

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

Delivered: **07/09/2005**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

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

Before Kerr LCJ, Campbell LJ and Morgan J

MORGAN J

[1] David Alexander Tweed is the Worshipful Master of Dunloy Loyal Orange Lodge 496 and the respondent in this appeal. On 9 March 2004 he notified police of a proposed public procession organised by the Lodge for Easter Sunday, 11 April 2004. On 5 April 2004 the Parades Commission for Northern Ireland determined that it should impose conditions on the organiser and participants which restricted the proposed procession. The Respondent is now pursuing a judicial review of that decision and a further decision made on 9 April 2004 whereby the Commission declined to alter its determination. In the course of those proceedings Mr Tweed sought an Order for discovery of certain documents referred to in an affidavit of Sir Anthony Holland, the chairman of the Commission, filed in response to the application for discovery. On 6 December 2004 Girvan J ordered that the Commission furnish discovery and provide inspection of five documents subject to any public interest immunity considerations. It is from that Order that the Commission now appeals.

[2] The Commission was established by section 1 of the Public Processions (Northern Ireland) Act 1998. By sections 3, 4 and 5 of the Act the Commission is charged with the duty of issuing a Code of Conduct to provide guidance to those organising a public procession, Procedural Rules to regulate and prescribe the practice and procedure to be followed by it and a set of

Guidelines as to the exercise by the Commission of its functions under section 8 of the Act. Each of these documents must be laid before Parliament before they can become effective. The Commission's power to impose conditions on public processions is set out in section 8 of the Act:

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

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

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

(a) the Code of Conduct; or

(b) any other document-

(i) prepared by the person or body organising the procession in question; and

(ii) approved by the Commission for the purposes of this section.

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

(5) In considering in any particular case -

(a) whether to issue a determination under this section;

(b) whether to amend or revoke a determination issued under this section; or

(c) what conditions should be imposed by a determination (or amended determination) issued under this section,

the Commission shall have regard to the guidelines.

(6) The guidelines shall in particular (but without prejudice to the generality of section 5(1)) provide for the Commission to have regard to-

(a) any public disorder or damage to property which may result from the procession;

(b) any disruption to the life of the community which the procession may cause;

(c) any impact which the procession may have on relationships within the community;

(d) any failure of a person of a description specified in the guidelines to comply with the Code of Conduct (whether in relation to the procession in question or any related protest meeting or in relation to any previous procession or protest meeting); and

(e) the desirability of allowing a procession customarily held along a particular route to be held along that route."

[3] In accordance with its obligations the Commission has issued Procedural Rules. Paragraph 3 of the rules sets out the process by which the Commission takes evidence:

" 3.1 The Commission may hold formal evidence-gathering sessions in order to hear views or clarify issues surrounding individual parades or a series of parades in a location. Where the Commission decides to pursue this course of action, the Commission Secretariat will seek to ensure that interested parties are given sufficient advance notice of arrangements. Evidence will be given on an entirely voluntary basis, and each session will be recorded. The method for recording evidence may vary and may include the use of tape-recording equipment.

3.2 In addition to the gathering of evidence for which para 3.1 provides, the Commission will receive information and representations, whether oral or in

writing, from any interested party or organisation at any time prior to the notified date of the parade.

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

The Commission has also issued Guidelines and at paragraph 4 thereof explains how when considering the exercise of its power to impose conditions it approaches the question of the impact of the procession on relationships within the community.

[4] In addition to his challenge to the determination of 5 April 2004 and the decision of 9 April 2004 the Respondent in his judicial review application seeks a declaration of incompatibility in respect of s.8 (6) (c) of the Act on the ground that any restriction on the rights contained in articles 9, 10 and 11 of the Convention because of the impact which the procession may have on relationships within the community is incompatible with the Convention rights. On the same basis the Respondent seeks a declaration that paragraph 4.4 of the Guidelines is incompatible with those Convention rights. Finally the Respondent contends that paragraph 3.3 of the Procedural Rules is unlawful and breaches the Respondent's rights under article 6 of the Convention in that the Respondent has not been informed of the representations made to the Commission concerning his application, consequently has not had an opportunity to meet the concerns of the Commission and has not been given adequate reasons for the determination.

[5] In answer to this challenge the chairman of the Commission made an affidavit in which he set out the chronology of the decision making process in paragraph 6:

"(i) On 9 March 2004 a Notice of Intention to organise a public procession on a Form 11/1 was provided to the police. The organising body concerned was the Dunloy Loyal Orange Lodge ('the Lodge') and the Form 11/1 provided the Applicant's name as the person organising the parade. The form contained the details of the proposed public procession. It was anticipated that the number of participants would be 200-300 persons with one band. It was indicated that the processors would assemble

at the Orange Hall in Dunloy at 1400 hours and would process to Dunloy Presbyterian Church where a Church service would be held. The procession would then process back to the Orange Hall with a dispersal time being given as 1615 hours. Regalia would be worn by the processors and the purpose of the procession was stated to be to enable them to 'manifest our faith in God as revealed in the Holy Scripture on the occasion of the day of the celebration of the Resurrection of the Lord Jesus Christ, through peaceful means during a peaceful procession'. Four stewards were to be in attendance to marshal the procession.

(ii) The Form 11/1 aforesaid was provided by police to the Commission on 12 March 2004. Police noted in an accompanying facsimile transmission that the parade was an annual one, that it had previously been contentious and that it had been the subject of previous Determinations by the Commission.

(iii) On 24 March 2004 the Commission received a police report in respect of the proposed procession. This was compiled by Superintendent Corrigan, the District Commander for Ballymoney. It contained a section dealing with recent parading history beginning with a parade on 21 May 2000 and working forward. This demonstrated that on some 27 occasions since that date public processions in Dunloy had been the subject of Determinations by the Commission restricting the route, mainly so as to prevent any procession occurring in the village of Dunloy. While, on occasions, there had been protests by Loyal Orders directed at the restrictions imposed it was noted that the organisers had complied with all the Determinations and had abided by the Commission's Code of Conduct. There had been no disorder or violence in connection with any of the parades which, subject to a small number of minor incidents, had passed off with little attention being paid to them by local residents. It was noted that local residents believed that it was the norm for no parades to be permitted in the village.

In the terms of the impact of processions on the community, Superintendent Corrigan records that in

the past applications to parade had raised tension within the wider community. In his view if the proposed parade took place without a local agreement damage would be caused to community relations within the area. In this circumstance it was thought that residents would mount a protest which would result in a number of persons taking to the streets. Such protests, if any, would bring a potential threat to public order. Superintendent Corrigan indicated that parades did have the potential to lead in Dunloy to inter-community conflict. Without any protest in opposition to the parade he noted that traffic diversions might cause limited inconvenience to village residents and business interests but in the event of a protest that led to violence from any quarter the disruption to the life of the community would be substantially increased. Superintendent Corrigan, in dealing with the impact of the proposed parade on human rights, noted that there would always remain the possibility that if the opposing factions came into contact in a disorderly manner the potential for a real and serious risk to life existed. In view of the fact that no Notice of Intention had been received to mount a counter-march or demonstration, the police view was that deployment of police would initially be maintained at as low a level as possible to ensure the safe passage of the parade consistent with the sensitivities of local residents. A peaceful protest against the parade would require careful monitoring on the part of the police with police being positioned to deal with disorder or violence which might arise from any quarter. If violence were to occur the police response was stated to be a graduated one commensurate with the public order situation, the object being to protect the lives of all.

(iv) On 24 March 2004 the Commission received a situation report from its authorised officers who worked in the area. Authorised officers are not employed by the Commission but are self employed and perform a range of functions for the Commission. An extract from the Commission's first Annual Report is exhibited hereto marked 'AH3' which may assist the Court in understanding their role. This report records a range of views which had been expressed to the authorised officers. Inter alia, it

records the view being expressed that as there had been no engagement between the Loyal Orders and the Dunloy residents over the winter the status quo regarding parades ought to continue. The report records information about the Orange Order in County Antrim's communications strategy. It notes that a signed letter from the Orange Order was to be sent to every household in Dunloy outlining the thinking behind the procession and service on Easter Sunday. It also records that an invitation to residents to attend the exhibition of Orange culture at the Joey Dunlop Centre in Ballymoney had been provided and that there was also to be a presentation for a range of public representatives and others on the day prior to the exhibition. The strategy was described as constituting meaningful communication in the eyes of the Orange Order though it is noted that the initial reaction among residents was that it fell short of engagement with the local community.

(v) On 30 March 2004 the Commission Secretariat provided a note to members concerning the proposed parade. This summarised the documents referred to above.

(vi) A further situation report was provided to the Commission by its authorised officers dated 2 April 2004. This records contacts by the authorised officers with a variety of persons from a range of backgrounds with views being expressed to the effect that any parade without residents' acceptance would be likely to lead to a deterioration in community relations and that the communication strategy of the Orange Order fell short of meaningful engagement, though potential existed for engagement arising out of the strategy. A view is also recorded in this report that relations between the police and the community would be set back a decade if a march was forced on the local population.

(vii) On 5 April 2004 the Commission was to have met Dunloy residents at the Commission's offices but the meeting was cancelled by the residents after a local death. On this date, however, the Commission met with the police and its own authorised officers.

The police at the meeting expressed, inter alia, the following views:

- That any change to previous Parades Commission Determinations could cause further tension within the community;
- That if a parade were allowed to proceed on the notified route the number of those likely to protest against the parade would substantially increase;
- That the Lodge would obey the law;
- That it was only in the last 25 years that demography had changed so that Dunloy was now seen as a Catholic town;
- That the Lodge would see the Commission allowing the parade to take place along the frontage of the Orange Hall as being progress;
- That a parade on the notified route would mean a large police and army presence. It could mean 14 TSGs and 300 plus officers and soldiers.
- That a parade without agreement would have a substantial adverse effect on the community as a whole and would possibly affect all other parades in Dunloy in 2004.

(viii) A letter was received on the morning of the 5 April 2004 from Mr Robert Campbell of the Ulster Human Rights Watch and this was considered.

(ix) On 5 April 2004 in the light of the foregoing the Commission made its Determination and communicated it to the Applicant."

[6] The Respondent then sought discovery of the following 6 documents to which reference was made in the affidavit:

- (i) The applicant's application form 11-1 in respect of the proposed procession.
- (ii) A police fax transmission accompanying the form 11-1 sent to the Parades Commission.
- (iii) A police report in respect of the proposed procession compiled by the Ballymoney District Commander, Superintendent Corrigan.

(iv) A situation report received from the authorised officers of the Commission who worked in the areas.

(v) A Commission secretariat note to members concerning the proposed parade summarising the documents referred to.

(vi) A situation report dated 2 April 2004 recording contacts by the authorised officers with a variety of persons from a range of backgrounds.

[7] The Court made an Order in respect of the last 5 documents. The first document was not included because a copy of it was already in the applicant's possession. The learned judge first considered the effect on the application of Rule 3.3 of the Procedural Rules. He concluded that the Rule falls to be construed and applied in the context of rules made to explain how the Commission will exercise its statutory function. It could not govern proceedings by way of challenge on Convention grounds. Accordingly the Court concluded that there was nothing in the Rule which precluded an order for discovery if otherwise appropriate.

[8] Next he noted that applying traditional judicial review discovery principles the application may have failed on the basis that there was no material to suggest that the evidence relied on by the Commission was inadequate. He considered, however, that the court in this case had been asked to determine whether the Commission's decision was proportionate. In those circumstances it was for the decision maker to adduce the relevant evidence upon which he relied to enable the court to carry out its more intense review or scrutiny of the process. In this case the chairman of the Commission had referred in paragraph 6 of his affidavit to documents which the Commission had taken into account and to which weight had been given. He then continued:

"[11] While the court retains a discretion even in relation to an application for disclosure of documents referred to in affidavits or pleadings, since a party has sought to incorporate reference to the documents in his pleadings or affidavits because they are essential and/or of probative value then the underlying basis for proper discovery is laid in ordinary cases. Whatever the position may be in judicial review cases where no Convention issue or issue of proportionality arises, in a case where proportionality is in issue I consider that disclosure of the full documents referred to in the affidavit should take place. If the anxious scrutiny by the court or the intense review (whichever term one uses) is to be properly carried

out then the court should have had sight of the documents. If this were not so the decision maker's interpretation and synopsis of documents would bind the court and the court would at least in part have surrendered to the decision maker the question of determining weight and the relevance of material before the decision maker when reaching its decision. A decision maker acting in perfectly good faith may put a particular interpretation on documentary material which on a proper analysis turns out in law to be erroneous. It is only by seeing the documents that the court itself can carry out its function properly. It is clear from authorities such as *R (Wilkinson) v Broadmoor Hospital Authority* [2002] 1 WLR 419 that in judicial review cases the traditional procedural approaches adopted in judicial review cases have to be adapted to deal with situations where Convention rights and issues of proportionality arise."

[9] For the Commission Mr McCloskey QC, who appeared with Mr Maguire BL, submitted that the principles applicable to discovery in judicial review proceedings were unaffected by the need to determine proportionality in respect of Convention rights. It remained the position that in the absence of some prima facie case for suggesting that the evidence relied upon by the deciding authority is incorrect or inadequate it is improper to allow discovery of documents the only purpose of which is to challenge the accuracy of the affidavit evidence (see *Re Rooney's Application* [1995] NI 398).

[10] Secondly he submitted that to accede to this application would effectively determine the issue as to whether Procedural Rule 3.3 was lawful and the related argument that the disclosure of materials submitted to the Commission was protected by public interest considerations. Since the learned judge expressly reserved the question of public interest immunity that issue does not arise on this appeal.

[11] Thirdly he submitted that the Commission was a specialised body which had acquired expertise and experience since it was established in 1998. The nature of its work necessarily involved the striking of a balance between competing Convention rights. Accordingly it was appropriate to accord the Commission a discretionary area of judgment as recognised in *Ex Parte Kebeline* [1999] 4 All ER 801. That set the context for the intensity of review that was appropriate in this case and pointed away from scrutiny of the kind that the court had considered necessary.

[12] Mr Hanna QC, who appeared with Mr Scofield BL for the Respondent, supported the approach taken by the learned judge. He

submitted that a more rigorous standard of judicial scrutiny is required in a case of this kind than is required by the common law doctrine of irrationality. He relied upon *R (Wilkinson) v Responsible Medical Officer Broadmoor Hospital* [2002] 1 WLR 419, an example of the court allowing cross examination to establish whether medical treatment was necessary and proportionate. He submitted that the analysis of Elias J in *R (Williamson) v Secretary of State for Education* [2001] EWHC Admin 960 supported the need for the court to have access to the materials upon which the decision maker had acted in order to determine whether the decision was proportionate.

[13] Secondly he submitted that the inspection of the documents was in the interests of justice and necessary for fairly disposing of the issues before the court even on the application of the test as developed prior to the coming into force of the Human Rights Act 1998. Once it was demonstrated that the Commission relied upon the content of the documents he submitted that the failure to disclose them gave rise to an inadequacy in its evidence.

[14] Thirdly he submitted that the application of the test for discovery needs to be modified to take into account the different nature of the review that has to be conducted in cases where the proportionality of an interference with a convention right is in issue.

[15] The overriding test for discovery is found in Order 24 Rule 9 which provides that the Court shall refuse to make an order if it is of the opinion that discovery is not necessary at that stage either for fairly disposing of the matter or for saving costs. The application of this test in judicial review proceedings was restated by Carswell LCJ, delivering the judgment of this court in *Re Belfast Telegraph Newspaper's Application* [2001] NICA 20 in the following terms:

“The principles governing discovery in judicial review matters were fully considered by this court in *Re McGuigan's Application* [1994] NI 143 and *Re Rooney's Application* [1995] NI 398, and it is unnecessary to do more than summarise the conclusions of the court in those cases. I set them out in a series of propositions in my judgment in *Re Rooney's Application* at pages 413-4, and repeat them here for convenience:

1. The court has a discretion under RSC (NI) 1980, Ord 24, r 3 to order discovery, either general or of particular documents or classes of documents, but under r 9 is to refuse to make an order if satisfied (the onus being on the party from whom discovery is sought) that discovery is not

necessary either for disposing fairly of the matter or for saving costs.

2. Discovery may be ordered in applications for judicial review, but because of the nature of the issues and the remedies available to an applicant it is more restricted than in ordinary actions, both in respect of the occasions on which it will be ordered and the extent to which discovery is to be made.

3. It is essential to examine carefully the issues which arise in any particular application for judicial review, to ascertain whether discovery is necessary for the resolution of some issue arising in the application.

4. Unless there is some prima facie case for suggesting that the evidence relied on by the deciding authority is in some respects incorrect or inadequate it is improper to allow discovery of documents, the only purpose of which would be to act as a challenge to the accuracy of the affidavit evidence.

5. The conclusion, as expressed by Hutton LCJ in *Re McGuigan's Application* (at 154), is that –

‘...if, after the respondent has delivered his replying affidavit, the applicant, upon whom the onus rests of proving that the respondent has acted improperly, is unable to point to any material which suggests that the respondent has acted improperly in coming to his decision, but merely states that he suspects impropriety, the court will conclude that ‘discovery is not necessary ... for disposing fairly of the cause’.”

[16] As that passage makes clear it is vital to identify the relevant issues arising in respect of any application of this type. In respect of the issues in this appeal there are two material matters arising from the judicial review challenge. The first is the procedural challenge focussed upon Rule 3.3 of the Procedural Rules. The Respondent contends that the Rule breaches his right to have knowledge of and comment upon all the evidence adduced.

Accordingly he contends that his fair trial rights under article 6 of the convention have been breached. It is important to recognise, however, that this application for judicial review is a challenge to an administrative decision making process. In order to address the issue of whether there has been a breach of the convention the court will have to take into account the nature of the full jurisdiction available to it in the judicial review proceedings and in particular the extent to which it is necessary or appropriate for the court to supplement the procedures of the Commission.

[17] At paragraph 8 of his judgment the learned judge stated that discovery of the relevant documents would not be necessary for the determination of the issue as to whether the application of the Rule involves an unfair procedure for determination of the decision by the Commission. I agree entirely with that view. I also consider that determination of the discovery application at this stage requires consideration of the extent to which it is necessary or appropriate for the court to supplement the procedures of the Commission. This is, of course, one of the issues which will have to be addressed in the procedural challenge made within the substantive judicial review application. In these circumstances an order for discovery at this stage could well have the effect of depriving the Commission of its common law right to a fair hearing of the matter.

[18] The second relevant challenge is based upon the proportionality of the interference with the article 9, 10 and 11 convention rights of the Respondent. The Commission seeks to justify the interference with the Respondent's convention rights on the basis of preventing public disorder and protecting the rights and freedoms of others. In order to determine that issue the court will have to consider the three criteria approved by the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture* [1999] 1 AC 69 and subsequently endorsed by the House of Lords in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26:

- (a) Is the objective of the interference sufficiently important to justify limiting a fundamental right;
- (b) Are the measures designed to meet that objective rationally connected to it; and
- (c) Are the means used to impair the rights of the Respondent no more than is necessary to accomplish the objective.

[19] In order to address those issues the Commission set out in the affidavit of its chairman the decision making process. Indeed once leave to apply for judicial review was given it was obliged to do so. In a judicial review application the respondent is required to fully set out the circumstances leading to the decision including where appropriate reference to any documents generated or upon which it relied. A respondent is not entitled to select only those documents or matters which are of assistance but must as a

matter of law disclose fairly the relevant decision making process (see *ex parte Huddleston* [1986] 2 All ER 941). That obligation does not include a duty to disclose every document upon which the decision maker relied nor does it require the disclosure of those documents to which reference is made in the replying affidavit. The fact that such documents are not disclosed could never of itself give rise to the conclusion that the response was incomplete or inadequate.

[20] It is clear, therefore, that the replying affidavits constitute material upon which the court can rely in determining the question of proportionality. The learned judge concluded, however, that, where proportionality is in issue, disclosure of the full documents referred to in the replying affidavits should be made. In reaching this view he relied upon the approach of Elias J in *Williamson* to support the proposition that where proportionality issues are to be determined the decision maker is obliged to adduce the relevant evidence relied upon by it. When the learned judge delivered his judgment the decision in *Williamson* was being considered by the House of Lords. Two months after the delivery of his judgment the House gave judgment and it is now clear from the opinions of Lord Nicholls and Lady Hale that the court does not need to have put before it the materials upon which the decision maker relied in order to determine the issue of proportionality but that it may be able to rely on other sources such as publicly available materials in order to determine the question.

[21] But the issues arising in a proportionality challenge are different from those in most judicial review cases and the difference of approach was most helpfully set out by Lord Steyn in *Daly* at paragraphs 27 and 28:

“27 The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:

"whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

Clearly, these criteria are more precise and more

sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? Academic public lawyers have in remarkably similar terms elucidated the difference between the traditional grounds of review and the proportionality approach: see Professor Jeffrey Jowell QC, "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] PL 671; Professor Paul Craig, *Administrative Law*, 4th ed (1999), pp 561-563; Professor David Feldman, "Proportionality and the Human Rights Act 1998", essay in *The Principle of Proportionality in the Laws of Europe* edited by Evelyn Ellis (1999), pp 117, 127 et seq. The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights. It will be recalled that in *Smith* the Court of Appeal reluctantly felt compelled to reject a limitation on homosexuals in the army. The challenge based on article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the right to respect for private and family life) foundered on the threshold required even by the anxious scrutiny test. The European Court of Human Rights came to the opposite conclusion: *Smith and Grady v United Kingdom* (1999) 29 EHRR 493. The court concluded, at p 543, para 138:

'the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court's analysis of complaints under article 8 of the Convention.'

In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.

28 The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving Convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell [2000] PL 671, 681 has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent the general tenor of the observations in *Mahmood* [2001] 1 WLR 840 are correct. And Laws LJ rightly emphasised in *Mahmood*, at p 847, para 18, 'that the intensity of review in a public law case will depend on the subject matter in hand'. That is so even in cases involving Convention rights. In law context is everything."

[22] In this case the context is set in part by the nature of the convention rights in issue, the extent of interference with those rights and the implications, if any, for the rights and freedoms of others. But it is also clear that the procedures which the court should use for the purpose of carrying out its scrutiny of the interference with the rights may well be determined by the procedural context which the court finds appropriate in this case. Rule 3.3

of the Procedural Rules provides a mechanism whereby the rights and freedoms of others are taken into account in a manner which imposes a duty of confidence on communications with the Commission. The validity of such an approach is at issue in the substantive judicial review application and the outcome of that challenge must set an important procedural context for the determination of the question as to whether discovery of those communications is necessary for fairly disposing of the matter or for saving costs. It is only when that context has been established that the issue of discovery in this proportionality challenge can be resolved.

[23] Accordingly I consider that it is not at this stage necessary for fairly disposing of the matter or for saving costs to order discovery of the documents sought and I would allow the appeal.