Hilary Term
[2017] UKSC 7
On appeal from: [2014] NICA 56

JUDGMENT

DB (Appellant) *v* Chief Constable of Police Service of Northern Ireland (Respondent) (Northern Ireland)

before

Lord Neuberger, President
Lord Kerr
Lord Reed
Lord Hughes
Lord Dyson

JUDGMENT GIVEN ON

1 February 2017

Heard on 15 November 2016

Appellant	*Respondent*
Karen Quinlivan QC Fiona Doherty QC (Instructed by Padraig O Muirigh Solicitors)	Tony McGleenan QC Joe Kennedy BL (Instructed by Crown Solicitors Office)

LORD KERR: (with whom Lord Neuberger, Lord Reed, Lord Hughes and Lord Dyson agree)

Introduction

1. The flags protest, as it has become known, took place throughout Northern Ireland in late 2012 and early 2013. The series of demonstrations and marches that the protest involved presented the Police Service with enormous, almost impossible, difficulties. They strove to deal with those difficulties by using different policing techniques and strategies; responding to intelligence reports; considering representations made by community leaders; continuously re-evaluating their decisions; and consulting interested parties who might contribute to the resolution of the problems caused by the protests. They also recorded the deliberations that they undertook and the consultations that they held within the Police Service. A great many police officers were deployed to police the demonstrations and marches. A considerable number of them sustained injuries. Assiduous detection of offenders and their prosecution continued throughout this unhappy time.

2. There can be no reasonable suggestion, therefore, that the police failed to treat the control of parades and demonstrations with sufficient seriousness. They were obviously exercised at an early stage, and throughout the period when the parades and the disorder took place, to seek to control the marches and to minimise the disorder to which they gave rise. It is also clear that police were constantly concerned about the risk of greater disorder occurring with the consequent risk to life which might accrue if they tried to prevent the parades from taking place altogether, rather than policing and controlling them as best they could. This case is not about the sincerity and authenticity of the efforts made by police to control the parades. It is about their conception and understanding of the powers available to them to do so.

3. The various managerial and strategic steps undertaken by the police and the tactical decisions made on foot of them reflect the standards required of and the demands made on a modern police force. It is also, of course, necessary for a police force in our society to have a proper understanding of the extent of the legal powers available to them in order to discharge their duties effectively and fairly in service of the community. The question whether the Police Service for Northern Ireland ("PSNI") was sufficiently aware of the full range and scope of those powers is now the principal issue in this appeal.

4. This was not always the position. Application for leave to apply for judicial review was first made on 31 January 2013. Its primary focus was on obtaining relief in relation to a planned parade on 2 February and challenging the failure of PSNI to give assurances that they would take action to prevent that parade from taking place. The statement served in support of the application under Order 53 of the Rules of the Court of Judicature of Northern Ireland (1980) did, however, contain the claim that the failure of PSNI to prevent the parade had the effect of undermining the Public Processions (Northern Ireland) Act 1998 and that it constituted a breach of their obligations under section 32 of the Police (Northern Ireland) Act 2000.

5. As the case progressed and the reasons that the police had not taken action to stop various parades became clear, the emphasis has shifted to an attack on PSNI's failure to recognise and make use of legal powers available to it to prevent the parades from taking place. It is still argued that that failure has undermined the efficacy and proper functioning of the 1998 Act. It is also claimed that the operational decisions of the police have not been proportionate. But these latter arguments have featured somewhat less prominently in the appellant's presentation of his appeal before this court.

6. The application for judicial review had also sought orders against the Secretary of State for Northern Ireland for failing to exercise her powers under section 11 of the 1998 Act to prohibit the holding of the procession. That particular application was dismissed. There is no appeal from that dismissal and nothing more need be said about it.

The historical setting

7. For a number of years before 1998, considerable public disorder and community conflict were regular features of many contentious parades in Northern Ireland. Until the enactment of the 1998 Act, the police were responsible for deciding whether parades should be permitted to proceed. This placed them in a wholly invidious position. Their impartiality was questioned and they were accused of taking sides both in permitting some parades to proceed and banning others. It was against this background that a report was commissioned by the government into what should be done about the management and control of public processions in Northern Ireland. The chairman of the body which produced the report was Dr Peter North and the report has become known as "the North report". Some details about the recommendations which the report contained are given at paras 45-49 below.

8. The 1998 Act created a new public body, the Parades Commission. The commission was charged under section 8 with the function of controlling parades by means of conditions regulating their conduct, imposed on those who organised them.

The commission did not have power to prohibit a procession. The Secretary of State did have such a power under section 11, on specific grounds, but it has never been exercised.

9. A key part of the scheme of the 1998 Act was that control of parades would be achieved by conditions imposed by the commission. In order for that vital element to work, a statutory duty (section 6(1)) was placed on those proposing to organise a public procession to give advance notice of that proposal to a member of the police force. By section 6(7) it was made a criminal offence to organise or to take part in a public procession which had not been notified. It was also an offence to fail to comply with any conditions imposed. None of the flags parades in Belfast was notified to the commission.

10. Under the general law the police have a duty to prevent the commission of offences. That fundamental duty of the police, inherent at common law, is expressly confirmed by section 32 of the 2000 Act. There was power, therefore, to prevent a parade from taking place on the grounds that it was likely to result in public order offences. But under the 1998 Act there was also power to prevent the commission of the offence of processing in an un-notified parade. The complaint which is made of the police in the present case is that they were conscious of the first of those powers, but they did not properly appreciate the existence and significance of the second.

The factual background

11. Until 3 December 2012 the Union flag flew over Belfast City Hall throughout the year. On that date the City Council decided that the flag should fly on certain designated days only. That decision sparked a wave of protests throughout Northern Ireland which continued for some months. The present appeal is concerned with those protests which took place in Belfast and the policing operations that were undertaken to deal with them.

12. After 3 December 2012, the protests in Belfast quickly took on a pattern. Every week, protesters marched from a meeting point in East Belfast to Belfast City Hall which is located in the centre of the city. That route took them through part of the city known as Short Strand. Most residents in the Short Strand area are perceived to be nationalist. Those taking part in the processions were loyalists. When the protesters who had processed from East Belfast assembled at the City Hall, they were joined by others who had found their way to the city centre by other means. Some at least of these others joined the protesters from East Belfast on the march back after the protest. Considerable numbers were involved in the parade which passed through the Short Strand on its return to East Belfast, therefore. There was

substantial violence and disorder as the parade went through that nationalist area. Sectarian abuse was directed at the residents of Short Strand; stones and other objects were thrown at them; and their homes were attacked. The appellant is a resident in Short Strand and his and his neighbours' homes have come under attack during the parades that took place during December 2012 and January 2013.

13. On 4 December 2012 an initial decision was made that protesters should not be permitted to enter Belfast city centre on Saturday 8 December when, as police knew, a protest at the City Hall was planned. That decision had nothing to do with stopping a parade or march. It was taken because it was considered necessary to prevent disorder. It was felt that the "normal life" of the city centre should be maintained because of the number of families and other members of the public who would be gathered there "at a peak retail period". The reputation of the city at a time when inward investment was being encouraged was also a consideration.

14. In the period between 6 and 8 December police reflected on this decision. That reflection led to a change of mind. In an entry of 7 December 2012 in an Event Policy Book maintained by PSNI, the change in decision was explained. It was considered that there was "a need to try and facilitate some form of protest at Belfast City Hall to allow for some venting of anger and [relief of] community tension on this issue".

15. The parades therefore began on 8 December 2012 and, as earlier noted, quickly developed into a weekly pattern. They continued until March 2013. Social media alerted those who wished to participate of their timing and organisation. Until March 2013, police took no action to stop them.

The affidavit evidence of Assistant Chief Constable Kerr

16. Soon after it had begun, a police strategy to deal with the flags protest was devised. This was called "Operation Dulcet" and its leader, designated Gold Commander, was Assistant Chief Constable Will Kerr of PSNI. Chief Superintendent Alan McCrum was appointed Silver Commander. In a series of affidavits filed in these proceedings, Mr Kerr has described how the police developed and implemented plans to deal with the protest. In the first of these he suggested that police have "no specific power to ban a procession" under the relevant legislation. He stated that PSNI seeks to enforce conditions imposed by the Parades Commission or a prohibition order by the Secretary of State for Northern Ireland. Such an order may be made by the Secretary of State under article 5(1) of the Public Order (Northern Ireland) Order 1987 (SI 1987/463 (NI 7)) in respect of open air public meetings. Significantly. Mr Kerr stated that "in the absence of either

a Parades Commission determination or prohibition from the Secretary of State, PSNI can only have recourse to general public order policing powers".

17. Having referred to a statement issued by the Parades Commission on 22 February 2013 (in which, among other things, the commission said that the "event" in East Belfast had not been notified). Mr Kerr made the following statements in paras 21 and 22 of his affidavit:

> "21. This being the case and there having been no determinations upon any of protests which have taken place close to the Short Strand area, the PSNI have had to police the situation in line with their powers outside of the statutory scheme contained in the [Public Processions (Northern Ireland) Act 1998].
>
> 22. PSNI also have regard to our general functions as contained in Section 32 of the Police (NI) Act 2000 ('the P(NI)A') wherein the general duties of the police are set out ie to protect life and property, to preserve order, to prevent the commission of offences and, where an offence has been committed, to take measures to bring the offender to justice. Human Rights considerations are included in decisions made in respect of public order issues such as have arisen during the flag protests. This includes but is not necessarily limited to article 2 Rights (Life) wherein public order disturbances can put this right at risk along with the article 8 Rights (Private Life) of persons in the community and the article 11 Rights (Assembly) of the protesters. The interaction between these competing rights and the status of article 8 and 11 rights as being qualified are all taken into account when operational decisions are being made."

18. Later in the same affidavit Mr Kerr said that where a public procession is not notified under the Public Processions (Northern Ireland) Act 1998, those organising the parade committed an offence under the Act. Tellingly, however, he continued, "The role of PSNI in such situations is to collect evidence of such offences and refer them to the prosecuting authorities while also employing public order and common law powers to keep the peace" - para 39.

19. In a second affidavit, Mr Kerr said that PSNI had "consistently held the view that parades can be stopped but not solely because they are unnotified." In February 2013, a change in police policy in relation to the flag protests and in particular the

marches coming from and returning to East Belfast occurred. Mr Kerr explained how this came about in para 17 of his second affidavit:

> "On the 14th of February, as part of the ongoing strategy review, several changes were adopted, one was in respect of the protests processing into the city centre and the other regarded the charging policy … The considerations resulting in the decision to stop the unnotified parade included the fact that protests were continuing although with lower numbers, the views of the CNR [Catholic/Nationalist/Republican] community that the protests should be stopped, the wider attitude in the PUL [Protestant/Unionist/Loyalist] community that the protests had run their course and the likely reaction from Loyalists would not be extreme as had been the case in or around the 6th of December. In addition, the wish to have a break in time between the protests and the main marching season, the lack of any proper structure in the protests groups whereby an agreed cessation could be settled, the resource considerations in terms of our ability to manage and contain any problems associated with stopping the protests and the impact upon the residents of the Short Strand of the ongoing protests."

20. It should also be noted that what he described as the article 2 risks weighed heavily with ACC Kerr in deciding to permit protestors in the city centre. In an affidavit he said:

> "Between the 6th of December and the 8th of December, the decision not to permit flag protestors to move into the city centre was changed. The rationale for this change was that risks associated with doing so were too great. The intelligence at the time informed us that had we stopped the protests from going into the city centre that the risk to life posed by the resultant disorder and violence posed too great an article 2 risk."

The Service Procedure and the Event Policy Book

21. PSNI maintains a service procedure which gives guidance for dealing with "public processions and protest meeting applications". It is also intended to provide "advice on the interaction between the Parades Commission and PSNI". The service procedure was issued on 31 March 2008 and amended and reissued on 9 June 2011. An event is defined in the procedure as including any event or incident ranging from

routine operational policing through to major disorder requiring a degree of planning. When an event has been notified or the police become aware of an intended event, a strategy meeting is held. At the first such meeting an Event Policy Book is opened. Strategic decisions concerning the way in which an event is policed should be recorded in this book. These include major decisions which have an impact on an established strategy; major tactical decisions; any change in strategy; and any issue or decision which may have legal consequences not already addressed in the strategy plan.

22. Between 4 December 2012 and 30 April 2013, no fewer than 67 decisions were taken as to how the parades and the associated disorder would be policed. A record of each of the decisions taken and the reasons for them was made in the Event Policy Book. We were referred to several of these. It is not necessary to advert to more than a few of them.

23. On 6 December 2012 Mr Kerr, in an email to police colleagues about the "movement of groups of protesters from various parts of the city towards Belfast City Hall", referred to "the rights and presumptions (*sic*) to peaceful protest, outlined in articles 9 to 11 of ECHR". He pointed out that these were not absolute rights and that the degree of disorder experienced during protests on earlier evenings justified preventing "known groups of protesters (from either community)" from entering Belfast city centre. This was cited as an example of Mr Kerr's appreciation that the police were entitled to stop unnotified processions or parades. It is plainly not that. To the contrary, the entire tenor of the email is directed towards the public order powers of the police to prevent disorder even where that takes place under the guise of the right to protest. The record of decision appearing in the Event Policy Book of the same date to the effect that a "Gold Direction" was issued to prevent large numbers of protesters moving towards the city centre prompts the same conclusion. It does not address the question of parades at all, much less the legal powers of police to stop them.

24. A change to the Gold Strategy was introduced in January 2013. This had two aspects: more proactive engagement with protest groups so as to convey to them that blocking the road was against the law; and avoiding the public impression that police were "doing nothing". Again, no reference was made to the circumstance that participating in an unnotified parade was a criminal offence and that, where such an event was reasonably apprehended, the police had powers to prevent it.

25. In January 2013, representations were received by PSNI from local representatives of the Short Strand area in which it was suggested that police were facilitating illegal parades. As is clear from the record of decision in the Event Policy Book of 22 January 2013, instead of prompting PSNI to examine its legal powers to stop an unnotified parade, this led to a discussion between ACC Kerr and the Chief

Constable that "the appropriate means and mechanism" to determine how the Public Processions (Northern Ireland) Act should be complied with was for PSNI and the Parades Commission to seek legal advice. It had been agreed between the chairman of the commission and Mr Kerr on 15 January 2013 that both sides should take advice. A letter from Chief Superintendent McCrum to the chairman of the commission on 19 January 2013 stated that un-notified processions that had been occurring every Saturday were likely to continue and that the commission might wish to take legal advice as to whether it "should be considering these in line with the Public Processions (Northern Ireland) Act 1998." This was followed up by a letter in much the same terms on 23 January.

26. On 12 February 2013 Mr Kerr and another senior police officer met a member of the Legislative Assembly of Northern Ireland who expressed concern about police decisions "to facilitate the weekly parade past Short Strand". The Event Policy Book's record of this meeting is to the effect that there were policing challenges in dealing with these events, Human Rights Act considerations and "gaps" in the Public Procession legislation. On 13 February 2013, a record was made that Mr Kerr was considering whether judicial review proceedings should be brought on behalf of PSNI in order to obtain "clarity on powers under the Public Processions Act". It was suggested that a judicial review application might act as "a catalyst to have weak legislation … reviewed and possibly amended."

27. On 14 February 2013 the Events Policy Book recorded for the first time discussion of stopping the parade. Even then, there was no reference to police powers to stop a parade which, because it had not been notified, was illegal. Indeed, it referred to the "absence of a legislative (regulatory) fix" under the Public Processions (Northern Ireland) Act.

ACC Kerr's press interview

28. On 16 February 2013, a local paper, the Irish News, published a report of an interview which one of its journalists had had with Mr Kerr on 14 February. An incomplete transcript of the interview and handwritten notes made by PSNI staff are available. In the course of the interview, Mr Kerr is recorded as saying that a difficulty with the Public Processions Act was that it was "predicated at least in part that everybody will consent to being regulated by that means … [and] if some people decide that they don't want to be regulated by those means it leaves a gap and that gap at the minute is defaulting to policing and we don't find that acceptable."

29. Later in the interview Mr Kerr said that there was "no such thing as an illegal parade under the Public Processions Act, it doesn't exist." He also said that the

police had "no power to stop an illegal parade under the Public Processions Act, the offence is taking part in an un-notified parade."

30. On the contact between the police and the Parades Commission the Assistant Chief Constable said that they had written to the commission in the hope that it would take responsibility for dealing with the parade. The situation was "legally complex" and that police would welcome "some judicial clarity" on what exactly the Public Processions Act allowed people to do. The principal concern of the police was not to be placed in the position of having to decide whether a parade should be permitted to take place because they could "only make the decision based on a risk or threat to life".

The proceedings

31. The application for judicial review generated a substantial number of affidavits. Apart from those of Assistant Chief Constable Kerr, the most significant of these relate to exchanges between police and a local Sinn Fein councillor, Niall O'Donnghaile. His council area includes Short Strand. He wrote to Chief Superintendent McCrum on 8 January 2013 asking for information about notification of the parades. He also inquired about the action PSNI intended to take in the event that no notification had been given. In his response of 19 January Mr McCrum confirmed that no notification of the parades had been received. In relation to the action to be taken by PSNI, he said this:

> "As regards the responsibility of PSNI to ensure that parades and protests which have previously resulted in disorder do not occur again, it is important to remember that PSNI do not authorise parades or protests. I am sure you will agree with me that it would be inappropriate in a democratic society for the police to determine when people can protest. However, it is important that the police take all feasible steps to maintain order and PSNI are committed to continuing to do so."

32. Again, as in the affidavits of ACC Kerr, no reference was made to the fact that, by reason of the illegality of the parades under the 1998 Act, the police could resort to common law powers and the statutory duty arising under section 32 of the Police (Northern Ireland) Act 2000 to stop them from taking place. The emphasis was, as before, on the maintenance of order.

33. In a careful and comprehensive judgment, [2014] NIQB 55, Treacy J reviewed the relevant provisions of the 1998 Act; he referred to section 32 of the

Police (Northern Ireland) Act 2000 which provides, among other things, that it is the general duty of police to prevent the commission of crime; and he considered the powers of arrest at common law referred to in article 26 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (SI 1989/1341 (NI 12)) to prevent an imminent breach of the peace. The judge also painstakingly examined all the evidence in the case, and in much greater detail than I have considered necessary for the purposes of the appeal. He summarised the appellant's submissions in a series of propositions. A simple paraphrase of those may be expressed thus:

1. In failing to stop the weekly parades, PSNI had undermined the 1998 Act;

2. The police had been wrong to conclude that they did not have power to stop the parades;

3. ACC Kerr had misunderstood the qualified nature of article 11 of ECHR;

4. The attacks on the appellant's home engaged his right under article 8 of ECHR. The state (in the form of its police force) had failed to discharge its positive obligation to protect him from unjustified interference with that right;

5. Operational decisions taken by PSNI were not immune from challenge on the basis that they were taken within an area of discretionary judgment since that had been wrongly informed by the belief that there was no power to stop the parades; and

6. Operational discretion does not, in any event, provide an automatic and blanket immunity - *H v Commissioner of Police for the Metropolis* [2013] EWCA Civ 69; [2013] 1 WLR 3021. The circumstances of the present case were quite different from those of *E v Chief Constable of the Royal Ulster Constabulary* [2009] AC 536 where the appellant had to surmount the high hurdle of showing that there was a positive obligation to prevent article 3 ill-treatment. Furthermore, unlike the position in the present case, there was a substantial body of evidence in *E v Chief Constable of the Royal Ulster Constabulary* that policing the operation in that case differently might have led to an extension of the protest to other locations and resulted in a risk to lives of other civilians.

34. Treacy J concluded that, in the period between 8 December 2012 and January 2013, ACC Kerr did not consider the option of stopping the weekly parades. PSNI did not behave in a proactive manner to arrest and prosecute those who were organising and participating in the parades. When he did come to consider police action to stop them, Mr Kerr wrongly believed, the judge held, that he was inhibited from doing so by the 1998 Act. The police officer was "labouring under a material misapprehension as to the proper scope of police powers and the legal context in which they were operating." - para 127 of the judgment. The judge further found that no evidence had been presented to him as to why police had "repeatedly permitted violent loyalist 'protesters' to participate in illegal marches both to and from Belfast City Centre on every Saturday between 8 December and 14 February …" - para 122 of his judgment.

35. The judge found that a failure to notify the Parades Commission of an intended parade invests the police with powers to prevent it from taking place. These were equivalent to the powers available to police when parade organisers and participants arrange and take part in parades where conditions imposed by the Parades Commission had not been observed - para 134 of his judgment. ACC Kerr's purported distinction between the two scenarios was unsustainable, the judge said. "Whether a parade was unlawful by reason of breach of a Parades Commission determination or because of a decision to flout the notice requirement, should not have led to a different police response. In each case the expectation is that the police will seek to uphold the rule of law." - para 135. The consequence of the police's failure to appreciate the extent of their powers to deal with the criminal offences of organising and participating in non-notified parades had the effect, in the estimation of the judge, of undermining the 1998 Act; it had led to a failure on the part of the police to act in accordance with their obligations under section 32 of the Police (Northern Ireland) Act 2000 and it gave rise to a violation of the appellant's article 8 rights - para 137 of the judgment.

36. The Court of Appeal (Sir Declan Morgan LCJ, Girvan LJ and Weir J [2014] NICA 56) allowed the Chief Constable's appeal against the judgment of Treacy J. The Lord Chief Justice, delivering the judgment of the court, also carefully rehearsed the evidence about the various parades and the action taken by police in relation to them. He quoted from a letter of 31 January 2013 sent by PSNI to the appellant's solicitors in response to their pre-action protocol correspondence. In it the police had said:

> "Professional policing decisions dealing with public order issues are extremely complicated and require the balancing of a wide range of competing interests. As recognised by the European Court of Human Rights in its decision on the admissibility in *PF and EF v United Kingdom* (23 November 2010) to require 'the police in Northern Ireland to forcibly end

> every violent protest would likely place a disproportionate burden on them, especially where such an approach could result in the escalation of violence across the province. In a highly charged community dispute, most courses of action will have inherent dangers and difficulties and it must be permissible for the police to take all of those dangers and difficulties into consideration before choosing the most appropriate response'."

37. At para 34 of the judgment the Lord Chief Justice said that the central issue in the case was whether the police response to the parades was based on the need to take account of "the possibility of violence and disorder giving rise to article 2 risks both in the immediate vicinity and in the wider Northern Ireland community". For reasons that I will give presently, I do not consider that this was in fact the central issue in the appeal.

38. Having taken this as the starting point, the judgment proceeded to examine the operational decisions taken by the police. This examination was conducted against the backdrop of the decision of the House of Lords in *E v Chief Constable of the Royal Ulster Constabulary* [2008] UKHL 66; [2009] AC 536 in which Lord Carswell, drawing on the judgment of the European Court of Human Rights in *Osman v United Kingdom* (1998) 29 EHRR 245, alluded to the many practical difficulties that confronted police in dealing with protests and making arrests in situations of riot or near riot. Having referred to Lord Carswell's opinion on this question, the Lord Chief Justice stated that the same approach should be taken by the Court of Appeal "in considering the police conduct in this case". It should also be borne in mind that section 32 of the 2000 Act did not impose a requirement to intervene on every occasion when a crime was being committed. The police had, he said, "a wide area of discretionary judgment as to how they should respond" - para 41 of the judgment.

39. In relation to Treacy J's conclusion that ACC Kerr had not addressed the question of whether to stop the weekly parade, the Lord Chief Justice said that "strategy documents indicate that there was ongoing consideration of the manner in which this situation, which at that time extended throughout Northern Ireland, should be managed." - para 46.

40. Commenting on the judge's view that ACC Kerr wrongly felt himself inhibited by the 1998 Act from taking action to stop the parades, the Lord Chief Justice suggested that this conclusion was based on two, essentially misconceived, considerations. The first was that Mr Kerr had said, when interviewed by the Irish News, that he had no power to stop an unnotified parade; the second was that the

assistant chief constable had sought to encourage the Parades Commission to take action in relation to the parades - para 49.

41. Dealing with the first of these reasons, the Lord Chief Justice said (at para 47 of the judgment):

> "The interview on which the article was based explored a number of aspects of the unnotified parades. ACC Kerr sought to promote the primacy of the Parades Commission in the regulation of all parades. He indicated that police did not want to find themselves in the situation they were in prior to the 1998 Act. It was against that background that he noted that police did not have power to stop an illegal parade under the 1998 Act. He was correct about that. Such power lay only with the Secretary of State. He noted that the offence under the Act was taking part in an unnotified parade. That again was correct. He went on to indicate that police were faced with having to make decisions about the appropriate response to such parades on the basis of a risk or threat to life. We do not consider that any criticism can be made of that."

42. The difficulty with this passage is that it does not address the point that Treacy J had made. This was that, because ACC Kerr had not adverted to the provision in the 1998 Act which made it illegal to organise or participate in an unnotified parade (section 6(7)), and had failed to recognise that this provided police with the power (and, indeed, the duty under section 32 of the 2000 Act) to prevent this particular species of criminal activity, the option of stopping the parade for that reason was not considered. Contrary to what the Lord Chief Justice said, the police *did* have power to stop an unnotified parade precisely because participating in such a parade was a criminal offence. Police have common law powers to prevent crime, quite apart from their duty to do so under section 32.

43. The Lord Chief Justice said, in para 48, that ACC Kerr had initially decided to prevent the parade coming into the centre of Belfast "which itself was an indicator that he recognised his power to stop it." As pointed out in para 23 above, however, a proper understanding of what was said by Mr Kerr in his email of 6 December 2012 and the entry in the Event Policy Book of the same date, leads inevitably to the conclusion that the police were not exercised about the question of stopping a parade at all. Their concern was to prevent disorder in Belfast city centre and to stop protesters converging there. Discussions about the tactical approach did not take place in the context of an anticipated parade.

44. On the second reason for the judge's conclusion (the attempt by ACC Kerr to engage the Parades Commission to deal with the unnotified parades), the Lord Chief Justice said this at para 49:

> "[Mr Kerr] hoped to persuade [the commission] that there was some mechanism by which they could become involved in the determination of the action to be taken in respect of such parades. That certainly was the intention of the North Committee. It is, however, agreed that there is no mechanism by which the Parades Commission can take decisions for unnotified parades. The management of such parades is the responsibility of the police on the basis of their general public order powers and their obligation to prevent crime including crimes under the 1998 Act."

45. Again, this does not deal directly with the judge's consideration of the issue. Treacy J had raised the question (in para 129 of his judgment) of Mr Kerr having suggested that the Parades Commission take responsibility when, given that the commission had no role because of the lack of notification about the parades, the only agency that had the legal authority to stop the parade was PSNI. The circumstance that it had been the intention of the North Committee that the Parades Commission should be involved in the regulation of non-notified parades is not relevant to ACC Kerr's attempt to persuade the Parades Commission to do what legally it could not. Trying to get the commission to intervene betokened a failure on the part of Mr Kerr to understand that it was the police, not the commission, who had responsibility under the law to prevent the parades from taking place.

46. In para 52 of the Court of Appeal judgment it is stated that that court had seen a transcript of the interview of ACC Kerr by the Irish News and that this was not available to Treacy J. In the same para it is also suggested that the Court of Appeal had been taken through the police strategy documents and the Events Policy Book in greater detail than had been opened to the trial judge. Ms Quinlivan QC, who appeared for the appellant, disputed both those statements. It is not possible to assess how detailed was the consideration before the judge of the various strategy documents etc. But it is abundantly clear (and not disputed by Mr McGleenan QC for the respondent) that the judge had seen the transcript of the interview. Indeed, he quoted from it in para 73 of his judgment.

47. The Court of Appeal concluded that the 1998 Act had not been undermined by the decisions and actions of the police in relation to the parades. It also decided that the steps taken by the police to protect the article 8 rights of the appellant and other residents of Short Strand were proportionate.

The North report

48. In August 1996 the government commissioned an independent review of contentious parades and marches in Northern Ireland. As earlier noted, the body convened to conduct the review was chaired by Dr Peter North and its report, published in January 1997, has become known as the North report. The Public Processions (Northern Ireland) Act 1998 implemented the report, although not all of its recommendations found their way into the legislation.

49. Before the 1998 Act police had responsibility for imposing conditions on public parades. Article 3(1) of the Public Order (Northern Ireland) Order 1987 required a person proposing to organise a public procession to give seven days' written notice of that proposal to the police. Article 4 of the 1987 Order provided:

> "(1) If a senior police officer, having regard to the time or place at which and the circumstances in which any public procession is being held or is intended to be held and to its route or proposed route, reasonably believes that -
>
> > (a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community; or
> >
> > (b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do,
>
> he may give directions imposing on the persons organising or taking part in the procession such conditions as appear to him necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the route of the procession or prohibiting it from entering any place specified in the directions."

50. The North report concluded that a new independent body was required which would replace the police as the organisation to decide whether a parade would take place and, if so, under what conditions. The report was not solely concerned with the identity of the body that would take decisions about whether parades should be permitted to take place and under what conditions they ought to be allowed to proceed. Public order considerations, which were intrinsic to the operation of the

police powers to control processions under the 1987 Order, were no longer to be the sole driver for determining whether and in what circumstances parades should be permitted to take place, although the report did recommend that the police should retain the power to intervene on public order grounds in "the extreme circumstances of the determination of the Parades Commission being defied" - Chapter 12 para 12.124 of the report. Generally, however, the report considered that putting emphasis on the question whether a particular parade might cause disorder ran the risk of rewarding threats that such disorder would take place. New criteria were required which should include the need to have regard to the impact that a parade would have on relationships within the community.

51. The North report envisaged that parades should come to the Parades Commission's attention in any one of three ways - first on referral by the police; second on the initiative of the commission itself; and third as a result of public representation -Chapter 12 paras 12.55 *et seq*. As it happened, however, the structure of the 1998 Act did not cater for the commission having power to make determinations in relation to processions unless the police had been notified of a parade and had sent a copy of the notice to the commission thereby triggering their powers.

The Public Processions (Northern Ireland) Act 1998

52. The Parades Commission was established by section 1 of the 1998 Act. Its functioning in relation to controlling public processions depends on receipt of a notification of an intention to hold a parade. Section 6(1) of the Act provides that a person proposing to organise a public procession shall give notice of that proposal to a member of the police force; within a stipulated period (section 6(2)); in a prescribed form (section 6(3)); and providing certain specified information (section 6(4)). By virtue of section 6(6) the Chief Constable is to ensure that the Parades Commission is provided with a copy of the notice immediately.

53. Section 6(7) makes it an offence to organise or take part in a procession that has not been notified. It provides:

> "(7) A person who organises or takes part in a public procession -
>
> > (a) in respect of which the requirements of this section as to notice have not been satisfied; or

> (b) which is held on a date, at a time or along a route which differs from the date, time or route specified in relation to it in the notice given under this section,
>
> shall be guilty of an offence."

54. Section 8 gives the commission powers to impose on persons organising or taking part in "a proposed public procession" such conditions as it considers necessary. These may include conditions as to the route of the procession and prohibiting it from entering any place. Section 9 gives the Secretary of State power to review a determination by revoking or amending it. Section 11 empowers the Secretary of State to ban processions in certain circumstances. This provision has not been invoked during the life of the commission.

55. Although article 4(1) of the 1987 Order was repealed by the 1998 Act, the recommendation that had been made in the North report that police should retain the power to intervene on public order grounds if the determination of the Parades Commission was defied, was not implemented. This does not mean, of course, that the police could not have recourse to common law powers to stop a parade in order to prevent disorder and to the duty under section 32 of the 2000 Act in order to avert the criminal offence of participating in an unnotified parade contrary to section 6(7) of the 1998 Act.

56. The Court of Appeal in para 19 of its judgment (perhaps in contrast to its later statement in para 47 - see para 41 above) acknowledged that these powers were available to PSNI but considered that the incomplete enactment of the North report created a particular difficulty for the police:

> "The North Report recognised that under its proposals there would still remain that cohort of parades that were last minute or unforeseen. It considered that in those circumstances the parades should be controlled by police using their public order powers. The problem for police, which the circumstances in this case demonstrate, is that the partial implementation of the North Report has left a larger cohort of parades outside the Parades Commission's jurisdiction. In particular, the PSNI have to deal with unnotified parades using their available public order powers including the right of arrest in respect of the organisation or participation in such parades and the prevention of such unlawful parades in accordance with the duty under section 32 of the 2000 Act to prevent crime."

57. It is not clear why this should be regarded as a particular problem, at least in terms of police operational decisions. When the correct legal position is understood, namely that the police have power to stop parades to prevent disorder and to pre-empt breach of section 6(7) of the 1998 Act, the police strategy and tactics in exercising those powers would have been similar, if not identical, to those which they would deploy to prevent a parade from proceeding in a manner which did not comply with a determination of the Parades Commission. Neither situation called on the police to form a judgment as to whether a parade *should* take place. What was required of them in both instances was a decision as to whether the parade was taking place legally. If it was not, either because it did not comply with a determination of the commission or because it had not been notified, their powers were, to all intents and purposes, the same. And the operational decisions should not have been any different, or, at least, certainly not on account of the fact that each parade contravened the law in different ways or that the source of the power of the police to stop the parade arose from different sections of the 1998 Act.

Article 11 of the European Convention on Human Rights

58. Article 11 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) provides:

> "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."

59. ACC Kerr clearly regarded what he described as the "interaction" between articles 8 and 11 of ECHR as important - see para 17 above. He also considered that it was significant that both were qualified rights. During his interview with the Irish News he had said:

> "The European Convention makes it very clear that there is a right to peaceful assembly under article 11 of the European Convention and the reasons it gets slightly confusing sometimes is that the European Convention is explicitly clear the Police Service has a responsibility to facilitate peaceful protests even if it is technically unlawful and that's where it takes us in to the space of confusing rights."

60. In *Eva Molnar v Hungary* (Application 10346/05) the European Court of Human Rights (ECtHR) considered a complaint that the applicant's rights under article 11 had been infringed by police dispersing a peaceful demonstration in which she had participated merely because prior notification of the protest had not been given. At paras 34-38 ECtHR said this:

> "34. The Court observes that paragraph 2 of article 11 entitles States to impose 'lawful restrictions' on the exercise of the right to freedom of assembly. The Court notes that restrictions on freedom of peaceful assembly in public places may serve the protection of the rights of others with a view to preventing disorder and maintaining the orderly circulation of traffic.
>
> 35. The Court reiterates that a prior notification requirement would not normally encroach upon the essence of that right. It is not contrary to the spirit of article 11 if, for reasons of public order and national security, *a priori*, a High Contracting Party requires that the holding of meetings be subject to authorisation (see *Nurettin Aldemir v Turkey*, nos 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02 (joined), para 42, 18 December 2007).
>
> 36. However, in special circumstances when an immediate response might be justified, for example in relation to a political event, in the form of a spontaneous demonstration, to disperse the ensuing demonstration solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, may amount to a disproportionate restriction on freedom of peaceful assembly (see *Bukta*, cited above, paras 35 and 36). It is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by article 11 of the Convention is not to be deprived of all substance (see *Nurettin Aldemir*, cited above, para 46).

> 37. Nevertheless, in the Court's view, the principle established in the case of *Bukta* cannot be extended to the point that the absence of prior notification can never be a legitimate basis for crowd dispersal. Prior notification serves not only the aim of reconciling, on the one hand, the right to assembly and, on the other hand, the rights and lawful interests (including the right of movement) of others, but also the prevention of disorder or crime. In order to balance these conflicting interests, the institution of preliminary administrative procedures is common practice in member states when a public demonstration is to be organised. In the Court's view, such requirements do not, as such, run counter to the principles embodied in article 11 of the Convention, as long as they do not represent a hidden obstacle to the freedom of peaceful assembly protected by the Convention (see *Balcik v Turkey*, no 25/02, para 49, 29 November 2007).
>
> 38. The Court therefore considers that the right to hold spontaneous demonstrations may override the obligation to give prior notification to public assemblies only in special circumstances, namely if an immediate response to a current event is warranted in the form of a demonstration. In particular, such derogation from the general rule may be justified if a delay would have rendered that response obsolete."

61. ACC Kerr's belief that PSNI was obliged by article 11 of ECHR to facilitate peaceful protests even if they were "technically illegal" was therefore misplaced. ECtHR has made it clear that, in general, a requirement to notify an intention to hold a parade and a decision to disperse a parade or protest which has not been notified will not infringe article 11. There was no warrant for allowing article 11 considerations to determine how these parades should be policed.

62. Ms Quinlivan submitted that the 1998 Act "occupies the field" for virtually all planned demonstrations in Northern Ireland. She also claimed that, in relation to protests such as involved in the parades here, the vital ingredient of spontaneity (which might absolve organisers of the need to notify) was missing. In both propositions she is clearly right. The 1998 Act is the considered response of Parliament to the intractable problem of parades in Northern Ireland. Fundamental to its successful operation is the requirement that there be notification of parades, especially those which are likely to be contentious or to provoke disorder. The parades in this case were far from peaceful. The police had no obligation to facilitate them. To the contrary, they had an inescapable duty to prevent, where possible, what were plainly illegal parades from taking place and to protect those whose rights under article 8 of ECHR were in peril of being infringed. Meeting those obligations

had to be tempered by operational constraints, of course. Stopping the parades without taking account of what further violence that might provoke was not an option. But the operational difficulties required to be assessed in the correct legal context. PSNI had to have a clear-sighted appreciation of their available powers and an equally percipient understanding of the fact that the Parades Commission had no power to intervene. I shall discuss this in more detail in the next section of this judgment.

Undermining the 1998 Act

63. Failure to notify a proposed parade strikes at the heart of the effective functioning of the Parades Commission and therefore at the successful implementation of the 1998 Act. This Act represented, as Ms Quinlivan put it, a paradigm shift away from the old system where police were drawn into the controversial role of deciding which parades should be permitted to take place and under what conditions they should be allowed to proceed. Enforcing the legal requirement of notifying an intention to hold a parade was not less than vital to the success of the new venture. A premium had to be placed on preserving the integrity of that requirement.

64. Unfortunately, ACC Kerr and his colleagues failed to recognise this central truth. There is no reference to section 6(7) of the 1998 Act in the many entries in the Event Policy Book. Instead, the focus was on the need to recognise the competing claims under articles 8 and 11 of ECHR; the so-called gaps in the 1998 legislation; the need to engage the Parades Commission in some role in controlling the parades; the lack of power on the part of the police to ban parades; the need to "police the situation outside of the statutory scheme"; that the role of the police was to collect evidence of such offences and refer them to the prosecuting authorities; that the parades could not be stopped solely because they were unnotified; that there was "no such thing as an illegal parade under the Public Processions Act"; and that the situation was legally complicated and judicial clarification was needed.

65. The situation was not legally complicated, although, in fairness to ACC Kerr this is a judgment that can be made in confidence now, with the benefit of close attention to the text and effect of the 1998 Act. But, having had the opportunity to consider these and the powers of the police both at common law and under section 32 of the 2000 Act, it can be assuredly said that there is no reason to suppose that the avowed gaps in the 1998 Act were other than the product of deliberate legislative intention. Likewise it must now be clearly understood that the Parades Commission had no role where a proposed procession had not been notified. The attempt to persuade the commission to become involved was misconceived. The police did not have power to ban the parades but they had ample legal power to stop them. Contrary to ACC Kerr's stated position, they could indeed be stopped solely because they

were unnotified. There certainly was such a thing as an illegal parade under the Public Processions Act.

66. All of that is quite different from saying that police decisions undermined the 1998 Act, however. Clearly, there was no considered intention to weaken the effect of the Act. The view of ACC Kerr and his colleagues on what were perceived to be shortcomings of the Act and their lack of powers to stop the parades were the result of misapprehension of the true legal position rather than a wilful disregard for it. It is true, of course, that the Loyal Orange Order, in light of PSNI's response to the unnotified parades, considered adopting a policy of not notifying the commission of intended parades, contrary to their previous practice of doing so. But that does not signify in the debate as to whether the 1998 Act was in fact undermined. As it happens such a policy was not adopted by the Orange Order.

67. The power of the police to stop a parade which has not been notified has been a consistent thread that runs through the judgments of Treacy J, of the Court of Appeal and of this court, although the emphasis on the importance of this may have varied. Whatever may have been the misapprehension of the police as to their powers to stop a parade which had not been notified, the legal position is now clear. The 1998 Act has not been undermined.

The central issue

68. The Lord Chief Justice considered that the central issue in the case was whether the police response to the parades was based on the need to take account of "the possibility of violence and disorder giving rise to article 2 risks both in the immediate vicinity and in the wider Northern Ireland community". One can understand why this might have been considered to be the dominant question. But it is now clear that the crucial issue was whether there was a proper understanding on the part of the police as to the extent of their legal powers.

69. Of course, there were many pressing concerns about the possibility of increased violence if the police attempted to stop the parades. But this must not distract from what was the true issue in the case. That was "did the police approach the difficult decision of whether to stop the parades with a proper understanding of their legal powers". If they wrongly considered that there were limits on their powers to do so, this would inevitably cloud their judgment on that critical question.

70. For the reasons that I have given, I consider that Treacy J was right in his conclusion that the police laboured under a misapprehension as to the extent of their powers and on that account alone the appeal must be allowed.

Operational discretion

71. It is universally agreed that PSNI must have operational discretion to make policing decisions. Treacy J accepted this in para 120, after citing the well-known passage from para 116 of ECtHR's judgment in *Osman v United Kingdom* (1998) 29 EHRR 245. The Court of Appeal dealt with the same issue in paras 38-41 of its judgment. It is also generally accepted, however, that operational discretion does not equate to immunity from judicial scrutiny of policing decisions. As Lord Dyson MR said in *H v Commissioner of Police of the Metropolis v ZH* [2013] 1 WLR 3021 at para 90:

> "… operational discretion is important to the police. … It has been recognised by the European court: see [(2012)] *Austin v United Kingdom* 55 EHRR 359, para 56. And I have kept it well in mind in writing this judgment. But operational discretion is not sacrosanct. It cannot be invoked by the police in order to give them immunity from liability for everything that they do."

72. The debate in the present case has centred on how judicial scrutiny of the policing decisions taken about these parades should be conducted. The appellant suggested that the discretion was circumscribed by the imperative of ensuring the full effectiveness of the 1998 Act. The area of discretion available to the police was also constrained by the positive obligation to protect the appellant's article 8 rights, Ms Quinlivan argued. She claimed that policing decisions in this context had to satisfy a requirement of proportionality. In advancing this claim she relied on what had been said by Lord Carswell in *E v Chief Constable of the Royal Ulster Constabulary* [2009] AC 536. That case was concerned with attempts by "loyalist" protesters in Belfast to prevent Catholic parents from taking their normal route on foot through a loyalist area to a Catholic girls' primary school. The appellant had challenged what she claimed was the failure of police to discharge their positive obligation to protect her and her daughter against the infliction upon them of inhuman and degrading treatment within the meaning of article 3 of ECHR. Having considered *R (Daly)v Secretary of State for the Home Department* [2001] 2 AC 532, *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 and *R (SB)v Governors of Denbigh High School* [2007] 1 AC 100, Lord Carswell said this at para 54:

> "… [these cases] all concerned the compatibility of decisions of an administrative character with the Convention rights of those affected by them. Nevertheless, the essential point established by them is that the *Smith* test [see *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554] is insufficiently intense and that the actions of the police in the present case

> have to pass the test of proportionality, which must be decided by the court."

73. Ms Quinlivan criticised the judgment of the Court of Appeal in the present case on the basis that it had failed to consider whether the actions of the police passed the test of proportionality. It is true that the court did not refer to the question whether the police actions were proportionate but it appears to have accepted that the appellant's article 8 rights were engaged and the Lord Chief Justice referred on more than one occasion to Lord Carswell's judgment in *E* so it is difficult to conclude that he did not have the question of proportionality in mind.

74. Whatever of that, it seems to me that there is something of an air of unreality about discussing the question of proportionality given that PSNI had wrongly construed their powers under the 1998 Act and the Court of Appeal failed to so find. Like so much else involved in judicial review of police actions, proportionality depends on context and PSNI had set themselves the wrong context in which to make decisions. Ms Quinlivan was therefore inclined to accept that a finding that the police had failed to recognise the true breadth and nature of their powers under the legislation would render discussion of the discretionary area of judgment less than central to the case. She was right to do so. What might be considered proportionate if the police view of the limits on their powers was correct might be considered not to be so if they had recognised the full panoply of controls that were in fact available. Discussion of what might have been proportionate in those circumstances is unlikely to be helpful. So too is speculation about what the police ought to have done if they had a proper understanding of the powers available to them.

75. One can say that proportionality has certainly a role to play in assessing whether police actions have fulfilled their positive obligation to protect the appellant's article 8 rights. One may also say that police took an active and continuing approach to the question of how to deal with the parades. Many officers were injured in the course of policing the flags protest. Many participants were arrested and successfully prosecuted. Constant review of the proper tactical approach was undertaken.

76. A definite area of discretionary judgment must be allowed the police. And a judgment on what is proportionate should not be informed by hindsight. Difficulties in making policing decisions should not be underestimated, especially since these frequently require to be made in fraught circumstances. Beyond these generalities, I do not consider it useful to go.

77. Treacy J has said (in para 136) that the policing operation was characterised by "an unjustified enforcement inertia". I do not understand him to suggest that this was the result of studied indifference or deliberate lack of response to the very difficult situation faced by the residents of Short Strand. The absence of a more proactive approach was due to a concatenation of unfortunate circumstances. These included the misunderstanding by PSNI of the powers available to them; their failure (at least in the early stages) to appreciate that the Parades Commission was powerless to intervene; a lack of insight into the central importance of ensuring that unnotified parades were not permitted to take place; the placing of too great an emphasis on the possible article 11 rights of protesters; and that the matter of controlling unnotified parades was legally complicated.

Review by an appellate court of findings at first instance

78. On several occasions in the recent past this court has had to address the issue of the proper approach to be taken by an appellate court to its review of findings made by a judge at first instance. For the purposes of this case, perhaps the most useful distillation of the applicable principles is to be found in the judgment of Lord Reed in the case of *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477. In para 1 of his judgment he referred to what he described as "what may be the most frequently cited of all judicial dicta in the Scottish courts" - the speech of Lord Thankerton in *Thomas v Thomas* [1947] AC 484 which sets out the circumstances in which an appeal court should refrain from or consider itself enabled to depart from the trial judge's conclusions. Lord Reed's discourse on this subject continued with references to decisions of Lord Shaw of Dunfermline in *Clarke v Edinburgh & District Tramways Co Ltd* 1919 SC (HL) 35, 36-37, where he said that an appellate court should intervene only it is satisfied that the judge was "plainly wrong"; that of Lord Greene MR in *Yuill v Yuill* [1945] P 15, 19, and that of Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* [2003] UKHL 45; 2004 SC (HL) 1, para 17 where he stated that:

> "It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion."

79. Lord Reed then addressed foreign jurisprudence on the topic in paras 3 and 4 of his judgment as follows:

> "3. The reasons justifying that approach are not limited to the fact, emphasised in *Clarke's* case and *Thomas v Thomas*, that the trial judge is in a privileged position to assess the credibility of

witnesses' evidence. Other relevant considerations were explained by the United States Supreme Court in *Anderson v City of Bessemer* (1985) 470 US 564, 574-575:

> 'The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be "the 'main event' … rather than a 'tryout on the road.'" … For these reasons, review of factual findings under the clearly erroneous standard - with its deference to the trier of fact - is the rule, not the exception.'

Similar observations were made by Lord Wilson JSC in *In re B (A Child)* [2013] 1 WLR 1911, para 53.

4. Furthermore, as was stated in observations adopted by the majority of the Canadian Supreme Court in *Housen v Nikolaisen* [2002] 2 SCR 235, para 14:

> 'The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.'"

80. The statements in all of these cases and, of course, in *McGraddie* itself were made in relation to trials where oral evidence had been given. On one view, the situation is different where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and consideration of contemporaneous documents. But the vivid expression in *Anderson* that the first instance trial should be seen as the "main event" rather than a "tryout on the road" has resonance even for a case which does not involve oral testimony. A first instance judgment provides a template on which criticisms are focused and the assessment of factual issues by an appellate court can be a very different exercise in the appeal setting than during the trial. Impressions formed by a judge approaching the matter for the first time may be more reliable than a concentration on the inevitable attack on the validity of conclusions that he or she has reached which is a feature of an appeal founded on a challenge to factual findings. The case for reticence on the part of the appellate court, while perhaps not as strong in a case where no oral evidence has been given, remains cogent. In the present appeal, I consider that the Court of Appeal should have evinced a greater reluctance in reversing the judge's findings than they appear to have done.

Conclusion

81. I would reverse the decision of the Court of Appeal and make a declaration that, in their handling of the flags protest in Belfast during the months of December and January, PSNI misconstrued their legal powers to stop parades passing through or adjacent to the Short Strand area.