HOUSE OF LORDS

SESSION 2007–08

[2008] UKHL 66

on appeal from:[2006]NICA 37

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

In re E (a child) (AP) (Appellant) (Northern Ireland)

Appellate Committee

Lord Hoffmann
Lord Scott of Foscote
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood

Counsel

Appellant:
Karen Quinlivan
Jessica Simor
(Instructed by Madden & Finucane)

Respondent:
Bernard McCloskey QC
Paul Maguire QC
(Instructed by Crown Solicitor)

First Interveners (Northern Ireland Human Rights Commission)
Barry MacDonald QC
Fiona Doherty
(Instructed by Northern Ireland Human Rights Commission)

*Second Interveners (Children's Law Centre and Northern Ireland Commissioner for Children and Young People (*Written submissions only*))*
Martin O'Rourke
(Instructed by Children's Law Centre)

Hearing dates:

17, 18 and 19 JUNE 2008

ON

WEDNESDAY 12 NOVEMBER 2008

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

In re E (a child) (AP) (Appellant) (Northern Ireland)

[2008] UKHL 66

LORD HOFFMANN

My Lords,

1. I have had the privilege of reading in draft the opinion of my noble and learned friend Lord Carswell. I agree with it and, as he has dealt fully with the facts and the law, I shall not detain your Lordships by covering the same ground. For the reasons he gives, I would dismiss the appeal.

2. It may however be of some assistance in future cases if I comment on the intervention by the Northern Ireland Human Rights Commission. In recent years the House has frequently been assisted by the submissions of statutory bodies and non-governmental organisations on questions of general public importance. Leave is given to such bodies to intervene and make submissions, usually in writing but sometimes orally from the bar, in the expectation that their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain. The House is grateful to such bodies for their help.

3. An intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything. It is not the role of an intervener to be an additional counsel for one of the parties. This is particularly important in the case of an oral intervention. I am bound to say that in this appeal the oral submissions on behalf of the NIHRC only repeated in rather more emphatic terms the points which had already been quite adequately argued by counsel for the appellant. In future, I hope that

interveners will avoid unnecessarily taking up the time of the House in this way.

LORD SCOTT OF FOSCOTE

My Lords,

4. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Carswell and for the reasons he has given, with which I am in full agreement and to which I can add nothing of value, I too would dismiss this appeal.

BARONESS HALE OF RICHMOND

My Lords,

5. The world looked on in consternation and amazement in September 2001 as day after day little girls being taken to school by their parents were subjected to a barrage of intimidating clamour, insults, abuse and offensive missiles from by-standers, some of them children themselves, as they walked up the street. The experience was obviously terrifying for the children and made more so by the precautions deemed necessary to enable them to get to school without physical harm. They walked in a group between lines of armoured vehicles and police or service personnel holding riot shields some of them facing the children rather than the aggressors. It is little wonder that their experiences had a marked effect upon their physical and emotional heath. It was the fact that little children could be subjected to such prolonged and very public ill-treatment which horrified the outside world and made it hard for them to understand, not only why the aggressors could think it in any way acceptable to subject the children to such an ordeal, but also why the authorities could allow it to happen. It is because of this that I would like to add just a few words to the opinion of my noble and learned friend, Lord Carswell.

6. I agree with him that it would have been preferable had the appellant’s daughter been made a party to these proceedings and even

separately represented. With the best will in the world, there is a tendency to see confrontations such as this through adult eyes, and to forget that these are not the eyes of children, who are simply the innocent victims of other people's quarrels. Fortunately, we have had the assistance of some very helpful written submissions from the Children's Law Centre and Northern Ireland Commissioner for Children and Young People. They draw attention to the particular vulnerability of children when exposed to violent conflict. They quote Thomas Hammerberg, Council of Europe Commissioner for Human Rights, in his 2007 Children's Law Centre lecture:

> "The atmosphere of violence and the tension tend to affect children deeply . . . Younger human beings have less ability to see the context and understand why people behave as they do and, certainly, their time perspective is different. All this makes them so much more vulnerable."

7. The European Court of Human Rights has taken particular note of the vulnerability of children in its judgments on the obligations of the state to protect people from inhuman or degrading treatment. It is noteworthy that the landmark rulings in which the state has been found responsible for failing to protect victims from serious ill-treatment meted out by private individuals have concerned children. The case of *A v United Kingdom* (1999) 27 EHRR 611 was decided shortly before the leading case of *Osman v United Kingdom* (2000) 29 EHRR 245. *A v United Kingdom* established the principle that the state was obliged to take measures designed to ensure that people were not subjected to ill-treatment by private individuals. Vulnerable people were entitled to be protected by effective deterrent measures. The existence of the defence of reasonable chastisement failed to afford children such protection. *Osman* took the matter further by establishing a duty to take more pro-active protective measures to guard against real and immediate risk of which the authorities knew or ought to have known. There was no breach in *Osman* itself; but breaches were found in both *Z v United Kingdom* (2002) 34 EHRR 97 and *E v United Kingdom* (2003) 36 EHRR 519. In *Z*, the authorities had failed to protect children from prolonged abuse and neglect which they knew all about. In *E*, they had failed to monitor the situation after a step-father had been convicted of sexual abuse, and so it was held that they should have found out that he was abusing the children and done something to protect them. The Court said this, at para 99:

> "The test under article 3 however does not require it to be shown that 'but for' the failing or omission of the public authority ill-treatment would not have happened. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the state."

8. These and later cases show that the special vulnerability of children is relevant in two ways. First, it is a factor in assessing whether the treatment to which they have been subjected reaches the 'minimum level of severity' – that is, the high level of severity – needed to attract the protection of article 3. As the Court recently reiterated in the instructive case of *Mayeka v Belgium* (2008) 46 EHRR 23, para 48:

> "In order to fall within the scope of article 3, the ill-treatment must attain a minimum level of severity, the assessment of which depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim."

Detaining a Congolese child of five, who had been separated from her family, for two months in an immigration detention facility designed for adults met that high threshold even though the staff had done their best to be kind to her.

9. The special vulnerability of children is also relevant to the scope of the obligations of the state to protect them from such treatment. Again, in *Mayeka v Belgium*, at para 53, the court reiterated, citing *Z, A,* and *Osman*, that:

> ". . . the obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals… Steps should be taken to enable effective protection to be provided, *particularly to children and other vulnerable members of society*, and should include reasonable measures to prevent ill-treatment of which the authorities have or ought to have knowledge." (emphasis supplied)

Despite the fact that the state had detained the little girl, the Court treated the case, not as a breach of its negative obligation, but as a breach of its positive obligation to look after her properly. She "indisputably came within the class of highly vulnerable members of society to whom the Belgian State owed a duty to take adequate measures to provide care and protection as part of its positive obligations under article 3 of the Convention" (para 55). This they had failed to do (para 58). The Court also found a breach of the state's obligations towards the child's mother, because of the distress she must have suffered at her daughter's treatment, even though it could be said that she had to some extent brought it on herself by arranging for the child to travel through Belgium without a visa (para 62).

10. That case demonstrates the wisdom of what was said by my noble and learned friend, Lord Brown of Eaton under Heywood, in *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396, para 92:

> ". . . it seems to me generally unhelpful to attempt to analyse obligations arising under article 3 as negative or positive, and the state's conduct as active or passive. Time and again these are shown to be false dichotomies. The real issue in all these cases is whether the state is properly to be regarded as responsible for the harm inflicted (or threatened) upon the victim."

Nevertheless, there must be some distinction between the scope of the state's duty not to take life or ill-treat people in a way which falls foul of article 3 and its duty to protect people from the harm which others may do to them. In the one case, there is an absolute duty not to do it. In the other, there is a duty to do what is reasonable in all the circumstances to protect people from a real and immediate risk of harm. Both duties may be described as absolute but their content is different. So once again it may be a false dichotomy between the absolute negative duty and a qualified positive one. In another recent case about children, *Kontrova v Slovakia*, App no 7510/04, Judgment of 24 September 2007, the Court, at para 50, reiterated the well-known passage from *Osman*, para 116:

> "Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities."

In *Kontrova*, the state admitted violating the positive obligation to protect life in article 2. Despite having received allegations of repeated and serious violence against by children's father, and that he had a shotgun and threatened to use it to kill himself and the children, they had failed to act upon these allegations, with the direct result that he carried out his threats and the children were killed.

11. This case has several features which distinguish it from the general run of cases, such as *Osman* and the recent decision of this House in *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50; [2008] 3 WLR 593, in which victims have complained that the state has failed adequately to protect them from the actions of private individuals. First, it concerns children. Second, there is no issue about whether the police should have appreciated the real and immediate risk of ill treatment. They knew all about it. It was going on under their noses. The fact that it may not have occurred to them that it fell within article 3 makes no difference. Third, while they were undoubtedly doing their very best to ensure that the children could get to school by their usual route without suffering physical harm, the steps they took made the experience even more frightening for the children: closing the road, making the parents and children walk together under escort at defined times in the morning and afternoon, rather than letting them go in dribs and drabs in the way that children normally make their way to and from school. Fourth, they let this situation continue throughout half a school term. The evidence suggests that this was because they saw it as part of a complex community dispute, in which a loyalist enclave on this area of North Belfast saw itself as under threat from the encroaching nationalists, and was exercising a right to 'protest' about this. The police now accept that this was not a legitimate exercise of the right to protest. But they also believed that more sinister forces on the loyalist side might exploit the dispute to foment much more serious violence elsewhere in Belfast if the matter was not carefully handled and ultimately a political solution found.

12. Hence the essential dispute before us is whether the police were entitled to take into account the risk of serious harm and even death to unspecified people elsewhere in Belfast when deciding how to protect the Holy Cross school children. Had they not done so, it is argued, they could and should have taken a more robust attitude to the aggressors from the outset, arresting the ring-leaders and driving the others off the street. This, it is said, is what they finally decided to do after the aggression had been going on for half a term, and shortly after they signalled their intentions, the so-called 'protest' was abandoned.

13. Both the trial judge and the Court of Appeal thought that the police were entitled to take those wider considerations into account. The Court of Appeal, perhaps understandably as their judgment came before this House had further clarified the matter in *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, mistakenly applied the test derived from *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 to their assessment of the police behaviour. It is now clear that, under the Human Rights Act, the court must make its own assessment of whether a public authority has acted incompatibly with the convention rights. That said, as Lord Bingham said in *Huang*, para 16, the court has to "give appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice".

14. As a general principle, a police officer is not entitled to stand by and let one person kill or seriously ill-treat another, when he has the means of preventing it, just because he fears the wider consequences of doing so. He has to step in, come what may. But this situation was not as straightforward as that. In *Z v United Kingdom* and *Kontrova v Slovakia* it was quite obvious what could have been done to protect the children from harm: the *Z* children could have been taken into care and the *Kontrova* children's father could have been arrested when he first threatened to kill them. It was rather less obvious what the authorities should have done to protect the children in *E v United Kingdom* and I have been troubled by the rejection of the "but for" test in the passage quoted in para 7 above. In the end, however, I do not think that it has been demonstrated that, had the police behaved at the outset in the way in which it is now said that they should have behaved, the children's experience would have been any better. Indeed, it could have been a great deal worse. They were in very real physical danger at the beginning. On 5 September an explosive device was thrown into the road where they were walking but thankfully injured no-one. The difficulties and dangers to them in doing what it is now suggested should have been done cannot be ignored. Hindsight is a wonderful thing and no doubt the police have learned lessons from this whole experience. But in a highly charged community dispute such as this, it is all too easy to find fault with what the authorities have done, when the real responsibility lies elsewhere.

15. For that reason, therefore, despite all the features which distinguish this case from those where no breach of duty has been found, and in agreement with Lord Carswell, I too would dismiss this appeal.

LORD CARSWELL

My Lords,

16. The essence of the appellant's case, as presented before your Lordships' House, was that the state and its emanation the police force failed to take appropriate steps to discharge their positive obligation under article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") to protect the appellant and her young daughter against the infliction upon them of inhuman and degrading treatment. It was also claimed that the police had discriminated against them in their handling of the events in which such treatment occurred. Other arguments were presented, but they were peripheral to these main issues. The appellant sought declarations in relation to them, notwithstanding the passage of time and the substantial change of circumstances since the events took place between June and November 2001. It was argued in the courts below that they should not entertain the proceedings, on the ground that the matter had become academic. Those courts decided to allow the application for judicial review and the subsequent appeal to proceed. Your Lordships took the same course in granting leave to appeal, on account of the importance of the issues concerned.

17. The appellant's application for judicial review was heard in the High Court by Kerr J, who by the time he gave judgment had become Lord Chief Justice of Northern Ireland. He dismissed the application on 16 June 2004 and the Court of Appeal (Campbell and Sheil LJJ, Gillen J) on 19 October 2006 dismissed the appellant's appeal.

18. Both the judge and the Court of Appeal set out the material facts in some detail, and for reasons which will appear I shall also give fairly extended consideration to them in this opinion, although any account must necessarily be only a summary of the voluminous affidavit evidence placed before the courts.

19. Holy Cross Girls' Primary School is a school with, at the material time, approximately 230 pupils aged between three and eleven years from the Catholic community in north Belfast. It is situated on Ardoyne Road, along which it was the custom of parents of some of the pupils to walk with their daughters to and from school. The district is largely Catholic, but the Glen Bryn estate forms an enclave bordering part of

Ardoyne Road on both sides. It is inhabited by Protestant families who on account of the political sympathies held by most of them are generally termed loyalists, a term which I shall use for convenience. Policing in Northern Ireland was the responsibility of the Royal Ulster Constabulary, which on 4 November 2001 was succeeded by the Police Service of Northern Ireland. Again for convenience I shall refer to the two bodies generally as the police.

20. In the afternoon of 19 June 2001 there was an outbreak of disorder on Ardoyne Road, which was the trigger for the events and conduct forming the factual background of this appeal. The area had been in a state of increasing tension, the development of which was described by Assistant Chief Constable McQuillan in his affidavit sworn on 21 January 2002. There was a certain amount of potentially violent confrontation between rival factions in the earlier part of June, and the police felt some concern about the possibility that loyalist paramilitary groups would attempt for their own ends to foment trouble where they could in the area, seeking to raise the temperature and encourage confrontation and even violent disorder.

21. The behaviour of the loyalist crowds along Ardoyne Road which I am about to describe has been termed a "protest" in the documents before the House. It is said that the *fons et origo* was a protest from the loyalists about an issue about which they felt concern, as mentioned by the trial judge in paragraph 2 of his judgment, and Mr McQuillan describes in paragraph 43(iii) of his affidavit the formulation in or about late October 2001 of demands from the loyalist residents. Certainly it is well known that disturbances of the kind which took place are commonly the product of a number of factors. The only evidence which the House had before it about any reasons which may have underlain the original disorder was the reference in paragraph 2 of the appellant's affidavit, which is inconclusive, and one by Mr McQuillan (para 43(ii) of his affidavit) to the concerns of the loyalist residents focusing at the outset on security in their area and their perception of attacks on them and their homes by nationalists. Whatever the initial cause may have been, however, it is entirely clear that the behaviour complained of far exceeded the bounds of that which could be associated with any legitimate protest. It was utterly disgraceful and was condemned by Kerr LCJ in strong terms in paragraph 63 of his judgment. The term "protest" is accordingly inappropriate, as may also be the term "demonstration" in the circumstances of this case. Nor is it readily apparent that the events should be classified as a "dispute", as referred to in some of the affidavits sworn by police officers. Since those events are described in so many material documents as a protest, I shall

continue to use the term, but subject to the caveat which I have expressed.

22. The events giving rise to the proceedings fall into two distinct periods: the first ran from 19 June 2001 until the conclusion of the school term at the end of June and the second between the start of the next term on 3 September until the protest was suspended on 23 November 2001.

23. Serious disorder broke out on Ardoyne Road in the afternoon of 19 June 2001, which appears to have been a reaction from an incident unconnected with the school or its pupils. This developed into abuse towards and attacks on children returning from school and their parents. The appellant does not claim that she and her daughter were directly subjected to that, but she states that her daughter was frightened and upset by witnessing a violent incident which took place. The following day the police closed Ardoyne Road, when further disorder and violent confrontation took place.

24. There was further rioting in Ardoyne Road on 21 June, but it was quieter on Friday 22 June. The appellant did not take her daughter to school on 21 June and on 22 June she went by an alternative, longer route along Crumlin Road and through the grounds of another school, as the police still did not permit them passage along Ardoyne Road. Mr McQuillan expressed the concern of the police at this stage in paragraph 38 of his affidavit:

> "With the police and army resources available to me and the general situation in Urban Region and the rest of Northern Ireland at that time, I was concerned that I simply did not have sufficient resources available to secure the safe passage of the children and parents. Furthermore, I was concerned that, to try to force them through Ardoyne Road at that time, also ran a real risk that serious violence would break out in Loyalist Communities across other parts of the Region and that this would include the risks of attacks on other Roman Catholic schools. Some of these attacks would be organised by the [Ulster Defence Association] and I considered that they would represent a real risk to life."

He therefore decided, in consultation with Chief Superintendent Maxwell, the District Commander, that it was not possible to mount an

operation that would guarantee the safety of the children and parents if they travelled along the road. This situation continued until the end of the school term.

25. Notwithstanding efforts on the part of the parents to negotiate with the Glen Bryn residents in the hope of improving matters and other initiatives by political and community groups, it became apparent that when the school term commenced in September the loyalist mob would endeavour to prevent the pupils of Holy Cross School and their parents from walking to school along Ardoyne Road past the Glen Bryn estate. Mr McQuillan states in his affidavit that the police resolved to mount a police operation to do everything possible to ensure that they could go in safety to school by the route of their choice along Ardoyne Road.

26. It was quickly apparent that the loyalist residents and those aligning themselves with them were intent on preventing the Catholic parents and children from walking to school on Ardoyne Road through the Glen Bryn estate. On 3 September, the first day of the school term, a large crowd of loyalists assembled and attacked the police and the soldiers erecting barriers. The police made efforts to clear the crowd, but the loyalists' numbers were too great and their hostility too severe for them to be able to do so. Later that day and on subsequent days in September serious rioting occurred in the area, notwithstanding the deployment of large numbers of police and Army personnel.

27. The loyalists' efforts in pursuit of their aim of blocking the walk to the school became increasingly violent and dangerous, with highly unpleasant and frightening consequences for the children. These are summarised in the statement of facts and issues agreed between the parties in a passage at paragraph 6 which makes distressing reading. A list of examples of the protesters' behaviour is there set out. No doubt the type of incident which occurred and the intensity of the abuse varied from day to day. The list reads as follows:

> "(i) the throwing of an explosive device on Ardoyne Road on the 5th September 2001 as children were being taken to the school.
>
> (ii) The throwing of other missiles at those making the journey to and from the school. These included bricks, rubbish, balloons filled with urine, dog excrement and in

particular in the pre-Halloween period firecrackers and bangers.

(iii) Some parents when travelling to or from the school were the object of death threats shouted at them by 'protesters'.

(iv) A commonplace was the shouting by 'protesters' of verbal abuse of a vile sectarian nature.

(v) Male 'protesters' shouted obscenities of a sexual nature at women and children as they sought to make their way to or from school.

(vi) There were occasions where racist abuse was directed at persons connected to the school.

(vii) On occasions explicit pornographic material was displayed by the 'protesters' as pupils travelled to school.

(viii) Two priests connected to the local parish and who were on the Board of Governors of the school were subjected to verbal abuse which suggested that they engaged in improper sexual activity with the pupils of the school.

(ix) Placards were on occasions displayed which described the same priests as paedophiles and stated that they had joined the priesthood to abuse small children.

(x) Some 'protesters' from time to time wore 'Johnny Adair' facemasks. Johnny Adair was a notorious loyalist paramilitary who for long had been associated with sectarian attacks on Catholics in the North Belfast area.

(xi) On occasions children, their parents and the priests already referred to were spat at by 'protesters'.

(xii) A frightening and intimidating atmosphere was created by the 'protesters' by the use of piercing whistles, sirens, horns and other instruments which could generate loud noises.

(xiii) Apart from the Johnny Adair masks, already referred to, 'protesters' also wore other masks from time to time."

The DVD which formed part of the material before the House provides vivid visual confirmation of the violent and intimidating nature of the protesters' behaviour. Notwithstanding all this the parents continued to take their children to school on foot every day along Ardoyne Road. Most of them declined to use the alternative route travelled by the appellant and her daughter in June, which was somewhat longer and was more difficult for some to traverse. The police offered to transport the parents and children to the school in an armoured bus, but this offer was also declined. So for over two months the group of parents and children ran the gauntlet twice a day along Ardoyne Road.

28. This unhappy state of affairs continued until late November 2001, in spite of efforts by the police to protect the children and parents and efforts by many people in the communities of north Belfast, members of the Northern Ireland Human Rights Commission ("NIHRC"), public representatives, clergy, teachers and others concerned with the welfare of the children to improve matters and seek a means to achieve their cessation. The effect on the physical and emotional health of the children who ran this gauntlet regularly with their parents was marked, as Dr Tan, a local medical practitioner, averred in his affidavit. This is confirmed by the evidence of the principal of the school, Mrs Anne Tanney, and three members of NIHRC who visited the school. It was mitigated only by the wise and compassionate way in which the principal and staff of the school endeavoured to make it a haven of normality and ease the fears and distress of the children.

29. It is clear from the affidavits of Sir Ronnie Flanagan, then Chief Constable, ACC McQuillan and David Watkins, principal security adviser to the Secretary of State for Northern Ireland, that it was the firm view of the Government and the police that a policing solution alone would not resolve the situation. A succession of meetings was held by Government ministers and officials and senior police officers with a wide range of people in the area, with a view to making both short-term and long-term progress in protecting the children and parents and bringing the matter to an end. Towards the end of October 2001 the atmosphere began to change and it appeared possible to make moves directed towards a return to normality.

30. In early November the police decided to adopt a revised strategy of lower-key policing of the protest. The loyalists then agreed to appoint stewards and reduce the level of confrontation, while the police removed their riot gear in favour of more usual street apparel. Gradually over the next three weeks the level and intensity of policing was reduced, without untoward effects, until the protest was suspended on 23 November.

31. A substantial part of the affidavit evidence was devoted to conflicting accounts of meetings which the Chief Constable, other senior police officers and the Security Minister Ms Jane Kennedy MP held with various persons and bodies concerned about the situation. Some of them made representations of varying vigour to the effect that the police were not taking sufficiently effective action to prevent the loyalist protesters from acting as I have described. Factual disputes of this kind cannot readily be resolved in judicial review proceedings and it is not possible for the House to attempt to do so. I do not consider, however, that those conflicts of evidence require to be resolved and, like the trial judge, I do not propose to comment upon them.

32. Counsel for the appellant laid some emphasis on statements appearing in the affidavits sworn by police officers, which she submitted showed that they misunderstood the extent of the obligation resting upon them to prevent the exposure of the children to the frightening behaviour of the protesters and paid an incorrect amount of regard to the rights of assembly and protest of the loyalists.

33. She pointed to places in Mr McQuillan's affidavit sworn on 21 January 2002 in which he referred to respecting and balancing the rights of all those involved (paras 43(iv), 56 and 63). In para 42 he stated that the police sought to ensure, among other concerns, "that the rights of protesters to lawfully protest are respected". In para 50 he said that the police hoped that the measures which they adopted

> "would provide some greater protection for the parents and children and at the same time minimal interference with the rights of the Loyalist residents to lawfully protest and make use of the public highway."

As against that the Chief Constable is recorded as having stated in a meeting with representatives of NIHRC on 25 October 2001 that "his paramount consideration is the welfare of the children" and that "the rights of the children far outweighed any rights to freedom of assembly

or expression claimed by the protesters." In a letter of 7 November 2001 to the Chief Commissioner he assured him that "the rights of the children are to the forefront of our thinking in all we do and in all we are seeking to achieve." An echo of this approach appears in para 27 of Chief Superintendent Maxwell's affidavit sworn on 14 January 2002, where he refers to his view that the safety of the children had to be paramount.

34. The difficulties faced by the police and the attempts made to overcome them and ensure the safe passage of the children and their parents are set out in the affidavits sworn by the senior police officers involved. They are summarised in some detail in the judgments of the trial judge and the Court of Appeal and I shall set out only a resume in this opinion.

35. During the first period, between the outbreak of disorder on 19 June 2001 and the end of the school term, the situation in the area was such that there would have been considerable risk to the children and parents if the police had attempted to force a passage for them through the protesters on Ardoyne Road. Firearms and blast, paint and petrol bombs had been used on 19 June against the police officers, 39 of whom had been injured. There were concerns about the effect which further confrontation and possible violence might have on the stability of the area, which was in a volatile condition. Chief Superintendent Maxwell was seriously concerned for the safety of the children, in the light of intelligence received about the risk of organised attacks by loyalists on Catholic residents. Even so, he told representatives of the school that had it been a situation of adults going to their place of work, rather than children going to school, he might have been disposed to push back the protesters. He considered the risk too great to take in the case of children, however, and so decided, with the agreement of ACC McQuillan, that he could not permit the use of Ardoyne Road for their passage to school. This decision was not challenged in the submissions advanced to the House.

36. When the new term commenced in September the police had been able to consider what strategy they would follow and what expedients they might adopt. A decision was made by them that their overriding priority was to do everything possible to enable the parents to take their children to school on foot along Ardoyne Road. To this end an attempt was made on 3 September to erect a barrier of screens between the protesters and the pedestrians, with police and soldiers stationed on each side of the barrier. This had limited success, as the

screens were not sufficiently robust to withstand stones and took so long to erect that assembling crowds were able to prevent the completion of the barrier. The use of hessian screens was also considered, but rejected, mainly on account of the fire risk.

37. The expedient adopted was to station police and military vehicles along both sides of the road, creating a corridor through which the group of children and parents could walk. Police and soldiers were deployed on the protesters' side and escorting police officers carrying long shields accompanied the group to protect them from missiles. This tactic proved successful, to the extent that no injuries were sustained by any children.

38. The ensuring of the passage of the groups of children and parents placed a heavy burden on the police. Mr McQuillan stated at para 53 of his affidavit of 21 January 2002:

> "Huge numbers of police and soldiers were deployed into the area each day to achieve the safe travel of the parents and children to school and each evening to prevent sectarian rioting along interfaces in the area. During the course of these operations Police and Army came under attack with gunfire, blast bombs, petrol bombs, acid bombs and missiles. Vehicles were hijacked, set on fire and rolled into police lines. Large numbers of soldiers and police officers were injured, some very seriously."

Mr Maxwell stated that a total of 41 police officers received injuries directly attributable to the Holy Cross dispute. The cost of policing it between June and December 2001 has been estimated at over £3 million. The deployment of such numbers of police officers in Ardoyne meant the diversion of resources from other areas, with a significant impact on the quality of policing in the Belfast Region.

39. Several deponents criticised the effectiveness of the steps taken by the police. Some, notably the appellant herself and Father Aidan Troy, the chairman of the board of governors of the school, described the screens as inadequate. It is apparent, however, that these criticisms are largely directed to the screening on 3 September 2001, whereas it was accepted by the police on reviewing that day's events that this had not been satisfactory and that other steps should be adopted. Others have complained that there were gaps in the line of vehicles

subsequently used, which enabled protesters to get too close to the children as they walked along the roadway. Mr Frank McGuinness, a member of NIHRC, regarded the riot gear worn by the police as intimidating and there were also complaints that the police vehicles faced the children instead of the protestors and that offensive posters were not removed. The major complaint, however, made by a number of critics, was that the police should have taken more robust action, in particular by forcing protesters off the street and making more widespread arrests, with the object of terminating the protest at an early stage. This complaint formed the *leitmotiv* of much of the submissions made by counsel for the appellant and the first intervener NIHRC.

40. The major issue to which argument was directed was whether the State through its emanations the RUC and PSNI was in breach of its positive obligation under article 3 of the Convention to take the steps required of it to prevent the infliction of inhuman and degrading treatment upon the appellant and her daughter. In the courts below the argument also encompassed article 2, but before the House the appellant and NIHRC, sensibly in my view, did not pursue the issue under that article and confined their argument to article 3.

41. Several discrete questions require to be decided in approaching this issue:

(a) whether the appellant is entitled to seek relief on behalf of her child, who is not formally a party to the proceedings;
(b) whether the appellant and her daughter suffered inhuman or degrading treatment;
(c) whether article 3 was engaged so as to give rise to the positive obligation under that article;
(d) if so, whether the police took sufficient steps to discharge that obligation.

42. In the appellant's Order 53 statement she purported to claim relief in respect of breach of the Convention rights both of herself and her young daughter. It has not been made clear why the child was not also joined as a party, which could readily have been done. The Court of Appeal held, in reliance on the decisions of the European Court of Human Rights in *Ilhan v Turkey* (2002) 34 EHRR 36 and *YF v Turkey* (2004) 39 EHRR 34, that the appellant was entitled to bring the present proceedings on behalf of her daughter. She was a young child and therefore vulnerable at the time of the events in question and the commencement of the judicial review proceedings. The appellant is a

close relative of the child, who ranked as a victim for the purposes of section 7 of the Human Rights Act 1998. No argument to the contrary was addressed to the House and I am content to accept that the proceedings are properly founded, though I would regard it as generally preferable to join persons in the child's position as parties.

43. The respondents accepted that some of the more extreme forms of conduct in which the loyalist protesters indulged potentially constituted inhuman or degrading treatment within the meaning of article 3. I regard this as a correct concession, certainly in respect of the appellant's daughter, and so I do not find it necessary to consider the reservation expressed by Campbell LJ in paragraph 88 of his judgment in the Court of Appeal.

44. Article 3 of the Convention provides in simple and unqualified terms:

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

It is not suggested that the state through the police itself subjected the appellant or her daughter to any such treatment. The appellant's case is rather founded upon a claim that it was in breach of the positive obligation imposed upon it by article 3. The negative obligation, not to inflict inhuman or degrading treatment, is unqualified. But the Strasbourg jurisprudence has laid down in decisions under article 2 that a positive obligation is also imposed upon contracting states, to take certain steps towards the prevention of loss of life at the hands of others than the state. It was accepted by all parties to the present appeal that a similar positive obligation is imposed under article 3 in the prevention of the infliction by third parties of inhuman or degrading treatment. That was the major premise of the arguments addressed to the House and it appears to be correctly founded in principle and supported by recent decisions of the European Court of Human Rights ("ECtHR").

45. The extent of the positive obligation obviously cannot be regarded as absolute as the negative obligation. The contracting states could sensibly bind themselves by an absolute and unqualified obligation not to take life and not to inflict inhuman or degrading treatment, matters which they themselves could control. They could not be expected to undertake a similarly absolute obligation to prevent other persons not under their direct control from taking such actions. The ECtHR set out the underlying reasoning fully in a passage in *Osman v*

United Kingdom (1998) 29 EHRR 245, paras 115-116, a case involving article 2, which has become familiar to your Lordships but which nevertheless bears repetition *in extenso*:

> "115. The Court notes that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.
>
> 116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.
>
> In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the

> authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life. Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2. For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case."

46. It may be seen from the passage which I have quoted and from such decisions as *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50; [2008] 3 WLR 593 that in cases involving article 2 the major issue may be whether the risk to life which in the event materialised was to be regarded at the time when precautions could have been taken as "real and immediate". Miss Quinlivan for the appellant pointed out that no analogous difficulty arose in the present case, for the inhuman and degrading treatment had actually occurred and then recurred over a lengthy period, so that article 3 in its positive aspect was engaged. The police accordingly possessed more than sufficient knowledge of that treatment to trigger their obligation to take preventive action.

47. That much was not in dispute, but counsel went further and submitted that since the police had available to them the means of stopping the protest and preventing the infliction of inhuman or degrading treatment, their obligation to use the measures at their disposal was absolute, unless they could conclusively demonstrate that if they adopted those measures worse consequences of risk to life or the

infliction of inhuman or degrading would ensue to the children concerned or other persons. The submission advanced by Mr Macdonald QC for the first intervener NIHRC went equally far. He argued in terms that the positive obligation under article 3 was absolute in its nature and that no element of proportionality entered into consideration. The full extent of this argument appears at para 55 of his written case:

> "55. Likewise, the concept of balance is not in play in that the needs of the community cannot be weighed against the right of an individual not to be subjected to torture or other ill-treatment reaching the threshold. To express the standard of the state's responsibility in terms of 'reasonableness' therefore fails to reflect the categorical imperative created by Article 3. Considerations of reasonableness may operate in deciding whether a proposed measure is available or likely to be effective to stop the ill-treatment in question but not otherwise. In circumstances where the state has it within its power to prevent or stop inhuman or degrading treatment, it must take the measures necessary to do so. The only room for discretion is in determining the most effective means of achieving the object of preventing the ill-treatment. There is no room for opting not to prevent it."

48. I am unable to accept the thesis advanced by either counsel. It is in my opinion quite clear from para 116 of *Osman* that the obligation placed upon the authorities in an article 2 case is to do all that could reasonably be expected of them to avoid a real and immediate risk to life, once they have or ought to have knowledge of the existence of the risk. I cannot suppose that the obligation under article 3 is different in kind, and the Strasbourg jurisprudence confirms this, as I set out below. To hold otherwise would be to place an intolerable burden on the state. In the present case it would have required the police to drive back the protesters by main force and make numerous arrests, irrespective of the consequences which could have ensued and which could have given rise to widespread disorder, loss of life and destruction of property. I consider that my observations in *In re Officer L* [2007] UKHL 36, [2007] 1 WLR 2135, para 21 are equally applicable to the present case:

> "[21] Secondly, there is a reflection of the principle of proportionality, striking a fair balance between the general

> rights of the community and the personal rights of the individual, to be found in the degree of stringency imposed upon the state authorities in the level of precautions which they have to take to avoid being in breach of article 2. As the European Court of Human Rights stated in *Osman v United Kingdom* (1998) 29 EHRR 245, para 116, the applicant has to show that the authorities failed to do all that was reasonably to be expected of them to avoid the risk to life. The standard accordingly is based on reasonableness, which brings in consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available. In this way the state is not expected to undertake an unduly burdensome obligation: it is not obliged to satisfy an absolute standard requiring the risk to be averted, regardless of all other considerations: cf McBride, 'Protecting Life: A Positive Obligation to Help' (1999) 24 EL Rev: Human Rights Survey HR/43, HR/52."

49. This conclusion is supported by the post-*Osman* decisions of the ECtHR, of which it is sufficient to mention only a few. *Oneryildiz v Turkey* (Application No 48939/99, 30 November 2004) was an application brought under article 2, in a case in which it was claimed that the respondent state had failed to take sufficient measures to prevent the loss of life caused by a methane gas explosion at a municipal rubbish tip. The Court held that the state had failed in its positive obligation under article 2 to set up a framework for the protection of persons at risk. Citing, amongst other cases, the *Osman* decision, it held that the authorities had ample knowledge of the risk and were in breach of their duty to take such operational measures as were necessary and sufficient to protect the persons at risk. There was no suggestion that this was an absolute duty or one which differed in any way from that laid down in *Osman. Z v United Kingdom* (2002) 34 EHRR 97 concerned a complaint brought under article 3 of child neglect and abuse. The Court stated in para 73 that the states' obligations under the Convention required them to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. Citing *Osman,* it said that these measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge. In *Gldani Congregation of Jehovah's Witnesses v Georgia* (Application no 71156/01, 3 August 2007) police had known in advance of an attack upon the applicants by religious opponents, which constituted inhuman

or degrading treatment, but had failed to take any preventive action. The Court reaffirmed the existence of a positive obligation upon States under article 3, in the terms set out in *Z v United Kingdom* and quoted above. It added at para 96 "This protection calls for reasonable and effective measures".

50. In the High Court Kerr LCJ accepted the principle of reasonableness as the test to be applied to the measures adopted by the police. He referred to the natural reaction of right-thinking people that those responsible for the intimidation, threats and attacks upon the children and their parents should have been prevented from doing so or that those responsible should have been arrested and prosecuted. He went on in para 46 of his judgment:

> "[46l Sadly, policing options and decisions do not readily permit such uncomplicated solutions, particularly in such a uniquely fraught situation. Those who had to decide how to deal with this protest were obliged to have regard to the effect that their decisions might have in the wider community. It is not difficult to understand that an aggressive, uncompromising approach to the protest might have been the catalyst for widespread unrest elsewhere. It is precisely because the Police Service is better equipped to appreciate and evaluate the dangers of such secondary protests and disturbances that an area of discretionary judgment must be allowed them, particularly in the realm of operational decisions. While the sense of grievance of the parents is perfectly reasonable and the perplexity of those who could not understand why the police did not adopt more forceful tactics is unsurprising, I cannot accept that it has been established that the measures taken by the police were unreasonable. I have concluded that no breach of article 3 has been demonstrated therefore."

51. The Court of Appeal also adopted the test of reasonableness of the measures adopted and went on in para 89 of its judgment to consider how the steps taken by the police matched up:

> "[89] There was a positive obligation on the State to take reasonable measures to protect the child of 'E' from degrading treatment. On behalf of 'E' it is submitted that

> more positive steps or measures to protect the Convention rights of her daughter ought to have been taken by the police. Those best equipped to make an assessment as to the course to be adopted considered that there was a significant risk of violence erupting on a wider scale if more robust action was taken against the protesters. Not only could this have put at risk the lives of police officers but also the lives of members of the public living in North Belfast. Applying the *Smith* test we consider that taking account of the nature and size of the operation that was mounted over a considerable period of time and the perceived risk if other measures were adopted the police did all that was reasonably open to them to protect the rights of the child."

The *Smith* test referred to in this passage and in an earlier part of the judgment of the Court of Appeal is that set out by Sir Thomas Bingham MR in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554:

> "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

The decisions of the High Court and the Court of Appeal were criticised by counsel for the appellant and NIHRC on two grounds, first, that the Court of Appeal had applied the wrong test in adopting that laid down in *Smith*, and, secondly, that it was wrong to defer to the judgment of the police.

52. It is well established in decisions since the coming into force of the Human Rights Act 1998 that the *Smith* test is not sufficient to determine an issue of proportionality under the Convention. In *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, 184, para 13 Lord Bingham of Cornhill summarised the position in succinct terms:

> "In the course of his justly-celebrated and much-quoted opinion in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, paras 26-28, Lord Steyn pointed out that neither the traditional approach to judicial review formulated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 nor the heightened scrutiny approach adopted in *R v Ministry of Defence, Ex p Smith* [1996] QB 517 had provided adequate protection of Convention rights, as held by the Strasbourg court in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493."

Lord Bingham set out the elements of the correct approach in *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100, 116, para 30:

> "[30] … it is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting. The inadequacy of that approach was exposed in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, para 138, and the new approach required under the 1998 Act was described by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, paras 25-28 in terms which have never to my knowledge been questioned. There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test adopted by the Court of Appeal in *R v Ministry of Defence, Ex p Smith* [1996] QB 517 at 554. The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time … Proportionality must be judged objectively, by the court … "

He further observed at para 31 that what matters "is the practical outcome, not the quality of the decision-making process that led to it."

53. It is worth returning to the *ipsissima verba* of Lord Steyn in *Daly's* case. He said [2001] 2 AC 532, para 27:

> "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 … [T]he 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."

54. It has of course to be borne in mind that the cases to which I have referred, *Daly*, *Denbigh High School* and *Huang*, 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 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. The Court of Appeal was therefore in error in applying the *Smith* test and I propose to assess the actions of the police in the light of the evidence adduced and by reference to the correct principles.

55. Between the beginning of September and late November 2001 the police devoted substantial effort and resources to keeping open this short stretch of road for the group of parents and children to traverse. They placed themselves as a shield between a hostile and dangerous crowd and a small group of vulnerable people, incurring a considerable number of injuries to their officers. They achieved a significant measure

of success in their efforts, in that no child sustained any injury during the whole period. They did not take what might have been a tempting course, to close the road on the ground that to keep it open was too dangerous. It was important that they should uphold the freedom of members of the public to walk at will along a public road, the abandonment of which would have been an inroad into the rule of law and a success for mob rule. It was not achieved easily or without cost, in terms of injuries and expense. But it was achieved, and the complaint in these proceedings is not that the police or the state failed to make sufficient endeavours to uphold the appellant's civic rights.

56. The complaint is rather that the passive protection which the police afforded was insufficient. It is claimed that they should have done more, that they should have taken more robust active steps to quell the protest and protect the children from the frightening experience which they endured when they walked along Ardoyne Road. That comes down to two specific assertions, first, that they should have forced the protesters back and away from their positions bordering Ardoyne Road and, secondly, that they should have made more numerous arrests, which would have served as a deterrent and brought about a speedier end to the protest.

57. As the trial judge said in the passage in his judgment which I quoted above, policing options and decisions do not readily permit of such uncomplicated solutions. One can readily envisage many practical difficulties in the way of forcing protesters back and making arrests, which is notoriously difficult in situations of riot or near-riot. More fundamental, the core of the respondents' case is that a robust response on the part of the police contained a serious danger that violence could spread and escalate. That could have given rise to potentially dangerous consequences both for the parents and children as they walked along Ardoyne Road and, more widely, for public order in the area and the lives and safety of its residents.

58. It was suggested on behalf of NIHRC that the risk of provoking collateral disorder was "essentially speculative and unquantified" and that reliance should not be placed on the *ipse dixit* of the police. There is, however, clear evidence of the volatile nature of the security situation in north Belfast at the time. The potential for the sudden development of violent disorder is shown by the speed with which it broke out when an incident occurred on 19 June 2001 and the length of time which it took to subside. When the police cleared the road on 3 September, using, as Mr McQuillan states, conventional crowd tactics, very violent protests ensued and serious rioting took place in the Upper Ardoyne

area. The police view was that only a negotiated community solution would end the protest, a view shared by Government ministers. The efforts made to achieve this eventually bore fruit and the protest was ended and not recommenced. Acceptance of the validity of proceeding in this manner is not merely deferring to the police view, although it would be quite proper to accord a measure of discretion to them as a body with expertise in handling matters of public security, as both Kerr LCJ and the Court of Appeal recognised. Independently of according such latitude of judgment to the police, acceptance of the validity of the course which they adopted is a matter of what Lord Bingham of Cornhill described in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, 185, para 16 as

> "performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice."

The police had such responsibility and were uniquely placed through their experience and intelligence to make a judgment on the wisest course to take in all the circumstances. They had long and hard experience of the problems encountered in dealing with riotous situations in urban areas in Northern Ireland. The difficulty of catching and arresting malefactors who had means of retreat available through paths and gardens are self-evident. The police had available to them sources of information about what was happening in the community and what was likely to happen if they took certain courses of action, which they were experienced in assessing.

59. In my judgment the evidence supports the overall wisdom of the course which they adopted. The assertions made by the appellant and NIHRC that they might possibly have adopted more robust action are in my view quite insufficient to establish that the course adopted was misguided, let alone unreasonable.

60. A further argument was presented on behalf of the appellant that the police had failed to have regard to the best interests of the children in carrying out the operation. This is based on the requirement in article 3(1) of the United Nations Convention on the Rights of the Child 1989, that in all actions concerning children "the best interests of the child shall be a primary consideration." The Convention was ratified by the United Kingdom in 1991, but has not been incorporated into domestic

law. The requirement is nevertheless a consideration which should properly be taken into account by the state and its emanations in determining upon their actions. It is accordingly a matter which may be relevant in determining whether the actions of the police satisfied the obligations placed upon them by article 3 of the Convention.

61. There was some conflict of evidence between the Chief Constable and members of NIHRC about an admission attributed to the former that the police had not paid proper regard to the best interests principle. Like the trial judge and the Court of Appeal, I do not find it either appropriate or necessary to attempt to resolve this conflict. I am satisfied that the senior police officers did at all stages pay regard to the interests of the children, with particular concern for their physical safety. Moreover, the evidence points sufficiently clearly to the conclusion that the action taken was in fact in their best interests. I do not find any substance in this argument.

62. It follows from all the foregoing that the police fulfilled the positive obligation imposed by article 3 and that the appellant has not established a breach of her rights or those of her child under that article.

63. Another argument addressed to the House concerned the observance by the police of their duty under section 32 of the Police (Northern Ireland) Act 2000. This issue is in the strict sense ancillary to the article issue, for the argument depends on the contention that the police failed to give effect to article 3 when complying with their statutory obligation under section 32 of the 2000 Act. I have held that they did give proper effect to their article 3 obligation, so the foundation for the submission under the 2000 Act is removed, as the appellant's counsel recognised in the course of argument.

64. The second main issue to which argument was addressed before the House was whether the police discriminated against the appellant and her daughter in the actions which they took. In so arguing the appellant invoked article 14 of the Convention, taken in conjunction with article 3. Article 14, whose terms are very familiar to your Lordships, provides:

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

> association with a national minority, property, birth or other status."

It is axiomatic that the discrimination prohibited is that which affects the freedom of enjoyment of the Convention rights, which is a limiting factor in the search in which the court is required to engage. Accepting that the case comes within the ambit of article 3, the question to be answered in the present case is whether the police in the way that they handled the protest and protected the appellant and her daughter from inhuman and degrading treatment treated them differently on the ground of their religion from the way in which they did treat or would have treated other people. This accords with such statements of the ECtHR as that in *Marckz v Belgium* (1979) 2 EHRR 330, where the Court said in para 32:

> "Article 14 safeguards individuals, placed in similar situations, from any discrimination in the enjoyment of the rights and freedoms set forth in those other provisions …"

As Lord Hoffmann said in *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] AC 173, para 14, "Discrimination means a failure to treat like cases alike." I do not understand Lord Nicholls of Birkenhead to have intended any different approach in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] NI 174, when he stated at para 11 that arid and sometimes confusing disputes about comparators may be avoided by asking whether the claimant was treated as he was on the proscribed ground which is the foundation of the application or for some other reason.

65. If one states the issue in this way, it seems clear that one should seek to ascertain whether the police would have handled matters differently if they had been dealing with Protestant parents and children facing a similar Catholic protest. As the courts below said, there is no evidence that that was the case. The suggested comparison between the policing of this protest and that of Orange parades is not valid, as the two are not comparable. Nor can the comparison properly be made between the treatment of the parents and children and that of the protestors.

66. Miss Quinlivan drew the attention of the House to the decisions of the ECtHR in such cases as *Nachova v Bulgaria* (2005) 19 BHRC 1, *Secic v Croatia* (2007) 23 BHRC 36 and *Cobzaru v Romania* (2007) 23

BHRC 526. In *Nachova* the victims were Army deserters shot while fleeing from military police. In *Secic* the applicant had been attacked and beaten by skinheads shouting racial abuse. In *Cobzaru* the applicant complained of having been beaten by police officers when he went to the police station to report an attack. The victim in each case was of Roma origin and the complaint in each was that the State failed to make sufficient investigation of the circumstances because of racial discrimination against such persons. The Court adverted to the difficulty in many cases of proving racial motivation and in *Nachova* at para 160 the Grand Chamber endorsed the Chamber's view that State authorities "have the additional duty to unmask any racial motive and to establish whether or not ethnic hatred or prejudice may have played a role in events", a statement repeated in *Cobzaru* at para 88. The appellant's counsel sought to draw from these decisions the conclusion that the court should be particularly vigilant in examining the actions of the police to search for any signs that they failed to take sufficient steps to protect the appellant and her daughter because of their religious affiliation. It appears clear that the motives of the protesters were founded, at least to a large extent, upon sectarian bias. There is, however, nothing to indicate that the police were motivated by any such bias to fail to provide the level of protection to the children and their parents than they would have provided to persons of any other religious persuasion faced with the same circumstances. They took all reasonable steps to protect them, as I have held, and there is nothing, however carefully one examines the evidence, to substantiate any suggestion of sectarian bias in their handling of the situation.

67. I accordingly would hold that the appellant has not made out any of the grounds on which she has relied and dismiss the appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

68. I have had the advantage of reading in draft the opinions of my noble and learned friends Baroness Hale of Richmond and Lord Carswell and for the reasons they give, with which I am in full agreement, I too would dismiss this appeal.

69. I would also express my agreement with what my noble and learned friend Lord Hoffmann has said about the role of interveners in appeals before the House.