Bell, C. and Murray, C. (2017)

***In Re E (a child)* (the 'Holy Cross' case).**

***In:* O'Donoghue A; Enright M; McCandless J, ed. *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity*.**

Oxford: Hart, pp.209-223.

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

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

[2008] UKHL 66

LORD MURRAY OF AGHERTON

My Lords,

70. "Let justice be done even if the sky should fall" has a venerable common law lineage. It was invoked by Lord Mansfield when, in freeing the radical politician John Wilkes, he maintained that judges "must not regard political consequences; how formidable soever they might be"; see *R v Wilkes* (1770) 4 Burr 2527, 2562. It is a comforting maxim for lawyers, serving as useful shorthand for the duty imposed on all those tasked with upholding the law to serve the populace as a whole without sectional favour. But it also requires the authorities take steps to protect the vulnerable in exercising their powers, even when it appears politically expedient not to do so. The facts before us concern whether the failure by the police to prevent the very real trauma suffered by the appellant and her daughter as a result of a known criminal threat amounted to a breach of this duty.

158 Days in North Belfast

71. The school run is a matter of daily routine for many families across the United Kingdom. For most of these families there is a comfortable regularity to the hubbub of planning for the day, for the minor crises of forgotten lunchboxes and misplaced books. For the 230 pupils of Holy Cross Girls' Primary School on the Ardoyne Road, however, the school run takes them along one of the most prominent sectarian fault lines in North Belfast. Decades of violent displacement of people during the Troubles left this Catholic school bordering the predominantly-Loyalist Glenbryn estate, with the result that the main entrance to the school faced this estate and could only be accessed by travelling through part of it.

72. The febrile summer of 2001 shattered whatever normality the journey to school can have in such circumstances. The spark for events outside Holy Cross remains disputed, but the tensions that had been rising within North Belfast for much of the month of June exploded into attacks by stone throwers on pupils and parents outside the Holy Cross

School on 19 June. In any event the cause of the events is a matter only relevant to the adults involved. It does not help girls aged between 3 and 11 to comprehend the violence and abuse that they faced. Thereafter, until the school holidays commenced on 28 June, Loyalists blockaded the main entrance to the school.

73. The police did not attempt to lift this blockade, as Assistant Chief Constable McQuillan has explained in his affidavit. Tensions were high. Resources were stretched. The marching season was fast approaching. A direct police response might have been used as a pretext for more widespread violence. The violence spread anyway; rioting swirled around Holy Cross on successive nights. On several days some children and family members, including the appellant and her daughter, were able to reach Holy Cross via the adjoining grounds of St Gabriel's Secondary School, but for the last week and a half of term the school was all but besieged.

74. Tensions in the area did not abate over the course of the school holidays. If anything, they worsened in the course of a summer of political upheavals which saw the resignation of David Trimble as First Minister and the temporary suspension of Northern Ireland Assembly. On the ground, protracted rioting in North Belfast accompanied the 12 July Orange Order parades. The police became aware that Loyalists would make another effort to block access to Holy Cross along the Ardoyne Road. In response, the police formed a cordon in an effort to permit safe passage for the girls and their families when school resumed on 3 September. That day the Red Hand Defenders, a terrorist group proscribed under schedule 2 of the Terrorism Act 2000, threatened the Holy Cross families, and the police cordon, if further attempts were made to use the Ardoyne Road. In the course of the blockade, this group would on multiple occasions issue direct threats against the appellant's life.

75. The blockade entered its most brutal phase in the first week of September. As the Holy Cross families walked to and from school between a cordon of police officers they were subjected to a barrage of sectarian abuse and death threats, accompanied by a hail of bricks, stones, rubbish, excrement and urine-filled balloons. All of this took place against a cacophony of sirens and whistles. Many of the Loyalists involved in the blockade wore masks. On 5 September, a blast bomb was thrown by Loyalists as the Holy Cross families walked this gauntlet. Four police officers in the cordon were injured, and one woman hospitalised as a result of shock. Thereafter fireworks would be thrown at the families to induce the same terror. The Loyalists methods' did not simply target the Holy Cross pupils for their religion, it targeted them as very young girls. Pornographic posters

were brandished and highly-sexualised abusive language yelled at the girls to put their parents off using the main entrance to the school. This conduct was intended to traumatise its young victims and even to rob them of their childhoods.

76. In responding to the situation, the police (with the support of the army) sought to contain the groups of Loyalists and prevent them from blockading the Ardoyne Road entrance rather than seeking to disperse the protesters and arrest those suspected of criminal behaviour. These efforts at containment evolved during the course of the blockade. On the first day of the school year, an effort was made to assemble crash barriers enclosed by a two-metre-high Perspex screen to provide a safe corridor for the children and their families. But the barriers took too long to erect and the Perspex screens proved too flimsy to withstand the missiles hurled at them, and on subsequent days police in riot gear carrying shields accompanied the families directly as they walked between a cordon of armoured police vehicles. Despite police filming of events in early September, by the end of October only 13 arrests had been made in response to the blockade.

77. Over the next two months the Holy Cross families refused to abandon their ordinary route or to see their children ferried to school in an armoured bus. There is a quiet dignity in the appellant's desire to perform life's run-of-the-mill tasks, like walking her child to school, in the face of such extreme intimidation. Many parents spent entire school days on the premises to be near their children. Through it all the principal, Anne Tanney, and her staff did their utmost to maintain the normal routines of school life and alleviate the visible distress of many of their pupils. The thrice-daily cycle (at morning, lunchtime and the end of the school day) involving the deployment of 700 soldiers and police officers continued until, following protracted negotiations, the protests scaled back from late-October onwards and ultimately suspended on 23 November. Only after the blockade ended was a prosecution strategy actively pursued, with 37 individuals being prosecuted in total over the next year.

Proceedings to Date

78. The appellant challenges the adequacy of policing approaches adopted in response to the blockade under the Human Rights Act 1998. Her challenge focuses in particular upon the second phase of blockade, from September to November 2001, when a threat that she and her daughter would be subject to inhuman and degrading treatment was known to the police who did not, she asserts, take sufficient steps to bring this threat to an end. As a corollary of this assertion, the appellant further submits that the police failure to effectively implement the criminal law discriminated against her as a Roman Catholic.

Put simply, she claims that the police approach would have been much more proactive had Protestant primary school children and their families been subject to such violence. To date, the courts hearing this case have accepted the arguments of the Chief Constable, as respondent, maintaining that all duties owed to the appellant during the period in question were fulfilled and that a more robust response to the blockade could have spawned more widespread violence. Kerr LCJ dismissed E's application on 16 June 2004, [2004] NIQB 35, and the Court of Appeal, in which Campbell LJ gave the judgment of the Court, dismissed the resultant appeal on 19 October 2006, [2006] NICA 37.

79. It follows from the above summary of the events that the appellant's daughter is a central figure in these proceedings. The Court of Appeal accepted, at para 77, that the appellant "is entitled to bring proceedings on her own behalf and on behalf of her daughter, who was a young child at the time of the incidents and therefore vulnerable". This decision was reached on the basis that both the mother and daughter met the test laid down in Article 43 ECHR and incorporated into Section 7(1) of the Human Rights Act 1998. Even though the child was very young when this judicial review commenced, no barrier prevented her from being joined as a party, and as her interests are at issue as separate from those of her mother, it would have been preferable to have done so. I agree with Baroness Hale of Richmond that it would have been preferable to have separated out the interests of the mother and daughter, but this omission does not mean that this action was improperly founded.

The Relevant Law

80. The ECHR is often characterised as a treaty which protects individuals against particular encroachments into their lives by public authorities in signatory states. Article 3 ECHR provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." The negative obligations upon public authorities inherent in this right are evident upon its terms; signatory states undertake not to subject individuals to these forms of treatment. As the European Court explained in *Pretty v United Kingdom* [2002] 35 EHRR 1, at para 52, courts adjudicating upon this right are required to assess whether the treatment an individual has suffered was sufficiently severe to trigger Article 3 ECHR. The classification of treatment as inhuman is determined by factors including whether it was premeditated, its duration and whether it caused "either actual bodily injury or intense physical and mental suffering", whilst the classification of treatment as degrading depends upon whether it "was such as to arouse in its victims feelings of fear,

anguish and inferiority capable of humiliating and debasing them"; see *T v United Kingdom* (2000) 30 EHRR 121, at para 69. Conduct of such a nature can satisfy the threshold for degrading treatment even if the victims' humiliation is in their own eyes; see *Smith and Grady v United Kingdom* (2000) 29 EHRR 493, at para 120.

81. Refraining from engaging in such treatment is not, of itself, sufficient for a state to satisfy this obligation. Societies which claim to be organised along liberal and democratic principles (the principles which underpin the ECHR) recognise the inherent dignity of their members. This recognition counts for little if a private individual, or group, within a society is known by the authorities to subject other individuals to degrading treatment without consequence. This much was acknowledged by the European Court of Human Rights in cases such as *Z v United Kingdom* (2001) 34 EHRR 97, a decision which recognised, at para 73, that positive obligations extended to protecting both the right to life under Article 2 ECHR and preventing torture or inhuman and degrading treatment contrary to Article 3 ECHR. Under the test set out in *Osman v United Kingdom* (2000) 29 EHRR 245, at para 116, for a positive obligation to arise:

> "[I]t must be established ... that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."

These obligations can be triggered where the infringement of Article 3 ECHR interests by other private actors is facilitated by a public authority's administrative action or inaction.

82. The general vulnerability of certain individuals or groups is relevant alongside the specific threat for the purpose of assessing whether there has been effective protection of Article 3 ECHR in a given case; see *Moldovan v Romania (no. 2)* (2007) 44 EHRR 16, at para 100. In this regard, the European Court has taken account of specialised international instruments, such as the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) 1979 and the United Nations Convention on the Rights of the Child (UNCRC) 1989, in developing the reach of positive obligations. These instruments are therefore of significance in this case even though the United Kingdom has ratified both but not incorporated their provisions into domestic law. Two provisions of the UNCRC are of particular relevance in highlighting the duties owed by

public authorities towards children. First, under Article 3(1) UNCRC, one of the key principles of the Convention is that "the best interests of the child shall be a primary consideration" when public authorities act with regard to children. Second, under Article 19 UNCRC, states are expected to take steps "to protect the child from all forms of physical or mental violence, injury or abuse". To these provisions must be added the positive obligation in Article 2(e) CEDAW, which enjoins signatory states to undertake "all appropriate measures to eliminate discrimination against women by any person, organization or enterprise".

83. As the European Court has affirmed, these instruments have influenced its approach to the obligations under Article 3 ECHR, and principles derived from them therefore form an important element of the authorities' assessments of this right where children are at issue; see *A v United Kingdom* (1999) 27 EHRR 611, at para 22. One of the most important elements of a positive obligations claim is the basis for establishing that the authorities' failure to adequately respond to inhuman or degrading treatment affected the claimants' rights, thereby engaging the state's responsibility. My learned colleague Baroness Hale of Richmond has expressed her concern with the European Court's rejection of a "but for" test for causation in favour of an approach whereby the claimant must establish that had the state taken adequate steps there would be "a real prospect of altering the outcome or mitigating the harm"; see *E v United Kingdom* (2002) 36 EHRR 519, at para 99. In light of the aim of positive obligations under Article 3 ECHR to protect vulnerable groups in society from the indifference of the authorities, I am not similarly troubled by the European Court's approach. The flexibility of state action is adequately protected by the permitted exceptions to the duty, to which I will return.

84. This Court must, under section 2(1) of the Human Rights Act, take account of the relevant European Court case law in assessing the content of the Article 3 ECHR right. In his opinion in *R (Ullah) v Special Adjudicator* [2004] UKHL 26, at para 20, Lord Bingham of Cornhill interpreted this provision as requiring the domestic courts of the United Kingdom to approach the incorporated ECHR provisions in line with the European Court's jurisprudence, and thereby "keep pace with the Strasbourg jurisprudence as it evolves". This approach prevents this Court from adopting the appellant's suggestion (supported by the intervention of the Northern Ireland Human Rights Commission (NIHRC)) that because the right contained in Article 3 ECHR is couched in unqualified terms, the obligation upon the authorities to secure these interests is absolute. The European Court's jurisprudence, from *Osman* onwards, requires "reasonable steps" by authorities in response to threats of inhuman and degrading

treatment, not that the authorities absolutely extinguish all such threats; see *Osman*, [116]. Nothing in the Court's subsequent jurisprudence indicates that there is a likelihood of this standard being displaced; see *Kontrová v Slovakia*, App.7510/04 (31 May 2007), at para 50.

85. The *Ullah* principle, however, does not mandate unquestioning adherence to the letter of European Court's jurisprudence. As no case decided by the European Court is directly analogous to the facts before us, we must therefore extrapolate the application of the principles laid down in its case law. As Baroness Hale of Richmond has maintained, judges cannot hold up our hands and refuse to engage with the ECHR when the European Court's approach is opaque, where we can make a "good prediction" as to the direction of travel; see *R (Countryside Alliance & Others) v Attorney-General* [2007] UKHL 52, at para 125. The test laid down in Osman is clear and objective, as Lord Hope of Craighead recognised in *Hertfordshire Police v Van Colle* [2008] UKHL 50, at para 66, but it has hitherto been applied in cases where the course of action open to the authorities to address the threat is clear. The instant case requires us to assess the adequacy of a particular response, chosen over other alternate options.

86. The Convention rights must be enjoyed without discrimination against the individual characteristics protected under Article 14 ECHR. The appellants assert that the policing approach adopted in response to the blockade was demonstrably less robust than the policing of nationalist demonstrations at Loyalist parades. In this regard, the European Court has maintained that "a difference in treatment is discriminatory if it has no objective and reasonable justification, i.e. if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised"; see *Moldovan v Romania (no. 2)* (2007) 44 EHRR 16, at para 137. It follows that if Article 3 ECHR is found to be engaged, this Court must also consider these claims.

87. At issue when assessing whether the police fulfilled these obligations in the duty imposed on public authorities by section 6(1) of the Human Rights Act 1998 to not act in a manner incompatible with an ECHR right. In the present case the relevant duties which must be fulfilled in a rights-compatible manner are set out in section 32(1) of the Police (Northern Ireland) Act 2000:

> (a) to protect life and property;

(b) to preserve order;
(c) to prevent the commission of offences;
(d) where an offence has been committed, to take measures to bring the offender to justice;

Under section 32(5) the Act requires that "Police officers shall, so far as practicable, carry out their functions in co-operation with, and with the aim of securing the support of, the local community". These duties codify, in statutory form, the first of Sir Robert Peel's principles of policing; "the basic mission for which the police exist is to prevent crime and disorder". That this foundational principle needed such codification, however, speaks to the experience of policing in Northern Ireland during the Troubles, and of the dangers which result when large sections of the community no longer trust the police to fulfil this function impartially. Having been promised impartial and effective policing as part of the dividend of the Northern Ireland peace process, the appellant and her daughter were entitled to expect this duty to be fulfilled.

88. Notwithstanding the expectations generated by the peace process, the duty contained within the 2000 Act is not a rigid encumbrance upon policing practice. It must be read in light of the operational discretion the European Court has identified in cases like *Kontrová v Slovakia*, App.7510/04 (31 May 2007), at para 50:

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

Efforts by the police to justify, on operational grounds, a course of action which would appear, at first sight, to be a derogation of duty are, however, subject to judicial review. Such Judicial oversight of police practice is essential to establishing and maintaining trust in policing in Northern Ireland. The role of this Court is to assess whether, even within the context of a measure of operational discretion, the policing response to the Holy Cross blockade adequately protected the rights of the appellant and her daughter.

The Standard of Review

89. The Court of Appeal, at para 89, assessed whether the policing operation was irrational on the basis of the approach laid down in *R v Ministry of Defence, Ex parte Smith* [1996] QB 517, concerning the ban on gay people serving in the armed forces, at 556. This decision urged a cautious approach to review where security concerns were at issue, and relying upon this formula it is unsurprising that Campbell LJ reached the following conclusion:

> "Applying the *Smith* test we consider that taking account of the nature and size of the operation that was mounted over a considerable period of time and the perceived risk if other measures were adopted the police did all that was reasonably open to them to protect the rights of the child."

90. When the European Court ultimately found that the ban breached the rights of gay military personnel it explicitly recognised that the approach to evaluating the irrationality of a decision adopted by the Court of Appeal in *Smith* did not provide for adequate rights protection; *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, at para 138. The Human Rights Act 1998 now obliges the courts to give effect to the incorporated Convention rights in cases in which they are engaged, and a series of decisions have established the inadequacy of the *Smith* approach in this regard; see *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, at paras 26-28 (Lord Steyn), and most recently (in an opinion issued after the Court of Appeal decision in the instant case) *Huang v Secretary of State for the Home Department* [2007] UKHL 11, at para 13 (Lord Bingham of Cornhill). The approach of the Court of Appeal to the standard of review was therefore flawed.

91. Where positive obligations under Article 3 ECHR are at issue, the court must make an objective assessment of the appropriateness of the public authority's response to the threat to this right on the basis of the proportionality test. Proportionality requires the court to evaluate the balance of competing interests struck by the public authority, and not simply to identify whether there was some reasonable basis upon which the authority proceeded; see *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, at para 27. Whereas the traditional test for irrationality sidelines the rights of the individual in question, requiring judges to concentrate on the actions of the public authority, the application of the proportionality test requires us to keep the interests of the appellant and her daughter at the forefront of the our minds.

The Blockade of the School and Freedom of Protest

92. Before I turn to assess the appellant's submissions regarding Article 3 ECHR one countervailing factor must be considered; the impact of the freedom of expression and assembly enjoyed by the Loyalists conducting the blockade of the Holy Cross School under Articles 10 and 11 ECHR. Assistant Chief Constable McQuillan's affidavit establishes that the policing approach adopted at Holy Cross in September 2001 was intended to "provide some greater protection for the parents and children and at the same time minimal interference with the rights of the loyalist residents to lawfully protest and make use of the public highway".

93. On one level, a consideration of such interests shows a necessary concern for human rights in the police decision-making process. Article 10 and 11 ECHR, however, are qualified rights. They can be subject to lawful restriction in line with the ECHR provided the restrictions are in accordance with law and are employed in a proportionate manner to address concerns including the rights of others, public safety, and the prevention of disorder or crime. Restrictions to the ability to protest exist under common law powers of police officers to prevent breaches of the police and under Article 20 of the Public Order (NI) Order 1987 (SI 1987/463 (NI 7)), which covers obstruction of a highway in such a manner as to prevent lawful users from going about their business. When a group amasses on a public highway for the purpose, evidenced over an extended period, of intimidating other members of the community, the limits of freedom of protest are far exceeded, and the police are within their powers to take proportionate steps to quell such disturbances and arrest individuals involved in unlawful conduct.

94. I am therefore in full agreement with my learned friend Lord Carswell that the terms protest, demonstration and dispute add an unwarranted veneer of legitimacy to efforts by Loyalists outside Holy Cross Girls' Primary School to terrorise children and their families. I will not, however, employ these terms for the sake of convenience within my judgment, as my noble friend has chosen to do.

95. Given the conduct of Loyalists during the June blockade of the school, the police were well aware that the limits of lawful assembly were highly likely to be exceeded with the resumption of the blockade in September. There will undoubtedly be situations where the police will find it difficult to calibrate their response to take account of both the positive obligations owed to one group under Articles 2 and 3 ECHR and the rights involved in freedom of protest under Articles 10 and 11 ECHR. A violent and sectarian mob threatening and attacking children and their parents on their way to and from school is

not, however, a difficult case. The appellant and her daughter found themselves at the centre of this maelstrom. The failure by the senior officers responsible for conducting the policing operation at Holy Cross to recognise the limitations to the Loyalists' rights under Article 10 and 11 ECHR is a factor which militates against this Court finding that the police made appropriate use of their operational discretion in this case.

Positive Obligations under Article 3 ECHR

96. As Lord Carswell has observed the respondents have accepted that, taken as a whole, the conduct of the Loyalists attempting to blockade Holy Cross amounted to degrading treatment under Article 3 ECHR. Whilst this concession alleviates the need for an exhaustive application of the relevant European Court case law to the facts of this case, I must emphasise that the ordeal to which the Holy Cross families were subjected between September and October 2001 was both inhuman and degrading. The conduct of the blockading Loyalists was tightly orchestrated, extended over a period of months, was intended to induce a state of inferiority and extreme fear, and indeed caused considerable anguish.

97. The European Court's jurisprudence on the Article 3 ECHR threshold also requires an evaluation of the vulnerability of the victim. Consideration of this requirement may have induced the Court of Appeal's assertion, at para 88, that:

> "The fact that she persisted in bringing her daughter to school by Ardoyne Road, in the face of the behaviour towards her of the protesters suggests that so far as she was concerned personally it may not have reached the threshold. In the case of her daughter the minimum level was more easily attained."

The proposition that the threshold for inhuman and degrading treatment applicable to the appellant is higher as a result of her choice to stand up, by entirely lawful means, to intimidation directed at her is tantamount to blaming her for the criminal activity to which she was subjected. The Holy Cross families did not seek "martyrdom" before the world's media by their entirely lawful use of the main entrance to the school. Rather, the police decision to mount a cordoning operation placed the families in the position of either walking the Ardoyne Road under these conditions or succumbing to intimidation. Nothing in the appellant's behaviour should colour this Court's decision as to whether her Article 3 ECHR right, and that of her daughter, was adequately protected.

98. An evaluation of the vulnerability of the appellant and her daughter in the context of Article 3 ECHR should start not with the appellant's behaviour but with a consideration of the impact of the blockade upon the Holy Cross families. Anne Tanney, Holy Cross's principal, has provided moving evidence of the impact of the protracted blockade upon the pupils in her care. Little teaching was possible during the months of the blockade. Dr Tan, general practitioner for many of the families involved, has recounted the range of nervous symptoms displayed by the school children. Many children continued to receive counselling long after the disturbances had ended. Under Article 28(1) UNCRC, the United Kingdom accepts that children's education is to be achieved 'on the basis of equal opportunity'. The importance of the girls' education explains the lengths to which the Holy Cross families went to secure regular access to the school by its ordinary entrance.

99. Whilst it is not in dispute that Article 3 ECHR has been engaged in the case at hand, the scope of the state's positive obligations under this right has proved more controversial. The facts do not indicate that the authorities failed to identify the threat to the appellant or that they took no meaningful steps to respond to it. The threat to the appellant's Article 3 ECHR right, even if it was not discussed in those terms, was evident to the respondent Chief Constable and his officers. Throughout September, October and November, against a backdrop of inter-community tension and strained political processes in Northern Ireland, steps were taken to shield the pupils and their families from the Loyalist blockade. Nor is the dedication to duty of the individual police officers providing that cordon is in doubt; 41 of them were injured in the course of the policing operation, some seriously. At issue in this case is the adequacy of the police response, especially in terms of the strategy adopted to policing the blockade.

100. As the written intervention by the Northern Ireland Commissioner for Children and Young People and the Children's Law Centre notes, in assessing whether the police response fulfilled the requirements of Article 3 ECHR this Court must give consideration to the United Kingdom's other relevant international obligations. As noted above, CEDAW and the UNCRC impose duties upon signatory states to take active steps to prevent women and children from discrimination and violence even when it is perpetrated by non-state actors. Positive obligations under Article 3 ECHR may well be a developing area of the European Court's jurisprudence, but *Moldovan v Romania (no. 2)* (2007) 44 EHRR 16 makes it clear that we must take these obligations into account in a case in which the nature of the abuse directed at the school children singled them out as girls even if it was directed at them for religious and ethno-nationalist reasons. In such

circumstances these instruments clearly require the authorities to establish the adequacy of the steps taken to fulfil their positive obligations.

101. In the High Court, Kerr LCJ noted (at para 26) that the Royal Ulster Constabulary (RUC) Chief Constable, Sir Ronnie Flanagan, had recognised during the disturbances that the 'the rights of the children are to the forefront of our thinking'. Kerr LCJ concluded (at para 53) that it had not been established that the police had failed to act in accordance with the "best interests of the child" principle articulated in Article 3 UNCRC. Stating a concern for this principle, however, is not the same as actively engaging with its requirements. At meetings from 6 September onwards NIHRC members raised serious concerns over the impact of the cordon operation upon the children. Dr Tan's evidence before the High Court illustrated how these concerns were borne out. At the time, however, they did not prompt any discernible change in police practice.

102. Protecting all members of the community from harm without prejudice is a vital part of a police officer's duty. But effective policing requires that the community as a whole must also have confidence that law breaking by particular groups will not be tolerated. In 1996 Sir Ronnie Flanagan decided to re-route an Orange Order parade away from the Garvaghy Road in Portadown. Following days of Loyalist disorder which spread far from the area around Drumcree Church, the Chief Constable felt compelled to reverse his decision and permit the march. These events not only provoked reform of the legislative arrangements for policing in Northern Ireland but also adversely affected subsequent policing practice.

103. The police's justification for instituting a cordon between September to November 2001, rather than preventing or dispersing the blockade, lay in the risk that disorder might spread, as it had done in 1996 following policing operations at Drumcree, if more proactive measures were undertaken. My colleagues have emphasised the experience of the RUC under Sir Ronnie Flanagan's leadership in assessing the reaction to their operations as a significant factor in reviewing the adequacy of this response. But in the aftermath of Drumcree, the Public Processions (Northern Ireland) Act 1998 was enacted in the light of the defects exposed in policing practice. Furthermore, section 32(1) of the Police (Northern Ireland) Act 2000 imposed positive obligations on the police to fulfil their responsibilities for upholding law and order for all sections of the community in Northern Ireland specifically as a response to the legacy of distrust over police even-handedness from both before and during the Troubles. In such circumstances my learned

colleagues' readiness to defer to decision-maker expertise hollows out this Court's independent assessment of the adequacy of the police response.

104. Under the test set out in *E v United Kingdom* (2002) 36 EHRR 519, at para 99, the appellant must establish the real prospect that a police strategy based on ending the blockade as opposed to cordoning the pupils and their families could have prevented them from suffering inhuman and degrading treatment. By herding the appellant and her daughter through a violent sectarian gauntlet, the police perpetuated their isolation and abuse. The state of terror the events inspired in the very young girls going to school was exacerbated, not diminished, by having to walk between dense lines of heavily armed soldiers and police in riot gear. The day-to-day lives of the affected families became dependent upon the timetable of police efforts to establish a cordon. The police's failure to act proactively to prevent the disturbances and arrest those involved in suspected criminality risked sending out a message that the behaviours in question were being tolerated because their victims were working-class Catholic families. It is easy to see how the Holy Cross families could come to interpret the violence as being condoned by the authorities.

105. Taken as a whole, the strategy adopted by the police cannot be characterised as the product of special experience on the part of the police, but of long-standing concerns over the possible spread of Loyalist disorder dominating the decision-making process. The new statutory duties upon the police under the 2000 Act and the positive obligations under Article 3 ECHR, which should have been at the forefront of senior officers' minds, were consequently marginalised. Even accepting that the police enjoyed a degree of operational discretion in the choice of response to the disturbances around Holy Cross, its ambit became considerably more restricted once the protracted and violent nature of the unlawful blockade, and the harm to the vulnerable children and their families, became evident at the start of the new school year in September 2001.

106. Positive obligations under Article 3 ECHR do not require the police to address every instance of violent disorder in a particular way. The operational discretion the police enjoyed in the present case was restricted by the operation of two factors. First, the police were aware that a particular vulnerable group was subject to violence and intimidation which amounted to inhuman and degrading treatment and, second, the manner in which the situation developed gave the police considerable time to prepare their response. The obligations upon the police were not breached in the June phase of the disturbances, when officers were forced to react to a sudden outbreak of public disorder around the

Holy Cross School. The intervening time period (in this case more than two months during the school vacation) and the consequent opportunity for the police to assess the situation on the ground transformed the situation. The police had the opportunity to calibrate their response and to prepare contingency measures to take effect as soon as it became evident that a cordoning operation could not effectively prevent intimidation and violence. Every day the police had to plan was a day in which the Holy Cross families concerns over the coming school year intensified. September saw those fears realised. By allowing the disturbances to continue to terrorise the children, disrupt their education and ruin their home lives for a further two months, such a long period in their short lives, the police response to the Holy Cross disturbances fell far short of being adequate.

107. For these reasons I must depart from the position adopted by my colleagues. The appellant has established that there was a real prospect that a more proactive policing approach, undertaken in the early stages of the blockade of September to November 2001, would have alleviated the abuse of her Article 3 ECHR right and that of her daughter.

Non-Discrimination under Article 14 ECHR

108. Although the police response was inadequate, it does not necessarily follow that this inadequacy was the result of discrimination against the Holy Cross families as nationalists or Catholics. Policing a situation such as the disturbances around Holy Cross school is undoubtedly complex, and the evidence before this Court establishes that the shortcomings in the police response resulted from operational miscalculations and not sectarianism.

109. The policing operation around Holy Cross Girls' Primary School took place at a time when the officers of the RUC were preparing for the Patten Reforms (*The Report of the Independent Commission on Policing for Northern Ireland,* Chaired by Christopher Patten (September 1999)) to come into full effect on 4 November. Indeed, lines of police officers protecting Catholic school girls and their families from attack by a violent mob, day-in, day-out, may indeed have helped to assuage long-held suspicions over whether the incoming Police Service of Northern Ireland would risk their safety on behalf of the community as a whole. The police officers and soldiers on duty outside Holy Cross put their lives in peril to protect the families and the children and the failings exposed in this case relate to the manner in which they were deployed, not their performance on the cordon. Article 14 ECHR is not engaged.

The Northern Ireland Human Rights Commission's Intervention

110. The intervention by the NIHRC on behalf of the appellant has caused some concern amongst my colleagues. Lord Hoffmann and Lord Brown of Eaton-under-Heywood consider that the NIHRC has duplicated the appellant's arguments and that its intervention has thereby added nothing of value to these proceedings. Section 68 of the Northern Ireland Act 1998 established the NIHRC as a successor to the Standing Advisory Commission on Human Rights. The Belfast Agreement envisaged the Commission as having "an extended and enhanced role" over the body it replaced. The statutory terms of under which the NIHRC was created, however, were unfortunately unclear. For much of its early existence, its efforts were in large part devoted to defending the bounds of its mandate, including the power to intervene as a third party in cases, a power only affirmed through an appeal to this Court: see *In re Northern Ireland Human Rights Commission* [2002] UKHL 25.

111. The NIHRC has the difficult task of building faith in the institutions and governance arrangements within a still divided society (See C. Bell, *Peace Agreements and Human Rights* (Oxford: Oxford University Press, 2000) at 229-232). In this context, the NIHRC's exercise of its hard-won power to intervene in this case should not lightly be criticised. The events at Holy Cross remain the source of much dispute, even at more than seven years remove, within society in Northern Ireland. The NIHRC's oral submissions addressed issues such as the limits to freedom of assembly which are of general importance to the people of Northern Ireland.

112. Even if the NIHRC's intervention does affirm the position of one of the parties, the Commissioners will have adjudged such involvement to be important for securing the protection of human rights in Northern Ireland. For the appellant in this action, challenging as she is the adequacy of the authorities' response to sectarian violence, the mere fact of the NIHRC's intervention at her side provides a powerful reassurance that official bodies take such claims seriously. However frustrating some of my colleagues might find a degree of repetition in the submissions before this Committee, this is a small price to pay for the societal benefits thereby secured. I would therefore disagree with, and indeed deplore, any effort to constrain the ability of the NIHRC to intervene in such a case.

Outcome

113. Even the youngest of the children affected by the clashes around Holy Cross will soon be teenagers. The traumatic events of the summer of 2001 will have cast a long shadow over their childhoods and shaken their faith in the capacity and willingness of the authorities tasked with upholding the law to protect them in the course of their day-to-day lives. No judicial decision can erase the memory of those events. The best that this Court can do is to affirm that the police owed a positive duty to protect these children when they were at their most vulnerable, a duty which was not adequately fulfilled in this instance.

114. I would therefore depart from the position adopted by my colleagues and allow the appeal, issuing a declaration that the Holy Cross cordon operation was illegal in its failure to fulfil the duties imposed upon the police under section 32(1) of the Police (Northern Ireland) Act 2000 in such a way as to secure the Article 3 ECHR right of the appellant and her daughter.