SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2019] SC GLA 80

B1175/19

NOTE BY SHERIFF S REID ESQ

in the Summary Application

Under section 64 of the Civic Government (Scotland) Act 1982

at the instance of

APPRENTICE BOYS OF DERRY, BRIDGETON

Pursuer

against

GLASGOW CITY COUNCIL

Defender

Act: McDougall, Advocate; Miller Becket & Jackson, Glasgow

Alt: Armstrong Q.C; Glasgow City Council Legal Department

1 October 2019

Summary

[1] A person proposing to hold a public procession must give no less than 28 days' notice of that proposal to the relevant local authority and to the Chief Constable of the Police Service of Scotland. After consulting with the Chief Constable, the local authority may prohibit the procession or impose conditions upon it. In exercising its discretionary powers, the local authority must have regard *inter alia* to the likely effect of the procession upon public safety, public order, damage to property, and disruption of the life of the community, as well as the extent to which containment of risks arising from the procession place an

excessive burden on the police. A right of appeal, on specified grounds, lies to the sheriff against a local authority's order (Civic Government (Scotland) Act 1982, sections 62 to 64).

[2] The pursuer is an unincorporated association called Apprentice Boys of Derry, Bridgeton. It duly notified the defender, as the relevant local authority, of its intention to hold a procession along certain streets in Glasgow's east end on Saturday 1 June 2019. The proposed route would have taken the procession along Abercromby Street and past the front of St Mary's Roman Catholic Church there.

[3] Three other unincorporated associations (Apprentice Boys of Derry Dalmarnock No Surrender Branch Club; Dalmarnock Orange and Purple District 50; and Orange and Purple District 37) notified the defender of their intention to hold separate processions along broadly similar routes, each passing by St Mary's Church, all on the same weekend (one on Saturday, two on Sunday), at certain times of the day.

[4] The police were concerned. They recommended that part of the pursuer's procession be re-routed to avoid the Catholic Church. The defender issued an Order under section 63(1)(ii) of the Civic Government (Scotland) Act 1982 ("the 1982 Act") altering part of the proposed route, by diverting the pursuer's procession around and away from St Mary's Church on Abercromby Street. (Similar Orders were issued for the same reasons in relation to the processions of the three other associations.)

[5] All four associations lodged separate appeals to the sheriff against that decision. They complained that the re-routing of their processions breached their right of peaceful assembly under Article 11 of the European Convention on Human Rights ("ECHR") and that the defender had erred in the exercise its power under the 1982 Act. Of consent, the four appeals were conjoined. No distinction was sought to be drawn between any of the associations, processions or appeals.

[6] Having heard parties' submissions, I dismissed all four appeals. I gave an *extempore* judgment and undertook to issue this note explaining my reasoning more fully.

[7] In summary, I dismissed the appeals for the following reasons: (i) the pursuers failed to establish that Article 11(1), ECHR was applicable because the purpose of their processions was not disclosed in averment or submission; (ii) separately, *esto* article 11, ECHR was applicable, the pursuers failed to establish that the Convention Right was engaged because the defender's alleged interference therewith was *de minimis*; (iii) *esto* the Convention Right was applicable and engaged, the interference therewith was nevertheless plainly justified in terms of Article 11(2), ECHR, because it was prescribed by law, it sought to achieve permitted legitimate aims, and it was necessary in a democratic society (*a fortiori* having regard to section 13 of the Human Rights Act 1998); and, further, (iv) the defender, in arriving at its decision, did not err in law, did not exercise its discretion in an unreasonable manner, and did not otherwise act beyond its powers in terms of the 1982 Act. Separately, I have offered an alternative analysis of the merits of the pursuers' appeals predicated upon the hypothesis that certain matters fall within judicial knowledge. I explain my reasoning more fully below.

Factual summary

[8] The following factual background was admitted in averment or otherwise conceded in submission.

[9] On 22 January 2019, in terms of section 62(1) of the 1982 Act, the pursuer notified the defender of its intention to hold a public procession through specific streets in the east end of Glasgow on Saturday 1 June 2019. A copy of the pursuer's notification is lodged as item 5/1 of process ("the notice"). The notice provides basic details of the proposed procession:

the "assembly point" (Gateside Street); the "dispersal point" (Tullis Street); the start time (5pm); the estimated duration (one hour); the estimated distance (three miles); and the route to be followed (namely, from Gateside Street, along Duke Street, Bellgrove Street, down Abercromby Street, onto London Road, to Bridgeton Cross, James Street, McKeith Street and Main Street, ending in Tullis Street). Approximately 80 persons with eight stewards were expected to participate, all accompanied by the Dennistoun Rangers Flute Band. A Google map showing the route proposed by the pursuer in the notice ("the pursuer's proposed route") was produced as item 5/2 of process.

[10] The notice discloses that the procession would pass one place of worship, a Roman Catholic Church on Abercromby Street. It was not in dispute that this referred to St Mary's Roman Catholic Church in the Calton.

[11] It was not in dispute that another association calling itself Apprentice Boys of Derry Dalmarnock No Surrender Branch Club (being one of the conjoined pursuers) had notified the defender of its intention to hold a procession on the same day, at the same time, slightly shorter in length and duration, but leaving from the same assembly point (Gateside Street) and following roughly the same route (including passing by the front of St Mary's Church). Approximately 50 persons with five stewards were expected to participate in this related procession. No accompanying band was identified in that notice.

[12] It was not in dispute that two other associations, calling themselves Orange and Purple District 37 ("District 37") and Dalmarnock Orange and Purple District 50 ("District 50") (being the remaining two conjoined pursuers), had notified the defender of their intention to hold public processions the following day (on Sunday 2 June 2019) through roughly the same area of Glasgow's east end. These two further processions were planned to commence at the same time (11.15am), on the same day, with roughly the same duration

(45 minutes), leaving from different but proximate assembly points (Tullis Street and Mordaunt Street, respectively), ending at the same points (Wishart Street), and following roughly the same routes, again travelling along Abercromby Street past the front of St Mary's Church. Approximately 60 persons with six stewards were expected to participate in the District 37 procession, accompanied by the Bridgeton Protestant Boys Flute Band. Approximately 50 persons with five stewards were expected to participate in the District 50 procession, also accompanied by one (unnamed) band.

[13] All four processions are annual events. They have followed the same routes for the past 15 years.

[14] It was a matter of admission that, on 7 July 2018, a well-publicised incident occurred in the course of a similar procession when a member of the public spat on a Catholic priest outside St Alphonsus Roman Catholic Church on London Road. The assailant was prosecuted and sentenced to 10 months imprisonment. This is referred to in the pleadings as "the Spitting Incident". (It is to be noted that St Alphonus Church and St Mary's Church are geographically very close; they form part of the same parish; and they are ministered to by the same parish priest, Canon Thomas White, who was the victim of the Spitting Incident.)

[15] It is a matter of admission that, on 18 May 2019, another similar procession (organised, on this occasion, by one of the conjoined pursuers, District 50) passed by St Alphonsus Church (the site of the Spitting Incident the previous year). A counter-protest was taking place outside the Church. When the District 50 procession passed the Church, the police heard shouts of "Fenian bastards" and "paedo" emanating "quite distinctly" from within supporters of the District 50 procession. The shouts were directed at the counter-protest.

[16] The Chief Constable sent a written submission to the defender regarding the four proposed processions. He expressed concerns. He recommended that the defender should exercise its power to vary the routes. So far as material, the Chief Constable's submission (item 5/5 of process) (undated but issued sometime between 18 & 23 May 2019) reads as follows:

> "The [defender] will be aware of the [District 50] procession held in the Calton last Saturday, 18 May. The procession route took it past St Alphonsus Church. By prior arrangement, there was a counter protest (against the procession going past the Church) on the pavement outside St Alphonsus. Although our assessment of the position indicated that both groups were to be peaceful in their conduct there was a comparatively large police presence and significant policing plan in operation. The size of the counter protest alone was some way in excess of that witnessed on previous occasions. (The police in operation for this parade used in excess of 100 officers, many in specialist roles, when a comparable parade last year, and prior to the events of 7 July, required a purely conventional policing operation of only 11 officers.) There has, in recent weeks, been a distinct and frankly troubling change in the terms and tone of commentary and rhetoric about Orange Order and/or ABOD [Apprentice Boys of Derry] processions going past St Alphonsus and/or St Mary's Churches, in the Calton. A difference of view about such things is, of course, nothing new, but the recent language has been more strident, on both sides of the argument, and positions are becoming more polarised. Whilst it is to be hoped that, through engagement and discussion in the relevant communities, some of that can be addressed in positive ways in the short term I am bound to recognise that further processions along the same route may only make things worse.
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> In the course of last Saturday's procession and as it went past St Alphonsus there was heard – quite distinctly from within those supporting the parade – shouts of "Fenian bastards" and "paedos". I think it fair to say that the abuse was directed towards those in the counter protest. Work continues to identify those responsible. Although I am glad to indicate that there was no disorder in consequence that is likely only to have been because of the very heavy police presence.
>
> I do not know whether those responsible for the abuse joined the procession with the intention of behaving in such a fashion or whether their actions were more spontaneous. In a sense, it does not greatly matter for present purposes. The forthcoming planned processions are also going to attract counter protests if they go along the same routes. It seems sensible, then, to assume that there is the very real prospect of a repetition of the same abuse and possibly even something altogether worse. I do not, with respect, see that it is at all appropriate, then, for the Council to – in effect – be invited to facilitate the creation of such obvious points of conflict.

> It seems clear enough to us that a repetition of last Saturday's events outside St Alphonsus is likely if the proposed processions go along the proposed routes. It also, and therefore, seems clear enough to us that that is likely to have a significant and disruptive impact on the life of the local community. It would also place an excessive burden on Police Scotland as far as deploying resources necessary to mitigate the risks arising is concerned. The policing presence required for the parades would draw on specialist resources from across Scotland.
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> In terms of section 63(8)(a)(iv) and/or (b), we invite the [defender] to impose a condition on the processions to re-route them away from the Churches. We are content, with regards to the relevant ECHR provisions, that would be lawful, necessary and proportionate.
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> Police Scotland has, as would be usual in such circumstances, drawn up a Community Impact Assessment in relation to the proposed processions and to consider its likely impact within the local community. The Assessment is a "living" document and one which continues to be developed in recognition of our most up to date understanding of the position.
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> The overall assessment is that the proposed procession is expected to substantially raise local experienced and evidenced tension; that this rise in tension may be localised within the geographic area or, more broadly, the local communities. The views strongly expressed by Canon White in his recent letter to the Committee as someone who is not only a local resident but the spiritual leader in the relevant parish communities requires to be taken into account by Police Scotland."

[17] On 23 May 2019, having considered the Chief Constable's submission, the defender issued an Order imposing a condition upon the pursuer's procession, namely varying the proposed route. The practical effect of the defender's condition was to re-route a part of the procession so that it was diverted around, and away from, St Mary's Church on Abercromby Street. A Google map showing the route determined by the defender ("the Council's route") is lodged as item 5/3 of process. That apart, the assembly and dispersal points remained the same; the assembly and start times remained the same; the composition and accompaniment of the procession remained the same; and, with the exception of the partial diversion around the Church, the bulk of the proposed route remained the same. The defender's Order explains the reasons for the imposed condition as follows:

> "…THEREFORE the Chief Executive of the [defender], acting under delegated powers, hereby Orders that the procession should take place on Saturday, 1 June 2019 with an amended route…
>
> The reasons for imposing these conditions are:
>
> (1) the [defender] has concluded that having regard to the written submission on behalf of the Chief Constable, a copy of which is attached hereto, it is considered that there is a clear set of circumstances which give rise to a high risk of disruption to the life of the community and places an excessive burden on Police Scotland in terms of the deployment of specialist police resources from across Scotland which would be necessary if the procession was allowed to proceed as originally proposed. The [defender] therefore considers it necessary to place proportionate conditions on the procession to mitigate that impact.
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> (2) The approach adopted by the [defender] recognises the organiser's right of freedom of assembly and balances it against the risks identified the Chief Constable."

Procedural summary

[18] On 29 May 2019, the pursuer lodged a summary application appealing against, and seeking to quash, the defender's Order, on a shortened period of notice. Given the time constraints, I granted warrant for intimation of the appeal on a reduced period of notice of 48 hours, and assigned a hearing on 31 May 2019 at 2pm.

[19] On 31 May 2019, the summary application called before me, together with three related appeals in identical terms at the instance of Apprentice Boys of Derry Dalmarnock No Surrender Branch Club, Orange and Purple District 37 and Dalmarnock Orange and Purple District 50 (case numbers B1173/19, B1176/19 & B1177/19, respectively). All parties were represented by Counsel. Answers for the defender were lodged at the bar. Of consent, the four applications were conjoined. I was invited to dispose of them on the basis of submissions only. No distinction was sought to be drawn between any of the pursuers or any of the appeals.

[20] Having heard parties' submissions, I dismissed all four appeals and issued an *extempore* judgment. I undertook to issue detailed reasons later. On the defender's unopposed motion, I found the pursuers liable to the defender in the expenses of the summary applications as taxed, and sanctioned the employment of senior counsel for the hearing (including preparation therefor and the drafting of answers).

Submissions for the pursuer

[21] For the pursuer, I was invited to uphold the appeal and quash the defender's Order dated 23 May 2019. Detailed written submissions were adopted, supplemented by oral submissions. The pursuer challenged the decision on four grounds. First, the defender's decision was said to constitute a violation of the pursuer's right to freedom of peaceful assembly, in terms of Article 11, ECHR, because the re-routing of the procession constituted an interference that was not "necessary". Second, there was said to be a breach of domestic law in that (i) the defender had failed to take account of, or to attach due weight to, relevant mandatory considerations referred to in section 63(8) of the 1982 Act and (ii) the defender had erred in law in concluding that the likely effect of the pursuer's proposed procession was the "disruption of the life of the community". Third, it was submitted that no proper or adequate reasons had been given to justify the decision. Fourth, it was submitted that the decision to re-route the procession was "wholly unreasonable" in that it proceeded on the basis of a single isolated incident 12 months ago (namely, the Spitting Incident) which was not properly attributable to the pursuer. Counsel clarified in submission that the ground of appeal in section 64(4)(b) of the 1982 Act (no material basis of fact for decision) was not founded upon. Reference was made to the Human Rights Act 1998, sections 6 to 9; Article 11, ECHR; section 63 of the 1982 Act; and *R (Laporte)* v *Chief Constable of Gloucestershire*

Constabulary [2007] 2 AC 105; *Aberdeen Bon-Accord Loyal Orange Lodge 701* v *Aberdeen City Council* 2002 SLT (Sh Ct) 52; and *Vogt* v *Germany* (1996) 21 EHRR 205.

[22] It was submitted that the pursuer had "the right to process on a route of their choosing under Article 11 of the Convention" (paragraph 2.20, written submission). The onus lay on the defender to show that its interference with that right was prescribed by law; directed to one of a number of permitted ends; and necessary in a democratic society. The burden lay on the defender to justify the interference. The test was a high one. It was submitted that the defender could not show that there was any necessity to re-route the processions.

[23] Re-routing was not necessary, it was said, because the defender (and Chief Constable) had failed to exclude as an option the deployment of a greater number of police officers around St Mary's Church to control the anticipated counter-demonstration. If, according to the Chief Constable's own written submissions, 100 officers were capable of being deployed to police the procession on 18 May 2019 (and disorder had thereby been avoided), there was no disclosed or explicable reason why the same deployment could not be arranged (to the same effect) for the pursuer's proposed procession. Besides, all that could be said was that there had been audible shouts of abusive language by an unidentified person during the procession on 18 May 2019. It was not even said that a crime had been committed. The pursuer's right to march could not be frustrated by the mere presence of a counter-protest. Further, the defender had erred in concluding that there was likely to be "disruption of the life of the community". Disruption of the life of the community does not occur by the mere shouting of abuse by an unidentified person. Besides, the defender had erred in conflating the counter-protestors with the "community". Even if a repetition of such verbal abuse could constitute "disruption of the life of the community", that did not

mean that the re-routing of the procession was "necessary". Rather, the appropriate response was for the State (in the form of the Chief Constable) to deploy sufficient resources to police the procession properly to prevent such conduct and to arrest any offenders.

[24] Likewise, it was submitted that the defender had erred in concluding that the procession would place "an excessive burden on the police" in terms of section 63(8)(b) of the 1982 Act. The Chief Constable's submission had failed to disclose essential details such as the number of officers that would be allocated to the procession if it were to follow the pursuer's proposed route; the number of officers that would be allocated to the procession if it were to follow the defender's proposed route; and the reason why, instead of re-routing the procession, a greater number of officers could not be allocated to the pavement outside St Mary's Church (being "a relatively small stretch" of the route), since this was the "obvious point of conflict" according to the Chief Constable's submission. No policing plan had been exhibited. Without that information, it was said that no objective assessment could be carried out as to whether the burden on the police was excessive.

[25] Lastly, it was said that the defender had failed to exercise its discretion in a reasonable manner. Section 63(8) listed eight factors to which the defender required to have regard in deciding whether to impose conditions on the procession. Only two had been referred to by the defender in its Order. It was submitted that inadequate weight had therefore been given to the other six factors (including public safety, public order and damage to property) which, it was to be assumed, had been satisfied and which, objectively speaking, ought to have carried more weight than mere "disruption of the life of the community". The pursuer submitted that the defender was seeking to "inflate artificially the importance of audible swearing or insults".

[26] It was submitted that issue of proportionality was to be considered only after the defender had satisfied the test of "necessity" for the interference. In other words, it did not matter if the re-routing involved "one metre or one mile": the defender required to satisfy the court of the necessity of the interference, before regard could be had to the proportionality of the interference.

Submissions for the defender

[27] For the defender, I was invited to dismiss the appeal. Alternatively, even if I was satisfied that one or more of the grounds of appeal was established, I was nevertheless invited to exercise my discretion to refuse the appeal. Alternatively, if I was persuaded to uphold the appeals (by reason of some error in the defender's reasoning), I was invited, given the time constraints, to thereafter determine the matter myself and to impose the same conditions upon the procession.

[28] First, no issue was taken with the pursuer's statement of the law. However, the defender submitted that the proper approach was set out in section 64(4) of the 1982 Act whereby the onus fell on the pursuer to establish that one of the statutory grounds of appeal under the 1982 Act was satisfied. It was not for the defender to clear a "hurdle" (as stated in paragraphs 3.1 & 3.9 of the written submission). Second, it was submitted that the defender had sufficient material before it to justify the decision to impose conditions on the route. That material comprised the Chief Constable's written submission (item 5/5 of process). Third, it was said that the defender had not erred in law because, having regard to the material before it, the defender was entitled to conclude that the likely effect of the procession, unless re-routed, was "the disruption of the life of the community" and the placing of an "excessive burden" on the police. Fourth, the reasons given by the defender

were "proper, adequate and intelligible". Fifth, there was said to be nothing irrational or unreasonable in the exercise of the defender's discretion. Addressing miscellaneous issues, counsel argued that the re-routing was necessary to prevent a repetition of the criminal activity referred to in the Chief Constable's submission; there was no requirement for the defender explicitly to refer to each of the statutory considerations in its decision; there was no obligation on the Chief Constable, still less the defender, to provide further details as to police numbers and tactics. It was submitted that the defender was entitled to assume from the Chief Constable's written submission that, if the procession did not go past the Church, there would be a reduced police presence due to the avoidance of the anticipated conflict. Reference was made to *Aberdeen Bon Accord Loyal Orange Lodge, supra*.

Discussion

[29] Public processions have long been a part of civic life in Scotland. From time to time nearly every city, town and village across the country hosts some form of march or procession, protest or demonstration, cavalcade or celebration, rally, riding or remembrance. They come in all shapes and sizes.

[30] They also vary in purpose.

[31] In law, the purpose of a procession is important because it may determine whether, and to what extent, the procession attracts protection under Article 11 of the European Convention of Human Rights ("ECHR"). As Lord Hope said in *R (Countryside Alliance)* v *Attorney General* 2008 1 AC 719 (at 760) "[t]here is a threshold that must be crossed before [Article 11] becomes applicable" and "[t]he purpose of the activity provides the key to its application".

[32] To illustrate, a procession or assembly may be for a political purpose. Scotland has a history of public political demonstration. Such events may relate to national or international issues of public concern like climate change or NHS funding, or they may concern an issue of purely local concern such as the absence of a zebra crossing outside a primary school.

[33] Some processions are religious in purpose. Churches and other religious organisations sometimes organise parades around important dates in their religious calendars or to venerate at a particular place held sacred or dear.

[34] Other processions are commemorative. Many organisations arrange processions on Remembrance Sunday to national and local war memorials to honour those who died in conflicts over the years.

[35] Some processions are, in nature, celebrations of community identity, culture or traditions, such as the Selkirk Common Riding, the Hawick Common Riding, and a host of other assemblies celebrating aspects of local culture and customs ranging from the Fireball Ceremony in Stonehaven, to the torch-lit Up-Helly-Aa procession in Lerwick, to the crowning of summer queens in countless village gala days.

[36] Others celebrate and promote racial, ethnic or group identity. Gypsy fairs may be an illustration of an assembly for such a purpose (*The Gypsy Council & Others* v *United Kingdom*, 14 May 2002, ECHR). Likewise, the Pride March, which first took place in Scotland in the summer of 1995, has as its avowed purpose the celebration and promotion of equality, diversity and social inclusion, specifically from the perspective of the lesbian, gay, bisexual and transgender community. For some participants, such assemblies or processions may afford a rare opportunity to make a safe public statement of their ethnicity, cultural tradition, gender identity, sexual orientation or the like.

[37] Other processions are recreational, social or sporting in nature. Increasingly, charity walks, fun runs, road races, Santa runs, marathons and half-marathons take place across Scotland. Local (or, more unusually perhaps, national) sporting victories are sometimes celebrated with a procession. Recreational organisations such as the Scouts Association, Girls Guides and Boys Brigade also organise annual parades to various youth festivals.

[38] Processions can be a glorious celebration of tradition and culture; they can forge community spirit; they can be engaging and fun; they can be informative, inspiring, educational, enlightening, thought-provoking and challenging. They may also be irritating and inconvenient. They may be distasteful and disliked. Others still may be menacing, rancorous, conflict-ridden and down-right intimidating,

[39] Those assemblies and processions that attract protection under Article 11, ECHR are recognised as a legitimate method of collective expression of shared views, opinions, beliefs, identity, culture or traditions. The power and influence of one individual in the democratic process is limited and precarious; the power and influence of a group, assembling to "pursue common objectives collectively" (*Baczkowski & Ors* v *Poland* 2007-VI, 48 EHRR 19), is much greater. To that extent, they can be seen as necessary in a democratic society because they provide a vital vent for the peaceful release and expression of such shared views.

[40] There is often said to be a "right" to march. That is not correct. In law, there is only a *qualified* right of "peaceful assembly" (which can include a procession) (ECHR, Article 11). It is not an absolute right; it can be, and often is, restricted to protect other legitimate interests; and it does not apply to every assembly or procession irrespective of its intent or purpose.

[41] It is often said that the "right" to march includes the right to choose whatever route one wishes. That too is incorrect. It is a popular misconception. Indeed, it is repeated in the

pursuer's written submissions (paragraph 2.20: "The appellants have the right to process on a route of their choosing under Article 11 of the Convention"). It erroneously assumes, perhaps, the application of Article 2 of the Fourth Protocol to the ECHR which states, so far as material, that:

> "[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement…."

and that "no restrictions shall be placed on the exercise of that right" except such as are prescribed. However, the United Kingdom has never ratified Article 2 of the Fourth Protocol to the ECHR. To understand the significance of this omission, it is necessary to consider the wider textual context: Article 5, ECHR (which confers an absolute protection against the unlawful *deprivation* of a person's liberty) is a Convention Right that forms part of UK domestic law; but Article 2 of the Fourth Protocol (which confers a qualified protection against *restrictions* on a person's liberty of movement, falling short of deprivation of liberty) does not form, and never has formed, part of UK domestic law (*Austin* v *Commissioner of Police of the Metropolis* 2009 1AC 564).

[42] In some quarters, it is sometimes thought that the police cannot interfere with the conduct or route of a march once a local authority has supposedly "authorised" it under the 1982 Act. That too is incorrect. The 1982 Act imposes a duty on the organisers of a procession to give notice, in advance, to the local authority of their intentions. The local authority has certain discretionary powers under section 63 of the 1982 Act, which it may or may not choose to exercise. Nothing in the 1982 Act abrogates the powers and duties of the police. The police retain full authority and responsibility to enforce the criminal law, including preventing any apprehended breach of the public peace or other criminality. Therefore, the police may issue orders, on the day, to the organiser or participants of a duly

notified procession to, for example, desist from playing music outside a Church (as in *McAvoy* v *Jessop* 1989 SCCR 301), or to re-route a march, or to abandon it entirely, if the police have reasonable grounds to apprehend the occurrence of a public order offence or other criminality absent compliance with such orders; and a failure by an organiser or participant to comply with such a lawful police order may itself constitute a breach of the peace or the statutory offence of obstruction of an officer in the execution of his or her duty (*Jones* v *Carnegie* 2004 JC 136, paragraphs 29-36).

[43] So, to be clear, there is no Convention Right in Scots law to assemble or march anywhere, at any time, and by any route of one's choosing. The separate statutory "right to roam" created by the Land Reform (Scotland) Act 2003 perhaps comes closest to establishing an actionable right of freedom of movement within Scotland but it is subject to defined limits and, critically, applies only for defined purposes (namely for recreational, relevant educational, and limited commercial, activities).

[44] And so we return to the issues of intention and purpose.

[45] What exactly is the intention and purpose of these four processions, a hundred strong, marching in rank and file through Glasgow's east end, each passing the front door of the same Catholic Church, accompanied by the thunderous roar of drum, fife and flute?

What is the purpose of the procession?

[46] In my judgment, the pursuer has failed to establish that Article 11(1), ECHR is applicable at all.

[47] In summary, while for present purposes I am prepared to assume that the pursuer's procession is, in its intent, a "peaceful assembly" (this issue not having been disputed in argument), no information was given to me, in averment or submission, to shed any light on

the purpose (or "common objectives" per *Baczkowski & Ors* v *Poland, supra)* of this proposed procession, and thereby to determine whether the procession qualified for protection under Article 11(1), ECHR.

[48] Absent any explanation of the purpose of the procession, *prima facie* the pursuer was merely asserting a supposed "right" to march for the sake of marching. That is not sufficient in law to qualify for protection under Article 11(1) of the ECHR.

[49] To explain, Article 11 forms part of a parcel of rights comprising Articles 9, 10 & 11, ECHR, which guarantee a range of civil and political freedoms. They protect freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10) and freedom of assembly and association (Article 11). They are closely linked not only in textual formulation but also in substantive content. They are considered essential for the protection of collective political freedom by contributing to the maintenance of democratic discussion, accountability, pluralism, tolerance, broadmindedness, and the development of individual identity as shaped through personal attitudes and beliefs (*Reed & Murdoch, Human Rights Law in Scotland* (4th ed.), 7.01). However, in contrast with the first four substantive guarantees in the Convention (the right to life; the prohibition of torture; the prohibition of slavery; and the right to liberty and security: Articles 2, 3, 4 & 5, ECHR), none of the rights in Articles 9, 10 & 11 is absolute.

[50] Article 11, ECHR states, so far as material:-

> "(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 restriction 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…"

The Article protects two inter-related rights: the right of freedom of peaceful assembly and the right of freedom of association with others. This case concerns only the former. (No one is preventing the pursuer's members from associating together.) An "assembly" can take the form of a static meeting or a moving procession, whether on private property or in a public space. Importantly, Article 11(1) does not confer protection upon every assembly or procession. In order to determine which assemblies and processions are protected, one must ascertain the intention and purpose of the activity.

[51] In the first place, the Convention guarantee extends only to a "peaceful assembly". That means that any meeting or procession that is, in *intent*, seeking to provoke violence or to occasion disorder will fall outwith the scope of the Convention protection. The intentions of both organisers and participants are likely to be relevant in this context, as well as the track records of both in previous such assemblies. State interference with any such "non-peaceful" assembly need not be justified by reference to Article 11(2), ECHR. However, that scenario must be distinguished from an assembly (or procession) that is, in conception and intent, "peaceful" but which merely runs the risk of causing disorder "by developments outside the control of those organising it", such as the possibility of violent counter-demonstrations or of unauthorised infiltration by violent extremists (*Christians against Racism and Fascism* v *United Kingdom* (8440/78) (1997) DR 21, 148). Such an assembly remains, in intent, a "peaceful assembly" for the purposes of Article 11(1), and State interference would require to be justified in terms of Article 11(2). Of course, an objective assessment of intent is required. No doubt, on 4 October 1936, when Sir Oswald Mosley led a march of uniformed, black-shirted fascists down Cable Street in London's east end (then a predominantly Jewish area), despite strident denunciation and opposition, he would have disavowed any intention to intimidate, provoke violence or incite disorder; but on a

common-sense objective assessment such an intention might readily have been inferred. Similarly, an assembly may purport to do no more than commemorate an historical event, or the acts, life or death of an individual; but if, on an objective assessment of the whole circumstances, it can properly be inferred that the avowed intent is a pretext, and that the true intent of the assembly is, say, to support and promote a proscribed terrorist organisation, or to taunt and provoke opponents into violence or disorder, or otherwise to provide a platform for rabble-rousing, the assembly or procession can legitimately be regarded as "non-peaceful" in conception and intent. It would therefore fall outwith the scope of the Convention protection. The distinction between a "peaceful" and a "non-peaceful" assembly may well be difficult to discern in advance from one case to the next. Nevertheless, it is a distinction that can, with care and adequate supporting factual information, properly be drawn in appropriate circumstances.

[52] In the second place, even if an assembly is "peaceful" in intent, the *purpose* (or "common objectives", per *Baczkowski & Ors* v *Poland, supra*) of the assembly must be ascertained in order to determine whether it qualifies for protection under Article 11(1), ECHR at all; and, if it does, whether, and to what extent, any interference with that right of assembly may be justified under Article 11(2). To explain, the Article 11(1) right is essentially concerned with protecting collective participation in the democratic process. It is not concerned with gatherings for purely social or recreational purposes. Instead, "there is a threshold that must be crossed before [Article 11(1)] becomes applicable" and "the purpose of the activity provides the key to its application" (*R* (*Countryside Alliance & Ors)* v *Attorney General* [2008] 1AC 719 at 760).

[53] To illustrate, in *Anderson* v *United Kingdom* (1998) 25 EHRR CD 172, the owners of Swansgate Shopping Centre in Wellingborough sought injunctions to prevent Mr Anderson

and others from entering the Centre due to their alleged misbehaviour there. Mr Anderson complained that his Article 11(1) right of peaceful assembly would be violated if he was barred from entering the Centre. His complaint was dismissed. The European Commission of Human Rights concluded that there was:-

> "… no indication in the … case law that freedom of assembly is intended to guarantee a right to pass and re-pass in public places, or to assemble for purely social purposes anywhere one wishes."

[54] Likewise, in *R (Countryside Alliance)* v *Attorney General*, *supra*, the House of Lords considered a challenge by the hunting lobby to the English statutory prohibition on mounted fox-hunting (in the Hunting Act 2004). It was claimed that the legislation violated *inter alia* the Article 11 right of assembly of those affected by the ban. The claimants were unsuccessful. The appeals were unanimously dismissed, though the reasoning of the Law Lords differed. The majority (Lord Bingham dissenting on this particular point) decided, for a number of reasons, that Article 11 was not engaged at all. Lord Hope concluded that the claimants' purpose in assembling was essentially social or recreational. Since Strasbourg jurisprudence on Article 11 had never gone as far as to guarantee a right to assemble for purely social or recreational purposes, the claimants' reliance on Article 11(1) was misconceived. He explained:

> "There is a threshold that must be crossed before the article becomes applicable….. The purpose of the activity provides the key to its application. It covers meetings in private as well as in public, but it does not guarantee a right to assemble for purely social purposes. The right of assembly that the claimants seek to assert is really no more than a right to gather together for pleasure and recreation…"

He concluded:

> "The claimant's position is no different from that of any other people who wished to assemble with others in a public place for sporting or recreational purposes. It falls well short of the kind of assembly whose protection is fundamental to the proper functioning of a modern democracy and is, for that reason, guaranteed by Article 11.

> No decision of the Strasbourg court has gone that far. I would hold that… [Article 11] is not applicable".

Baroness Hale agreed. She too considered that the kind of assembly protected by Article 11 was informed by Article 10 and the democratic values that Article sought to protect.

[55] The House of Lords (of identical composition) heard the parallel appeal in the Scottish case of *Whaley* v *The Lord Advocate* 2008 SC (HL) 107. In *Whaley*, the petitioners challenged the legality of the Scottish legislative ban on fox-hunting (in the Protection of Wild Mammals (Scotland) Act 2012). They too complained that the hunting ban violated their Article 11 right of assembly. Again, the appeal failed. Lord Hope repeated his reasoning in *R (Countryside Alliance), supra*. Baroness Hale of Richmond added some observations in *Whaley* that are pertinent to the present case. She said:

> "….[T]here is a difference between a fundamental human right and the freedom to do as one pleases. The Convention Rights…. do not protect everything which a group of people might wish to do when they get together."

[56] The hunting lobby did not stop there. They appealed to the European Court of Human Rights ("ECtHR"). Again, they were unsuccessful. In *Friend, The Countryside Alliance & Others* v *United Kingdom* (2010) 50 EHRR SE6, the ECtHR unanimously rejected their complaints as inadmissible. The ECtHR agreed with the House of Lords that Article 11, ECHR was not engaged at all, though a subtle distinction emerges in the judgment. The Court agreed with Lord Hope and Baroness Hale that the "primary or original purpose" of Article 11 "was and is to protect the right of peaceful demonstration and participation in the democratic process", but it went on to state that it would be an "unacceptably narrow interpretation" of Article 11 to confine it only to that kind of assembly. In dicta that may signal a willingness to develop the scope of the right of assembly in the future, the Court stated that it was "prepared to assume" that Article 11 "may" extend to the protection of an

assembly of "an essentially social character". However, the Court did not formally adjudicate upon the point. Instead, the appeal was decided on a subtly different ground (namely, that the statutory ban did not interfere with the right of assembly *per se*, but rather merely prohibited a particular activity that might otherwise have been pursued after the claimants had assembled). Therefore, we are left with the tantalising suggestion in *Friend* that, in the future, Article 11(1), ECHR "may" be held to extend to an assembly of an essentially social (or, presumably, recreational) nature but, aside from these obiter dicta, there is no binding precedent to support the view that Article 11(1) presently guarantees a right to assemble or process for all and any purposes. Rather, the preponderance of authority suggests the contrary.

[57] Where does that leave the pursuer? Since the matter was not disputed, for present purposes I am prepared to assume that the *intent* of the pursuer's procession is peaceful. But what is the *purpose* of the proposed procession? Unfortunately, the purpose of the pursuer's procession is nowhere explained. It was not disclosed in averment or submission. Curiously perhaps, the pursuer's claim is perilled on Article 11, ECHR alone. To that extent, it amounts to little more than the assertion of a right to march for its own sake, with no explanation, one way or the other, as to the purpose or "common objectives" of the procession. Twice, in the course of submissions, I explicitly asked for clarification of the purpose of the pursuer's procession. No response was forthcoming. No other Convention Right is founded upon, in averment or submission. For example, the pursuer does not aver or submit that the procession is a means or method by which it seeks to exercise a right of freedom of expression under, say, Article 10, ECHR. Of course, to do so, the pursuer would still have to make some degree of disclosure of what "opinions" or "ideas" it purportedly seeks to express or impart by means of the march. Not only is such disclosure necessary to

determine whether the procession is for a purpose protected by the Article 11(1) guarantee, it will also be relevant to an assessment of the necessity and proportionality of any interference with that right, in terms of Article 11(2), ECHR (see *Friend, supra,* page 19). This is not a mere technical omission. It is incumbent upon the pursuer first to engage the application of the Article 11 guarantee; and it can only do so by disclosing that the procession is for a purpose that falls to be protected by that guarantee. It has failed to do so.

Is the alleged interference de minimis?

[58] Separately, in my judgment the pursuer has failed to establish that Article 11, ECHR, if applicable, is engaged by the defender's impugned action. That is because the defender's re-routing of the procession is properly characterised as *de minimis*. It does not strike at the essence of the pursuer's supposed right of assembly as such.

[59] To explain, in *Friend, supra*, the ECtHR dismissed the complaint of the hunting lobby on the ground that the statutory ban on fox-hunting did not interfere with the claimants' right to assemble *per se*, but instead merely prohibited them from pursuing a particular activity once they had assembled (namely, hunting with intent to kill wild mammals). The Court held (at paragraph 50):

> "The hunting bans in Scotland, England and Wales…do not prevent or restrict [the claimant's] right to assemble with other huntsmen and thus do not interfere with his right of assembly *per se*. The hunting bans only prevent a hunt from gathering for the particular purpose of killing a wild mammal with hounds; as such, the hunting bans restrict not the right of assembly but a particular activity for which huntsmen assemble. The hunt remains free to engage in any one of a number of alternatives to hunting such as drag or tail hunting…"

Put another way, the prohibition on one particular activity (namely hunting with hounds to kill defined mammalian prey) was not sufficiently material to have: "…struck at the very essence of the right of assembly" (*Friend, supra,* para. 50). This accords with the reasoning of

Lord Brodie at first instance (2004 SC 78) and of the Inner House on appeal (2006 SC 121) in *Whaley* v *Lord Advocate*, and with Lord Brown of Eaton-under-Heywood in *R (Countryside Alliance), supra*. Lord Brodie explained the distinction most neatly (*supra,* page 121). He said the statutory ban on fox-hunting:

> "…does not prohibit the assembling of a hunt, on horseback or otherwise, but, rather, a particular activity which the hunt might engage upon. Farmers, landowners and riding enthusiasts remain free to assemble together for a mock chase or drag hunt or simply a communal ride. What is subject to regulation is the nature of the quarry and the method of the kill, not the fact or manner of association."

Lord Brown in the House of Lords (in *R (Countryside Alliance, supra*, paragraph 143) was of the same view. He said:

> "I have the greatest difficulty understanding how this article [Article 11] is engaged in the present case. All those affected by the ban continue to be entitled to assemble and associate with others to their hearts' content. Obviously, the ban prevents their hunting together once they have done so and obviously, therefore, they will be less likely to exercise their article 11(1) rights than in times past. But it is not the right itself that has been restricted, only hunting."

[60] The same logic applies here. The Order does not prohibit the pursuer from assembling (or moving in procession). Rather, it prohibits a particular activity which the pursuer might engage upon, namely marching on particular streets, at particular times, close to St Mary's Roman Catholic Church in the Calton. The pursuer's members remain free to assemble and to process, up and down, backwards and forwards, or in circles if they wish, all "to their hearts' content" (per Lord Brown in *R (Countryside Alliance), supra).* The effect of the Order is merely to prevent the pursuer marching at a particular locus that would otherwise bring the procession into close proximity to the Church. The restriction does not strike "at the very essence of the [pursuer's] right of assembly" (*Friend*, *supra,* paragraph 50). In nature, it is *de minimis*. It is not sufficiently material to engage the pursuer's Article 11(1) right (if any) at all. It is not sufficiently material to constitute a *prima facie* "interference"

requiring any justification under Article 11(2), ECHR. Even if the prohibition of that particular activity means that the pursuer is "less likely to exercise [its] article 11(1) rights than in times past" (per Lord Brown, *supra*), so be it. That is their choice. The restriction of that particular activity is not sufficient to engage the Convention Right.

[61] Therefore, it is legitimate to distinguish between, on the one hand, a restriction on Convention Rights to assemble (or march) and to express one's views publicly and, on the other hand, a restriction on the *manner* in which those rights are exercised. If the restriction does not go to the "essence" of the asserted right to assemble (or express one's views), then the Convention Right may not be engaged at all. Naturally, this distinction between the essence of an assembly and the manner and form of its exercise has to be treated with considerable care, so as not to emasculate the important Convention Right. In some cases, the distinction will be real, in others it will be insubstantial: all depends on the particular facts.

[62] Simply to illustrate, the distinction was recognised in *Mayor of London* v *Hall* [2011] 1WLR 504, in *R (Gallastegui)* v *Westminster City Council* [2013] 1WLR 2377 and in *The Scottish Parliamentary Corporate Body* v *The Sovereign Indigenous Peoples of Scotland & Others* [2016] SLT 1307, paragraph [38]. Each case involved attempts to clear protestors away from permanent tented encampments that had been set up outside Parliaments, at Westminster and Holyrood. In *The Scottish Parliamentary Corporate Body* v *The Sovereign Indigenous Peoples of Scotland & Others, supra,* a group of demonstrators set up a permanent protest camp on the grounds of the Scottish Parliament. There was disunity as to the purpose of the camp: some regarded it as a peace camp, others as a "vigil", some saw it as a protest in support of Scottish independence, others as a protest against corruption, and others were attracted by spiritual considerations. In any event, the Inner House, affirming the decision of the Lord

Ordinary (Turnbull), concluded that while a court order for removal would operate as a restriction on *inter alia* the protesters' rights under Articles 10 & 11, it would not do so "in a way which went to the essence of these rights" (*supra,* paragraph 35). The demonstrators' rights under Articles 10 & 11, ECHR:

> "… did not extend to allowing them to exercise those rights *in any manner or place of their own choosing*. Their right to protest remained, and the only restriction imposed would be *as to the manner* in which such protest might be executed" (my emphasis).

[63] Of course, it is possible to conceive of situations where a decision to re-route or relocate a procession or assembly might well engage Article 11(1), ECHR. Such a scenario might arise where the route or location itself is so intrinsically connected with the purpose of the procession that a re-routing or relocation strikes at the *de quo* of the assembly, and thereby at "the essence" of the Convention Right. A simple example may be the diversion of an Armistice Day Parade away from the cenotaph itself. Another example (as discussed in *Tabernacle* v *Secretary of State for Defence* [2009] EWCA Civ 23) would be an attempt to remove the Aldermaston Women's Peace Camp which, after 23 years of continuous, 24 hour, peaceful presence outside the Atomic Weapons Establishment at Aldermaston, had acquired "a symbolic force inseparable from the protestors' message" (*R (Gallastegui), supra*, paragraph [25] per Neuberger M.R.). In such special cases, the *manner* or *form* of the assembly or procession may be of the essence of the right; Article 11(1) may then be engaged; and the interference would require to be justified under Article 11(2), ECHR.

[64] This is not such a case. Nothing was offered by the pursuer to shed any light on why this procession had any interest whatsoever, still less any reason, preference, purpose or need, to follow any particular route, still less to march in proximity to St Mary's Church. Absent any disclosed or fathomable reason, purpose or need to follow the pursuer's proposed route (including a route taking it along Abercromby Street past the front steps of

St Mary's Church), in my judgment it follows logically that the precise route must be a matter of irrelevance and immateriality to the pursuer's procession. For aught yet seen, as long as the pursuer can hold its procession somewhere, by some route, at some time, it does not matter greatly which route is followed. For all disclosed intents and purposes, the pursuer's asserted right of assembly could equally well be exercised by walking in circles around Glasgow Green.

[65] The best that the pursuer could muster was that it was entitled to follow a route of its choosing and that it had followed the same route for the last 15 years. That is unpersuasive. Firstly, as explained above, there is no "right" as such to march anywhere, at any time, by any route one wishes. That is a fallacy. Secondly, the relocating of an assembly (or re-routing of a procession) may, but will not necessarily, engage or interfere with Article 11(1), ECHR. Each case will turn on its own facts. If the location, route or manner of the meeting or procession have some relevant, material connection with the exercise of the right, such as to make it of the essence of the exercise of the right, then a relocation, re-routing or other restriction may engage the Article 11(1) right (and the interference would then require to be justified under Article 11(2)); but if, as here, the location or route are of no apparent substantive relevance or materiality to the exercise of the pursuer's supposed right, then a relocating or re-routing is likewise of no relevance or materiality, provided the "essence" of the Convention Right is not defeated.

[66] In my judgment, in the circumstances, the defender's re-routing of the procession was *de minimis;* it did not strike at "the essence" of the pursuer's supposed right of assembly as such; it was insufficient, in nature and extent, to constitute an interference requiring justification under Article 11(2), ECHR; and, therefore, Article 11, ECHR was not engaged at all.

Is the interference justified under Article 11(2), ECHR?

[67] If I am correct that Article 11(1), ECHR is neither applicable nor engaged in the present case, it follows that there is no need to consider whether any interference with that Convention Right is justified under Article 11(2). However, in deference to the careful submissions presented to me, I record my conclusions and reasoning on this issue as follows.

[68] As I have explained, there is not a scintilla of explanation, in averment or submission, as to the constitutions, aims or activities of the pursuer or as to the purpose or common objectives of the proposed procession. The absence of that information places the pursuer in a difficult position in seeking to engage the Article 11(1) guarantee in the first place. It also presents an insurmountable hurdle for the pursuer in seeking to resist the defender's *prima facie* compelling asserted justification for imposing restrictions on the procession in terms of Article 11(2), ECHR.

[69] Article 11(2) provides that no restrictions shall be placed on a right to freedom of assembly except such as (i) are prescribed by law, (ii) pursue one or more of certain permitted legitimate aims, and (iii) are "necessary in a democratic society" in order to achieve one of those legitimate aims. The onus lies on the defender to justify the restriction. In my judgment, the defender has satisfied each of the criteria specified in Article 11(2).

Is the interference prescribed by law?

[70] Firstly, the defender's interference with the pursuer's asserted right is "prescribed by law". This was not in dispute. The defender is empowered under the 1982 Act to issue an order imposing conditions upon a notified procession. Those conditions can include the re-routing of a procession. It is an administrative, not a judicial, function (*Aberdeen Bon-Accord*

Loyal Orange Lodge v *Grampian Regional Council* 1988 SLT (Sh Ct 58). In exercising the function, the defender is enjoined to have regard to considerations that are clear and intelligible including public order, public safety and "disruption of the life of the community".

Does the interference pursue a legitimate aim?

[71] Secondly, the re-routing of the procession is plainly directed at achieving a number of the permitted legitimate aims listed in Article 11(2), ECHR namely, preventing "disorder", preventing "crime" and at protecting the "rights and freedoms of others". In this context, it can be inferred that the "rights and freedoms of others" would include the rights of churchgoers (including the parish priest) to enter and exit St Mary's Church, and to worship there, peacefully and unimpeded by disruption. The fact that the defender cross-refers expressly to the specific consideration or factor in section 63(8)(a)(iv) of the 1982 Act ("disruption of the life of the community") and not to any of the preceding considerations (such as "public safety", "public order", and "damage to property" in section 63(8)(a)) is of no moment. The conduct which is at the core of the defender's decision (as disclosed in the Chief Constable's submission) is apprehended criminality or disorder aggravated by religious prejudice. That particular kind of aggravated criminality or disorder is of a uniquely pernicious nature. It is aptly described as being disruptive of "the life of the community" in terms of section 63(8)(a)(iv) of the 1982 Act. I refer to paragraph [95], below.

Is the interference "necessary in a democratic society"?

[72] The real battle-ground, and the focus of the parties' submissions, was whether the defender's restriction was "necessary in a democratic society" in order to achieve one of the

permitted legitimate aims listed in Article 11(2). In my judgment, this requirement was also satisfied.

[73] The pursuer's counsel sought to argue that the re-routing of the march could not be shown to be "necessary" *inter alia* because the defender had failed to establish that other options (not involving re-routing) were unavailable such as deploying greater police resources around the entrance to the Church to quell any disorder. In my judgment, this approach confused the test "necessary in a democratic society" with an absolutist concept of necessity.

[74] The concept of "necessity" is involved, expressly or implicitly, in several articles of the ECHR but it has subtly different connotations in different contexts (*Reed & Murdoch, supra*, paragraphs 3.73-3.81)). In those guarantees which are of the highest rank within the ECHR, a stricter test of necessity is applied to exceptions, derogations or justifications. For example, Article 2, ECHR guarantees the right to life but it has been interpreted to be subject to an exception where the deprivation of life results from the use of force which is "no more than absolutely necessary" for specified purposes. The words "absolutely necessary" indicate (per *McCann & Others* v *United Kingdom* (1996) A 324 at paragraph 149) that:

> "…a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11."

Article 3 (the prohibition against torture) contains no reference to necessity but again case law acknowledges that certain conduct, which might otherwise be inhuman or degrading, may be justified in defined circumstances if "strictly necessary" (*Ribitsch* v *Austria* (1995) A 336, paragraph 38). Article 6 (the right to a fair hearing) requires in principle a public hearing but permits the exclusion of the press and public "…to the extent strictly

necessary…" in some cases. When such stricter tests of necessity are imposed, the test of proportionality is correspondingly more stringent.

[75] These stricter tests of necessity do not apply to the parcel of civil and political freedoms found in Articles 8 to 11, ECHR (*McCann & Others, supra*). These Convention Rights are subject to widely expressed qualifications. Interferences may be justified *inter alia* where they are "necessary in a democratic society". In this context, the adjective "necessary" is not synonymous with "indispensable" (though it is also plainly something more than merely "useful", "reasonable" or "desirable"). Instead, it implies the existence of a "pressing social need" (*Sunday Times* v *United Kingdom (No. 1)* (1979) A30, paragraph 59; *Handyside* v *United Kingdom* (1976) A24, paragraph 48; *Vogt* v *Germany* (1996) 21 EHRR 205). A restriction on these civil and political freedoms may be justified as "necessary in a democratic society" if a fair balance has been struck between the demands of the general interest of the community and the requirement to protect the fundamental rights of the affected individual(s). This fair balance will be achieved if the interference corresponds to a "pressing social need"; if the interference is proportionate to the legitimate aim sought to be achieved; and if the reasons given to justify the interference are "relevant and sufficient" (*Vogt, supra*, paragraphs 52 & 66; *Handyside*, *supra,* paragraph 50). The question whether an interference is "necessary in a democratic society" is ineluctably a question of judgment (*Reed & Murdoch, supra,* paragraph 3.80). The fundamental issue is whether a fair balance has been struck between the relevant competing rights and interests. True, the onus of establishing that the interference is so justified rests on the defender, as the State authority seeking to interfere with the right, but that does not mean that, in every case, every conceivable alternative option must be excluded before the interference can be justified. Absolute necessity is not the correct test.

[76] This balancing exercise involves further subtle variations from case to case. In principle, the stronger the "pressing social need", the less difficult it will be to justify the interference. On the other hand, it can be more difficult to justify interferences with certain types of Convention Right than with others. For example, there must exist particularly serious reasons before interferences can be justified under Article 8(2), ECHR with "a most intimate aspect of private life" such as sexual behaviour (*Dudgeon* v *United Kingdom* 1981 A45, paragraph 52). Likewise, interferences with Article 10, ECHR (freedom of expression) (which was not invoked in the present place), particularly on matters of public interest, similarly require a convincing justification (*Barthold* v *Germany* [1985] A90, paragraph 55). Lastly, the nature and degree of interference is itself a material factor: an objectively minor or inconsequential interference will obviously be more easily justified (*Smith & Grady* v *United Kingdom* 1999 – VI, paragraph 91).

The balancing exercise in the present case

[77] I now turn to undertake the so-called balancing exercise in the present case in terms of Article 11(2), ECHR. Firstly, applying the approach described above, according to the pursuer's own averments and submissions we are dealing here only with the right of freedom of assembly under Article 11(1), ECHR, not with any intimate aspect of private life (Article 8), or freedom of thought (Article 9), or even freedom of expression (Article 10). While indubitably Article 11 is an important Convention Right the value of which I do not seek to demean, Strasbourg jurisprudence has not bestowed any heightened protection upon this particular freedom *in isolation* nor otherwise insisted upon an especially anxious scrutiny of interferences therewith (cf. *Dudgeon, supra; Barthold, supra*).

[78] Secondly, in the present case the interference (that is, the re-routing) is clearly aimed at addressing several "pressing social needs". These pressing social needs are the prevention of disorder, the prevention of crime and the protection of the rights and freedoms of others, all being legitimate aims in terms of Article 11(2), ECHR. That these aims are sought to be addressed by the re-routing is evident from the terms of the defender's Order, the supporting documents and the surrounding circumstances. The defender's Order expressly refers to the circumstances narrated in the Chief Constable's written submission.

[79] What are these circumstances? They fall into three broad categories: (i) the Spitting Incident on 7 July 2018, (ii) the Verbal Abuse Incident on 18 May 2019 (see below, paragraph [81]); and (iii) police intelligence of increased tension within the community between supporters and opponents of the conjoined pursuers' processions.

[80] The Spitting Incident on 7 July 2018 (referenced obliquely in paragraph 4, line 8 of the Chief Constable's submission) is a matter of admission on record and of public notoriety in this Sheriffdom. The Spitting Incident involved an unprovoked assault, by spitting, upon a Catholic priest; the assault occurred during a broadly similar procession, organised at around the same time last year, following roughly the same route; the assault occurred as that similar procession was marching past a Catholic Church (namely, St Alphonsus Church on London Road); the victim of the assault was the parish priest (Canon Thomas White); at the time of the assault, the priest was standing at the front door of the Church, greeting churchgoers; the assault was serious; it attracted significant media attention; and it resulted in the prosecution, conviction and imprisonment of the assailant for a period of 10 months. Self-evidently the Spitting Incident involved criminality; self-evidently, it involved a violation of the rights and freedoms of others (specifically, the parish priest, but also the

churchgoers to whom he was ministering); by plain inference, given the nature of the misconduct, it also involved a high risk of public disorder. The Spitting Incident is directly relevant to the pursuer's proposed march for a number of material reasons: (i) the pursuer's proposed procession is broadly similar in nature; (ii) the pursuer's proposed procession intends to follow a broadly similar route; (iii) the pursuer's proposed procession also intends to pass by the front door of a Catholic Church, namely St Mary's Church; (iv) Canon White, the victim of the assault in last year's Spitting Incident, is also the parish priest of St Mary's Church; St Mary's Church and St Alphonsus Church are sister parishes in the community, located just a short distance from each other in the Calton district of Glasgow's east end (see Chief Constable's submission, final paragraph). In those circumstances, self-evidently, the pursuer's proposed procession creates the risk of a repetition of violent criminality; self-evidently, it creates a risk of interfering with the rights and freedoms of others (specifically, the parish priest of St Mary's and churchgoers there); by plain inference, it also involves the same risk of public disorder.

[81] On 18 May 2019, less than two weeks prior to the pursuer's proposed procession, a further incident occurred (referred to herein as "the Verbal Abuse Incident"). On that date, District 50 (which is one of the conjoined pursuers in these proceedings) organised a procession following a broadly similar route as in the case of the Spitting Incident a year earlier; the procession passed by the front door of the same Catholic Church (St Alphonsus); at this location, the District 50 procession encountered "a counter-protest" (per the Chief Constable's submission, paragraph 3, line 3); as the procession passed the Church, abusive language (including abuse aggravated by religious prejudice) was heard "quite distinctly from within those supporting the [District 50] parade" (per Chief Constable's submission, paragraph 4, lines 1 & 2); the abuse was directed at those in the counter-protest; and public

disorder was considered to have been averted "only" because of the significantly increased "heavy police presence" on that occasion. Self-evidently, the Verbal Abuse Incident involved criminality; self-evidently, it involved a violation of the rights and freedoms of others (specifically, the counter-protestors to whom it was directed and also, it may be inferred, churchgoers who were seeking to attend the Church in peace); by plain inference, it also involved a high risk of public disorder. The Verbal Abuse Incident is directly relevant to the pursuer's proposed march for a number of material reasons: (i) one of the conjoined pursuers organised the procession that was involved in the Verbal Abuse Incident; (ii) the pursuer's proposed procession intends to follow a broadly similar route; (iii) the pursuer's proposed procession also intends to pass by the front door of a Catholic Church, namely St Mary's Church; (iv) St Mary's Church and St Alphonsus Church are sister parishes located just a short distance from each other in the Calton; (v) Canon White, the victim of the assault in last year's Spitting Incident, is the parish priest of both Churches; and (vi) according to police intelligence, the pursuer's planned procession is "… also going to attract counter-protests if they go along the same routes" (Chief Constable's submission, paragraph 5, line 3).

[82] Matters do not end there. The Chief Constable's submission discloses police intelligence and assessments of increased tension within the community between supporters and opponents of the conjoined pursuers' processions. The written submission does not pull any punches. The Chief Constable reports upon "a distinct and frankly troubling change" in the "terms and tone of commentary and rhetoric" between the competing factions supporting and opposing the conjoined pursuers' processions; he reports that "recent language" on both sides has been "more strident"; that opposing positions are "becoming more polarised" (Chief Constable's submission, paragraph 3, lines 9 to 11); and

that the pursuer's planned processions "are also going to attract counter-protests if they go along the same routes" (paragraph 5, lines 3 & 4). The Chief Constable's assessment is that "further processions along the same route may only make things worse", notwithstanding police engagement and discussion within the relevant communities (paragraph 3, line 14); that there is "the very real prospect of a repetition of the same abuse or possibly even something altogether worse"; that the conjoined pursuers' proposed procession will create "obvious points of conflict" (paragraph 5, lines 4 to 6); that the proposed processions are "likely to have a significant and disruptive impact on the life of the local community" (paragraph 6, lines 2 & 3); and that the proposed processions are expected to "substantially raise local experienced and evidenced tension" (paragraph 9). These policing assessments can be said to be vouched by the increased size of the counter-protest against the District 50 procession just a fortnight earlier ("some way in excess of that witnessed on previous occasions") and also by the significantly larger policing operation that was deployed on that occasion, comprising "in excess of 100 officers, many in specialist roles" compared to "conventional" policing operations of similar processions prior to the Spitting Incident which involved "only 11 officers" (paragraph 3, lines 5 to 8).

[83] In my judgment, the Chief Constable's submission, which forms the bedrock of the defender's decision, supports two conclusions: first, that there is an adequate factual basis to conclude that the pursuer's proposed procession created a high risk of occasioning criminality and disorder aggravated by religious prejudice, and, by plain inference, of causing a violation of the rights and freedoms of others (including churchgoers seeking to attending St Mary's Church in peace); and, second, that a re-routing of the proposed procession "away from the churches" (Chief Constable's submission, paragraph 7, line 2) was an interference that was aimed directly at addressing those perceived risks and thereby

at achieving the permitted aims of preventing apprehended crime, disorder and violation of others' rights. In other words, the defender's decision to re-route the processions corresponded directly to "pressing social needs".

[84] Thirdly, on any objective assessment the defender's interference with the pursuer's freedom of assembly is immaterial and minor, in nature and extent. The interference comprises a re-routing of part only of the procession. The interference is *de minimis* in nature: it does not impinge upon the essence of the pursuer's right of assembly; in substance, it merely restricts a particular activity (that is, marching along particular streets); and the pursuer otherwise remains free to assemble and process elsewhere. The interference is also *de minimis* in effect: it does not ban the march outright; it does not wholly re-route the march; it does not disturb the departure or terminal points, start time, composition or accompaniment; it does not substantially alter the duration or distance; on any objective view, it does not even substantially alter the route, and certainly not in any respect that is said to be material to the disclosed purpose of the procession. (The variation to the route proposed by District 37 involves a slightly more sizable diversion than the trifling deviations imposed on the other three pursuers, but it remains entirely insubstantial in nature and extent on any objective assessment.)

[85] Fourth, having regard to the whole circumstances, in my judgment the defender's interference was a proportionate means of achieving the permitted aims. The re-routing involved an objectively immaterial interference with the pursuer's asserted right of assembly; it did not otherwise materially impinge on the essence of that right; it did not prevent, or materially hinder, the exercise of that right (in the sense that the processions were otherwise allowed to proceed substantially unaltered); the interference corresponded to and was aimed directly at the permitted aims, in the sense that the re-routing was precise,

forensic and targeted, being aimed solely at diverting only a *part* of the procession route away from the apprehended point of conflict, and no more than that; the defender's interference with the pursuer's right corresponded to the opinion of the police as to the action that was necessary to achieve the permitted aims, the professional policing judgment on that issue, while in no sense determinative, being itself deserving of respect; the defender's interference also corresponded to information from the police as to the policing resources reasonably available to achieve the permitted aims, the police advice on such operational details, while again in no sense determinative, being nevertheless equally deserving of respect.

[86] Fifth, the reasons provided by the defender were "relevant and sufficient" to support the interference. The defender's Order narrates the reasons for the interference, mainly by reference to the content of the Chief Constable's submissions, a copy of which was attached to the Order. Those reasons are clear, intelligible to the informed reader, and correspond to permitted aims under Article 11(2), ECHR.

[87] For the foregoing reasons, in my judgment the defender has discharged the onus of establishing that its interference with the pursuer's asserted Article 11, ECHR right of assembly is justified under Article 11(2), ECHR.

The Human Rights Act 1998, Section 13

[88] There is a further consideration that supports the foregoing conclusion. In carrying out the balancing exercise under Article 11(2), ECHR, I concluded that I was obliged to consider section 13 of the Human Rights Act 1998. Section 13 states:

> "If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the

> Convention Right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right".

[89] The United Kingdom has a long tradition of religious tolerance. Section 13 of the 1998 Act formalises and fortifies that tradition by compelling the courts to have "particular regard" to the importance of Article 9, ECHR in any adjudication that "might affect" the exercise of that right by a religious organisation or its members. Article 9, ECHR protects both the right to hold a religion or belief (which is absolute) and the right to "manifest" that religion or belief (which is qualified).

[90] In the present case, there is no suggestion in averment or submission that the pursuer is a "religious organisation". The pursuer founds solely upon its supposed Article 11, ECHR right of peaceful assembly. It invokes no other Convention Right. In contrast, it is evident from the narrated circumstances that Article 9, ECHR is engaged for the benefit of the churchgoers (and parish priest) of St Mary's Roman Catholic Church. To explain, if this Court upholds the pursuer's appeal, and allows the pursuer's procession to proceed as planned, that judicial determination "might affect" (adversely) the exercise by the parishioners and parish priest of St Mary's Church (who are, incontrovertibly, members of a religious organisation) of their Article 9, ECHR right to "manifest" their religion, in respect that their ability to enter, worship in, and leave St Mary's Church, peacefully and without disruption, is at risk of being impeded by the apprehended criminality and disorder on the front steps of their Church occasioned by the pursuer's procession. In those circumstances, in determining the pursuer's appeal, this Court must have "particular regard" to the importance of the churchgoers' Article 9 Convention Rights. An appropriate context in which to have "particular regard" to that important Article 9 Convention Right is when the court is carrying out the balancing exercise under Article 11(2), ECHR, specifically when

considering whether the re-routing of the pursuer's planned procession was proportionate for the purpose of protecting the rights and freedoms of those churchgoers. Having done so, I am fortified in my conclusion that a fair balance was indeed struck between the competing interests and that the defender's interference with the pursuer's asserted Convention Right under Article 11, ECHR was justified.

Miscellaneous arguments for the pursuer

[91] For completeness, I shall address the remaining arguments advanced for the pursuer. In summary, the pursuer averred or submitted (i) that there was "no disorder" and "no note of any criminal activity" involved in the Verbal Abuse Incident (condescendence 10); (ii) that there was no reasonable basis to apprehend a repeat of the Verbal Abuse Incident; (iii) that mere audible shouts of abusive language (while "unsavoury and unwanted": pursuer's written submission, paragraph 3.7.2) did not constitute, nor are they likely to cause, "disruption to the life of the community" (condescendence 10(a) & (b)); (iv) that the mere "potential" for audible shouts of abusive language along "a small section of a total procession" did not render it necessary to interfere with the pursuer's Convention Right of assembly (written submission, paragraph 3.10); (v) that the perpetrator of the Verbal Abuse Incident was "not identified" (condescendence 8); (vi) that the assailant in the Spitting Incident had "no affiliation" with the pursuer (condescendence 5); (vii) that any historic and anticipated criminality or disorder was attributable solely to the presence or actions of the counter-demonstration and/or errant third parties, not to the peaceful exercise of the pursuer's right to march; and (viii) that attention and resources should be focussed upon policing the counter-demonstration and third parties, not on preventing the pursuer from exercising its right of assembly (pursuer's written submissions, paragraphs 3.5 to 3.10).

[92] In my judgment, the pursuer's criticisms are not well founded.

No criminality

[93] Arguments (i), (ii), (iii) & (iv) do not bear scrutiny. In the first place, the behaviour in the Verbal Abuse Incident is perfectly sufficient to constitute a breach of the peace at common law or the statutory offence of abusive behaviour under section 38 of the Criminal Justice & Licensing (Scotland) Act 2010, in each case aggravated by religious prejudice in terms of the Criminal Justice (Scotland) Act 2003, section 74.

No risk of repetition

[94] In the second place, there is every reasonable basis to apprehend a repeat of such conduct or worse during the pursuer's procession, when the Verbal Abuse Incident (which is conceded by the pursuer to have occurred in a procession organised by "a related organisation": pursuer's written submission, paragraph 3.7.1) is viewed in the wider context of the Spitting Incident one year earlier and of the current policing intelligence of heightened tension within the community, of a "distinct and frankly troubling" change in tone between the opposing factions, and of the likelihood of counter-demonstration at the same location. Interestingly, when addressing the issue of whether a repetition of misconduct is likely, the pursuer's written submissions make no reference to the Spitting Incident or to the current police intelligence of heightened tension. Instead, the pursuer's submissions seek to narrow the assessment of likelihood of repetition to the circumstances of the Verbal Abuse Incident only. That approach is erroneous.

No "disruption of the life of the community"

[95] In the third place, in my judgment a repetition of such conduct is liable to cause "disruption of the life of the community" in terms of section 63(8) of the 1982 Act *et separatim* to make interference "necessary in a democratic society" in terms of Article 11(2), ECHR. Such conduct cannot be dismissed as merely "unsavoury and unwanted" (pursuer's written submissions, paragraph 3.7.2). The spitting on a priest, shouts of "Fenian bastards", all occurring on the steps of a Catholic Church: this is misconduct of a different nature entirely. It is criminality and disorderly conduct aggravated by religious prejudice. History is replete with grim memorials to the wreckage caused by religious intolerance. Intolerance of that peculiarly malignant nature is toxic and corrosive to social cohesion and harmony. It destroys community life. It is inimical to the pluralistic objectives of the ECHR. In the present case, it is that nasty, pernicious element of the apprehended criminality and disorder which fully justified the defender's conclusion that the "life of the community" was at risk of "disruption" by the apprehended repetition of such conduct, if the defender had failed to divert these marches.

The counter-demonstrators and misbehaving third parties

[96] Arguments (v), (vi), (vii) & (viii) seek in effect to dissociate the pursuer from the conduct involved in the Spitting Incident and Verbal Abuse Incident and to divert attention to the counter-demonstrators and other third parties. This misses the point. The exercise here is not to attribute formal blame or responsibility to the pursuer for the culpable acts of others. The exercise is to ascertain whether, in the whole circumstances, an interference with the asserted right of assembly is justified under Article 11(2), ECHR.

[97] Circumstances vary infinitely, but it may be suggested that troublesome assemblies fall into three broad classes (adopting the analysis set out by Lord Carswell in R *(Laporte)* v *Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, paragraphs 94 to 100). The first class of case is where a person exercising a right of assembly is himself committing, or is about to commit, a crime (such as a breach of the peace). An interference with the person's Convention Right of assembly (by arrest, detention or otherwise) is likely to be justifiable under Article 11(2), ECHR.

[98] The second class concerns people whose acts are lawful and peaceful in themselves but which are likely to provoke others into committing a crime or otherwise causing disorder. This second category can cause difficult problems of judgment for police officers who have to balance, on the one hand, the need to prevent crime and disorder and, on the other hand, the need not to obstruct the actions of persons acting lawfully. An early example of this category is the Irish case of *Humphries* v *Connor* (1864) 17 ICLR 1 (cited by Lord Carswell in *R (Laporte), supra*, paragraph 97). In *Humphries*, the plaintiff decided to walk through the streets of Swanlinbar, County Cavan, wearing an orange lily, an action which, in that part of the country, was "calculated and tended to provoke animosity between different classes of Her Majesty's subjects". Several members of the public followed the plaintiff causing noise and disturbance, and threatening her with violence for wearing the emblem. A police officer asked her to remove the lily; she refused; so the officer "gently and quietly" removed the lily from her lapel. She sued the police officer for trespass. Now, up to the point of her refusal, the plaintiff had been doing nothing unlawful in itself, but the State (in the form of the police officer) was entitled to intervene to prevent her from going about her otherwise lawful business (wearing an orange lily) because the

police officer had by that stage reasonably concluded that, in the particular circumstances, it was the only way of preventing a breach of the peace. Hayes J observed:

> "It would seem absurd to hold that a constable may arrest a person whom he finds committing a breach of the peace, but must not interfere with the individual who has wantonly provoked him to do so."

Another example of this second class of case is *Wise* v *Dunning* [1902] 1KB 167. Mr Wise, a Protestant lecturer, had held meetings in public places in Liverpool, causing large crowds to assemble and obstruct the thoroughfares. In addressing those meetings, he had used gestures and language which were highly insulting to Roman Catholics living there, of whom there was a large body in that city. He was summoned to appear before the stipendiary magistrate and bound over to keep the peace. Mr Wise appealed. He argued that if he did not intend to act unlawfully himself, or to induce other persons to act unlawfully, the fact that his words might have led other people so to act would not be sufficient to justify a restraint upon him. The Divisional Court rejected his appeal. Mr Wise was perfectly at liberty to hold and express his views. His actions were lawful in themselves. However, the State (in the form of the stipendiary magistrate) was entitled to intervene to restrain him because "the natural consequence" of his words and conduct in the context of his public meetings was to cause crime and disorder to be committed by his opponents and supporters. In other words, illegality by others was the "natural consequence" of his conduct. Darling J. put the matter thus:

> "Large crowds had assembled in the streets, and a serious riot was only prevented by the interference of the police. Now, what was the natural consequence of the appellant's acts? It was what has happened over and over again, what has given rise to all the cases which were cited to us, and what must be the inevitable consequence if persons, whether Protestants or Catholics, are to be allowed to outrage one another's religion as the appellant outraged the religion of the Roman Catholics of Liverpool….

> …. In my view, the natural consequence of those people's conduct has been to create the disturbances and riots which have so often given rise to this sort of case. Counsel for the appellant contended that the natural consequence must be taken to be the legal acts which are a consequence. I do not think so. The natural consequence of such conduct is illegality."

In summary therefore, sometimes, lawful conduct by A may be liable to result in a violent or disorderly reaction from B, even though A's conduct is not directed against B. If B's resort to violence or disorder can be regarded as the natural consequence of A's conduct, and there is no other way of preserving the peace, the State may order A to desist from his conduct, even though A's conduct is lawful in itself (*R (Laporte), supra*, per Lord Rodger of Earlsferry, paragraph 78).

[99] It may be argued that this approach confers on the heckler, trouble-maker or angry counter-protestor a right of veto over lawful assembly, or expression of opinion, that he or she happens to dislike; in other words, that it makes the law of the mob supreme. That is not so, provided it is understood that the only justification for the State intervention to restrain the exercise of otherwise lawful conduct is "the necessity of the case" (*Dicey, An Introduction to the Study of the Law of the Constitution* (10th ed), pages 278 to 279, cited with approval in *R (Laporte), supra*, per Lord Rodger at paragraph 80). In other words, if the public peace can be preserved, not by breaking up an otherwise lawful meeting or removing an offensive emblem or silencing insulting language or expressions of opinion, but by arresting or dispelling the wrongdoers, then the State is obliged to deal with the wrongdoers and thereby to protect the others in the exercise of their lawful rights. In each of these early cases, State intervention to restrain or restrict otherwise lawful conduct was justified because the police (or magistrate, as the case may be) had reasonably concluded that there was no other way to keep the peace.

[100] Of course, these older cases were decided before the "constitutional shift" marked by the enactment of the Human Rights Act 1998. That may be so, but they are all decisions that were referred to with approval in 2006 by the House of Lords in the leading case of *R (Laporte), supra*, and which were regarded by the Law Lords as being consistent with the Strasbourg jurisprudence. According to Lord Rodger (at paragraph 85): "…the Convention standard is basically the same as that set by the common law rule formulated by Dicey", subject to the clarification that the onus rests on the State to show that what was done was indeed no more than was necessary. The standards articulated in the ECHR are standards which "march with those of the common law" (*R* v *Secretary of State for the Home Department ex parte McQuillan [1995] 4 All ER 421*). I shall return to consider the Strasbourg jurisprudence below.

[101] Lastly, in the third class of case, the actions of a person exercising a right of assembly are not necessarily provocative *per se* or otherwise naturally liable to cause crime or disorder, but a counter-demonstration is arranged of such a nature that "the confluence of demonstrations" is likely to lead to disorder (*R (Laporte), supra*, per Lord Carswell, paragraph 98). In that scenario, the authorities may find themselves with an invidious choice: should their preventive efforts be directed to those taking part in the original assembly or to the counter-protest?

[102] This category of case is illustrated by another old Irish case: *O'Kelly* v *Harvey* (1883) 14 LR Ir 285, again referred to with approval by the House of Lords in *R (Laporte), supra*. The incident in question occurred at a time of considerable agitation in Ireland over land tenure. An organisation called the Land League proposed to hold a demonstration in a town to be attended by several notable people including Charles Stewart Parnell M.P. and the plaintiff, who was himself a nationalist politician. This led to the printing and circulation of a notice

calling on local Orangemen to assemble in their thousands on the day of the Land League demonstration and to "give Parnell and his associates a warm welcome". The local justice of the peace was faced with a dilemma. He knew of the notice. He believed, on reasonable and probable grounds, that the only way of preventing a breach of the peace when the Orangemen arrived was to order the (lawful and peaceful) Land League meeting to separate and disperse. That is what he did. The counter-protest of the Orangemen assembled; the justice of the peace asked the plaintiff and his colleagues to disperse; when he refused to do so, the justice of the peace laid his hand on the plaintiff in order to break up the meeting; and the plaintiff subsequently sued the magistrate for assault and battery. The plaintiff's action failed. The Irish Court of Appeal held that that the magistrate was justified in taking steps to disperse the (lawful) Land League meeting since, in the circumstances, there was no other way in which the breach of the peace could be avoided. The Court explained (at pages 109 to 110):

> "The question then seems to be reduced to this: assuming the plaintiff and others assembled with him to be doing nothing unlawful, but yet that there were reasonable grounds for the defendant believing, as he did, that there would be a breach of the peace if they continued so assembled, and that there was no other way in which the breach of the peace could be avoided but by stopping and dispersing the plaintiff's meeting; was the defendant justified in taking the necessary steps to stop and disperse it? In my opinion he was so justified, under the peculiar circumstances stated in the defence, and which for the present must be taken as admitted to be there truly stated. Under such circumstances the defendant was not to defer action until a breach of the peace had actually been committed. His paramount duty was to preserve the peace unbroken, and that, by whatever means were available for the purpose. Furthermore, the duty of a justice of the peace being to preserve the peace unbroken he is, of course, entitled, and in part bound, to intervene the moment he has reasonable apprehensions of a breach of the peace being imminent; and, therefore, he must in such cases necessarily act on his own reasonable and bona fide belief, as to what is *likely* to occur. Accordingly in the present case, even assuming that the danger to the public peace arose altogether from the threatened attack of another body on the plaintiff and his friends, still if the defendant believed and had just grounds for believing that the peace could only be preserved by withdrawing the plaintiff and his friends from the attack with which they were threatened, it was, I think, the duty of the defendant to take that course."

The Court added (at page 112):

> "I assume here that the plaintiff's meeting was not unlawful. But the question still remains – was not the defendant justified in separating and dispersing it if he had reasonable ground for his belief that by no other possible means could he perform his duty of preserving the public peace. For the reasons already given, I think he was so justified, and therefore that the defence in question is good…"

[103] How then does the ECHR grapple with these tricky cases? Strasbourg jurisprudence achieves a broadly similar outcome to the domestic law as described above. It does so in this way. Article 10(1) confers a right to freedom of expression and Article 11(1) confers a right to freedom of peaceful assembly. The two are often, in practice, closely associated. Both are acknowledged to be "fundamental" in a democratic society. However, neither right is absolute. The exercise of these rights may be restricted if the restriction is prescribed by law, necessary in a democratic society and directed to any one of a number of specified permitted aims.

[104] Counter-demonstration is not a new phenomenon. It is a familiar concept in Strasbourg jurisprudence. It is well-recognised that an individual does not cease to enjoy the right to peaceful assembly merely as a result of "sporadic violence or other punishable acts committed by others" in the course of a demonstration, provided the individual in question remains peaceful in his or her own intentions or behaviour (*Ziliberberg* v *Moldova* (Application No 61821/00), 4 May 2004, paragraph 2). The Strasbourg authorities are clear that the State's effort to maintain peace and order should be directed, in the first instance, towards continuing to secure the right of peaceful protest of the innocent and law-abiding parties, and to suppress (by arrest, prohibition or other restriction) the actions of those threatening violence and disorder. Hence the recognised duty of the State (*Plattform Arzte fur das Leben* v *Austria* (1998) 13 EHRR 204, paragraph 32):

> "…to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully".

The underlying logic is that a protest group must be able to:

> "… hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interest from openly expressing their opinions on highly controversial issues the community. In a democracy, the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate" (*Plattform Arzte fur das Leben, supra,*paragraph 34).

[105] However, in their practical application of these principles, the ECtHR and the former Commission have not been slow to sustain restrictions on the right of peaceful assembly. These repeated practical outcomes reflect the qualified nature of the Convention Right of assembly; the willingness of the Court to extend to domestic national authorities a margin of appreciation in balancing competing rights and interests from one case to the next (because those authorities are "better placed to assess where the appropriate balance [lies] and how best to achieve that balance": *Karaahmed* v *Bulgaria,* 24 February 2015, paragraph 95); and, it might be said, the Court's repeated acknowledgment of the practical reality that "due regard must be had to the difficulties in policing modern societies" (*Karaahmed, supra,* paragraph 96). When assessing the response of police to events, the positive obligation on the State to guarantee the rights of demonstrators, counter-demonstrators and others whose interests may be affected:

> "… must be interpreted in a way which does not impose an impossible or disproportionate burden on them" (*Karaahmed*, paragraph 96).

[106] Many cases illustrate the point. In *Rai, Allmond & Negotiate Now!* v *United Kingdom* (1995) 19 EHRR CD 93 a general blanket ban was imposed on demonstrations at a time of well-documented political tension in Northern Ireland. The ban was imposed on the claimants' march not because the authorities feared that the organisers of the proposed rally

intended to create disorder or violence but because they feared that disorder or violence instigated by others would be occasioned if the march took place. The same logic applied in *Rassemblement Jurassien et Unite Jurassienne* v *Switzerland* (1979) 17 DR 93. In *Chappell* v *United Kingdom* (1988) 10 EHRR CD 510, a ban on assemblies at Stonehenge, designed to prevent disorder by certain groups which had hijacked the otherwise peaceful Druidic celebration of the summer solstice, was upheld as necessary on the same basis, even though the result was an interference with the lawful and peaceful exercise by the Druids of their right to assemble. In *S* v *Austria* (13812/88) (3 December 1990), the applicant challenged a ban on a demonstration at which (ironically) he and others planned to protest about "repression" in Austria. The organisers had indicated their intention to make "excessive noise" during the demonstration. The ban was held to be proportionate to prevent disorder and to protect the rights of others. In *Christians against Racism and Fascism* v *United Kingdom* (1978) 21 DR 138, a march that was indubitably entirely peaceful was subjected to a general ban. In fact, the general ban was principally aimed at prohibiting different demonstrations (by a far-right group) which, it was thought, were likely to result in violence. The general ban was held to be a proportionate measure designed to prevent disorder and preserve public safety. In *Chorherr* v *Austria* (1994) 17 EHRR 358, the applicant and a friend distributed leaflets bearing the slogan "Austria does not need any interceptor fighter planes" at a military ceremony in Vienna. They "flew" enlargements of the leaflet about half a metre above their heads attached to oversized rucksacks carried on their backs. The demonstrators were themselves entirely peaceful. Their conduct caused a commotion among those spectators at the ceremony whose view had been blocked by their rucksacks and flying leaflets. The police informed the two demonstrators they were disturbing public order and instructed them to desist; they refused, asserting their right to freedom of expression; this

led to increasingly loud protests from the crowd; as a result, the pair were arrested. The ECtHR held that the restriction on their Convention Rights was justified. The Court concluded that when they chose this particular locus for their demonstration they must have realised this might lead to a disturbance requiring a measure of restraint. In *Steel & Another* v *United Kingdom* (1998) 28 EHRR 603, the first applicant was a protestor against blood sports. In the course of a grouse shoot, after a morning of disruption, she walked in front of the shooting party to prevent the party shooting at the birds. She was arrested. The second applicant, who was trying to stop the construction of a motorway, was arrested when she stood underneath the bucket of a mechanical digger towards the end of a day during which protestors had repeatedly obstructed the work of the road-builders. In neither case was the conduct of the protestors unlawful. In both cases the police had intervened because they feared a violent reaction against the peaceful demonstrators and considered that arrest was the only means to prevent it. The ECtHR agreed that the interference was proportionate. The domestic authorities were reasonably entitled to conclude that it was indeed necessary to take preventive action by restricting their Convention Rights. All of these cases involved peaceful groups being prevented from protesting and expressing a view on matters of contemporary political concern for fear of the effect upon, or reaction from, others.

[107] In the present case, the pursuer's procession falls (at least) within the third class described above. Trouble is feared to emerge from the confluence of the pursuer's (lawful) procession with the (equally lawful) counter-protest at this particular locus. In those circumstances, both ECHR jurisprudence and domestic case law make it clear that proportionate restrictions on the rights of the marchers (often by way of outright bans) will be tolerated to achieve the permitted aims of preventing criminality, disorder and disruption

of third party rights and freedoms. This addresses the pursuer's arguments (v), (vi) and (vii), above.

[108] In argument (viii) above, the pursuer tackles the issue of necessity head-on. The pursuer submits that the defender failed to discharge the onus of showing that re-routing of the march was "necessary" because other viable options have not been excluded, specifically by redeploying police officers to the "obvious point of conflict" outside the steps of the Church. In my judgment, this argument also fails in the present case.

[109] I make three preliminary observations. Firstly, it will be recalled that the test of necessity in Article 11(2) does not mean absolute necessity. In assessing whether the impugned restriction is "necessary in a democratic society", the court is seeking to identify whether the restriction corresponds to a "pressing social need", whether the means employed were proportionate to the aim that was sought to be achieved, whether the reasons adduced were relevant and sufficient, and overall whether a fair balance was struck between the general interest of the community and the need to protect the individual's fundamental rights. Whether an interference with an Article 11 Convention Right is "necessary in a democratic society" is "ineluctably a question of judgment"; and whether the means employed to achieve a permitted aim is proportionate is "a question of degree" (*Reed & Murdoch, supra,* paragraph 3.80). Secondly, the positive obligation upon the State is only to take "reasonable and appropriate measures" to enable lawful demonstrations to proceed peacefully (*Plattform Arzte fur das Leben* v *Austria*, *supra*, paragraph 32). Again, the duty is not absolute. Thirdly, as earlier observed (*Karaahmed*, *supra*, paragraph 96), when assessing the response of police to events, the positive obligation on the State to guarantee the rights of demonstrators, counter-demonstrators and others whose interests may be affected:

"… must be interpreted in a way which does not impose an impossible or disproportionate burden on them".

On questions of policing judgment on operational matters, the police are to be afforded a "wide margin of appreciation" *(Karaahmed, supra,* paragraph 105).

[110] Let us consider three recent examples: *Regina (Laporte)* v *Chief Constable of Gloucestershire Constabulary* [2007] 2AC 105; *Karaahmed* v *Bulgaria* (Application No. 30587/13), 24 February 2015, and *Ollinger* v *Austria* (2008) 46 EHRR 38. All three involved judicial criticism of the adequacy of the police response to a demonstration.

[111] In *Laporte*, the claimant was a peace protestor, strongly opposed to the Iraq war. She wished to participate in a protest demonstration at RAF Fairford. Along with about 120 other protestors, she had booked a seat on one of three coaches setting off from London to the airbase on 22 March 2003. The passengers were a diverse group of varying ages and affiliations, including a legal observer and a long-standing female member of CND aged 76. There was nothing to suggest that Ms Laporte's conduct and intentions were anything but entirely peaceful throughout.

[112] The police had intelligence that members of a hard-core anarchist group called the Wombles, which had infiltrated a previous protest at the airbase causing mass disorder, may be on the coaches. The police intercepted the coaches on the motorway miles before they reached the RAF base. They searched the buses but they identified only eight members of the Wombles on board. Instead of simply arresting the eight identified suspected trouble-makers there and then (as they would have been entitled to do), and allowing the coaches and remaining passengers to carry on their way, the police chose to shut the doors, turned all three coaches around with everyone still on board, and escorted them back to London

with police motorcycle outriders, preventing the coaches from stopping in lay-bys or at service stations, even to allow passengers to relieve themselves.

[113] In judicial review proceedings, Ms Laporte complained that her Article 11 right of assembly (and Article 10 right of freedom of expression) had been breached. The House of Lords agreed. The police action was a disproportionate restriction on the claimant's Article 10 & 11 rights because it was "general and indiscriminate" in nature. Of the 120 passengers, only eight were identified as being associated with the violent Wombles group. There was no factual basis to justify treating the remaining passengers as falling into the same category as the identified trouble-makers or otherwise to be intent on violence or disorder.

[114] Bear in mind that *Laporte* does not fall within any of Lord Carswell's three classes of case, as described above. Ms Laporte was not a person who was actually committing a crime (or intent on doing so); she was not a person whose conduct had the "natural consequence" of provoking others to criminality or disorder; she was not confronted with a counter-demonstration, the convergence of which was itself likely to occasion crime or disorder. The essence of the *Laporte* decision is that, for no good reason, the claimant and her fellow peaceful protestors were simply unlawfully lumped together and detained with a handful of known and identified trouble-makers on a bus. It was obvious that it was not necessary to divert the entire coachload of passengers in order to achieve the legitimate aim of preventing crime and disorder at the airbase; the police could and should have separated the sheep from the goats (*supra*, paragraph 54) when the coaches were intercepted, by arresting and removing the eight identified anarchists and their associated accoutrements of planned disorder (a can of red spray paint, scissors, safety flare, home-made shields), leaving the remaining peaceful passengers to proceed on their way in exercise of their Convention Rights. The police action in diverting all coaches and passengers back to

London was plainly disproportionate because a simple, obvious, and less draconian, alternative means of achieving the same end (preventing disorder) could readily have been pursued that would have entirely avoided any interference with the peaceful demonstrators' Convention Rights.

[115] Not so here. In the present case, the convergence of the pursuer's march with the counter-protest is assessed, from a reliable source, as creating "the very real prospect" of causing disorder and disruption. The pursuer argues that the re-routing of its march has not been shown to be "necessary" because the Chief Constable's submission fails to explore and exclude the possibility of redeploying officers to the "relatively small stretch" outside the Church, to quell any potential disorder at that "obvious point of conflict" (pursuer's written submission, paragraph 4.2.3). In light of my preliminary comments above (paragraph [109]), the courts must be wary of second-guessing policing judgments on operational matters in respect of which the police are to be afforded "a wide margin of appreciation" *(Karaahmed, supra,* paragraph 105). Decisions of that nature should not be weighed, with the benefit of hindsight, in too fine a set of scales. In my judgment, in the first place, the pursuer's criticism involves too great an intrusion upon an issue of detail falling within the realms of police operational judgment. It is not generally for the Court (or the defender) to decide where, when, which, and how officers should be deployed to police a procession, unless there is a much clearer evidential basis for trespassing upon that function (as in cases such as *Laporte*, *Karaahmed* and *Ollinger, supra*). *Prima facie* the Chief Constable is best placed to know which officers, with which skills and experience, are available to him, at any one time; the Chief Constable is best placed to assess the intelligence available to him, and the risks attendant thereon; the Chief Constable is best placed to know how any risk of criminality or to public order is most effectively addressed from time to time, and, specifically, whether

that should be by re-routing a procession or by the redeployment of uniformed, plain clothes or specialist resources. In contrast with *Laporte* (and *Karaahmed*, which I shall come to shortly), the circumstances of the present case do not provide even a toe-hold for the Court to intrude upon the minutiae of judgment calls on police operational matters, such as whether to shuffle a few more officers here or there. In the second place, even if I was to venture into this realm of operational judgment, and to declare that concentrated numbers of police could have been deployed in front of the Church, there is no logical or evidential basis whatsoever to conclude that that option would actually have achieved the desired aims (of preventing crime and disorder and protecting the rights of others). Flooding a locus with more and more police does not necessarily mean that trouble is avoided. On the contrary, it may itself simply increase tension and occasion disorder, quite apart from haemorrhaging police resources from other flanks of the march or away from competing run-of-the-mill and emergency demands elsewhere in the City and further afield. There is no basis on which the court or the defender could properly conclude (as opposed to merely speculate) that the piling of yet more officers onto the pavement in front of St Mary's Church would achieve the desired aims of quelling crime, disorder and disruption.

[116] In essence, the Chief Constable's conclusion is that the ever-increasing demand on public resources to police the pursuer's marches is not sustainable. His professional opinion is that it is placing an "excessive burden" on the police. More alarmingly perhaps, the Chief Constable's conclusion is that throwing more and more police at the planned marches is not even proving effective to achieve the desired aims of preventing crime and disorder, and protecting the rights and freedoms of others, standing his assessment of a continuing "very real prospect" of disorder, despite a recent ten-fold increase in policing numbers and the conscription of specialist support from elsewhere. In blunt terms, the Chief Constable is

saying that he cannot keep the peace, even with a significantly enlarged and specialist policing resource. Enough is enough. That is the crux of the Chief Constable's written submission to the City Council. In the circumstances, it is a professional policing judgment, from a reliable source, which is unassailable.

[117] The *Karaahmed* case is an even more striking illustration of inadequate police action than *Laporte*. Again, the alternative policing options that were available to the police, and that should have been deployed, were sufficiently obvious and clear that the court felt able to intrude on areas of operational judgment that might otherwise have been reserved to the police. *Karaahmed* involved a serious incident of disorder in front of the Banya Bashi Mosque in the heart of Sofia, Bulgaria, when supporters of a political party called Ataka clashed with Muslim worshippers who had gathered at the mosque for regular Friday prayers. Ataka's views were well-known: it was vociferously anti-Islam, anti-immigration and openly hostile to Bulgaria's Turkish minority. They had campaigned openly to ban the broadcasting of calls to prayer from loudspeakers on local mosques. When Ataka notified the municipal authorities of its intention to demonstrate outside the mosque, the police and authorities did nothing. Only when about 150 Ataka supporters assembled outside the mosque were police finally mobilised to attend the locus but, again, they did nothing. The Ataka demonstrators began chanting racist and religious abuse and threats at the worshippers who were engaged in Friday prayer; some demonstrators entered the mosque carrying wooden flagpoles and metal pipes, and started assaulting the worshippers; other demonstrators climbed onto the roof and attempted to remove the loudspeakers; others pelted the worshippers with eggs, stones and insults. Finally, a few police officers intervened. When the incident finally ended, four Ataka demonstrators threw worshippers' prayer rugs onto a pile and set fire to them. No action was taken by the police against those

responsible, other than that they phoned the fire brigade. Four years after the incident, no one had yet been brought to justice. The case illustrates a scandalous failure by the State (including the police) to take "reasonable and appropriate" steps to protect the worshippers' Convention Rights. The ECtHR makes repeated reference to the "clear" risks and "readily apparent" failures of the police to take "any number of steps" to avoid the trouble. The inadequate decisions of the police (albeit on operational matters) were manifest and unanswerable. The *Karaahmed* case bears no comparison with the considered, evidence-based, tangible and substantial preparation of the Chief Constable in the present case. Interestingly, in what may be seen as a vindication of the defender's decision in the present case, the Court in *Karaahmed* also criticised the Bulgarian municipal authority for not imposing restrictions, in advance, on the Ataka demonstration, observing (at paragraph 105) that:"[i]t was inherently risky to allow that number of demonstrators so close to the mosque."

[118] Lastly, for completeness, I refer to *Ollinger* because, though not cited to me, it may seem, at first blush, to support the pursuer's position in the present case by advocating a more liberal and tolerant approach to potential disturbances arising from the confluence of opposing demonstrations. It may also, at first blush, appear to advocate a more stringent analysis of the positive obligation on the State to police and manage such anticipated conflicts. In my judgment though, on closer analysis, *Ollinger* can also be seen to be exceptional, peculiar to its facts, and of limited wider application.

[119] In *Ollinger*, an association calling itself "Comradeship IV" had, for over 40 years, held an annual memorial ceremony at the Salzburg municipal cemetery on All Saints' Day. The purpose of the assembly was to commemorate SS soldiers killed in the Second World War. Comradeship IV was made up mostly of surviving SS members. In recent years,

several protest campaigns had been organised so as to disturb the Comradeship IV ceremony, leading to vehement discussions between the groups and with unrelated members of the public who traditionally visited the cemetery on that day. Mr Ollinger was a politician and a member of the Austrian Parliament. He organised a counter-protest in the cemetery to coincide with the Comradeship IV commemoration ceremony. Mr Ollinger's protest involved only about six participants, each, in silence, carrying commemorative messages in their hands and on their clothes but without any other means of expression (such as chanting or banners) which might offend piety or undermine public order. The express purpose of Mr Ollinger's demonstration was to commemorate those Jews who were killed by the SS during the War. How were the domestic authorities to deal with this febrile concoction of conflicting interests?

[120] The Austrian police imposed an outright ban on Mr Ollinger's demonstration (i.e. the counter-protest). They did so purportedly to prevent any disturbance of Comradeship IV's commemoration (which was now of such long standing that it was exempt from the usual local notification requirements), to prevent public disorder, and to protect the rights of other visitors to the cemetery. The Austrian Constitutional Court rejected the first two reasons given by the police, but upheld the ban on the more restricted ground that other visitors to the cemetery were likely to be disturbed in the exercise of their right to manifest their religion. Mr Ollinger appealed to the ECtHR which, by a majority, found in his favour. The outright ban was disproportionate. Both demonstrations should have been allowed to proceed.

[121] In my judgment, the decision in *Ollinger* turns on a number of atypical features that make it peculiar to its own facts and certainly inapt for comparison with the present case. First, the Austrian national authorities had failed to attach *any* weight to the explicitly

disclosed purpose of Mr Ollinger's assembly (which was to protest at the Comradeship IV ceremony, thereby expressing an opinion on a matter of contemporary public and political interest). The Court found this omission to be "striking" (paragraph 44). (In the present case, the pursuer does not disclose the purpose of its procession at all, still less that it comprises a mechanism by which to express any view on any matter.) Second, Mr Ollinger was himself an elected politician, the embodiment of democratic participation. This feature alone demanded "particular justification" of any interference with his right of freedom of expression (paragraph 44). (None of the pursuer's members are said to be elected politicians expressing an opinion on a matter of public interest.) Third, before the ECtHR, the Austrian Government conceded that the reasons originally given by the police for the outright ban of the Ollinger counter-protest were largely inadequate (paragraph 45) and the Government abandoned any effort to justify the ban on public order grounds. Instead, the Government pinned its colours to a single mast, namely the protection of the rights of other cemetery-goers to manifest their religious beliefs. It was a patently desperate last stand. The ECtHR was influenced by the absence of any previous incident of violence at previous counter-protests against the Comradeship IV ceremony (paragraph 47) and concluded that, standing the minimalist, silent and objectively inoffensive nature of Mr Ollinger's counter-protest, that counter-protest was unlikely to hurt the feelings of any of the other visitors to the cemetery. (In contrast, in the present case the prevention of crime and disorder, and the protection of the rights of others, stand four-square at the front of the defender's justification of the restriction of the pursuer's march, all to be viewed in the context of previous violence in the Spitting Incident, heightened local tension, and the police assessment of a "very real prospect" of public disorder, aggravated by religious prejudice.) Fourth, little effort appears to have been made to support the Government's rather half-hearted and unconvincing

assertion that other preventative measures (such as a simple police cordon between the two static and relatively small opposing groups) were not viable to allow both meetings to proceed (paragraphs 31 & 48). (In contrast, in the present case the Chief Constable has disclosed the key preventive measures taken by him, namely increasing ten-fold the policing resource available and enlisting specialist support from elsewhere, but candidly concedes that achievement of the desired aims cannot yet be assured, thereby necessitating his recommendation of a limited restriction on the pursuer's qualified right.) Stepping back, and viewing the case more broadly, it might be said that it would have been astonishing if the ECtHR were to have tolerated a situation in which a commemoration of dead Nazis had been allowed to proceed, while a small, silent, peaceful counter-demonstration in commemoration of the Salzburg Jews who were murdered by the Nazi regime was banned. Such an outcome would have sat uncomfortably with the genesis of the ECHR, which was conceived in part to prevent a recurrence of Nazi atrocities. Viewed in the round, *Ollinger* is an exceptional decision which is likely to be confined to its peculiar facts.

[122] For the foregoing reasons, I rejected the pursuers' submissions regarding the alleged breach of Article 11, ECHR.

Alternative analysis

[123] Judicial knowledge is eclectic, but it also tends to be rather shallow. In general it is confined to matters which can be ascertained from sources of indisputable accuracy or which are so notorious as to be indisputable. Matters falling within judicial knowledge have been held to include Acts of Parliament and statutory instruments; Scottish judicial decisions, decisions of the superior courts, and decisions of lower English courts having reference to a branch of law assimilated to Scots law; certain facts of nature (such as the

infirmity of human temper or elementary principles of dynamics); and matters of common knowledge concerning general economic and social conditions, customs or behaviours. Judicial knowledge may vary from one locality to the next: a district land judge sitting in Portree may be deemed to have judicial knowledge of housing shortages on Skye; a Glasgow Sheriff may, I would suggest, be entitled to claim judicial knowledge of, say, general historic sectarian tensions within that City.

[124] I have no knowledge of any of the pursuers or of their constitutions or activities. I have no knowledge of the purpose or objectives of any of these proposed processions.

[125] In my judgment, while certain *general* knowledge might properly be imputed to me, it would be inappropriate to assume any *specific* knowledge concerning these particular pursuers or the purposes of their processions, absent any averment or submission or evidence thereon, nor was I invited to take notice of any such matters.

[126] However, in case I am wrong in that conclusion, I have undertaken an alternative analysis of the merits of the pursuers' claims based upon the hypothesis that certain matters concerning these particular pursuers and these particular processions fall within judicial knowledge, local or otherwise. I undertake this exercise with some hesitation given the absence of any submission on the matter; but I do so out of fairness to the pursuer in order that it can be satisfied that I have sought to give the fullest consideration to, and respect for, its rights and interests in this matter, and to the feelings of its members. If any of the following specific or general assumptions are incorrect or incomplete, I apologise to the parties. That said, any such error would tend to underline the absence of guidance received in submission or averment on the matter and would tend to fortify my primary conclusion that no judicial knowledge specific to these particular pursuers and to these particular processions properly comes into play here.

Sectarianism in Scotland

[127] At its core, sectarianism is nothing more complex than hatred and intolerance, conflict and division, motivated by religious prejudice. The ECtHR has observed that "sectarian violence is a societal problem in Scotland" (*Maguire* v *United Kingdom* (2015) 60 EHRR SE 12). The specific form of sectarianism that manifests itself between some factions professing allegiance to the Protestant faith and some factions professing allegiance to the Roman Catholic faith is a deeply entrenched legacy of Scottish history, and equally notorious. Sectarianism tends to graft itself onto, and thereby mutate, distort and expropriate diverse aspects of personal and communal life such as political allegiance, sporting allegiance, national identity, even seeking to associate itself with particular employers, localities, clubs, pubs and attitudes. It nurtures negativity; it thrives on division. All this can safely be taken to be within general judicial knowledge.

[128] The Scottish Government has publicly committed itself to eradicating sectarianism in Scotland. In August 2012, the Scottish Ministers appointed an Advisory Group on Tackling Sectarianism in Scotland to provide independent advice on how to address the perceived societal problem, including that specific form arising from tensions between professed Protestant and Catholic factions. The Group submitted its report to the Scottish Ministers in December 2013. The foreword stated:

> "What has been obvious to us is that sectarianism has had its day in Scotland, and there is an increasingly large groundswell of people who are tired of its worn-out rhetoric and the way in which it manifests itself in exclusionary and confrontational behaviour."

The Report recommended a host of measures, including proposals relating to marches, parades and Scottish football. This heralded the enactment of legislation (some of which has since been repealed). All of the foregoing general matters can be taken to be within judicial

knowledge, having been discussed in multiple Scottish and ECtHR decisions (*Maguire, supra*; *Donaldson* v *United Kingdom* (2011) 53 EHRR 14; *MacDonald* v *Cairns* 2013 SLT 929; *Donnelly & Walsh* v *Procurator Fiscal, Edinburgh* [2015] HCJAC 35; *Procurator Fiscal, Glasgow* v *K* 2018 SLT 179).

Marches and Parades

[129] The Advisory Group also reported that the negative public perception of sectarian violence remained "very strong":

> "… particularly when it comes to the more visible areas where sectarianism is seen to be a problem – football and marches and parades" (paragraph 1.9.3).

This perception was vouched by independent research commissioned by the Government to inform the Advisory Group's work, specifically a dedicated module in the Scottish Social Attitudes Survey 2014 entitled *Public Attitudes towards Sectarianism in Scotland*, a qualitative enquiry entitled *Communities' Experiences of Sectarianism in Scotland* and a multi-method study entitled *The Community Impact of Public Processions*. This independent research was broadly consistent in its findings. It disclosed highly negative public perceptions towards both Loyalist and Republican marches; these marches were perceived to be amongst the most important contributors to sectarianism in contemporary Scotland; and the marches were regarded as associated with a range of social problems, including community tensions and anti-social behaviour. In fairness to the Loyalist and Republican marchers, the research confirmed that the main parading organisations (Loyalist and Republican) had made significant improvements in stewarding their own parades, with consequential substantial savings in police costs.

[130] Some years earlier, in 2004, the First Minister appointed Sir John Orr, the former Chief Constable of Strathclyde Police, to undertake a full scale review of marches and parades in Scotland. It was the first such review of its kind. The Orr Report was published in 2005. It disclosed that, at around that time, there were 1,712 notified processions in Scotland, 50% of which were organised by the so-called Loyalist Institutions, although that figure was said to rise to 73% in the Strathclyde area. Only 1% were organised by Catholic or so-called Republican groups. The remainder (49%) were organised by various other groups for disparate purposes. These broad percentages are not understood to have varied significantly.

[131] A decade later, in 2015, the Scottish Government appointed Dr Michael Rosie of the University of Edinburgh to carry out a follow-up review to the Orr Report. Dr Rosie happened also to be a member of the Advisory Group on Tackling Sectarianism which had reported to the Scottish Government two years earlier. Dr Rosie's report confirmed ongoing widespread negative attitudes towards both Loyalist and Irish Republican marches. While few issues of major concern were identified, and the main parading organisations were acknowledged to have very good stewarding practices, Police Scotland continued to express concerns about the "threatening" and "exclusionary" nature of the marches, as well as the burden on their resources. In this latter respect, the scope, complexity and city-centre location of these marches meant that the police focus was often directed simply at "keeping a lid" on events, sometimes requiring a higher tolerance of behaviours that would not otherwise be tolerated, as police intervention risked exacerbating rather than helping the situation (Dr Rosie Report, paragraph 2.15).

[132] The Orr Report was "by and large" positively received by march organisers and other respondents (see Dr Rosie Report, paragraph 2.2). For that reason I shall return to the

Orr Report as it contains background information concerning the so-called Loyalist organisations whose parades make up, by far, the largest proportion of notified processions throughout the country. Some of this background information may also be said to comprise general historical facts of common knowledge, local or otherwise, falling within the scope of judicial knowledge.

Loyalist Institutions

[133] The Orr Report records that most media and public attention has traditionally been focused upon marches organised by the Orange Order and associated Loyalist Institutions. The Report identifies other groups, including the Apprentice Boys of Derry and the Provincial Grand Black Chapter of Scotland, as associated Loyalist institutions.

[134] The Report records that the Orange Order has been a part of Scottish life for 200 years. It takes its name from King William III, Prince of Orange, and celebrates his role in bringing constitutional monarchy to Britain. It derives from the Loyal Orange Institution which was formed in Ireland in 1795 after a battle in County Armagh, when a group of Roman Catholics attacked a cottage owned by a Protestant. The Loyal Orange Institution's founding principles were loyalty to the Crown and to the Protestant religion. By 1796, its membership had increased. An association called the Grand Orange Lodge was established to give disparate groups a sense of coherence, uniformity and strength. The Order held its first parade commemorating the Battle of the Boyne in July 1796.

[135] The Order in Scotland had a military foundation. It was brought to Scotland by Scottish regiments who had fought in the Irish rebellion of 1798. The first civilian lodge was established in 1808 in Ayrshire, with further lodges established thereafter. All these lodges then came under the control of the Grand Lodge of England whose political activities

included opposition to Catholic emancipation. A Select Committee of the House of Commons was appointed to carry out an enquiry into the Order's activities. The findings of the Committee were uncomfortable for the then head of the Grand Lodge (the Duke of Cumberland), and he officially disbanded the Order in 1836.

[136] This caused much unrest and confusion. Lodges were divided. Some joined other organisations; others remained outwith any constituted authority; others still united and formed the Grand Orange Association of Scotland in 1836 with headquarters at the King William Tavern in the Gallowgate, Glasgow. The fragmentation continued until 1850 when all the lodges in Scotland enrolled with an association calling itself the Grand Protestant Association of Loyal Orangemen of Great Britain. This association organised a system of provincial Grand Lodges. Eventually, the Grand Orange Lodge of Scotland was established, and the Orange Order grew.

[137] In 1859, the Order suffered another setback. It split apart over its asserted right to march. Its processions had attracted opposition and skirmishes. Coatbridge Orangemen had been seriously assaulted in 1857. A procession planned for Inchinnan in 1858 had to be called off when it was prohibited by the local Sheriff. A demonstration at Linwood in 1859 ended with a loss of life. All this resulted in the Sheriffs of Ayr, Lanark and Renfrew ordering 10 year bans on Orange Order marches.

[138] The Orange Order is recorded as emphasising its religious foundation. It describes its belief system as "Christian, Protestant, patriotic and fraternal". Its constitutional principles are set out formally in the "Qualifications of an Orangeman" which state that an Orangeman should *inter alia*:

> "…uphold and defend the Protestant religion and sincerely desire and endeavour to propagate its doctrines and precepts. He should strenuously oppose the fatal errors and doctrines of the Church of Rome and scrupulously avoid countenancing (by his

> presence or otherwise) any act or ceremony of popish worship… [and] should by all lawful means resist the ascendancy of that Church, its encroachments and the extension of its power, ever abstaining from all uncharitable words, actions or sentiments towards Roman Catholics".

[139] The Order organises parades for various purposes: some commemorate events, ranging from the Remembrance of the Fallen at the Somme to a commemoration of (the Protestant) William III's victory over (the Catholic) James II at the Battle of Boyne; some are local parades celebrating more localised events, such as the founding of a Lodge or the unfurling of a new banner; some are parades to attend a local church service; some are "feeder" parades ancillary to a principal commemorative parade.

[140] Separately, the organisation known as Apprentice Boys of Derry is independent from other Loyal Orders, although many of its members are also members of the Orange Order. The first Apprentice Boys "Club" was formed in 1714 to commemorate the siege of Derry which took place in 1689. It commemorates the actions of 13 "apprentice boys" who seized the keys to the gates of Londonderry and closed them in the face of the advancing army of (the Catholic) James II James II's army besieged the city for 105 days before (the Protestant) William III's forces were able to relieve it. The present day organisation of the Apprentice Boys of Derry dates from around 1814. The Apprentice Boys of Derry was first established in Scotland in 1903.

[141] The organisation holds two main parades each year to commemorate the two main events of the Derry siege: the closing of the city gates in December 1688, and the relief of the siege in August 1689. The first parades in Scotland appear to have taken place in 1959.

Who are the pursuers?

[142] I was given no information on the constitutions or aims of the present pursuers, and the purposes of these specific proposed processions. However, two of the pursuers (Orange and Purple District 37 and Dalmarnock Orange and Purple District 50) may, from their names, be inferred to be part of the Orange Order, as described above. (I also observe a solitary, fleeting reference to the term "Orange Order" in the Chief Constable's submission (paragraph 3, line 9).) The remaining two pursuers (Apprentice Boys of Derry, Bridgeton and Apprentice Boys of Derry Dalmarnock No Surrender Club) may likewise be assumed to be associated with the group known as Apprentice Boys of Derry, as described above. For the purposes only of this alternative analysis, I shall make those assumptions and I shall also assume that the foregoing information (regarding the history and purposes of these associations) forms part of the corpus of judicial knowledge to be noted by me. In that event, how might this new information affect the merits of the applications?

The alternative analysis: is Article 11(1), ECHR applicable?

[143] Absent information concerning the purpose of the processions, and absent the assertion of any other Convention Right in conjunction with Article 11, I concluded that the pursuers had failed to establish that Article 11(1) was applicable at all. However, on the alternative analysis described above, if I make the assumptions referred to, it might reasonably be inferred that the true purpose of the processions is to provide a mechanism by which the pursuer may exercise its right to freedom of expression of its views (and those of its members), in terms of Article 10(1), ECHR. In this context, the pursuer's asserted Article 11 right would require to be considered in the light of Article 10, because the protection of personal opinions secured by Article 10 is one of the objectives of the freedom

of assembly enshrined in Article 11. The proper approach would be to treat Article 10 as the *lex generalis* and Article 11 as the *lex specialis*.

[144] The views, opinions or ideas that are sought to be expressed by the pursuer (and its members) might be said to comprise, for example, the commemoration or celebration of historical events, such as King William III's triumph over James II or the liberation from siege of the city of Derry; or an affirmation or celebration of the pursuer's Protestant faith or an affirmation of a belief in its supremacy. On that assumption, and the assembly being otherwise "peaceful" in intent (which I shall also assume for the sake of this discussion), in my judgment the pursuer's purpose would be of a sufficient nature as to attract the protection of the Article 11(1), ECHR guarantee. Therefore, on this alternative analysis, the pursuer would at least pass the first hurdle by establishing that Article 11(1) is applicable.

The alternative analysis: is Article 11(1) engaged?

[145] The next question is whether Article 11(1), ECHR is engaged. In my judgment, notwithstanding the assumptions referred to above, on this alternative analysis the pursuer would still fail to establish that Article 11, ECHR is engaged by the defender's impugned action. That is because the defender's re-routing of the procession is properly characterised as *de minimis*. It does not strike at the essence of the pursuer's supposed right of assembly as such, even when viewed in the light of Article 10. I refer to my reasoning in paragraphs [58] to [66], above.

[146] For all intents and purposes, even on this alternative analysis, the pursuer's asserted right of assembly (and associated right to freedom of expression) could equally well be exercised by walking around elsewhere. The inability to do so at this precise location,

outside St Mary's Church, is a singular irrelevance to the exercise of those rights. The ratio of *Friend, supra*, remains applicable.

The alternative analysis: is the interference justified under Article 11(2)?

[147] If, contrary to my last conclusion, Article 11, ECHR is engaged, the next question is whether the interference with that right is justified under Article 11(2), ECHR, as considered in light of Article 10, ECHR.

[148] For the reasons previously stated, I would be satisfied that the defender's interference was "prescribed by law" and that it sought to achieve several of the permitted aims listed in Article 11(2). I refer to paragraphs [70] and [71], above. The battle-ground would remain whether the defender's re-routing was "necessary in a democratic society" in order to achieve one of those permitted legitimate aims. In my judgment, if I make the assumptions referred to above, I remain of the view that the defender's interference satisfies this final requirement for the reasons set out in paragraphs [72] to [87], above. Indeed, having regard to the foregoing assumptions, in my judgment the justification becomes even more compelling.

[149] To explain, if the background information referred to above is materially correct, and if it is properly to be taken into account as judicial knowledge, and if it is indeed applicable to the pursuer and its proposed procession, then the true nature and purpose of the pursuer's procession is suddenly revealed. In that event, it is incontrovertible that the divulged purpose of the processions, which, on this alternative analysis, is sought to be expressed through the conduit of the march, can be seen to be antithetical and hostile to the views, beliefs and interests of the Roman Catholic churchgoers at St Mary's. The two pursuers (District 50 and District 37) who, on this alternative analysis, are most closely

associated with the Orange Order are thereby allied to the avowed principles of that association, namely that the Protestant religion is supreme and its principles are to be propagated; and that the "fatal errors" of Roman Catholicism are to be "strenuously" opposed, its acts and ceremonies "scrupulously" avoided, and its ascendancy and encroachments resisted (see paragraph [138], above). The remaining two pursuers, though independent of the Orange Order, would still, on this alternative analysis, be associated, through their shared membership, with the stated principles of the Orange Order's constitution. In any event, like the Orange Order, their historical genesis and constitutional raison d'etre lie in a vigorous celebration of historic triumph in battle over Roman Catholics and opposition to their faith.

[150] The upshot is that, on this alternative analysis, the spectre emerges of the entrenched and violent sectarian conflict that is widely known to exist within Scottish society, and has been judicially recognised.

[151] Any objective consideration of the purpose of the pursuer's procession (as now divulged in this alternative analysis) necessarily leads to the conclusion that that purpose is intrinsically opposed to the views of the Roman Catholic churchgoers at St Mary's Church. (In *Christians against Racism and Fascism, supra* (paragraph 5), the ECtHR likewise took account of the fact that the "statutory purposes" of the peaceful association whose procession had been banned were "expressly directed against the National Front policies" and, as a result, the likelihood of a clash with the National Front necessarily existed.) When, on this alternative analysis, the avowed purpose of the pursuer's march is taken into account, viewed in the context of a judicially-recognised societal problem of sectarian violence, the risk of criminality, disorder and disruption of the rights and freedoms of the churchgoers at this locus becomes manifest and compelling. The further information in the

Chief Constable's submission makes the position unassailable. In other words, on this alternative analysis, the "pressing social need" that is sought to be addressed by the restriction becomes even more cogent once the sectarian context of the conflicting interests is apparent. This in turn vindicates the re-routing of the march as a proportionate means of achieving the permitted aims in Article 11(2), ECHR.

[152] Indeed, if this alternative analysis is correct, the pursuer's insistence on marching past the front steps of St Mary's Church would in itself, in the context of the heightened tension described by the police, tend to support the conclusion that the pursuer's procession falls not merely into Lord Carswell's third class of case described above (per *R (Laporte), supra*) but also into the second class of case (see paragraphs [101] & [102] above), being a procession whose "natural consequence" is the provocation of illegality on the part of others. In that event, the justification for restricting the pursuer's Convention Right of assembly becomes irrefutable.

The alternative analysis: duties and responsibilities attached to freedom of expression

[153] On the alternative analysis, there is another reason why the balancing exercise tips in favour of the defender's restriction of the pursuer's asserted right of assembly, when it is viewed in the context of Article 10, ECHR.

[154] Article 10(2), ECHR expressly states that freedom of expression "carries with it duties and responsibilities". No such express admonition appears in Article 11. According to ECHR jurisprudence (*Otto-Preminger-Institut* v *Austria* (1994) A 295–A, paragraph 49), this translates to an obligation:

> "…to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs."

This obligation is perceived to be of particular relevance in the context of the expression of views concerning religious opinions and beliefs (*Otto-Preminger-Institut, supra; Wingrove* v *United Kingdom* 1996–V, paragraphs 57-65). When does free speech on religious matters become "gratuitously offensive"?

[155] In this context, the word "offensive" must mean something more than merely displeasing, annoying, distasteful or insulting. We know that because ECHR jurisprudence is clear that Article 10 guarantees protection for the expression of ideas or information which "offend, shock or disturb" as well as those that are "favourably received or regarded as inoffensive or as a matter of indifference" (*Handyside* v *United Kingdom, supra,* paragraph 49). The criticism of religious groups is legitimate, as is measured discussion of historical opinion, particularly when made in a political forum in which issues of public interest are expected to be debated openly. Those who manifest their religious convictions "must tolerate the denial by others" of those beliefs, even the propagation by others of doctrines opposed to their faith (*Otto-Preminger-Institut, supra*, paragraph 47). In my judgment, in this context, the word "offensive" has a wider meaning: it describes something antagonistic, aggressive, designed or having effect to cause alarm, fear or hurt; something which is imbued with the notion of intimidation, provocation or attack, implicit or otherwise (*Procurator Fiscal, Glasgow* v *K, supra*, paragraphs 23 & 24, 46 & 47; see also New Shorter Oxford English Dictionary (6th ed.), page 1987).

[156] Let us assume that the pursuer's march is indeed a means by which its members are seeking to exercise their right to express their views and opinions freely. That is all well and good. No one is preventing the pursuer and its members from holding their views. No one is preventing the pursuer and its members from expressing those views, on any number of occasions, in any number of ways, in any number of other places. The issue is solely

whether it is justifiable to restrict them from expressing their views at this particular place, in this particular form and manner, and at this particular time.

[157] The distinction between offensive speech and that which is merely unpopular may be difficult to draw at times. In this alternative analysis, the present case involves no such difficulty. As well as the content of the expressed view, the *form* and *manner* of expression is relevant in deciding whether it is "gratuitously offensive". In the present case, on the alternative analysis, the pursuer seeks to express its views and opinions by marching, nearly a hundred-strong, in rank and file, accompanied by the spectacle and thunderous roar of drum, fife and flute, with all the historic triumphalist resonance that conduct entails; and to do so along a particular street, past a particular Church, at a particular time. In my judgment, it is disingenuous to suggest that the pursuer's chosen form and manner of expression is anything other than "gratuitously offensive" to the congregation and priest of the Church. It is "gratuitous", in the sense that there is no disclosed or fathomable reason to understand why it is necessary, desirable or even convenient to follow this particular route, at this particular time. It is "offensive", in the wider signification discussed above, because, having regard to the (now disclosed) diametrically conflicting beliefs of the opposing groups, viewed in the incendiary context of entrenched sectarian violence and tension within this city and country, it is a form and manner of expression that can reasonably be interpreted as hostile and antagonistic in nature to the religious beliefs of those wishing to attend the Church, imbued with the notion of intimidation, provocation and implicit attack, having effect (if not calculated) to cause alarm and fear.

[158] Sometimes it can be difficult to understand the feelings and fears of another unless one steps into the shoes of that other person. How would the pursuer feel if vigorous opponents of its personal beliefs organised assemblies each year, numbering hundreds at a

time, on consecutive days and weeks, to march past the front door of the pursuer's Lodges or meeting places, with vociferous drum and pipe accompaniment, in strident implicit denunciation of the pursuer's chosen creed or in commemoration of some historic vanquishing of Protestant adherents? In the context of the country's wider sectarian strife, such conduct would properly be characterised as intolerably hostile and antagonistic, imbued with an undercurrent of provocation and intimidation, calculated to cause alarm and fear.

[159] The pursuer points out that it has chosen to walk this route without incident for 15 years or so. It refuses to accede to any diversion. As Lord Steyn observed in *Brown* v *Stott* 2001 SC 43 (at page 63):

> "… a single-minded concentration on the pursuit of fundamental rights…to the exclusion of the interests of the wider public might be subversive of the ideal of tolerant European liberal democracies. The fundamental rights of individuals are of supreme importance but those rights are not unlimited…"

We live in communities of individuals who also have rights. When those rights come into conflict (especially face-to-face), a fair balance must be struck.

[160] On this alternative analysis, having regard to the duty and responsibility of the pursuer to avoid expressing its opinions in a form and manner that is "gratuitously offensive" to the religious beliefs of others, I conclude that the defender's restriction on the pursuer's march would be a proportionate means to achieve the permitted aims in Article 11(2), ECHR.

The alternative analysis: section 13, Human Rights Act 1998

[161] In addition, the further consideration discussed in paragraphs [88] to [90] above (concerning the application of section 13 of the Human Rights Act 1998) acquires even

greater persuasive force in favour of the defender's re-routing of the procession, when viewed through the lens of a likely sectarian encounter outside St Mary's Church.

[162] An interesting new issue also arises on this alternative analysis. If it is correct that the pursuer's procession has an avowed religious element, it might conceivably be argued that the pursuer itself is entitled to the enhanced protection of section 13 of the 1998 Act. It is an attractive proposition but, in my respectful judgment, it is bound to fail.

[163] It will be recalled that section 13 requires the court to have "particular regard to the importance" of Article 9, ECHR if a judicial determination "might affect" the exercise by a religious organisation or its members of that Convention Right. In my judgment, the St Mary's congregation and parish priest are certainly entitled to the benefit of the section 13 protection. That is because the Church is a religious organisation; the priest and congregation are members; and their attendance at the Church is plainly a manifestation of their religious belief for the purposes of Article 9, ECHR. If their ability to enter, leave and worship there, peacefully and without obstruction or fear of violence or intimidation, is impeded by the pursuer's march (as seems likely, on the assessment of the Chief Constable), then their Article 9 right to "manifest" their religion is breached. In contrast, it is not self-evident that the pursuer is a "religious organisation" for the purposes of section 13 of the 1998 Act. Nor does it matter that the procession begins or ends with a church service. (In *Christians against Racism and Fascism, supra* (see paragraph 6), an attempt was made by the organisers of the banned march to have their procession recognised as being of a religious nature by arranging for the procession to follow a limited route between the Abbey and the Cathedral in Westminster, with a service to be held in each, and for the journey between the two to be led by "choirs in robes", but all to no avail.) Even assuming that the pursuer is a "religious organisation", the pursuer's procession is not a "manifestation" of its (or its

members') religion or beliefs. For the purposes of Article 9, ECHR, a crucial distinction exists between actions merely motivated by religion or belief and actual "manifestations" thereof. An act that is merely "motivated or influenced by a religion or belief" is not necessarily a manifestation of the same (*Arrowsmith* v *United Kingdom* (1978) DR 19, 5). Thus, a committed pacifist who sought to distribute leaflets critical of government policy in Ulster to soldiers may have considered, in ordinary parlance, that he was manifesting his beliefs in doing so; but this was not a "manifestation" of that belief for the purposes of Article 9, ECHR; rather, it was an act motivated by his values, not one ordained by pacifist dogma. A Roman Catholic who protests outside an abortion clinic may consider, in ordinary parlance, that he is manifesting his religious belief; but this is not, in law, a "manifestation" of religion or belief for the purposes of Article 9, ECHR (*Van der Dungen* v *Netherlands* (1995) DR 80, 147; rather it is an act motivated by religion, not one ordained by a precept of faith.

The Civic Government (Scotland) Act 1982

[164] Finally, the pursuer submitted that the defender had failed to comply with domestic law, namely section 63 of the 1982 Act. This took a number of forms. It was submitted that the reasons given for the interference were "inadequate, unbalanced and lack transparency"; that there was no adequate evidence of any disruption to the life of the community; and that there was no proper basis on which the defender could conclude that the procession placed an excessive burden on the police. Overall, the defenders' reasoning was said not to be balanced or transparent. In my judgment, none of these criticisms has merit.

[165] Firstly, the reasons given by the defender were adequate. The duty upon an administrative decision-maker, such as the defender, is to ensure that the informed reader

(who is assumed to have knowledge of the relevant context) is left in no real and substantial doubt as to the reasons for the decision and as to the material considerations that were taken into account in reaching it. The classic formulation of the test appears in *Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345 (at page 348 per Lord President Emslie). The reasons given need not be extensive or intricate. They merely require to be reasonable and rational, with a sufficient factual foundation. In my judgment, the defender's decision satisfied that test. The pursuer can be in no real doubt as to the reason for the decision. Based on the Chief Constable's submission, the defender reasonably concluded that the route of the march, unless altered, would have the likely effect of causing disruption of the life of the community, due to an apprehended risk of violent criminality or disorder aggravated by religious prejudice, and that the burden on police resources to keep the peace on that original route was excessive, based on the information, events and intelligence referred to in the Chief Constable's submission, a copy of which was exhibited. There is nothing opaque or arbitrary in the reasons.

[166] Secondly, the defender had a sufficient factual basis to conclude that there was likely to be disruption of the life of the community and an excessive burden placed on police resources, if the march proceeded on its original route. The factual basis appears in the Chief Constable's submission, read in context. As regards the burden on police resources, he explained the ten-fold increase in officers compared with previous comparable processions; he explained the enlisting of specialist support from elsewhere; he explained that, despite all of this, the prospect of disruption remained a "very real prospect", vouched by the events of the preceding week when criminality still occurred, but disorder was quelled due only to the huge police presence; critically, he disclosed his assessment that crime and disorder is nevertheless expected due to intelligence about anticipated counter-

protests and heightened local tensions; and he concluded, as a consequence, that the burden on his resources is excessive unless the route is altered. There can be no reasonable expectation that the Chief Constable requires to disclose any further details on operational matters which properly fall within the Chief Constable's area of expertise and margin of appreciation. His information is succinct, but clear and intelligible. He has disclosed the taking of "reasonable and appropriate measures"; despite this, he disclosed his assessment that crime and disorder is likely to be repeated; so he recommended a minor restriction on the pursuer's procession to regain preservation of the public peace. The defender had sufficient material before it, from a reliable source, to reach the same conclusion. As regards the apprehended disruption of the life of the community, I refer to my reasoning in paragraph [95] above. The spitting on a priest, shouts of "Fenian bastards", all occurring on the steps of a Catholic Church, is serious criminality aggravated by religious prejudice which, viewed in context, can properly be considered to be divisive of social cohesion and community harmony.

[167] Accordingly, in my judgment, in issuing its Order to re-route the pursuer's march, the defender did not fall into error, it did not exercise its discretion in an unreasonable manner, and it did not otherwise act beyond its powers. For these reasons, I dismissed the application. The same logic applies *mutatis mutandis* to the three conjoined applications.

SHERIFF

GLASGOW, 1 October 2019