim that the applicant, to maintain a claim that the Convention has been violated, must show that she has been the victim of the alleged infringement of the right invoked. Section 7 (1) of the Human rights Act 1998 provides: -

> "**7.** - (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may-
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
> (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act."

[38] Section 7 of HRA reflects the approach of ECtHR. It has consistently been held that an *actio popularis* is not permitted. In *Klass and others v Germany* (1980) 2 EHRR, [1978] ECHR 5029/71 paragraph 33 the court said: -

> "33. While Article 24 allows each Contracting State to refer to the Commission "any alleged breach" of the Convention by another Contracting State, a person, non-governmental organisation or group of individuals must, in order to be able to lodge a petition in pursuance of Article 25, claim "to be the victim of a violation . . . of the rights set forth in (the) Convention". Thus, in contrast to the position under Article 24 – where, subject to the other conditions laid down, the general interest attaching to the observance of the Convention renders admissible an inter-State application – Article 25 requires that an individual applicant should claim to have been actually affected by the violation he alleges (see the judgment of 18 January 1978 in the case of *Ireland v. United Kingdom*, Series A no. 25, pp. 90-91, paras. 239 and 240). Article 25 does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain against a law *in abstracto* simply because they feel that it contravenes the Convention. In principle, it does not suffice for an individual applicant to claim that the mere existence of a law

> violates his rights under the Convention; it is necessary that the law should have been applied to his detriment. Nevertheless, as both the Government and the Commission pointed out, a law may by itself violate the rights of an individual if the individual is directly affected by the law in the absence of any specific measure of implementation."

[39] To assert a claim that the Convention has been breached the applicant must therefore establish that she has been a victim of the alleged violation. I have no difficulty in acknowledging that she felt under threat on many occasions. I am persuaded that she genuinely believed that her life was threatened. But I simply cannot accept that it has been proved that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the applicant's life. I have concluded therefore that no violation of article 2 has been established.

Article 3

[40] It was claimed that the failure of the police to prevent the protesters behaving as they did towards the applicant constituted a breach of article 3 of the Convention. It provides: -

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[41] In *Keenan v United Kingdom* (2001) 33 EHRR 913 ECtHR considered the question of the type of behaviour and its effect on the victim required to establish a violation of article 3. At paragraphs 108/9 the court said: -

> "108. The Court recalls that ill treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim (see, amongst other authorities, the *Tekin v Turkey* judgment of 9 June 1998, *Reports* 1998-IV, § 52).
>
> 109. In considering whether a punishment or treatment is "degrading" within the meaning of Article 3, the Court will also have regard to whether its object is to humiliate and debase the

> person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3 (see eg the *Raninen v Finland* judgment of 16 December 1997, *Reports* 1997-VIII, p 2821-22, para 55). This has also been described as involving treatment such as to arouse feelings of fear, anguish and inferiority capable of humiliating or debasing the victim and possibly breaking their physical or moral resistance (*Ireland v the United Kingdom* judgment of 18 January 1978, Series A No. 25, p 66, para 167), or as driving the victim to act against his will or conscience (see eg the Commission's opinion in the Greek Case, Ch IV, p 186)."

[42] Mr McCloskey argued that the treatment to which the applicant was subjected did not pass the 'threshold test' for article 3. He further submitted that the allegations of ill treatment amounting to a violation of article 3 must be proved to the criminal standard, citing *Indelicato v Italy* (2002) 35 EHRR 38, and suggested that the evidence proffered by the applicant fell conspicuously short of meeting that exacting standard. It is true that ECtHR has devised a test for article 3 violations that might be considered stringent. One must recognise, however, that it has repeatedly been emphasised that any assessment of offending conduct must be directly related to the particular facts of an individual case and that contemporary views as to what may be said to constitute inhuman or degrading treatment must be dictated by current standards. It is unnecessary for me to reach a conclusion on this aspect of the case for reasons that will presently appear. I would not be prepared to say, however, that the indignities, threats and naked intimidation to which the applicant was subject would not amount to 'inhuman or degrading' treatment for the purposes of article 3.

[43] If the applicant was subjected to treatment falling within article 3 the duty on the state authorities is to take reasonable steps to prevent the offending treatment. In *DP & JC v United Kingdom* (2003) 36 EHRR 14, , [2002] ECHR 38719/97 ECtHR said: -

> "Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties under article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with article 3, requires

> States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals (see *A v UK* (1998) 5 BHRC 137 at para 22). These measures should … include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge (*mutatis mutandis*, *Osman v* UK (1998) 5 BHRC 293 at para 116."

[44] In deciding whether the measures taken by the police were reasonable, two important considerations arise. First, as ECtHR said in *Osman*, "the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources" have to be taken closely into account. Secondly, an appropriate area of discretionary judgment must be allowed the police authorities in their choice of policing strategies and operational decisions – see, in this context *Re A's application for judicial review* [2001] NI 335, 345.

[45] In a case such as this, there is an understandable inclination to view the matter of policing in straightforward terms. Innocent children and their equally innocent parents were being prevented from making their way peaceably to school. They were entitled to do so without having to endure the brickbats and intimidation of others – especially since these so-called protesters avowedly impeded their way for reasons that had nothing to do with the schoolchildren and their parents. The immediate reaction of right thinking people is that those who intimidated, threatened and attacked those children and parents, who blocked their way and frightened them were committing criminal offences; they should have been prevented from doing so; they should have been arrested and prosecuted.

[46] Sadly, policing options and decisions do not readily permit such uncomplicated solutions, particularly in such a uniquely fraught situation. Those who had to decide how to deal with this protest were obliged to have regard to the effect that their decisions might have in the wider community. It is not difficult to understand that an aggressive, uncompromising approach to the protest might have been the catalyst for widespread unrest elsewhere. It is precisely because the Police Service is better equipped to appreciate and evaluate the dangers of such secondary protests and disturbances that an area of discretionary judgment must be allowed them, particularly in the realm of operational decisions. While the sense of grievance of the parents is perfectly reasonable and the perplexity of those who could not understand why the police did not adopt more forceful tactics is unsurprising, I cannot accept that it has been established that the measures taken by the police were

unreasonable. I have concluded that no breach of article 3 has been demonstrated, therefore.

Article 14

[47] Article 14 of ECHR provides: -

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"

[48] It is well established that this is not a freestanding provision. In order to rely on article 14 it is necessary for a claimant to show that he or she has been the victim of a violation under another provision of the Convention or that their claim comes 'within the ambit' of such a provision. In the present case Mr McCloskey argued that the applicant's claim did not come within the ambit of any other article of the Convention and relied on the decision of ECtHR in *Rasmussen v Denmark* (1985) 7 EHRR 371.

[49] It is not necessary for me to reach a conclusion on this argument since I am satisfied that there is no evidence to support the contention that the manner in which the protest was policed discriminated against the applicant. For that reason it is also unnecessary for me to consider the further argument of the respondents that any distinction that might be said to exist in the manner of the treatment of the applicant as opposed to that rendered to others could not be said to be on the basis of any characteristic or status personal to her.

Article 2 of the First Protocol

[50] This provides: -

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

[51] The respondents' primary submission in response to the applicant's claim that there had been a violation of this article was that this could not be asserted by the applicant since her right to education was not in issue. It

appears to me, however, that the more prosaic, but equally effective, defence to the claim is that the applicant's daughter has not in fact been denied her right to education. On the contrary, because of the sterling efforts of the parents and the dedication of the teachers led by their admirable principal the right of the applicant's child and the other schoolchildren to an education was assured.

United Nations Convention on the Rights of the Child

[52] Article 3 of this Convention provides: -

> "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies the best interests of the child shall be a primary consideration.
>
> 2. State parties undertake to ensure the child such protection and care as is necessary for his or her well being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to that end shall take all appropriate legislative and administrative measures."

[53] The respondents object that the applicant may not have recourse to this Convention under domestic law – *R v Secretary of State for the Home Department ex parte Brind & others* [1991] 1 AC 696. They further object that the applicant may not invoke the Convention because it applies only to children. These are no doubt effective answers to the applicant's reliance on the Convention but I prefer to base my rejection of her argument on the ground that it has not been shown that the respondents have failed to accord the 'best interests of the child' the primacy of importance that the provision demands. I shall deal with this aspect at greater length in a different context below.

The Police (Northern Ireland) Act 2000

[54] In so far as they are relevant, sections 32 and 33 of this Act (which are the provisions that the applicant relied on) provide: -

> "**32.** - (1) It shall be the general duty of police officers-
>
> (a) to protect life and property;
>
> (b) to preserve order;

(c) to prevent the commission of offences;

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

…

(5) Police officers shall, so far as practicable, carry out their functions in co-operation with, and with the aim of securing the support of, the local community.

33. - (1) The police shall be under the direction and control of the Chief Constable."

[55] The various obligations imposed by these provisions cannot be regarded as absolute in their terms. Thus a police officer cannot be expected in every conceivable situation to prevent the commission of offences, oblivious to the possible consequences of his action. If, for instance, to intervene to stop a crime would place himself or a member of the public in mortal danger, he is not compelled to do so. It is, of course, his general duty to fulfil the statutory obligations provided for and he may not refrain from doing so arbitrarily or capriciously. Where, however, as in this case, a judgment is made, in the interests of general public order throughout the community, that an aggressive policy of arrest and detention of all observed to be breaking the criminal law should not be pursued, it does not follow that breach of section 32 is thereby automatically established.

[56] In this case the judgment was made that a more aggressive approach to the arrest and detention of those who were seen to be committing criminal offences would lead to more widespread disorder. What might be described as a policy of containment of the dispute was preferred for a substantial part of its duration. I have not been persuaded that this policy was adopted in dereliction of the police officers' duty or by reason of a reluctance to fulfil the statutory obligations under sections 32 and 33 of the Act. I do not accept, therefore, that any breach of these provisions has been made out.

The 'contentious parade' strategy

[57] The applicant's complaint that the police took account of the opinions and interests of the protesters has two aspects. Firstly it is suggested that the police were all too ready to seek the views of the protesters and to cater for their wishes to the detriment of the schoolchildren and their parents. Secondly, it is claimed that the police should not have had regard to any 'rights' of the protesters to impede the progress of the children to school; this

was, the applicant claims, a wholly illegitimate form of protest directed at innocent children who had no influence over or power to redress the grievances that were supposedly the reason for the protest. This erroneous approach led the police to deal with policing strategy on the basis that this was akin to a contentious parade where the interests of both sides required to be equally catered for.

[58] One can certainly sympathise with a view that these protesters should not have been afforded much in the way of consideration of their claims to be entitled to protest, given the nature of that protest and the distress and fear that they instilled in the minds of these young children. It appears to me, however, that the police cannot be faulted for exploring with the representatives of those who were protesting any possible means of bringing it to an end. Moreover, however unpalatable it may appear at first blush, the possible rights of the protesters under articles 10 (freedom of thought, conscience and religion) and 11 (freedom of expression) of the Convention could not simply be ignored by the police. On the evidence available to me I cannot be satisfied that the police were wrong either to attempt to mediate with the protesters' representatives or to keep in mind their rights to protest.

The best interests of the child principle

[59] All the principal deponents who have supplied affidavits on behalf of the first respondent have asserted that they bore closely in mind the need to give particular consideration to the interests of the schoolchildren. The applicant has relied crucially on the evidence of the human rights commissioners that the former Chief Constable accepted that this had not been considered in arriving at the policing strategy for the protest.

[60] The Chief Constable did not accept the accuracy of the note that was prepared of the meeting between him and the commissioners. In any event, I have found the note on this critical issue less than clear. It refers to 'human rights and legal advice'. It is not apparent whether this purports to convey that the advice that the police were receiving was deficient. Another possible interpretation of the note is that the events as revealed on video did not give the appearance that the rights of the child were being accorded the primacy of importance that they deserved.

[61] The onus of establishing the accuracy of the accusation that the police failed to have regard to the 'best interests of the child' principle rests, of course, with the applicant – see *Ex parte Curl* (unreported) and Supperstone & Goudie *Judicial Review* 2nd edition paragraphs 17.8 – 17.9. The evidence in support of this proposition is at best equivocal and, in the face of the express assertions to the contrary, I am not prepared to hold that it has been established.

The failure to secure the effective implementation of the criminal law

[62] For the reasons given earlier in this judgment, particularly in paragraphs [54] and [55] I do not consider that either the Police Service or the Secretary of State failed to secure the effective implementation of the criminal law.

Conclusions

[63] The so called protest directed towards the young children of Holy Cross school for girls is one of the most shameful and disgraceful episodes in the recent history of Northern Ireland. The sheer weight of evidence about these terrible events permits no conclusion other than that many of those involved in the protest had as their purpose the terrorising of these innocent children and their parents.

[64] The sense of outrage that these events provoked cannot be allowed to substitute for a dispassionate and scrupulous examination of the legality of the policing strategy and the decisions taken as to how the protest should be handled, however. That appraisal must take place within a well-defined legal framework. Having conducted that assessment, I have concluded that the policing judgments made have withstood the challenge that has been presented to them. The application for judicial review must be dismissed.