HOUSE OF LORDS SESSION 2006–07

[2006] UKHL 53

on appeal from: [2005] NICA 42

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Tweed (Appellant)
v.
Parades Commission for Northern Ireland (Respondents)
(Northern Ireland)

Appellate Committee

Lord Bingham of Cornhill
Lord Hoffmann
Lord Rodger of Earlsferry
Lord Carswell
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
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David Scoffield
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Respondents:
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Paul Maguire QC
(Instructed by Crown Solicitor)

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LORD BINGHAM OF CORNHILL

My Lords,

1. As explained by my noble and learned friends Lord Carswell and Lord Brown of Eaton-under-Heywood (to whom I am indebted for their exposition of the relevant facts, the history of the proceedings, the relevant legislation and rules and the authorities), the issue in this appeal is whether discovery of five documents held by the Parades Commission should be ordered for purposes of Mr Tweed's application for judicial review, to the extent that such application turns on a proportionality argument under the Human Rights Act 1998 and the European Convention on Human Rights.

2. The disclosure of documents in civil litigation has been recognised throughout the common law world as a valuable means of eliciting the truth and thus of enabling courts to base their decisions on a sure foundation of fact. But the process of disclosure can be costly, time-consuming, oppressive and unnecessary, and neither in Northern Ireland nor in England and Wales have the general rules governing disclosure been applied to applications for judicial review. Such applications, characteristically, raise an issue of law, the facts being common ground or relevant only to show how the issue arises. So disclosure of documents has usually been regarded as unnecessary, and that remains the position.

3. In the minority of judicial review applications in which the precise facts are significant, procedures exist in both jurisdictions, as my noble and learned friends explain, for disclosure of specific documents to be sought and ordered. Such applications are likely to increase in

frequency, since human rights decisions under the Convention tend to be very fact-specific and any judgment on the proportionality of a public authority's interference with a protected Convention right is likely to call for a careful and accurate evaluation of the facts. But even in these cases, orders for disclosure should not be automatic. The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly.

4. Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence. Any summary, however conscientiously and skilfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says. There may, however, be reasons (arising, for example, from confidentiality, or the volume of the material in question) why the document should or need not be exhibited. The judge to whom application for disclosure is made must then rule on whether, and to what extent, disclosure should be made.

5. In the present case, Mr Tweed has obtained leave to apply for judicial review on grounds which include a challenge to the proportionality of the Commission's interference with his claimed Convention rights. The Commission's deponent has summarised five documents which Mr Tweed wishes to see. Disclosure is resisted on the ground that this would breach the assurance of confidentiality given to the Commission's informants. Like my noble and learned friends, and for the reasons they give, I would order that the five documents in question be disclosed by the Commission, in the first instance to the judge alone. He will assess whether the documents appear to record information imparted in confidence by identified informants. If not, he is likely to order disclosure to Mr Tweed, since there will be no reason not to do so. If they do appear to disclose such information, he must consider whether the documents add anything of value to the summaries in the evidence. If not, that will be the end of the matter. If he judges that they do add something of value to the summaries, he will move on to consider the submissions of the parties on redaction and, if raised, public interest immunity.

6. I would allow the appeal and make the order which my noble and learned friends propose.

LORD HOFFMANN

My Lords,

7. I have had the advantage of considering the speeches of my noble and learned friends, Lord Bingham of Cornhill, Lord Carswell and Lord Brown of Eaton-under-Heywood, in draft. I agree with them and would make the order which they propose.

LORD RODGER OF EARLSFERRY

My Lords,

8. I have had the advantage of considering the speeches of my noble and learned friends, Lord Bingham of Cornhill, Lord Carswell and Lord Brown of Eaton-under-Heywood, in draft. I agree with them and would make the order which they propose.

LORD CARSWELL

My Lords,

9. This interlocutory appeal from the Court of Appeal in Northern Ireland on the subject of disclosure of documents in judicial review applications enables the House to review the extent of disclosure which should be ordered in such applications, since the rules applicable in Northern Ireland are identical with those in England and Wales. The issue which is at the heart of the appeal is the way in which the court should approach disclosure when the question before it involves the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), in particular those qualified rights contained in articles 9, 10 and 11.

10. Parades, or to give them their statutory name, public processions, are a well-established tradition in all democratic countries. They can be

organised to celebrate, to express solidarity or cultural identity or to articulate concern and give expression to grievances. Very few of them are contentious in the sense that they provoke any opposition or counter-protest, but in Northern Ireland a small proportion of them have in recent years proved to be contentious in that sense and some of them have been the occasion of serious public disorder. The extent of that disorder in the mid-1990s caused the Government to set up a review body chaired by Dr Peter North, which produced a substantial report in 1997. The main recommendations of the North report were enacted in legislation in the passing of the Public Processions (Northern Ireland) Act 1998 ("the 1998 Act").

11. Section 1 of the 1998 Act established the respondent body, the Parades Commission for Northern Ireland ("the Commission"), whose membership is, by paragraph 2(3) of Schedule 1, to be as far as practicable representative of the community in Northern Ireland. By section 2(2)(b) the Commission is empowered to issue determinations in respect of particular proposed public processions. A person proposing to organise a public procession must under section 6 give notice to the police at the time and in the manner set out in that section. Determinations are provided for by section 8, subsections (1) and (2) of which read:

> "(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."

Notice is given annually of approximately 3000 processions (to which I shall refer for convenience by their usual name of parades), but the large majority are entirely uncontentious and do not attract any restrictions. The Commission issues about 170 determinations each year containing restrictions of varying kinds.

12. Under section 5 the Commission has to issue a set of guidelines as to the exercise of its functions. Section 8(6) provides in part:

> "(6) The guidelines shall in particular … 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 …"

The appellant has in the substantive application for judicial review challenged the validity of paragraph (c), claiming that it is incompatible with the provisions of the Convention.

13. He also put in issue the validity of paragraph 4.4 of the Commission's guidelines, which provides:

> "*Communication 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."

14. The Commission made procedural rules, as required by section 4 of the 1998 Act. The validity of rule 3.3 is challenged by the appellant in the interlocutory proceedings the subject of the present appeal. Rule 3.3 reads:

> "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."

15. Dunloy is a small village in north Antrim. It is generally found that the most acrimonious disputes and protests over parades occur in areas where there has been demographic change, and Dunloy is no exception. The local Orange lodge Dunloy LOL 496 ("the lodge") has been established in the village for many years and has its own hall there. It has been the custom for the lodge to parade at regular intervals from the Orange Hall to Dunloy Presbyterian Church, a distance of some 325 yards, and return to the hall after the service, with a band playing for the parade in each direction. In recent years the community balance of the area has changed and according to the 2001 census 97 per cent of the population of Dunloy is now Catholic. Opposition to the parades began to mount and in 1995 there was serious public disorder. Since the 1998 Act came into force the Commission has issued a series of determinations considerably restricting the parades. The Commission has sought to encourage the members of the lodge to enter into discussion with the residents of Dunloy, but they have consistently declined to do so on what they see as a matter of principle.

16. On 9 March 2004 the appellant gave notice to the police on behalf of the lodge of a proposed public procession to be held on Easter Sunday 11 April. The proposed route was between the Orange Hall and Dunloy Presbyterian Church and back, via Station Road and Main Street. Regalia was to be worn, but no banners carried and the parade was to be accompanied by the Dunloy Accordion Band. The police forwarded a copy of the notice to the Commission on 12 March 2004, together with an accompanying facsimile stating that the parade was an annual one, that it had previously been contentious and that it had been the subject of previous determinations by the Commission.

17. The lodge then undertook what the appellant refers to as a "communications strategy", sending out letters to local people and inviting them to an Open Day in Ballymoney on 2 April. On this occasion an exhibition was mounted, with the object of making information available about the Orange Order and the lodge and its memorabilia. One of the members and other representatives of the Commission attended the exhibition, but none of the residents of Dunloy came to it, and no direct contact was made with them by the officers or members of the lodge.

18. On 24 March 2004 the Commission received a police report on the proposed procession from Superintendent Corrigan. The report, disclosure of which is sought in the present appeal, was summarised in

paragraph 6(iii) of the affidavit sworn on 29 July 2004 by Sir Anthony Holland, the chairman of the Commission:

> "(iii) On 24 March 2004 the Commission received a police report in respect of the proposed procession. This was compiled by Superintendent Corrigan, the District Commander for Ballymoney. It contained a section dealing with recent parading history beginning with a parade on 21 May 2000 and working forward. This demonstrated that on some 27 occasions since that date public processions in Dunloy had been the subject of Determinations by the Commission restricting the route, mainly so as to prevent any procession occurring in the village of Dunloy. While, on occasions, there had been protests by Loyal Orders directed at the restrictions it was noted that the organisers had complied with all the Determinations and had abided by the Commission's Code of Conduct. There had been no disorder or violence in connection with any of the parades which, subject to a small number of minor incidents, had passed off with little attention being paid to them by local residents. It was noted that local residents believed that it was the norm for no parades to be permitted in the village.
>
> In terms of the impact of processions on the community, Superintendent Corrigan records that in the past applications to parade had raised tension within the wider community. In his view if the proposed parade took place without a local agreement damage would be caused to community relations within the area. In this circumstance it was thought that residents would mount a protest which would result in a number of persons taking to the streets. Such protests, if any, would bring a potential threat to public order. Superintendent Corrigan indicated that parades did have the potential to lead in Dunloy to inter-community conflict. Without any protest in opposition to the parade he noted that traffic diversions might cause limited inconvenience to village residents and business interests but in the event of a protest that led to violence from any quarter the disruption to the life of the community would be substantially increased. Superintendent Corrigan, in dealing with the impact of the proposed parade on human rights, noted that there would always remain the possibility that if the opposing factions came into contact in a disorderly manner the potential for a real and serious risk to life existed. In view of the fact

> that no Notice of Intention had been received to mount a counter-march or demonstration, the police view was that deployment of police would initially be maintained at as low a level as possible to ensure the safe passage of the parade consistent with the sensitivities of local residents. A peaceful protest against the parade would requite careful monitoring on the part of the police with police being positioned to deal with disorder or violence which might arise from any quarter. If violence were to occur the police response was stated to be a graduated one commensurate with the public order situation, the object being to protect the lives of all."

19. The Commission also received reports from its authorised officers, a variety of persons from a range of backgrounds, who obtain information and opinions from a multiplicity of sources in their areas, and from whom the Commission seeks information and advice about proposed processions. The first report, received on 24 March 2004, is summarised in paragraph 6(iv) of Sir Anthony Holland's affidavit as follows:

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

20. A further situation report from the authorised officers was furnished to the Commission on 2 April 2004. Sir Anthony Holland summarises this at paragraph 6(vi) of his affidavit:

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

21. In paragraph 6(vii) of his affidavit Sir Anthony Holland set out a summary of the advice given by police officers at a meeting in the Commission's offices:

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

> and would possibly affect all other parades in Dunloy in 2004."

22. The Commission issued its determination on 5 April 2004. In the opening paragraphs it referred to the background of previous incidents in Dunloy and stated in paragraph 6:

> "The Commission has cause to believe that should the parade process the entirety of its notified route, there will be an adverse effect on community relations and a potential for public disorder."

It went on to state in paragraph 15:

> "The Commission believes that community relations in Dunloy would be significantly damaged by the passage of this parade should it proceed without restriction. This would cause increased tension and disaffection, which would work against the building of an understanding that could support a long-term pattern of parading."

The determination applied a number of conditions to the parade, many of which the members of the lodge could readily accept. The parade itself was, however, very closely confined to a very short stretch of road outside the frontage of the Orange hall, which the members regarded as very little different in effect from a complete ban on parading.

23. The applicant on 2 June 2004 commenced proceedings for judicial review of the Commission's determination and on 10 June Girvan J granted leave to apply. The application was based, as I have stated, partly on a challenge to the compatibility with the Convention of section 8(6)(c) of the 1998 Act and the validity of paragraph 4.4 of the Commission's guidelines and rule 3.3 of its procedural rules, and partly on a claim that the determination constituted a disproportionate infringement of his Convention rights. The application for disclosure of documents hinges round the extent which is required when an application for judicial review turns on the proportionality of the respondent's action.

24. By a summons dated 29 September 2004 the appellant's solicitors sought specific discovery of the documents set out in the schedule to the summons, described as follows:

> "1. The Form 11/1 received by the Respondent dated 9 March 2004 and referred to in paragraph 6(i) of Sir Anthony Holland's affidavit of 29 July 2004.
>
> 2. The facsimile transmission received by the Respondent from the police and referred to in paragraph 6(ii) of Sir Anthony Holland's affidavit of 29 July 2004.
>
> 3. The police report received by the Respondent on 24 March 2004 and referred to in paragraph 6(iii) of Sir Anthony Holland's affidavit of 29 July 2004.
>
> 4. The situation report received by the Respondent from its Authorised Officers on 24 March 2004 and referred to in paragraph 6(iv) of Sir Anthony Holland's affidavit of 29 July 2004.
>
> 5. The note provided by the Commission's Secretariat to the Commission members dated 30 March 2004 and referred to in paragraph 6(v) of Sir Anthony Holland's affidavit of 29 July 2004.
>
> 6. The further situation report provided to the Respondent by its Authorised Officers on 2 April 2004 and referred to in paragraph 6(vi) of Sir Anthony Holland's affidavit of 29 July 2004."

Item 1 was not in issue, as it was the appellant's own document, but the Commission has resisted discovery of the other five.

25. Girvan J in the High Court acceded to the appellant's application and ordered discovery of the documents specified as items 2 to 6 of the summons, subject to any issue which might be raised of public interest immunity. In a written judgment given on 19 November 2004 he concluded that in a case where proportionality is in issue disclosure of the full documents referred to in the affidavit of Sir Anthony Holland should take place. He stated at paragraph 11 of his judgment:

> "Whatever the position may be in judicial review cases where no Convention issue or issue of proportionality arises, in a case where proportionality is in issue I consider that disclosure of the full documents referred to in the

> affidavit should take place. If the anxious scrutiny by the court or the intense review (whichever term one uses) is to be properly carried out then the court should have had sight of the documents. If this were not so the decision maker's interpretation and synopsis of documents would bind the court and the court would at least in part have surrendered to the decision maker the question of determining weight and the relevance of material before the decision maker when reaching its decision. A decision maker acting in perfectly good faith may put a particular interpretation on documentary material which on a proper analysis turns out in law to be erroneous. It is only by seeing the documents that the court itself can carry out its function properly."

26. The Commission appealed with the leave of the judge against this ruling and the Court of Appeal (Kerr LCJ, Campbell LJ and Morgan J) set aside the order for disclosure, on the ground that it was premature to require it until the validity of rule 3.3 had been determined. Morgan J, giving the judgment of the court on 7 September 2005 , referred to the principle, to which I shall return later, that the intensity of review in a public law case will depend on the subject matter in hand, quoting Lord Steyn's remark "In law context is everything." He stated his conclusions in paragraphs 22 and 23:

> "[22] In this case the context is set in part by the nature of the convention rights in issue, the extent of interference with those rights and the implications, if any, for the rights and freedoms of others. But it is also clear that the procedures which the court should use for the purpose of carrying out its scrutiny of the interference with the rights may well be determined by the procedural context which the court finds appropriate in this case. Rule 3.3 of the Procedural Rules provides a mechanism whereby the rights and freedoms of others are taken into account in a manner which imposes a duty of confidence on communications with the Commission. The validity of such an approach is at issue in the substantive judicial review application and the outcome of that challenge must set an important procedural context for the determination of the question as to whether discovery of those communications is necessary for fairly disposing of the matter or for saving costs. It is only when that context has

> been established that the issue of discovery in this proportionality challenge can be resolved.
>
> [23] Accordingly I consider that it is not at this stage necessary for fairly disposing of the matter or for saving costs to order discovery of the documents sought and I would allow the appeal."

27. Discovery of documents, now termed disclosure in the Civil Procedure Rules applying in England and Wales, is governed by Order 24 of the Rules of the Supreme Court (Northern Ireland) 1980, the analogue of RSC Order 24, which applied before the CPR came into being. The same principles continue to apply in both jurisdictions and for convenience I shall refer to the procedure as disclosure, notwithstanding the fact that it continues to bear the appellation of discovery in the RSC in Northern Ireland.

28. Applications for judicial review in Northern Ireland are not subject to the requirement contained in RSC (NI) Order 24, rule 2(1) that the parties exchange lists of documents, which applies only to actions in which pleadings are served. They are governed instead by the provisions of rule 3(1), whereby the court may order any party to make disclosure by a list of documents, and rule 7(1), empowering the court to require a party to make disclosure by affidavit in relation to any specified document or class of documents. These rules are in turn subject to rule 9, which provides that on applications for orders under rule 3 or 7 the court shall refuse to make an order for disclosure "if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs." Until the Civil Procedure Rules came into force in England and Wales identical provisions applied under RSC Orders 24 and 53. Under CPR Practice Direction CPD 54.12, however, it is specifically provided that disclosure is not required unless the court orders otherwise.

29. The courts in both jurisdictions developed over a series of decisions an approach to disclosure in judicial review which is more narrowly confined than in actions commenced by writ. The basis of this approach is that disclosure should be limited to documents relevant to the issues emerging from the affidavits: see *R v Inland Revenue Commissioners, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 654, per Lord Scarman, and cf Lewis, *Judicial Remedies in Public Law*, 3rd ed (2004), para 9.086 and a valuable article by Oliver Sanders, *Disclosure of Documents in Claims for Judicial Review* [2006] JR 194. In building upon this foundation the

courts developed a restrictive rule, whereby they held that unless there is some prima facie case for suggesting that the evidence relied upon by the deciding authority is in some respects incorrect or inadequate it is improper to allow disclosure of documents, the only purpose of which would be to act as a challenge to the accuracy of the affidavit evidence: see the line of authority represented in England by *R v Secretary of State for the Environment, Ex p Islington London Borough Council and the London Lesbian and Gay Centre* [1997] JR 121 and in Northern Ireland by *Re McGuigan's Application* [1994] NI 143 and *Re Rooney's Application* [1995] NI 398.

30. The reasoning of the arguments underpinning the principles laid down by the courts has not escaped criticism and some judicial unease has been expressed on occasion about their application and effect. The "terminus" argument (that in judicial review the court is not required to consider the route by which the impugned decision is reached, but only the terminus), which emerged first in *R v Secretary of State for the Home Department, Ex p Harrison* [1997] JR 113 although adopted in a number of subsequent cases, has not been universally regarded as valid. A note of caution about accepting it without qualification appears in the judgment of Dillon LJ in *R v Secretary of State for the Environment, Ex p Islington London Borough Council*. When the Law Commission issued its report *Administrative Law: Judicial Review and Statutory Appeals* (1994, Law Com No 226, HC 669) it recorded (para 7.8) that two thirds of those who responded to the consultation paper favoured the introduction of a more liberal regime of discovery. The Law Commission expressed the opinion in para 7.12 that the requirements of the accepted rule were unduly restrictive and undermined the basic test of relevance and necessity laid down in *O'Reilly v Mackman* [1983] 2 AC 237.

31. The reasons which have hitherto been regarded as providing grounds for maintaining these principles are (a) the obligation resting on a public authority to make candid disclosure to the court of its decision making process, laying before it the relevant facts and the reasoning behind the decision challenged: see, eg, *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment of Belize (No 2)* [2003] UKPC 6, para 86, per Lord Walker of Gestingthorpe; *R v Secretary of State for the Home Department, Ex p Fayed* [1998] 1 WLR 763 at 775, per Lord Woolf MR; (b) the undesirability of allowing "fishing expeditions", where an applicant for judicial review may not have a positive case to make against an administrative decision and wishes to obtain disclosure of documents in the hope of turning up something out of which to fashion a possible

challenge: cf *R v Secretary of State for Health, Ex p Hackney London Borough Council* (unreported) 29 July 1994; Court of Appeal (Civil Division) Transcript No 1037 of 1994, per Sir Thomas Bingham MR.

32. Mr Hanna QC for the appellant invited your Lordships to reconsider these principles limiting the extent of disclosure in judicial review applications, as they have not been explored in an appeal before the House. He placed this argument before the House, without developing it very far, as he concentrated on the question of the effect of the proportionality issue. I do consider, however, that it would now be desirable to substitute for the rules hitherto applied a more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirements of the particular case, taking into account the facts and circumstances. It will not arise in most applications for judicial review, for they generally raise legal issues which do not call for disclosure of documents. For this reason the courts are correct in not ordering disclosure in the same routine manner as it is given in actions commenced by writ. Even in cases involving issues of proportionality disclosure should be carefully limited to the issues which require it in the interests of justice. This object will be assisted if parties seeking disclosure continue to follow the practice where possible of specifying the particular documents or classes of documents they require, as was done in the case before the House, rather than asking for an order for general disclosure.

33. In support of his claim for disclosure of the documents the appellant also called in aid the provisions of RSC (NI) Order, rule 11:

> "11 —(1) Any party to a cause or matter shall be entitled at any time to serve a notice on any other party in whose pleadings or affidavits reference is made to any document requiring him to produce that document for the inspection of the party giving the notice and to permit him to take copies thereof.
>
> (2) The party on whom a notice is served under paragraph (1) must, within 4 days after service of the notice, serve on the party giving the notice a notice stating a time within 7 days after the service thereof at which the documents, or such of them as he does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds."

In *Dubai Bank Ltd v Galadari (No 2)* [1990] 1 WLR 731, 737, Slade LJ, giving the judgment of the court, said that they were disposed to share Morritt J's view that the phrase "whose … affidavits" extends to any affidavit sworn by a deponent who is not a party, but which is procured by and filed or used on behalf of a party. That view was expressed in unqualified form in *The Supreme Court Practice 1997*, para 24/10/1, and it seems to me clearly correct to adopt such an interpretation to make the rule sensible and workable. Moreover, an entity such as the Parades Commission can only swear an affidavit by a person duly authorised to make it on his behalf. I am therefore satisfied that the affidavit sworn by Sir Anthony Holland on behalf of the Commission comes within rule 11(1). (A similar difficulty of interpretation would not arise under CPR 31.14(1), which entitles a party to inspect a document mentioned in, inter alia, "an affidavit"). A party whose affidavits contain a reference to documents should therefore exhibit them in the absence of a sufficient reason (which may include the length or volume of the documents, confidentiality or public interest immunity). If he raises objection to production of any document, the judge in a Northern Ireland case can decide on the hearing of a summons under rule 12 whether to order production, bearing in mind the provisions of rule 15(1) that no such order is to be made unless the court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs. In England and Wales the court may order specific disclosure or inspection under CPR Rule 31.12. In determining the extent of such disclosure or inspection the court will take into account all the circumstances of the case and in particular the overriding objective in Part 1 and the concept of proportionality: *Civil Procedure 2006*, vol 1, para 31.12.2.

34. The essence of the appellant's case, and the ground on which Girvan J found in his favour, is in the effect of the Convention and the principle of proportionality. The appellant has claimed that the restrictions infringe his rights under articles 9, 10 and 11:

> *"Article 9*
>
> *Freedom of thought, conscience and religion*
>
> 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

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to 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

Freedom of assembly and association

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."

It is not necessary in this appeal to pronounce upon the question of which of these articles may be engaged or whether the objects for which the Commission imposed the restriction fell within the grounds on which the rights may be qualified. I am content to assume for the purposes of this disclosure application that each of them is engaged and that the qualifications in articles 9(2), 10(2) and 11(2) will apply. The significant point is that under each article the acts of the Commission in imposing restrictions must be proportionate.

35. This concept was described by Lord Steyn in a passage at paragraphs 27 and 28 of his opinion in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, which has been much quoted since but bears repetition:

> "27 The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:
>
> > 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'
> >
> > Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? Academic public lawyers have in remarkably similar terms elucidated the difference between the traditional grounds of review and the proportionality approach: see Professor Jeffrey Jowell QC, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] PL 671; Professor Paul Craig, *Administrative Law*, 4th ed (1999), pp 561-563; Professor David Feldman,

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

> 'the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social

> need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court's analysis of complaints under article 8 of the Convention.'
>
> In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.
>
> 28 The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving Convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell [2000] PL 671, 681 has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent the general tenor of the observations in *Mahmood* [2001] 1 WLR 840 are correct. And Laws LJ rightly emphasised in *Mahmood*, at p 847, para 18, 'that the intensity of review in a public law case will depend on the subject matter in hand'. That is so even in cases involving Convention rights. In law context is everything."

36. Along with the concept of proportionality goes that of a margin of discretion, frequently referred to as deference or, perhaps more aptly, latitude. This has been conveniently encapsulated in a passage in Lester & Pannick, *Human Rights Law and Practice*, (1999) para 3.21, quoted with approval by Lord Steyn in *Brown v Stott* [2003] 1 AC 681 at 710-11 (the same passage appears with slight modification in Lester & Pannick's 2nd edition (2004) at para 3.20):

> "Just as there are circumstances in which an international court will recognise that national institutions are better placed to assess the needs of society, and to make difficult choices between competing considerations, so national courts will accept that there are some circumstances in

> which the legislature and the executive are better placed to perform those functions."

That this also applies to other public bodies is clear from the expression of the principle in Fordham, *Judicial Review Handbook*, (3rd ed, 2001), para 58.2, cited with approval by Lord Walker of Gestingthorpe in *R (ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185, para 138 (a closely similar passage appears in Fordham's 4th edition (2004) at para 58.5):

> "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."

I do not propose to explore further in this opinion the degree of deference due or latitude to be extended to a body such as the Commission, for this will be an issue in the substantive application for judicial review. It is sufficient at this stage to say that it is one of the issues which the court must take into account when considering the question of disclosure.

37. The Court of Appeal concluded (in paragraphs 22-23 of the judgment of Morgan J which I quoted) that the validity of rule 3.3 of the Commission's procedural rules required to be ascertained before the extent of disclosure of documents could be settled. Girvan J expressed the view, however, in the High Court that the interests of justice could, if it were required, override the provisions of rule 3.3. He said at paragraph 8 of his judgment:

> "[8] There are issues as to whether para 3.3 of the Procedural Rules are [sic] invalid and or whether the application of the rule involves an unfair procedure for determination of the issue which the Parades Commission had to determine. Discovery of the relevant documents

> would not be necessary for the determination of that legal issue. Para 3.3, if read as subject to an overriding power of the court to direct disclosure of documents if disclosure is necessary in the interests of justice, would not in itself preclude an order [for] disclosure if that is required in the interests of justice. The court would in that event have to determine whether it would be appropriate to direct discovery taking account of the fact that information in evidence was gathered on the basis that it would be treated as confidential. It would, in my view, require clear words to preclude the court from ordering disclosure of documents when [ex] hypothesi it considers that the interests of justice so require. Para 3(3) falls to be construed and applied in the context of rules made to explain how the court will exercise its statutory functions. It does not govern proceedings to challenge determinations in which a court is called on to review the legality of the way in which the Commission has exercised its functions, particularly where the court is required to take account of Convention rights. Accordingly, I conclude that there is nothing in para 3(3) which precludes an order for discovery, if otherwise appropriate. Insofar as the documents contain information obtained confidentially the protection of confidentiality may be achievable by limited redaction. Confidentiality, on its own, would not prevent an order for disclosure if the interests of justice are required and there is no public interest which requires that the documents should not be disclosed."

I am in complete agreement with these propositions, the correctness of which was properly conceded by Mr McCloskey QC on behalf of the Commission. The court will clearly pay regard to the fact that statements and opinions were given to the Commission and its representatives on receipt of assurances of confidentiality and the importance of maintaining that flow of opinions and information in the future. It will no doubt seek to cause minimum disturbance to that confidence when assessing the requirements of justice in disclosure of the documents sought, bearing in mind always the principles laid down by the House in *Science Research Council v Nassé* [1980] AC 1028. It follows accordingly that the decision of the Court of Appeal cannot be supported and that the question of disclosure can be considered without waiting until the validity of rule 3.3 is the subject of adjudication.

38. It remains then to consider the order which should be made in respect of the documents the subject of this appeal. If Girvan J in the passage which I have quoted from paragraph 11 of his judgment intended to lay down the general proposition that disclosure of documents referred to in affidavits should always take place where proportionality is in issue, I could not support that. The proportionality issue forms part of the context in which the court has to consider whether it is necessary for fairly disposing of the case to order disclosure of such documents. It does not give rise automatically to the need for disclosure of all the documents. Whether disclosure should be ordered will depend on a balancing of the several factors, of which proportionality is only one, albeit one of some significance. Moreover, it may be possible to obtain the materials required for consideration of the issues by recourse to other sources, such as publicly available documents, as was the case in *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246.

39. When one takes into account the proportionality factor, the need for disclosure is greater than in judicial review applications where it does not apply. The duty of candour has been fulfilled by adduction of summaries of the police report, authorised officers' reports and other documents, and the appellant's counsel did not suggest that there had been any deficiency in candour in putting that evidence before the court. He submitted, however, that it is not always possible to obtain the full flavour of the content of such documents from a summary, however carefully and faithfully compiled, and that there may be nuances of meaning or nuggets of information or expressions of opinion which do not fully emerge in a summary. I consider that there is force in this view and that in order to assess the difficult issues of proportionality in this case the court should have access as far as possible to the original documents from which the Commission received information and advice.

40. Girvan J had regard to these factors and exercised his discretion in favour of disclosure. As his propositions favouring disclosure in cases involving assessment of proportionality may have gone further than I could support, I think that the House should itself consider the need for disclosure of the documents sought, while giving weight to the judge's discretionary decision.

41. I would order disclosure in the manner set out below of items 2 to 6 in the list which I set out in paragraph 24 of this opinion. Disclosure of the situation reports from the authorised officers will require some care.

The complete text of the officers' views may be of some importance, for the reasons which I have given, but much of it appears to have been based on information and opinions obtained on the basis of assurances of confidentiality. I think that the judge considering disclosure should first receive and inspect the full text of all of the documents in items 2 to 6, so that he may decide whether that would give sufficient extra assistance to the appellant's case on proportionality, over and above the summary already furnished, to justify its disclosure in the interests of fair disposal of the case. If he does so decide, then the question of redaction may have to be considered, in which the parties may be invited to make submissions to the court. If he decides the contrary in the case of any of the documents, that document will not be disclosed to the appellant. Only after this has been settled should the question of public interest immunity receive any necessary consideration.

42. I would therefore allow the appeal and order disclosure in the manner I have set out of items 2 to 6 in the schedule to the summons.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

43. This appeal is all about disclosure of documents in judicial review proceedings. Although it comes from Northern Ireland it is not suggested that the approach there is or should be any different from that taken in England and Wales. And this is so notwithstanding that civil procedure in England and Wales is now governed by the Civil Procedure Rules (CPR) whereas in Northern Ireland the old rules of court (RSC) remain in force.

44. In England and Wales judicial review is now subject to CPR Part 54; disclosure and inspection of documents to CPR Part 31. Part 54 makes no mention at all of disclosure and the Practice Direction issued under it states no more than "12.1 Disclosure is not required unless the court orders otherwise" (54 PD.12). That the court has power to make disclosure and inspection orders under Part 31 is not of course in doubt, whether orders for standard disclosure under Part 31.6 or for specific disclosure or inspection under Part 31.12 or for inspection of individual documents mentioned in, for example, an affidavit under Part 31.14 (1)(d).

45. Before the introduction of the CPR the touchstone for deciding what if any disclosure should be ordered lay in rule 13 of RSC Order 24: was it "necessary either for disposing fairly of the cause or matter or for saving costs?" That remains the test in Northern Ireland. Under the CPR the guiding principle is that all the rules should be applied "with the overriding objective of enabling the court to deal with cases justly" (CPR Part 1.1). This includes, so far as is practicable, "(a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate …".

46. The commentary upon CPR Part 54 in the 2006 White Book (volume 1 at paragraph 54.16.2), having noted the availability of disclosure orders, says this:

> "Disclosure in judicial review proceedings, however, is ordered in relatively few cases and is generally limited to ordering disclosure of specific documents. The courts are not, generally, concerned with finding facts in judicial review cases. Facts will often be agreed or appear in documentary form and it will usually be the legal consequences attaching to those facts that are in issue. Furthermore, the defendant will normally have explained what action it took and why in the written evidence. A claimant will not be granted an order for disclosure to go behind the written evidence to ascertain whether the statements in that written evidence are correct unless there is some material outside that evidence which suggests that it is inaccurate, misleading or incomplete in some material respect (*R v Secretary of State for the Environment, Ex p Islington London Borough Council and London Lesbian and Gay Centre* [1992] COD 67; *R v Secretary of State for the Foreign and Commonwealth Affairs, Ex p World Development Movement Ltd* [1995] 1 WLR 386 at p 396). The courts will not allow 'fishing expeditions' where a claimant seeks disclosure in the hope that something will emerge which may form the basis for a claim (*R v Secretary of State for the Environment, Ex p Islington London Borough Council and London Lesbian and Gay Centre* [1992] COD 67)."

47. This appeal calls into question the correctness of that approach, in particular insofar as it states that "[a] claimant will not be granted an order for disclosure to go behind the written evidence to ascertain

whether the statements in that written evidence are correct unless there is some material outside that evidence which suggests that it is inaccurate, misleading or incomplete in some material respect." The authorities supporting it, your Lordships will notice, substantially pre-date the coming into force of the Human Rights Act 1998 and even before that the Law Commission had expressed the opinion (in paragraph 7.12 of its report, (1994) Law Com No 226, HC 669, *Administrative Law: Judicial Review and Statutory Appeals*):

> "While accepting that discovery should not be obtained on a contingency basis in judicial review proceedings, we consider that requirements which mean that in practice there must be a contradiction or inconsistency in the respondent's affidavit before discovery is ordered are unduly restrictive and undermine the basic test of relevance and necessity laid down in *O'Reilly v Mackman*."

48. The particular factual and legislative context in which the question of disclosure now arises is fully set out in the opinion of my noble and learned friend Lord Carswell whose detailed exposition of these matters I gratefully adopt. In basic outline the position is this. On the substantive judicial review application the appellant challenges (i) the compatibility with articles 9, 10 and 11 of the Convention of section 8(6)(c) of the Public Processions (Northern Ireland) Act 1998 and paragraph 4.4 of the Parades Commission's guidelines, each of which in essence requires the Commission to have regard to any impact which a procession may have on relationships within the community—a consideration which the appellant submits falls outside any of the permissible objectives to be pursued under paragraph 2 of each of the three articles; (ii) the validity of rule 3.3 of the Commission's Procedural Rules—which provides essentially that the Commission will treat all evidence provided to it as confidential and for its use only—a rule challenged on both natural justice and article 6 grounds; and (iii) the Commission's substantive determination on 5 April 2004 permitting, but only subject to the most stringent conditions, the Dunloy Orange Lodge march on Easter Sunday, 11 April. The appellant contends that the conditions imposed were disproportionately restrictive so as to violate his rights under articles 9,10 and 11.

49. All these issues, of course, will fall for determination at the substantive hearing of the judicial review challenge. The question now is an interlocutory one: whether disclosure should be given of five

particular documents mentioned and summarised in Sir Anthony Holland's affidavit of 29 July 2004, most importantly two situation reports from the Commission's Authorised Officers recording the views of a variety of people in the community about the proposed march. It is now common ground between the parties that rule 3.3 presents no obstacle to proper disclosure being ordered. Girvan J so held (see paragraph 8 of his judgment set out in paragraph 37 of Lord Carswell's opinion) and, like Lord Carswell, I agree with him.

50. The issues I have numbered (i) and (ii) in paragraph 48 above plainly do not require the disclosure of documents. The application goes rather to the central issue numbered (iii), the proportionality of the restrictions imposed upon the march, given their obvious interference with the appellant's rights under articles 9, 10 and 11. It is in that context that disclosure is sought here. What then should be the court's approach to it?

51. Like Lord Carswell, I too have difficulties with each of the judgments below: Girvan J's because it appears to prescribe a fixed rule that disclosure shall be made (a) whenever proportionality is in issue (b) of whatever documents are referred to in the respondent's affidavit (see paragraph 11 of the judgment set out in paragraph 25 of Lord Carswell's opinion); Morgan J's (the only reasoned judgment in the Court of Appeal) because he appeared to hold that the rule 3.3 validity issue needed to be decided before disclosure could properly be determined so that the disclosure application at the present stage must fail for prematurity (see paragraphs 22 and 23 of the Court of Appeal's judgment set out in paragraph 26 of Lord Carswell's opinion).

52. Is disclosure "necessary for disposing fairly" of this challenge (the test under the RSC), or to "[enable] the court to deal . . . justly" with it (the test under the CPR) (plainly identical tests in the present context)?

53. There can be no doubt that proportionality challenges have brought a new dimension to judicial review. In times past, when the *Wednesbury* principle ruled, decision-makers had only to have regard to all material considerations (the weight of which was entirely for them), to ignore immaterial ones, and to have reached decisions which were rational (as opposed to perverse) to be immune from challenge. Subject only to rationality, decisions could not be impugned on the ground that a wrong balance had been struck between competing considerations. Now of course, in certain cases at least, a more sophisticated and intensive

process of review is required, in particular when investigating alleged violations of the qualified rights protected by the Convention.

54. All this is very well known and the subject of copious jurisprudence and academic commentary. Lord Steyn's judgment in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (quoted extensively by Lord Carswell in paragraph 35 of his opinion) has attained near-classic status. Plainly nowadays, in cases like the present, a more intensive review, a closer factual analysis of the justification for restrictions imposed, is required than used to be undertaken on judicial review challenges. But it is important too to recognise that even in proportionality cases judicial review still remains a very different process from the sort of litigation in which disclosure orders are ordinarily made. The challenge by definition goes to the *legality* of the decision impugned. Generally no fact-finding will be necessary—unless perhaps in procedural challenges where it may be necessary to establish what happened in the course of the decision-making process rather than what material was before the decision-maker. And it is a well-established principle that once permission to bring a claim for judicial review has been given public authorities are under a duty of candour to lay before the court all the relevant facts and reasoning underlying the decision under challenge. Even, moreover, where proportionality is an issue, as Lord Steyn remarks towards the end of the passage cited from his judgment in *Daly*: "This does not mean that there has been a shift to merits review. On the contrary . . . the respective roles of judges and administrators are fundamentally distinct and will remain so."

55. In addressing the critical question in any proportionality case as to whether the interference with the right in question is objectively justified, it is the court's recognition of what has been called variously the margin of discretion, or the discretionary area of judgment, or the deference or latitude due to administrative decision-makers, which stops the challenge from being a merits review. The extent of this margin will depend, as the cases show, on a variety of considerations and, with it, the intensity of review appropriate in the particular case.

56. This then is the general framework within which applications for disclosure in judicial review should be considered. In my judgment disclosure orders are likely to remain exceptional in judicial review proceedings, even in proportionality cases, and the courts should continue to guard against what appear to be merely "fishing expeditions" for adventitious further grounds of challenge. It is not

helpful, and is often both expensive and time-consuming, to flood the court with needless paper. I share, however, Lord Carswell's (and, indeed, the Law Commission's) view that the time has come to do away with the rule that there must be a demonstrable contradiction or inconsistency or incompleteness in the respondent's affidavits before disclosure will be ordered. In future, as Lord Carswell puts it, "a more flexible and less prescriptive principle" should apply, leaving the judges to decide upon the need for disclosure depending on the facts of each individual case.

57. On this approach the courts may be expected to show a somewhat greater readiness than hitherto to order disclosure of the main documents underlying proportionality decisions, particularly in cases where only a comparatively narrow margin of discretion falls to be accorded to the decision-maker (*a fortiori* the main documents underlying decisions challenged on the ground that they violate an *unqualified* Convention right, for example under article 3). That said, such occasions are likely to remain infrequent: respondent authorities under existing practices routinely exhibit such documents to their affidavits (and, indeed, should be readier to do so whenever proportionality is in issue). Take this very case. But for the important matter of confidentiality arising in respect of these particular documents, it seems to me almost inevitable that they would have been exhibited, not least because that would have been simpler than summarising them. Without his having seen them, however, one can readily understand the appellant's concern that their effect may have been unwittingly distorted.

58. I too agree, therefore, that the disclosure application here should not be dismissed. I would treat all five documents in the same way: the judge should receive from the respondent and inspect the full text of the disputed documents (consistently with the practice laid down by the House of Lords in *Science Research Council v Nassé* [1980] AC 1028); if he concludes that realistically their disclosure could not affect the outcome of the proportionality challenge he will dismiss the appellant's application for inspection; if, however, he reaches the contrary conclusion he will need to consider (with counsel's assistance) the question of redaction; only then may he still need to determine the respondent's public interest immunity claim.

59. I too, therefore, for substantially the same reasons as those given by Lord Carswell, would allow the appeal and make the necessary order.