

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

AN APPLICATION BY DAVID TWEED
FOR JUDICIAL REVIEW

WEATHERUP J

The application.

[1] This is an application for judicial review of the decisions of the Parades Commission for Northern Ireland ("the Commission") made on 5 and 9 April 2004 concerning a proposed public procession in Dunloy, Co Antrim on 11 April 2004 whereby the Parade Commission determined that certain conditions be placed on the organiser and participants in the parade.

[2] The application includes a challenge to the compatibility of section 8(6)(c) of the Public Processions (Northern Ireland) Act 1998 with Articles 9, 10 and 11 of the European Convention on Human Rights. The Court issued a notice of incompatibility under section 4 of the Human Rights Act 1998 and pursuant to Order 121 Rule 2 of the Rules of the Supreme Court (Northern Ireland) 1980 and the Secretary of State for Northern Ireland was joined as a party to the proceedings. Mr Hanna QC and Mr Scofield appeared for the applicant, Mr McCloskey QC and Mr Maguire QC appeared for the respondent, the Parades Commission, and Mr Shaw QC and Dr McGleenan appeared for the Secretary of State.

The restrictions imposed on the proposed parade.

[3] The applicant is Worshipful Master of Dunloy Loyal Orange Lodge 496. On 9 March 2004 the applicant submitted a "Notice of Intention to Organise a Public Procession" further to section 6 of the Public Processions

(Northern Ireland) Act 1998. The notice contained the details of the proposed procession, namely that on Easter Sunday, 11 April 2004, Dunloy LoL 496 would assemble at 2.00 pm at Dunloy Orange Hall to parade to a religious service at Dunloy Presbyterian Church between 2.30 pm and 3.30 pm. It was estimated that 200-300 participants would parade with Dunloy accordion band and would return to Dunloy Orange Hall at 4.15 pm. The parade distance was some 315 yards. The purpose of the procession was stated to be to "... manifest our faith in God as revealed in the Holy Scripture on the occasion of the day of celebration of the resurrection of the Lord Jesus Christ, through peaceful means during a peaceful procession."

[4] By its determination of the 5 April 2004 the Parades Commission concluded that it should exercise its powers under section 8 of the 1998 Act and that it was necessary to impose conditions on the organiser and participants in the parade by limiting it to the vicinity of the Orange Hall, prohibiting the parade from passing through the village of Dunloy and imposing other restrictions. The applicant sought a review of the determination and on 9 April 2004 the Parades Commission declined to review its determination. The Commission concluded its consideration of the issues as follows -

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

19. In determining whether the conditions are necessary in a democratic society and proportionate, the Commission has regard inter alia to the criteria set down in section 8(6) of the Public Processions (Northern Ireland) Act 1998 and to its own Guidelines made under section 5 of the Act and to which under section 8(5) it shall have regard when making a determination. The Commission genuinely believes that the restrictions, which it proposes, are the most appropriate in all the circumstances.

20. Having regard to the factors set out above the Commission considers that the conditions it now imposes are necessary and proportionate to the aim pursued. The conditions are not such to affect significantly the individual's right to assemble. The

Commission believes that the conditions it imposes strike a fair balance between the needs of the community and the rights of the individual.”

The North Report.

[5] There have been long standing issues about parades in Northern Ireland. In 1997 the report of the “Independent Review of Parades and Marches” (“the North report”) was published. The report stated that it was considered by many that the parades issue was a microcosm of the political problems of Northern Ireland and that it was a complex issue that had great capacity to polarise the community (paragraph 1.2). The parades and protest issue quickly uncovered the widespread anger, deep divisions and political anxieties lying just beneath the surface (paragraph 1.3). Public order problems stemming from demonstrations, processions, parades and open air public meetings were not a new phenomena and the issue was stated to have been around for at least 150 years and probably a good deal longer. It was stated that its current importance waxed and waned in relation to a number of factors including the wider political situation, the relative self confidence of the respective parts of the community at both national and local level and the attitudes and actions of individuals and groups including the police (paragraph 1.5).

[6] The North report stated seven fundamental principles that should form the basis for the development of processes and procedures to address the issue of conflict over parades (paragraph 11.19) -

- (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 of doing so on their relationships with other partes 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 (d) and responsibilities, those involved must neither commit nor condone criminal acts or offensive behaviour.
- (e) The legislation and its application must comply with the United Kingdom’s obligations under international law, and provide no encouragement for those who seek to promote disorder.

(f) The structure for and process of adjudication of dispute over individual parades should be clear and apply consistently with as much openness as possible.

(g) Any procedures for handling disputes over parades and the enforcement of subsequent decisions should be proportional to the issues at stake.

[7] The analysis carried out in the North report pointed in two directions in particular. The first was the need for statutory criteria which took clearer account of the underlying rights and responsibilities of all concerned and the second was the need for a determination by someone other than the police as to whether conditions were required to be imposed in relation to contentious parades if agreement was not reached locally. The second direction led to the creation of the Parade Commission. The first direction found expression in new statutory criteria. The previous statutory criteria had not included the impact of contentious parades and relationships within the community. The North report recommended that the statutory criteria should extend to the wider impact of the parade on relationships within the community.

[8] It is clear from paragraph 12.91 of the North report that this extension of the statutory criteria was considered within the context of the European Convention on Human Rights and the United Nations International Covenant on Civil and Political Rights. It was stated that both clearly embodied a right of peaceful assembly on which was based a "right to march". It was recognised that that right was not absolute but subject to clear limitations which must be prescribed by law and which included the protection of the rights and freedoms of others. The North report referred to the important rights of residents and other members of the community and the protection of those rights to be inferred from the European Convention's limitations on the right to peaceful assembly and from the general law and that those rights were not absolute. The compatibility of statutory changes with Convention rights is under challenge from the applicant and is a matter for the Court.

Dunloy.

[9] The applicant described a history of parades by members of the local Orange Lodge between the Orange Hall and the Presbyterian Church. However the applicant had noted a change of attitude towards the loyal orders among certain element of the local community and described the destruction of the local Orange Hall in an arson attack and the resulting use of the hall in "very beleaguered conditions". From 1995 public processions were disturbed by public disorder which the applicant stated had involved unprovoked and unexpected attacks on the parades and that members of Dunloy Loyal Orange Lodge had not behaved violently during parades.

[10] The North report referred to attempts at mediation in relation to the Dunloy parade in 1996. Mediation was not successful and the police prevented the parade from entering the village. The North report stated that a group of loyalists had mounted a weekly picket outside a Roman Catholic Church in Harryville, Ballymena at times when worshipers were going to attend Mass. The pickets sought to make a comparison with the right of the Orangemen to attend a church service in Dunloy after their parade. The Protestant church leaders, local civic leaders and the Grand Master of the Orange Order publicly disassociated themselves from this action.

[11] The Orange Order in County Antrim devised a “communications strategy.” This consisted of a signed letter being sent to every household in Dunloy outlining the thinking between the Easter Sunday parade and accompanied by a short tract explaining the form and content of an Orange service. Residents were also invited to attend an exhibition of Orange culture and the Protestant religion on 2 April 2004 and representatives of political parties, statutory bodies, churches and some voluntary and community groups were invited to attend a presentation on 1 April 2004 that would focus on the history and role of the Orange Order and address the current approach to parading.

The Public Processions (Northern Ireland) Act 1998.

[12] The Public Processions (Northern Ireland) Act 1998 was introduced after the North report. It established the Parades Commission and required it to issue a code of conduct, procedural rules and guidelines. Section 8 deals with the Commission’s powers to impose conditions on public processions as follows –

- (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.

(7) A person who knowingly fails to comply with a condition imposed under this section shall be guilty of an offence, but it is a defence for him to prove that the failure arose –

- (a) from circumstances beyond his control; or

(b) from something done by direction of a member of the Royal Ulster Constabulary not below the rank of inspector.

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

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

The grounds for judicial review.

[13] The applicant's grounds for judicial review are as follows -

(a) The Parades Commission has acted in breach of the applicant's rights under the European Convention contrary to its obligations under Section 6 of the Human Rights Act 1998 and has done so in particular by violating the applicant's rights -

(i) Under Articles 9, 10 or 11 of the Conventions (rights to freedom of religion, expression and peaceful assembly) by restricting the applicant's rights in pursuance of a name which is not legitimate within the terms of Articles 9(2), 10(2) and/or 11(2) of the Convention.

(ii) Under Articles 9, 10 and or 11 of the Convention by restricting the applicant's rights in a manner which is not necessary in a democratic society nor proportionate.

(iii) Under Article 6 of the Convention (or the procedural rights conferred by Articles 9, 10 and/or 11 of the Convention) by determining the applicant's civil rights in a manner so that -

(1) The applicant was not permitted to know the evidence or case against his notification for the proposed procession in order to be able to answer it.

(2) The applicant was neither informed of the representations, objectors nor the gist thereof in advance of the Parades Commission's determination such as to allow him or his representatives to make representations in relation thereto.

(3) The applicant was neither informed of the representations or advice of the Police Service of Northern Ireland nor the gist thereof in advance of the Parade Commission's determination such as to allow him or his representatives to make representations in relation thereto.

(4) The applicant was neither informed of the factors weighing against his notification in the mind of the Parades Commission or the gist thereof in advance of the Parades Commission's determination such as to allow him or his representatives to make representations in relation thereto.

(5) The applicant has not been given adequate reasons for the Parades Commission's determination and in particular has not been given any or adequate reasons as to why the Commission had public order concerns about the proposed procession.

(b) The Parades Commission's decision were taken in breach of its duty to act in a procedurally fair manner and in particular were so taken by virtue of the matters set out at sub paragraphs (a) (iii) above.

(c) The Parades Commission has unlawfully fettered its discretion in relation to what information or evidence might be made available to a person wishing to organise a public procession in the course of his notification.

(d) The Parades Commission has failed to give adequate reasons for its decision and in particular has failed to specify within a degree of particularity the public disorder which may result from the proposed procession being permitted or the reason why it would not be possible to control such disorder in a manner proportionate to the exercise of the applicant's rights.

(e) The Parades Commission has used its powers under Section 2(2)(b) of the Act for an improper purpose that is to require a person wishing to organise a public procession to communicate with the local community.

(f) The Parades Commission's decisions and actions were disproportionate in all the circumstances.

(g) The Parades Commission's decisions and actions were unreasonable in the Winsbury sense.

[14] The applicant's grounds resolve to five main issues -

(1) The compatibility of section 8(6)(c) of the 1998 Act with Articles 9, 10 and 11 of the Convention.

(2) The validity of paragraph 4.4 of the guidelines.

(3) The purpose for which the Parades Commission made its determination.

(4) The proportionality of the interference with the applicant's rights.

(5) Procedural fairness in the making of the determination.

(1) Compatibility of section 8(6)(c).

[15] Section 8(6)(c) of the 1998 Act reflected the recommendations of the North report and introduced a statutory criterion that the guidelines shall in particular provide for the Commission to have regard to any impact which the procession may have on relationships within the community. The guidelines at paragraph 4 address this criterion as follows:-

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

4.2 Location and route - Where residents and parade organisers are in conflict over proposals for parades to pass through individual areas, the Commission will take account of the -

- Extent to which contested parts of the route comprise mainly residential or commercial property.
- Demographic balance among the residents in the immediate area surrounding any contested parts of the route.
- Presence of sites such as monuments or churches of other traditions or other sites associated with past events which give rise to sensitivity within the community.
- Purpose of the parade and whether the route is necessary or proportional to that.
- Availability of alternative routes which are not controversial.

4.3 Type and frequency of parades - The Commission recognises as a general principle that residents along the route of a parade have the reasonable expectation not to feel fear or a sense of intimidation because a parade is planned. Again, past events in the area will have a bearing on local sensitivities. In attempting to measure fear or sense of intimidation the Commission will take account of the -

- Notified purpose of the parade.
- Numbers notified to take part.
- Past experience of the manner in which previous parades have been conducted.
- Regalia associated with the parade.
- Nature and number of bands notified to participate and the type of music it is reasonably anticipated will be played.
- Frequency of such parades along the route.

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

4.5 The broader context - There are other important considerations in gauging the impact of parades on relationships within the community. In some areas there has been a long history of inter community strife, much of which precedes any contention about parades and has its roots in the longer term conflict which has taken place across Northern Ireland. The Commission will have particular regard to any history of conflict associated with a given parade; including advice from the PSNI, in considering the potential impact which a proposed parade may have on relationships within both the immediate community and the wider Northern Ireland community."

[16] Article 9 of the European Convention deals with the right to freedom of thought, conscience and religion as follows -

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

Article 10 provides for freedom of expression as follows:-

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

Article 11 deals with the right to freedom of assembly and association as follows -

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

In addition, Article 17 deals with the prohibition of the abuse of rights and Article 18 with limitations on the use of restrictions on rights as follows -

“17. Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

18. The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

[17] The permitted restrictions on the qualified rights under Articles 9, 10 and 11 include the prevention of disorder and the protection of the rights and freedoms of others. The applicant contends that any impact which a procession may have on relationships within the community is not a permitted aim of any interference with the qualified rights and thus the inclusion of section 8(6)(c) is incompatible with Convention rights. The applicant considers that the impact on relationships within the community is concerned first of all with preventing or restricting the possibility of offence or annoyance being caused to the objectors to the procession and secondly that it accords to the objectors the right to exercise a veto over or to influence those who seek to exercise the qualified rights. As neither of those matters is a legitimate aim of interference with the qualified rights the applicant contends that section 8(6)(c) imports an illegitimate purpose into the considerations of the Commission.

[18] The Commission’s determination at paragraph 18 states that on imposing conditions on the parade the Commission was pursuing the legitimate aims laid down in Articles 10(2) and 11(2) of the European Convention of seeking to prevent disorder and to protect the rights and freedoms of others. In considering its determination the Commission stated that it had regard to the guidelines, the human rights of others, the criteria specified in section 8(6) of the 1998 Act, the issue of engagement between the protagonists to the parading dispute and the scale of policing operations. It is evident from the terms of the determination that the impact on community relations was a significant consideration. This was expressed as a recognition of “the real possibility of damaging community relations with a consequential effect on the likelihood of public disorder” should the parade proceed (paragraph 14); that community relations in Dunloy would be significantly damaged by the parade and that would cause increased tension and disaffection “which would work against the building of an understanding that could support a long term pattern of parading” (paragraph 15).

[19] The respondent accepts that the impact of the procession on the relationships within the community was a factor in the determination and the view of the respondent is that an unrestricted procession would have an adverse impact on community relations. The respondent contends that the impact of a procession on relationships within the community is a proper factor to take into account in pursuing the legitimate aims of preventing disorder and protecting the rights and freedoms of others. The respondent regards an adverse impact on relationships within the community as adding to the potential for public disorder and affecting the rights and freedoms of others in relation to the maintenance of a peaceful and stable society.

[20] The applicant does not accept that section 8(6)(c) can be concerned with public disorder. Section 8(6)(a) provides that the Commission have regard to any public disorder or damage to property which may result from the procession and section 8(6)(b) provides that the Commission have regard to any disruption to the life of the community which the procession may cause. Accordingly the applicant contends that section 8(6)(c) must be concerned with matters other than public disorder or disruption to the life of the community. That being so the applicant considers that section 8(6)(c) is not directed to the legitimate aim of the protection of public order.

[21] Further, the applicant contends that there is no valid right or freedom of others that relates to relationships within the community. The determination refers to the rights of others under Article 8 and Article 1 of the First Protocol, but whether or not the objectors have a Convention right to be considered, interference with the applicant's Convention rights may be justified on the basis of the rights and freedoms of others arising outside the Convention. In Chapman v United Kingdom [2001] 33 EHRR 18 the applicant was described as a gypsy who was refused planning permission to live in a caravan on her own land. The European Court of Human Rights found that there was interference with the applicant's Article 8 right to respect for her private life, family life and home. It was held that the restrictions on planning permission pursued the legitimate aim of protecting the rights of others "through preservation of the environment". Mr Maguire for the respondent described the position of the ECtHR on the nature and extent of the rights and freedoms of others as being an "unfussy approach".

[22] In VGT Verein v Switzerland (28 Sept 2001) the applicant produced a telephone commercial promoting the protection of animals with particular emphasis on animal experiments and industrial animal production. There was a refusal to broadcast the commercial further to a legislative prohibition on political advertising. The ECtHR found interference with the applicants right to freedom of expression under Article 10 of the Convention. It was held that the interference was justified for the protection of the rights of others namely the prevention of financially powerful groups from retaining a competitive political advantage and to ensure the independence of broadcasters and to spare the political process from undue commercial influence and to provide for a degree of equality of opportunity among the different forces of society and to support the press which remained free to publish political advertisements.

[23] In Chassagnou v France [1999] 29 EHRR 615, the applicant land owner opposed hunting on ethical grounds but was obliged to transfer hunting rights over his land to approved municipal hunters associations and was made an automatic member of those associations and could not prevent hunting on his property. The ECtHR found an interference with the right to

freedom of association under Article 11 of the Convention by the imposition of the requirement to be a member of the hunters association. It was held that the interference was justified for the protection of the rights and freedoms of others, namely the need to protect or encourage democratic participation in hunting. At paragraph 113 the ECtHR noted that the rights and freedoms to be protected may themselves be among those guaranteed by the Convention or its protocols and it was precisely this constant search for a balance between the fundamental rights of each individual that constituted the foundation of a democratic society.

“It is a different matter where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect ‘rights and freedom’ not, as such, enunciated therein. In such a case only indisputable imperatives can justify interference with enjoyment of a Convention right.”

[24] The issue was considered by the House of Lords in R (Prolife Alliance) v BBC [2004] 1 AC 185. The applicant was a political party opposed to abortion and produced a video which the BBC refused to broadcast on the grounds of taste and decency, concluding that the material would be offence to public feeling and contravene the BBC’s legal obligations. The House of Lords upheld the BBC’s decision. Lord Scott at paragraph 91 stated that the reference in Article 10(2) to the “rights of others” need not be limited to strictly legal rights the breach of which might sound in damages, as it was well capable of extending to a recognition of the sense of outrage that might be felt by ordinary members of the public who, in the privacy of their homes, had switched on the television set to be confronted by gratuitously offensive material. Lord Walker at paragraph 123 stated:

“Nevertheless the citizen has a right not to be shocked or affronted by inappropriate material transmitted into the privacy of his home. It is not necessary to consider whether that is a Convention right (Mr Panick made a brief reference to Article 8 but did not seek to develop the point). Whether or not it is classified as a Convention right, it is in my view to be regarded as an ‘indisputable imperative’ in the language of the European Court of Human Rights in Chassagnou v France.”

Thus the concept of the rights and freedoms of others has a broad reach.

[25] The Court of Appeal considered section 8(6) of the 1998 Act in Pelan's Application [1996] NIJB 260. The Commission had decided not reroute a parade on the Lower Ormeau Road, Belfast and had considered the effect of its decision on the wider community outside the Lower Ormeau area. The applicant contended that the word "community" in section 8(6)(c) of the 1998 Act was limited to the inhabitants of the locality through which the proposed procession was to pass and further the Commission was confined to consideration of the factors contained in the guidelines to which it was to have regard. Carswell LCJ concluded that the word "community" was to be determined by the context in which it was used and could extend beyond the local community and at page 271D he continued -

"So in paragraph (b) of section 8(6) the disruption referred to appears to be primarily (though not exclusively) that which may occur in the life of those members of the community who live in the area through which the procession is to pass. When one turns to paragraph (c) however, it seems to us quite possible to interpret the word "community" as referring to a wider group."

[26] Further, the applicant in Pelan had submitted that paragraph 4.4 of the guidelines ("Communications with the local community") was ultra vires the Commission's powers. The Court of Appeal pointed out that section 8(6) merely requires the Commission to "have regard to" the factors specified. It does not follow that it is confined to consideration of those factors -

"It seems to us incontestable that the effect that the decision would have on relationships within the wider community was a factor relevant to the Commission's consideration of the application before it. In our opinion it was quite entitled to take that factor into account or to have regard to it, even if, contrary to our view it was not one of those falling within the wording of section 8(6). For this reason we consider that it is incorrect to suggest that paragraph 4.4 of the Commission's guidelines is ultra vires." (Pages 271 J to 272 B).

[27] The Court of Appeal returned to the interpretation of section 8 of the 1998 Act in Tweed's Application (2001) NI 165. This was an earlier application by the present applicant for leave to apply for judicial review of a decision of the Commission in relation to a parade in Dunloy on Sunday 29 October 2000. The Commission's determination prohibited the parade from entering any public place in the village of Dunloy in the interests of preventing disorder and protecting the rights and freedoms of others. The determination stated that in

considering whether the conditions that were introduced were necessary, the Commission considered that there would be an adverse impact on community relations both locally and wider afield if the parade were to follow its notified route. The applicant contended that the Commission had relied on matters outside the terms of the legitimate aims under Article 11(2) of the Convention, namely that while restrictions could be imposed to prevent disorder or to protect the rights or freedoms of others that did not extend to restrictions imposed in order to protect persons from being offended by the sight of others parading in support of a cause that they opposed. The Court of Appeal was satisfied that the basis of the Commission's determination was the risk of public disorder.

“[The Commission] was bound to have regard to the other matters specified in section 8(6) of the 1988 Act, but they did not form the ground for its decision to impose restrictions, which was placed firmly on the prevention of public disorder. The other considerations came into play in that part of the Commission's decision which was concerned with the issue of whether those restrictions were necessary in a democratic society and proportionate.

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

[28] Thus the decision in Tweed rejected the applicant's challenge on the basis first of all that the decision to impose restrictions was based on the

ground of public disorder and that consideration of relationships within the community related to the different issue of the necessity for restrictions and secondly that in considering the impact of the Convention the focus was on the substance of the decision, where the Court was satisfied that the restrictions were justified. As to the substance of the decision in the present case I refer to the discussion of ground (4) "Justification and Proportionality" below.

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

[30] Further consideration of relationships within the community may bear on the rights and freedoms of others. The rights and freedoms of others may extend to the continuation of the lawful activities of the residents, traders and visitors, all of which may in turn have to be limited by a procession. The rights and freedoms of others may also extend to the maintenance of an harmonious community, a peaceful and stable society and to mutual respect between the members of that society. A balance of the respective interests will be required. The applicant accepts that "community" in section 8 includes the wider community, although contends, contrary to the Court of Appeal in Pelan's Application, that the word community should bear a common meaning throughout section 8. As Carswell LCJ stated in Pelan the word community must take its meaning from the context and it may have a wider meaning in some parts of section 8.

[31] I accept the approach of the respondent and the notice party on this issue and am satisfied that section 8(6)(c) is not incompatible with the Convention.

(2) Paragraph 4.4 of the Guidelines.

[32] Paragraph 4.4 of the guidelines appears under the heading "Impact of the Procession on relationships within the community" being the terms of section 8(6)(c) of the 1988 Act which has been found above to be compatible with the Convention. Section 8(5) requires the Commission to have regard to

the guidelines in considering a determination and the conditions that should be imposed. Section 8(6) provides that the guidelines shall provide for the Commission to have regard to any impact which the procession may have on relationships within the community. Paragraph 4.4 of the guidelines dealing with “communication with the local community” is stated by the applicant to have three distinct limbs. First the Commission will take into account any communications between parade organisers and the local community or the absence thereof. Secondly the Commission will assess the measures, if any, offered or taken by parade organisers to address genuinely held relevant concerns of the members of the local community. Thirdly the Commission will consider the stance and attitudes of local community members and representatives.

[33] Once the impact that the procession may have on relationships within the community is found to be compatible with the Convention any considerations that are relevant to that impact should be taken into account. In determining that which is “relevant” for this purpose it will be noted that the impact on relationships within the community draws its compatibility with the Convention from the legitimate aims of preventing disorder and protecting the rights and freedoms of others.

[34] The applicant contends that it would not be Convention compatible for members of the local community to entertain concerns that they might be offended or annoyed by the manifestation of another’s religious beliefs or by the expression of another’s opinions or ideas or by the peaceful assembly or freedom of association of others no matter how much they dislike or disagree with them. Nor would it be Convention compatible for them to be concerned to exercise a veto over or to exercise influence upon the lawful exercise by others of Convention rights.

[35] The context in which parade disputes take place is relevant. Parades in Northern Ireland may be perceived by different members of the community as reflecting religious, cultural, social, sectarian, political or other matters. They may be seen as a traditional feature of religious expression or may give rise to a sense of community offence or annoyance that is not simply a response to the purported manifestation of religious belief but to more deep-seated community grievance. So while it may be accepted that there is no right not to be offended, that is an inadequate response to what may be happening. The offence and annoyance generated may be of such a nature and degree that it may impact on relationships within the local community and the wider community, which in turn may impact on the prevention of disorder and the rights and freedoms of others.

[36] The relevant concerns of the local community would include all parts of that community being accorded the respect of those who would organise and participate in processions and that there be engagement between those

processing and all parts of the community. The balance of interests that is an inherent part of all qualified Convention rights is a matter that ought first be addressed directly by those whose rights and freedoms are in conflict.

[37] The three distinct limbs of paragraph 4.4 of the guidelines are a legitimate measure of relationships and matters that require to be taken into account. Paragraph 4.4 is not incompatible with the legitimate aims of restrictions on Convention rights.

(3) The Commission's Purpose.

[38] The Commission has stated the purpose of its determination to be the pursuit of the legitimate aims of seeking to prevent disorder and to protect the rights and freedoms of others. The applicant contends that the true purpose of the Commission was otherwise, namely to prevent offence or annoyance to objectors, to give effect to Convention irrelevant views of objectors, to afford a veto or Convention improper influence to objectors, to pressurise the applicant to engage with residents, to influence relationships between the applicant and others, to influence relations between the police and others, to put pressure on the applicant to address Convention irrelevant concerns and to give effect to the stance and attitudes of local community members.

[39] In advancing this position the applicant relied on a number of documents that were prepared in advance of the determination.

First a public procession report prepared by the Police Service on 24 March 2004. This is a comprehensive document that sets out recent parading history, public disorder or damaged property which had previously occurred, a community impact assessment and a consideration of various Convention rights.

Secondly a situation report dated 24 March 2004 prepared by the Commission after discussions. It referred to the "communications strategy" adopted by the Orange Order in County Antrim and noted that a representative of the residents group in Dunloy considered that the communication strategy fell short of engagement with the local community.

Thirdly a Commission Secretariat paper of 30 March 2004 assessed criteria that were stated to be traditionality, impact on community relations, disruption to the life of the community, public order, disorder and damaged property and compliance with the code of conduct.

Fourthly a further situation report dated 2 April 2004 discussed a meeting with residents on 31 March. The applicant attached particular significance to a passage that indicated that a symbolic parade around the perimeter of the Orange Hall grounds would be acceptable to Dunloy residents. This was in effect the extent of the parade permitted by the

Commission's determination. The paper noted that the residents resisted any parade into the village unless the Orange Order first engaged in dialogue with residents. The report stated -

"The view was expressed that if a parade was permitted without prior dialogue between the Orange Order and residents, then the residents group which has the support of most residents along the proposed route would be effectively disenfranchised."

[40] Fifthly the applicant relies on the minute of a meeting between the Commission and police on 5 April 2004. It was noted that the proposed route meant that a large number of police and army resources would have to be utilised which could mean deploying 14 TSGs and approximately 300 officers and soldiers. The applicant noted that throughout the papers there was no suggestion that the police would be unable to contain any disorder that erupted. The applicant met the local police commander on 7 April 2004 and received an assurance that if the Commission permitted the parade to proceed the police would take every appropriate measure to protect those who were to process peacefully as well as the general public and that the police would be able to control the situation and keep the peace without having to deploy an excessively large policing operation. The applicant contended that there was a contradiction between the Commission's version of the operational needs for policing the proposed parade and the police assessment. I do not accept that that is the case. The police considered that they could control the situation without having to deploy an excessively large policing operation. The Commission noted that the policing operation could mean deploying 14 TSGs and 300 officers and soldiers. In police terms that was not considered an excessively large policing operation. Nevertheless it is a significant deployment and a matter that was taken into account by the Commission.

[41] Finally the applicant referred to that part of the Commission chairman's affidavit that deals with "engagement". The chairman, Sir Anthony Holland, accepted that the issue of engagement was a factor that the Commission took into account in making its determination. The applicant does not accept that engagement is a legitimate factor but for the reasons outlined above that approach is rejected.

[42] I do not accept that the matters outlined above undermined the Commission's stated position. The Commission took into account all the matters referred to above, which I am satisfied the Commission was entitled to do and that it did so in furtherance of its stated aims. It is not accepted that the Commission exercised its power to make the determination for an improper purpose.

(4) Justification and Proportionality.

[43] The applicant relies on Articles 9, 10 and 11 of the Convention. There is an absolute right to freedom of thought, conscience and religion under Article 9 but a qualified right to the manifestation of religion or belief in worship, teaching, practice and observance. The applicant contends that the parade from the Orange Hall to the church and back is a manifestation of religious belief. The respondent disputes that the actions of the applicant amount to a manifestation of religious belief and in any event rejects any interference by the respondent with the manifestation of any religious belief.

[44] The right to manifest religion or belief may be subject to limitations. In Kokkinakis v Greece [1993] 17 EHRR 397 the European Court of Human Rights stated:-

“31. As enshrined in Article 9 freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.

While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to ‘manifest (one’s) religion’. Bearing witness in words and deeds is bound up with the existence of religious convictions.

According to Article 9, freedom to manifest one’s religion is not only exercisable in community with others, ‘in public’ and within the circle of those whose faith one shares, but can also be asserted ‘alone’ and ‘in private’; furthermore, it includes in principle the right to try to convince one’s neighbour, for example through ‘teaching’, failing which, moreover, ‘freedom to change (one’s) religion or belief’, enshrined in Article 9, would be likely to remain a dead letter.”

[45] Article 9 was considered by the House of Lords in R (Williamson) v Secretary of State for Education and Employment [2005] 2 AC 246 in relation to teachers and parents in independent private schools who supported corporal punishment. From Lord Nicholls at paragraphs 23 and 32 a number

of propositions may be stated. First, when the genuineness of a professed belief is an issue the Court will inquire into and decide as a question of fact that an assertion of religious belief is made in good faith. That is not an issue in the present case. Second, it is not for the Court to embark on an inquiry into the asserted belief and judge its “validity” by some objective standard, as freedom of religion protects the subjective belief of an individual. Third, issues as to the manifestation of a belief must satisfy certain modest objective minimum requirements. The “threshold requirements” are that the belief must be consistent with basic standards of human dignity or integrity, it must possess an adequate degree of seriousness and importance and it must be intelligible and capable of being understood. Fourth, the conduct that constitutes the manifestation of a belief must be intimately connected to the belief. In deciding whether the conduct constitutes manifesting a belief in practice it is first necessary to identify the nature and scope of the belief. If the belief takes the form of a perceived obligation to act in a specific way then the act will be intimately linked to the belief and will be a manifestation of that belief. However a perceived obligation is not a prerequisite to manifestation of a belief in practice. I am satisfied that the procession, the purpose of which was stated by the applicant to be to attend a religious service on Easter Sunday, was a manifestation of religious belief.

[46] It is not every impact on the manifestation of religious belief that constitutes “interference” for the purposes of Article 9. To constitute sufficient interference for the purposes of Article 9 it must be shown that the Regulations interfere “materially, that is, to an extent which was significant in practice, with the claimant’s freedom to manifest their beliefs in this way” per Lord Nicholls in R (Williamson) v Secretary of State for Education and Employment. Section 548 of the Education Act 1996 was amended in 1998 to provide that corporal punishment by teaching staff in independent and State schools could not be justified. The Secretary of State contended that there was no interference with the manifestation of a belief in corporal punishment because section 548 did not interfere materially with the claimants parents manifestation of their beliefs as it left open to the parents several adequate alternative courses of action. The House of Lords did not accept that the suggested alternatives would be adequate and held that there had been interference with the belief.

[47] By contrast R (Begum) v Head Teacher and Governors of Denbeigh High School [2006] 2 All ER 487 concerned a school uniform requirement prohibiting the use of a Jilbab, a form of female dress which concealed the shape of arms and legs. The applicant had attended the school for two years and adhered to the dress code but then changed her position on the basis of religious belief. The majority of the House of Lords found that there had been no interference with her right to manifest her belief in practice or observance. It was noted that the Strasbourg institutions had not been at all ready to find an interference with the right to manifest religious belief in practice or

observance where a person had voluntarily accepted an employment or role which did not accommodate that practice or observance and there were other means open to the person to practice or observe his or her religion without undue hardship or inconvenience.

[48] I am satisfied that the determination of the Commission amounts to an interference with the applicant's right to manifest religious belief.

[49] Further the applicant relies on the right to freedom of expression under Article 10 of the Convention and the right to freedom of peaceful assembly and association under Article 11 of the Convention. The essence of the applicant's right concerns the right to freedom of assembly and association which includes the right to parade. I am satisfied that the determination of the Commission amounts to an interference with the applicant's right to parade.

[50] As well as being freestanding, the rights under Article 10 are connected to the exercise of the Article 11 rights. In Christians Against Racism and Fascism v United Kingdom (8440/78 of 16 July 1980) the police banned parades in an area of London for a stated period in exercise of statutory powers. The applicant claimed interference with Articles 10 and 11 of the Convention. The European Commission on Human Rights confined the examination of the application to the aspects concerning Article 11. The allegations under Article 10 were considered as subsidiary in relation to those concerning the right to peaceful assembly. It was stated that the problem of freedom of expression could not in that case be separated from that of freedom of assembly as guaranteed by Article 11 and that it was the latter freedom which was primarily involved.

[51] The applicant's rights are qualified rights which may be subject to restrictions that must first of all be prescribed by law, about which there is no dispute, secondly the restrictions must pursue a legitimate aim, in this case the prevention of disorder or crime or the protection of the rights and freedoms of others, and finally the restrictions must be necessary in a democratic society. Accordingly the basis of interference with the qualified rights is "necessity". This introduces the principle of proportionality, although it is not a word used in the Convention.

[52] The principle of proportionality has been restated by the House of Lords in Huang v Secretary of State for the Home Department [2007] UKHL 11. The overarching approach is "...the need to balance the interests of society with those of individuals and groups. This is indeed an aspect which should never be overlooked or discounted." It has been stated to be inherent in the whole of the European Convention that a fair balance be struck between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights (ECtHR

in Sporrong v Sweden [1982] 5 EHRR 35 at para 69 and the House of Lords in Razgar v Secretary of State for Home Department [2004] UKHL 27 para 20).

[53] Under the overarching approach of the need to balance public and private rights the ingredients of proportionality were stated in Huang at paragraph 19 to be -

- “Whether (1) the legislative objective is sufficiently important to justify limiting a fundamental right;
- (2) the measures designed to meet the legislative objective are rationally connected to it; and
- (3) the means used to impair the right or freedom or no more than is necessary to accomplish the objective.”

[54] The above ingredients have been drawn from Canadian, South African and Zimbabwean authority. In place of the third ingredient, sometimes described as minimal impairment, Canada and South Africa have outlined two matters, namely proportionate means and proportionate effects. I refer to the discussion in The Christian Institutes Application [2007] NIQB 66.

[55] It is well recognised that legislative and other decision makers enjoy a discretionary area of judgment, also described as deference, although that may have become unfashionable because of its connotation, and more recently described as latitude. Lord Carswell in Tweed v Parades Commission [2006] UKHL referred to the expression of the principle in Fordham, *Judicial Review Handbook*, (3rd ed, 2001), para 58.2,

"Hand in hand with proportionality principles is a concept of 'latitude', which recognises that the Court does not become the primary decision-maker on matters of policy, judgment and discretion, so that public authorities should be left with room to make legitimate choices. The width of the latitude (and the intensity of review which it dictates) can change, depending on the context and circumstances. In other words, proportionality is a 'flexi-principle'. The latitude connotes the degree of deference by court to public body."

[56] In summary the approach to proportionality requires consideration of-

- (1) The overarching need to balance the interests of society with those of individuals and groups.

- (2) The recognition of the latitude that must be accorded to legislative and executive choices in relation to the balance of public and private interests.
- (3) The legislative objective being sufficiently important to justify limiting the fundamental right.
- (4) The measures designed to meet the legislative objective being rationally connected to it, that is, the measures must not be arbitrary, unfair or based on irrational considerations.
- (5) The need for proportionate means being used so as to impair the right or freedom no more than necessary to accomplish the objective, that is, that the measures are the least intrusive, in light of both the legislative objective and the infringed right. The Court should consider whether the measures fall within a range of reasonable alternatives, rather than seeking to ascertain whether a lesser degree of interference is a possibility.
- (6) The need for proportionate effect in relation to the detrimental effects and the advantageous effects of the measures and the importance of the objective.

[57] The following are two examples of the approach of the European Commission and the European Court to the issue of disputed parades. In Christians Against Racism and Fascism v United Kingdom (8440/78 of 16 July 1980) the ECommHR upheld a general ban on London parades. It was stated that the possibility of violent counter demonstrations, with the possibility of extremists with violent intentions not members of the organising association joining a demonstration, could not as such take away the right to organise a peaceful demonstration under Article 11. Even if there was a real risk of a public procession resulting in disorder by developments outside the control of those organising it such procession did not for that reason alone fall outside the scope of Article 11. The legitimate aims of the restrictions on processions were the interests of public safety, prevention of crime or disorder and the protection of rights and freedoms of others. The ECommHR upheld the general ban on demonstrations because of the situation prevailing at the time, which was characterised by a tense atmosphere resulting from a series of riots and disturbances, the inability to prevent grave damage to persons and property despite very considerable police contingents having been deployed and the prospect of similar demonstrations being imminent in several districts of London where the most serious clashes that happened.

[58] In Ollinger v Austria (29/9/2006) the applicant proposed to hold a meeting at the Salzburg Municipal Cemetery in front of the War Memorial to commemorate the Salzburg Jews killed by the SS during the Second World War. The meeting was to coincide with a gathering of Comradeship IV in memory of SS soldiers killed in the Second World War. The applicant's meeting was banned and the ECtHR held the prohibition to be disproportionate. The ECtHR reiterated that Article 11 comprises negative

and positive obligations on the part of the State. On the one hand the State is compelled to abstain from interfering with the right, which also extended to a demonstration that might annoy or give offence to persons opposed to the ideas or claims that it sought to promote. It was stated that if every probability of tension and heated exchange between opposing groups during a demonstration was to warrant a prohibition, society would be faced with being deprived of the opportunity of hearing different views. States may be required to take positive measures in order to protect a lawful demonstration against counter demonstrations.

[59] Further in Ollinger Article 11 had to be considered in the light of Article 10 as the protection of opinions and the freedom to express them was one of the objectives of freedom of assembly and association enshrined in Article 11. In relation to Article 9 the responsibility of the State may be engaged where religious beliefs are opposed or denied in a manner which inhibits those who hold such beliefs from exercising their freedom to hold or express them and the State may be called upon to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs. (Paragraphs 36 to 39). The ECtHR found that the aim of protecting the gathering of Comradeship IV did not provide sufficient justification for the prohibition. It also had to be determined whether the prohibition was justified to protect the right of cemetery visitors to manifest their religion. The meetings were to take place on All Saints Day and disturbance in the cemetery was likely to offend the religious feelings of members of the public visiting the cemetery and would indisputably be regarded as disrespectful towards the dead soldiers of both World Wars and would be an unbearable provocation and may have led to protests by visitors to the cemetery which could degenerate into open conflict. The ECtHR noted a number of factors which indicated that the prohibition was disproportionate. The applicant's meeting was not directed against the cemetery visitors' beliefs or the manifestation of them. The applicant expected a small number of participants engaged in a peaceful and silent meeting and that while heated debates might arise it was not alleged that any incidents of violence had occurred on previous occasions. It was considered that preventative measures such as ensuring a police presence to keep the two assemblies apart was a viable alternative which would have preserved the applicant's right to freedom of assembly while at the same time offering a sufficient degree of protection to the rights of the cemetery visitors.

[60] In the present case the overarching approach to the interference with the applicant's rights is to balance the interests of the applicant in holding the procession with the general interest that is reflected in the interests of those affected by the procession, including the police and the general public. The public authority decision maker has been determined by parliament to be the Parades Commission and they should be accorded room to make legitimate choices in the exercise of their powers in relation to processions. The decision

maker has set out the considerations that led to the imposition of the restrictions on the procession. I have accepted the validity of the considerations for the reasons set out above. The objectives of the restrictions on the applicant's rights concerned the prevention of disorder and the protection of the rights and freedoms of others, both of which are legitimate objectives. The restrictions imposed on the procession were rationally connected to the objectives in that they were neither arbitrary nor unfair nor based on irrational considerations. There were proportionate means employed in that, in the context of the objectives and of the rights infringed, the restrictions were the least intrusive reasonably available in the circumstances. There were proportionate effects, given the balance of consequences in the context of the objectives. Accordingly, in all the circumstances of the case, I am satisfied that the restrictions were justified as being necessary in a democratic society.

(5) Procedural Fairness.

[61] The applicant contends that there has been procedural unfairness in two respects. First the failure of the respondent to provide to the applicant particulars of the matters adverse to the holding of the proposed procession and secondly the failure to give reasons for the restrictions imposed on the proposed procession.

[62] Public authority decision making may attract the requirements both of common law fairness and Convention fairness where Convention rights have a procedural aspect as well as a substantive aspect. The rules of procedural fairness include the right of a party to know and to respond to adverse considerations. As expressed by Lord Mustell in Doody v Secretary of State for the Home Department [1994] 1 AC 531:

“(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both.

(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is

informed of the gist of the case which he has to answer.”

[63] Thus the “gist” of the case to answer will “very often” be required and thus there may be cases where in the circumstances it is not required that the gist be provided. The requirements of fairness depend upon the context of the decision and that includes the character of the legislative framework within which the decision is taken. The legislative framework applicable in the present case is a regulatory system for the control of public processions in the interests of individuals concerned to promote the procession, those affected by the holding of the procession, the police who may be deployed on public order grounds, the Commission in being fully informed so as to enable it to carry out its statutory functions and the general public interest.

[64] Section 4 of the 1998 Act provides that the Commission shall issue a set of procedural rules for the purpose of regulating and prescribing the practice and procedure to be followed by the Commission in exercising its functions including determinations in respect of particular proposed public processions. The procedural rules provide at paragraph 3 under the heading “Taking evidence” at 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 applicant seeks a declaration that Rule 3.3 is unlawful ultra vires and of no force or effect.

[65] The Commission chairman defends Rule 3.3 in his replying affidavit. He states that the Commission attaches great importance to Rule 3.3 and that it has been the experience of the Commission that the confidentiality which the rule guarantees has encouraged a broad spectrum of human sources to supply the Commission with material information, views and representations. Those who provide relevant views and information to the Commission frequently express their concern about publication of their communications. The confidence is stated to be that of the supplier of the information and the Commission is not at liberty to breach such confidence at will. It is considered that if a confidentiality rule were not in existence it would significantly impair the frank and uninhibited disclosure of information to the Commission and this in turn would frustrate and compromise the performance of the Commission’s statutory functions. In

addition the Commission considers that it owes legal duties to those who provide it with information and that it must particularly respect and protect rights under Articles 2, 3 and 8 of the Convention. Any breach of the confidentiality rule would in many cases jeopardise the personal safety and security of persons supplying information to the Commission. It is noted that Rule 3.3 is not one sided in that it operates to protect the confidentiality of all information and views supplied to the Commission by parade organisers, their supporters and representatives.

[66] The Commission Chairman states that in any event the Commission frequently communicates with parade organisers and their representatives and attempts to provide all interested parties with a summary of the material information, views and representations which it has received and he continues

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“If the applicant or the lodge had attended a meeting with Commission in the context of the proposed procession, he and the lodge would have been provided with a summary of the material information, views and representations it had received. Such would have been discussed in general terms without prejudice to the operation of procedural Rule 3.3 discussed above.”

The applicant contends that had such summary of material information, views and representations been received it would in any event have been insufficient to enable the applicant to address properly the adverse considerations. In the alternative the applicant contends that the respondent could have provided the summary to the applicant in written form.

[67] In Donnelly’s Application [2007] NI QB Gillen J considered refusals of firearms certificates where the applicants had been informed in general terms that the basis of the refusal had been association with members of a prescribed dissident Republican organisation. The police and the Secretary of State sought to protect the confidentiality of information where it was claimed that disclosure may harm the public interest and stultify the purpose of the legislation. Gillen J emphasised the statutory context of the decision making process, being the regulation of the possession of firearms. He was satisfied that there would be occasions in which the public interest must prevail over the private interest to some degree. The gist of the case had been provided to the applicants, albeit in a diluted form. It was held to be appropriate that no further information be disclosed, as such disclosure would serve to undermine the purpose of the legislation and perhaps seriously impede firearms control.

[68] In the context of the present legislative framework I am satisfied that there are public interests grounds, as articulated by the Commission chairman,

for the evidence provided to the Commission, both oral and written, being treated as confidential. However, as the Commission chairman states, that does not prevent a summary of the material information, views and representations received by the Commission being disclosed to those proposing particular processions. While Rule 3.3 relates to the Commission expressing unattributed general views, but only as part of an explanation of its decision, it appears that in practice the summary of the material information, views and representations may be furnished by the Commission during the decision making process. The applicant elected to refrain from engaging in such communications with the Commission, when he would have had the opportunity to receive the potential fruits of such communication. In the circumstances there was no procedural unfairness.

[69] The applicant complains that the respondent did not provide adequate reasons for its determination. There is no general duty to give reasons for the decision. However procedure Rule 5.2 provides -

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

The written determination of the Commission of 11 April 2004 sets out the conditions placed on the organiser and participants in the proposed parade and the 20 paragraphs of text attached to the determination sets out the reasons.

[70] The adequacy of reasons was discussed by Lord Brown in South Bucks DC v. Porter [2003] 2 AC 58 at paragraph 36 -

“The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or,

as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.”

[71] I am satisfied that in the text of the determination the respondent has given adequate reasons for the decision, being reasons with which the applicant disagrees.

[72] I reject all of the applicant’s grounds. The application for judicial review is dismissed.