SHERIFF COURT OF GRAMPIAN, HIGHLAND AND ISLANDS AT ABERDEEN

ABE- B222/24

JUDGMENT

of

SHERIFF IAN H L MILLER

in the

SUMMARY APPLICATION

brought by

DUNNOTTAR MARTYRS MEMORIAL LOL 1685

Appellants

Against

ABERDEENSHIRE COUNCIL

Respondents

Act: Sanders, Advocate

Alt: Upton, Advocate

ABERDEEN, 28 March 2024.

[1] This summary application is an appeal against the Prohibition Order made by the Kincardine & Mearns Committee of the Respondents on 5 March 2024 prohibiting the appellants from holding a public procession through parts of Stonehaven on 16 March 2024. It was presented under section 64 of the Civic Government (Scotland) Act 1982. The Respondents opposed the appeal and lodged answers to the application.

[2] I heard the appeal on 15 March 2024. That was the first and earliest opportunity for a hearing. Having heard counsel instructed on behalf of each party I took time for consideration and then delivered my decision *ex tempore*. I refused the appeal. My interlocutor dated 15 March 2024 expresses my decision. I indicated to counsel that I would issue in writing my reasons for my decision which I do now.

[3] The appeal had to be presented on the pleadings contained in the application and the answers thereto, both unadjusted, and on the oral submissions made by counsel, together with the legal authorities they referred to and the productions they used so far as they used them. While it was open to me under section 63(5) to ask for and hear evidence there was neither time nor opportunity to secure that. Neither counsel indicated that there was a need to hear evidence and I agree with their decision on that. Moreover having heard counsel I could not make avizandum, as I would normally expect to do, because time did not permit that. That meant that my decision was final in so far as the proposed public procession was concerned because there was no time to appeal my decision before it would have taken place.

[4] During the appeal hearing both counsel sought leave to amend their pleadings. Counsel for the appellants made three such requests. The first sought at the outset of the

hearing to introduce averments and a fifth plea-in-law founding upon alleged bias on the part of the Committee in their decision making process. Counsel for the respondents opposed that motion. I refused the motion on the grounds that it was incompetent as presented, irrelevant in its terms and too late in its presentation. The second asked to dismiss the appellant's second crave. I granted that unopposed and accordingly repelled their fourth plea-in-law. That removed from the application the options contained in that second crave and founded in section 64(6) of remitting the cause to the respondents, quashing the order made on 5 March 2024 and making no further order or making such order as I deemed proper. The third came at almost the end of the hearing when counsel asked that the word "Submission" where it appeared in article 7 of condescendence on two occasion should be deleted and the word "representations" substituted for it. That motion was unopposed and I granted it. Counsel for the respondents made one such unopposed request which I granted, that I repel their second and third pleas-in-law for want of insistence.

The positions of the parties as stated in their pleadings

[5] The dismissal of the appellants' second crave resulted in the appeal being presented on the appellants' first crave only. That invited the court to uphold their appeal against the order made by the Committee on 5 March 2024 prohibiting them from holding a public procession through parts of Stonehaven on 16 March 2024. If I granted that the procession would proceed. The appellants ground that crave in their first three pleas-in-law supported by their averments in their articles of condescendence.

[6] The facts of the case are narrated in articles 1 and 4 to 6 of condescendence inclusive. All are admitted by the respondents subject to their positive averments in their answer to article 5.

[7] Article 1 identifies the parties and the statutory duty on the respondents under Part V of the 1982 Act in respect of public processions. Article 4 narrates the procedure whereby the appellants sought permission to hold the procession. They aver it is a new event to mark the opening of a new Orange Lodge in Stonehaven. They also aver the attitude towards the procession of the Chief Constable of Police Scotland which they assert was one of no objection subject to observations. Article 5 sets out how and when the Committee responded to the application. On 5 March 2024 it took the decision to prohibit the procession and on 8 March 2024 issued to the appellants its Statement of Reasons for their Order prohibiting the procession (the Statement). Article 6 quotes its reasons for its decision as given in paragraphs 31 to 33 of the Statement.

[8] The respondent's averments in answer to article 5 aver that the Statement sets out a record of the Committee's meeting on 5 March 2024, a note of the issues raised, a record of its deliberations and its reasons for issuing the Order. It also lists the various documents that it had before it at the meeting and of which it took account.

[9] In article 7 the appellants set out three grounds on which they assert their appeal should be upheld.

[10] The first, at 7a, is that the Committee decision is in breach of article 11 of the European Convention of Human Rights. There could be no prohibition unless the Committee could prove that prohibition was necessary for the prevention of *inter alia* disorder or crime or for

the protection of the rights and freedoms of others. The appellants then list six reasons in support of that: (i) the Committee had before it insufficient material to warrant a restriction of the appellant's rights based on the test of necessity; (ii) if there were a potential point of conflict created by persons other than members of the appellants that was for Police Scotland to address in order to protect all members of the public in a proportionate fashion and the fact that such a potential point might exist did not of itself render it necessary to prohibit the procession; (iii) the onus of proving that the prohibition was necessary lay upon the respondents and they could not discharge that onus based on the representations made to the Committee where Police Scotland did not object to the procession taking place and could police it with the co-operation of the appellants and their stewards; (iv) concerns of public safety, public order and damage to property were ill-founded; (v) most of the appellant's processions passed off peacefully; and (vi) the presence in Stonehaven of about 200 visitors would enhance the businesses of those in the town that stayed open.

[11] The second ground, at 7b, is that even if the Order were necessary, which was denied, it had to comply with domestic law and in particular with section 63(8) of the 1982 Act. The representation before the Committee invited them to prohibit the procession under section 63(8)(a)(iv) and/or (b).

[12] The third, at 7c, is that the written reasons noted in the Order were inadequate, unbalanced and lacked transparency.

[13] The respondent's averments in answer 7 deny all the foregoing averments of the appellants. They aver that they (or rather their Committee) were entitled to make the Order for the reasons set out in the Committee's Statement. They then aver their position countering all the reasons advanced by the appellants and particularly those in their first ground.

[14] The respondents plead that in reaching their decision they did not err in law (plea 1), otherwise act beyond their powers in reaching their decision (plea 4) or breach the human rights of the appellants (plea 5).

[15] Counsel presented their submissions orally. I want to record my thanks to both for their respective submissions.

Submissions on behalf of the appellants

[16] Counsel for the appellants began his submissions by inviting me to sustain the appellants' pleas-in-law, Grant the appellants' first crave and thereby uphold their appeal against the Prohibition Order and then make no further order. In the alternative he moved that I sustain the pleas for the appellants and substitute my own decision for that of the committee. He subsequently departed from that position when the appellants' fourth plea-in-law was repelled and their second crave dismissed.

[17] He submitted that the appellants had a right to hold a public procession and that I should reverse the ban on them holding a procession in Stonehaven. On the practicalities of the procession the respondents had advertised road closures and nothing of that affected the appeal and had contacted the police who were ready to police the procession.

[18] The facts of the application were set out in Articles 1 to 5 inclusive of condescendence. What the appellants proposed was one of the very few processions of this nature. It was a short procession of some 30 minutes in duration and that was a relevant consideration when considering questions of disruption and inconvenience to the locality. The appellants had submitted to the respondents their Notice of Proposal to Hold a Procession dated 8 January

2024 to which was attached a map of the proposed route. The Chief Constable of Police Scotland submitted representations dated 14 February 2024. Police Scotland had no objection to the holding of the procession. Counsel accepted that the appetite for an Orange Order March in Stonehaven on 16 March 2024 was not general but the police were able to police the procession contrary to the stated view of the Committee that the extent to which the containment of risks arising from the procession would, whether by itself or in combination with any other circumstances placed an excessive burden on the police excluding costs. Under reference to the appellants' pleas-in-law he submitted that the issues of breach of domestic law, inadequate and unbalanced reasons and lack of transparency were covered by their first plea-in-law and the concept of breach of Article 11 by their second plea-in-law. He conceded that he was not making much of lack of transparency but said that the degree of transparency exhibited by the Committee was not enough.

[19] Turning to Article 11 counsel discussed what was meant by necessary. It placed a high test on the respondents. He supported that from the statement in the decision of the European Court of Human Rights in the case of *The Sunday Times* v *The United Kingdom* (1979 – 80) 2 E.H.R.R. 245 at Ground 3(a) of the decision of the court that the expression "necessary in a democratic society" implied the existence of a pressing social need. In that context he referred to the guidance for Scottish Local Authorities issued in December 2006 by the then Scottish Executive called "Review of Marches and Parades in Scotland" which was still in force. This was a very detailed guide to governing the conduct of marches and parades in Scotland. He instanced in particular the text of paragraphs 26 to 30. From paragraph 26, which was concerned with when to prevent a procession or place conditions on it, he took that a local authority must consider the effect of holding the procession on four factors before deciding whether to restrict a procession, namely, public safety, public order, damage to property and

disruption to the life of the community. He acknowledged that the language adopted in the decision of the Committee dealt with all of these points. Paragraph 28 provided that a local authority should examine all the factors before deciding whether it would be appropriate to prevent a procession or place conditions on it. Paragraph 29 dealt with managing traffic and paragraph 30 with disruption to the life of the community.

[20] Counsel referred next to two decisions of the European Court of Human Rights: *Vogt* v *Germany* (1996) 21 E.H.R.R. 205 and *Plattform "Artze fur das Leben"* v *Austria* (1991) 13 E.H.R.R. 204. From *Vogt* he adopted the proposition expressed in paragraph 3(a)(i) of the decision of the court that "[f]reedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment.". From *Plattform* he quoted the proposition stated at paragraph 2.(b) of the decision of the court that it was "the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully". This meant that the onus of proof was on the state to allow a demonstration to go ahead.

[21] In this context he focussed upon the role of Police Scotland and its role. It had received a copy of the appellants' application. A representative of Police Scotland had attended the appeal hearing in case he was required to give evidence which he was not. If there were a fundamental policing problem with the proposed procession then the police would raise that. The only observation made was that the procession needed twenty stewards and not six and the appellants accepted that. Police Scotland was an interested party and had submitted no material objections to the holding of the procession. That was not to say that the police had no concerns. Orange Marches have taken place before. Police Scotland knew what such marches involved. There was no intelligence of any trouble over the proposed procession but there was social media content that there might be trouble around the procession. Counsel

acknowledged that the appellants and their aims were not universally admired or appreciated but he submitted that they were a legal organisation and part of the fabric of society particularly in certain parts of Scotland and Northern Ireland. There were two strands in the concerns expressed which brought with them a measure of apprehension: firstly there were those opposed to the appellants who would seek to disrupt the procession; and secondly so called "casuals" which were not formally affiliated to the appellants might "jump on the band wagon" in order to cause trouble. Police Scotland was able to deal with either contingency.

[22] Under Article 11(1) the appellants had a right to process. As far as disruption to the community was concerned, the Committee decision gave no assessment of the level of the disruption and no assessment of the measures to be taken to deal with that. It was said that Stonehaven shopkeepers would close their shops but there was no indication in the decision of positive measures or steps taken to mitigate that disruption. Even if there were a real risk of disruption by those beyond the control of the appellants that did not justify banning the procession. If the fact that some 11,000 people said that there should be no procession was the reason that the Committee called off the procession that reason and decision were not in accordance with the demands of Article 11. The ban was unnecessary on the known facts. Furthermore, at no point did the respondents say that there was an alternative route which would not take it through the town centre but would allow it beyond the town centre and up to its end point at Dunnottar Wood.

[23] Article 11(2) requires any derogation from the general right under 11(1) to be proportionate, the reasons given for it to be relevant and sufficient and the decision to be focussed on an assessment of relevant facts. The respondents had not shown any reason that the decision was proportionate, had not given relevant reasons and had not given an acceptable assessment of the relevant facts. Counsel acknowledged that there had been in the

order of 11,000 objections and also that some objectors had been given a five minutes' slot to address the Committee at its meeting as recorded in the Statement particularly at paragraphs 14 to 17.

[24] Counsel turned to the case of *Aberdeen Bon-Accord Loyal Orange Lodge 701* v *Aberdeen City Council* 2002 S.L.T. (Sh Ct) 52 a decision of Sheriff Cowan sitting in Aberdeen Sheriff Court and founded upon the paragraph in her decision at page 54 in which she discussed Article 11 and how it should be applied. He submitted that that paragraph set out very crisply the law and how to apply it with which the present appeal was concerned with and that nothing had changed in the law since then and should be applied to the present case.

[25] Counsel addressed next the issue of the inadequate nature of the Statement of Reasons. It did not pass the test of adequacy. He supported that conclusion by reference to the decisions in two cases both of which applied the test enunciated by the Lord President (Lord Emslie) in the case of *Wordie Property Co. Ltd.* v *Secretary of State for Scotland* 1984 S.L.T. 345 at pages 347 and 348. The first was *Mirza* v *Glasgow City Council* 1996 S. C. 450 which confirmed that where a challenge was made as to adequacy of reasons given for a decision, the test to apply was that referred to in *Wordie*. The other was *Leisure Inns (UK) Limited* v *Perth & Kinross District Licensing Board* 1991 S.C. 224 for the observations of the Lord Justice Clerk (Lord Ross) in deciding similarly on the question of the inadequacy of reasons as set out at page 233.

[26] Counsel then turned to the Statement to discuss its paragraphs 31 to 33 which give the Committee's Reasons for its decision to prohibit the procession. Paragraph 31 narrated the considerations to which the Committee was required to have regard and how it dealt with them. There were four and counsel addressed the Committee's treatment of each of them. On the issue of public safety he submitted that the Committee had reached the wrong conclusion. The backstop in respect of public safety lay with the police. The Committee did not appear to

have given any regard to the Police Scotland position that it saw no problem with the procession. The Committee had been reminded of this and the legal test during the meeting as recorded at paragraph 25 of the Statement of Reasons. On the issue of public order whether it would be disrupted was once again a matter for the police. The decision to which the Committee came on it had been swung by what he described as "the mob". On the issue of damage to property he accepted that a minority of those in attendance might cause damage. On the issue of disruption to the life of the community the appellants anticipated there would be about 200 persons taking part in the procession and they would be accommodated in 6 buses. He acknowledged that there was a potential for opposition and that there might be the potential for reputational damage to the town of Stonehaven. Any question of the burden on police resources was a matter that the police could deal with. Paragraph 32 was framed under reference to Article 11. He noted that members of the local community expressed a significant level of fear and anxiety and fear of disorder taking place.

[27] In conclusion, counsel submitted the appellants had done everything that they should have done and in the right way and the refusal to allow them to hold the procession was a very serious breach of their Article 11 rights.

The submissions on behalf of the respondents

[28] Counsel for the respondents invited me to repel the respondents' second and third pleas-in-law because they were not to be insisted in (as previously noted), then sustain their first, fourth and fifth pleas-in-law, repel the appellants' pleas-in-law and refuse the appeal.

[29] Counsel said that he wished to present his submissions in seven points. The first was to consider the role of the Committee Report dated 23 February 2024. This in its terms was a

neutral document and should to be treated as a report by legal officers of the respondents to assist the work of the Committee.

[30] The second was that the Committee had the relevant documents before it. It was also aware of the legal test to apply because it was set out in Appendix 4 of the Report. In passing, he observed that in the summary application there was reference to Submissions at two places at lines 182 to 183 and 202 to 204 of the application but he was unable to understand to which Submissions the appellants were making reference (this was subsequently clarified).

[31] His third was concerned with the information provided in paragraph 19 of the Statement. That paragraph related to the questions and responses in summarised form that were made as a result of members of the Committee asking questions of all parties during the meeting. He emphasised in particular those at (d), (k), (t) and (u). Question (d) was concerned with whether the date selected for the parade was significant to which the committee were advised it was not but was selected to fit in with existing calendar commitments of the appellants. In fact, as was observed, it was the day before St. Patrick's Day. In respect of (k) the organiser of the procession confirmed that he had not liaised with the community council or other local groups in the area because he would not usually do this. For (t) the committee received confirmation that protection of mental health and wellbeing covered under Article 11 would be a relevant consideration and for (u) the committee received confirmation that the event at Stonehaven Town Hall following the procession would be an additional burden on the police.

[32] The fourth was under reference to sections 63 and 64 of the 1982 Act. They were the sections that governed the application and section 63(8) of the 1982 was a mandatory provision.

[33] For the fifth he turned to the guidance document "Review of Marches and Parades in Scotland" and in particular to its paragraphs 26, 30, 33, 55, 56 and 62. The Committee was obliged to have regard to its guidance. Paragraph 26 directed that it must have regard to section 63(8)(a) of the 1982 Act and to the contents of paragraph 30 and 33 which were concerned with disruption of the life of the community. Paragraphs 55 and 56 were concerned with the requirement to consult communities. He placed much emphasis on that and evidenced the extensive number and level of responses which the Committee had received in advance of the meeting and which were lodged as productions. Paragraph 62 was concerned with the assessment of risk. The Committee had had regard to all of this guidance and had done so in textbook fashion.

[34] The sixth was to refer to the Human Rights Reissue part of the Stair Memorial Encyclopaedia at paragraph 138 and its discussion of the interpretation of Article 11(2) for the statement that in the context of the necessity of an interference of the right granted under Article 11(1) a valid interference may include the impact of any planned assembly on the life of a community as a whole.

[35] The seventh point consisted of an analysis of articles 5, 6 and 7 of condescendence. Under reference to section 64(4) counsel drew particular attention to the concept of the margin of appreciation. He submitted that the onus of proof for the application was on the appellant. The appellants had not pled that section 63 of the 1982 Act was incompatible with Article 11 of the ECHR. Accordingly, section 63 must be held to be Article 11 compliant. There was no challenge to that in the application. This was relevant to a consideration of the relevancy or otherwise of article 7a. Counsel submitted that on a broader matter the appellant's application was deficient because it made no reference to there being any breach of section 63(8) on the part of the respondents. In particular that was not averred in article 7 of condescendence. The

only question which should be posed was how it was that the respondents as the local authority had failed to comply with section 63. In the absence of any such averment there was, as he put it, a gaping hole in the middle of the appeal. The absence of any such averment meant that article 7b was unable to do what the appellants wished it to do and did not support the appellant's second plea-in-law. Article 7b was a completely inarticulate paragraph. As presented it was irrelevant. Article 7c was an attack on the way and the manner in which the Committee communicated its decision. The respondents had complied with section 63(3)(a)(i). Any breach of that was not said to be a ground of appeal. If there were a competent ground presented then there would be a duty to give reasons. There should not be a doubt about the reasons that the Committee had given? They had been presented with admirable clarity in paragraphs 31 to 33. They were the core of the matter on the facts of the case. It was irrelevant for the appellants to plead a breach of Article 11 if they did not aver that there had been a breach of Article 11.

[36] *Esto* he was mistaken on that and it was relevant to present the case as the appellants had, then in paragraph 7a the appellants mounted six criticisms of the decision making process of the Committee. I have already mentioned them at paragraph [10] above. As expressed in the article, as amended, they are as follows. I have added numbers to the passage and presented its content in a list for ease of reference.

> "(1) There was insufficient material in front of the Respondents which warranted a restriction of the Appellants' rights based on necessity. The Appellants are simply seeking to exercise their Convention rights;
> (2) If there is a potential point of conflict created by others then it is the job of Police Scotland to protect all members of the public in a proportionate fashion. That is particularly so when the Respondents are under a positive duty to facilitate the Appellant's rights under- the Convention. The fact that a potential point of conflict may exist does not, of itself, render it necessary for the Respondents to prohibit the Procession;
> (3) To interfere with the Appellant's Article 11 rights, the onus is upon the Respondents to prove that the prohibition was necessary. They cannot discharge that

> onus based on the representations alone. The Respondents have failed to demonstrate the necessity required by Article 11. The Respondents have failed to demonstrate the necessity required by Article 11;
> (4) Police Scotland, with extensive experience of policing such events did not object to it taking place, can police it and should police it with the cooperation of the Appellants and their stewards.
> (5) Concerns of public safety, public order and damage to property are ill founded. Most of the Appellant's processions pass off peacefully. Likewise, even if there is any disruption to the life of the community, which is denied, this would apply to any procession and applying the Respondents' logic every procession or demonstration would require to be prohibited. The proposed route of the Appellants' procession follows the same one as the Remembrance Sunday procession in 2023.
> (6) At least 200 visitors to Stonehaven, including attending a reception after the procession, will enhance the businesses of those that stay open.

[37] The first criticism was that the Committee had insufficient material before it. Counsel submitted that was factually incorrect. The committee had a great deal of information before it as set out in the Committee Report and confirmed in the Statement. He instanced in particular the content of appendix 8 to the Committee Report. That consisted of numerous responses received from the local community and others and ran to 281 pages. Counsel quoted from 28 representations from which he instanced the repeated concerns expressed about public safety, public order, damage to property and disruption to the life of the community of Stonehaven and its businesses. Two of the representations came from local Members of the Scottish Parliament. A further response came from fifteen licensed trade operators in the Stonehaven area expressing their concerns about public disorder around and in the wake of the proposed procession. Counsel acknowledged that all of these responses were full of subjective opinions but submitted that they presented a body of evidence which included objective and reasoned concerns on the issues mentioned in them. Accordingly, it was unjustified to say that the committee had insufficient material before it.

[38] The second concerned the role of the police in the event of a potential point of conflict created by persons other than the appellants. Counsel submitted that there was no rule that it was for the police to run public order.

[39] The third was that the use of the word Submission (replaced after this was said by the word representations) did not support the point being made.

[40] The fourth concerned public safety. The concerns were not ill-founded. To say that they were ill-founded was an error of fact and not a ground of appeal.

[41] The fifth asserted that most processions pass off peacefully. This did not say very much of value because that left up to 49% that may be said had not passed off peacefully.

[42] The sixth, the issue of enhancement of business, was ill-founded because the letters and responses that had been received, particularly from the licensed trade operators, indicated that the enhancement of business was not made out.

[43] In conclusion, counsel submitted that I should dismiss the appeal. Article 7a was irrelevant. The court was effectively being asked to retake the decision. The decision made by the Committee was made after an honest and careful assessment of what was before it which included a significant body of evidence and submissions. The appellants' submissions were presented largely as if the decision were for the court rather than for the Committee. As for what he described as mitigatory measures the appellants proposed none to address the concerns stated. On the question of expenses, they should follow success.

The reply on behalf of the appellants

[44] Counsel for the appellants in reply observed that the use of the word Submission was ill-chosen and that it should have been representations and that was because it referred to the content of appendix 8. As recorded above he moved for leave to amend the application to

that extent which was unopposed and which I granted. With regard to the content of appendix 8 he submitted the responses were all close in date between 26 February and 1 March. This reinforced the importance of the court standing up for the minority, in this case the appellants, and not, as he put it, caving in to the majority. If Police Scotland had nothing adverse to say about policing the procession that should be the end of the matter. On the question of expenses counsel was of the same view that expenses should follow success.

Decision

[45] The law which governs the appellants' application is contained in Part V of the 1982 Act and in particular in subsections 63(8) and 64(4).

Subsection 63(8) so far as relevant to the application, provides as follows.

> "The considerations to which the local authority shall have regard when deciding whether to prohibit the holding of a procession or impose conditions on it under this section shall include—
>
> (a) the likely effect of the holding of the procession in relation to—
>
> (i) public safety;
>
> (ii) public order;
>
> (iii) damage to property;
>
> (iv) disruption of the life of the community;
>
> (b) the extent to which the containment of risks arising from the procession would (whether by itself or in combination with any other circumstances) place an excessive burden on the police."

Subsection 64(4) provides for present purposes:

> "The sheriff may uphold an appeal under this section only if he considers that the local authority in arriving at their decision to make the order—
>
> (a) erred in law;
>
> (b) based their decision on any incorrect material fact;

(c) exercised their discretion in an unreasonable manner; or

(d) otherwise acted beyond their powers."

[46] The grounds of appeal as grounded in the appellants' first, second and third pleas raise against the respondents the stated issues of error of law by giving inadequate reasons for the decision of the Committee (plea 1), error in law and/or acting beyond their powers by failing to have proper regard to and breaching the appellants' right to peaceful assembly under article 11 of the Convention (plea 2) and error in law and/or acting beyond their powers in performing their duties under the 1982 Act (plea 3). By the conclusion of the submissions I did not understand that the appellants were insisting in the ground of acting beyond powers. Accordingly and to that extent I repelled their second and third pleas but that left the ground of error in law for both. The error in law is the alleged failure to comply with article 11 of ECHR. The inadequacy of the reasons relates to the terms of paragraphs 31 to 33 inclusive of the Statement of reasons. It is notable that the appellants do not state for each of their pleas the particular ground in section 64(4) on which they say the plea rests.

[47] It forms no part of this appeal that I be invited to make a decision on the application to hold the public procession as it were of new or to replace the existing decision. The closest that the appellants came to that position was under their second crave but that was dismissed during the hearing. Moreover whether I would have reached a different decision from that of the Committee is not for consideration. What I am required to do is to decide whether the decision made by the Committee can stand. The appellants have to demonstrate that it cannot. The onus rests on them to do that. Success in that or otherwise rests on how they express and present their case as formulated in their pleadings. That means that I must have full regard to the ways in which the appellants' case has been pled in their summary application as it was amended at the bar.

[48] A summary application must comply with the requirements of the rules of procedure in the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999. They prescribe in rule 2.4 and Form 1 the form which the initial writ of an application must take. After stating the heading and the parties the writ must state in the crave the specific decree, warrant or order sought by the applicant, then state in numbered paragraphs the facts which form the ground of an applicant's action and then state in numbered sentences the applicant's plea- or pleas-in-law. The present application complies with that form. The criticism of the respondents was to the content of the initial writ, to the way in which the case was presented. They said that the averments and the pleas-in-law did not support the first crave and therefore the order sought could not be granted.

[49] The respondents advanced two arguments based on what was said to be relevant law. The first was that section 63 must be held to be Article 11 compliant and there was no challenge to that in the application. The second was that the appellant's application was irrelevant because it made no reference to there being any breach of section 63(8) on the part of the respondents. In particular that was not averred in article 7 of condescendence. The only question which should be posed was how it was that the respondents as the local authority had failed to comply with section 63. In the absence of any such averment there was, as counsel put it, a gaping hole in the middle of the appeal. The absence of any such averment meant that article 7b in particular was unable to do what the appellants wished it to do and did not support the appellant's second plea-in-law. Counsel for the appellants did not challenge either argument in his reply.

[50] I considered both arguments to be well-founded. For the first there was nothing put before me that challenged the proposition as a matter of law. The second was dependent upon an interpretation of the relevant sections of the 1982 Act.

[51] Part V of the 1982 Act governs the regulation of public processions in Scotland. That responsibility is delegated now to local authorities. Section 63, as amended, prescribes the functions of local authorities in relation to processions. Section 63(1), in so far a relevant for the present appeal, confers on them a discretion whereby they may, after consulting the chief constable, in respect of a procession notice make an order prohibiting the holding of the procession. That discretion is not unfettered. In particular it is constrained by the provisions of section 63(8). Those provisions are mandatory. Those that are relevant to the present appeal are contained in section 63(8)(a) and (b). I have quoted them above. When a person, individual or legal, has a legitimate and enforceable legal interest in questioning the decision of a local authority as being a failure to carry out its statutory function of regulating a procession, that person must ground his assertion in a statement of the respect in which the authority has failed to comply with its function as regulator. That failure has to be of a provision in section 63 and most likely of section 63(8). The statement of that failure constitutes the ground of an application for a reconsideration of the decision by way of appeal. Any such appeal has to be presented under and in terms of section 64 and making use of whichever ground or grounds of appeal set out in section 64(4) apply. Section 63 provides the right to challenge a decision while section 64 provides the means whereby that right is exercised and the grounds that must be used. It is section 63 that triggers the right of appeal not section 64.

[52] How might such a person express that in an application such as the present one? In my opinion the least that an applicant should do is aver the way or ways in which the local authority in question had failed to comply with its statutory responsibilities and that by reference to the provisions of section 63 and table a plea-in-law to ground those averments. In addition to that I can see great benefit in an application including a declaratory crave asking the court to find and declare that the local authority had failed in the way or ways set out in the averments and grounded in the plea-in-law. That, if granted, would establish the legal ground on which the appeal was presented. Having constituted the ground of the application the applicant should then proceed to crave, aver and plead which of the grounds in section 64(4) apply to the facts of the application and set out how the local authority had failed in their responsibilities.

[53] Applying my analysis to the present application, it lacks the ground under section 63. That section is mentioned four times in it; in crave 1, in article 5 of condescendence, in article 7b and in article 7c. The first does no more than record that the respondent's order prohibiting the procession was made under section 63(1) and the second that they had exercised their powers under that subsection. The third is confined to a statement that section 63(8) sets out a compulsory list of considerations which the respondents must consider when deciding whether to impose conditions on a proposed procession and the fourth refers to the requirement of section 63(3)(a)(i) that the respondents were required to give a written statement of reason for their order. All four references in character are informative as to the powers and duties of the respondents but go no further than that. They do not individually or *in cumulo* amount to a case stated in express terms against the respondents that is founded in section 63. That means that the appellant's case against the respondents lacks that essential

ground of action. It is therefore irrelevant so far as pled under the 1982 Act. Turning to the appellants' pleas-in-law their extant three pleas, their first to third, as tabled and in so far as insisted in are all founded in a provision of the 1982 Act, namely section 64 (4)(a) founding as they do on an assertion of error of law. They make no reference to section 63. That secures that the whole application, as amended, is irrelevant. The appeal must therefore be refused on the legal ground of irrelevancy and without the need to go into or reach a decision on its facts.

How I would have decided on the facts of the case

[54] In case my decision given above is held to be unsound then I think it right to indicate the decisions to which I would have come on the facts of the case.

[55] An error of law is one of the permitted grounds of appeal against a decision to prohibit the holding of a procession: section 64(4)(a) of the 1982 Act. The appellants assert that the respondents erred in law in three respects as stated in their first to third pleas: by giving inadequate reasons for their decision, expanded in their article 7 of condescendence to being inadequate, unbalanced and lacking in transparency (plea 1); by failing to have proper regard to and breaching the appellants' right to peaceful assembly under article 11 of the Convention (plea 2); and in their performing (sic) their duties under the 1982 Act.

Inadequacy of reasons for the decision – plea 1

[56] As pled this challenge is said to be under section 64(4)(a). I am not persuaded that that is the correct ground to use for the purpose of the specific challenge that has been made. I

appreciate that inadequacy of reasons of itself or as expanded in article 7 to include reasons that are unbalanced and lacking in transparency is not referred to expressly in the four permitted grounds of appeal prescribed in section 64(4) and which an appellant has to observe. The challenge as pled and presented could not be brought under either section 64(4)(b) or (d). It might more likely be brought under section 64(4)(c) but that is not how it has been pled and presented. The idea of the inadequacy of reasons is one of fact or perhaps in certain circumstances one of mixed fact and law but I do not see it readily having the character, certainly in the present application, of a matter of law. For this reason I would have repelled the appellants' first plea-in-law.

[57] If I am wrong in repelling that plea for that reason I would have had to consider the merits of the plea and its supporting averments.

[58] Counsel for the appellants drew from the decisions in both Mirza and *Leisure Inns* that the test to apply where a challenge was made to the adequacy of reasons given for a decision was that referred to in *Wordie*. That stated that the decision maker:

> "must give proper and adequate reasons for his decision which deal with the substantial questions in issue in an intelligible way. The decision must, in short, leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it."

That test is relevant and in point for the purposes of the present application and is binding upon me. I would therefore have applied it to the circumstances of the present challenge.

[59] The challenge was mounted against what the Committee said in paragraph 31 of the Statement. The averments to support it are in article 7c. They are stated baldy and without further specification of the nature and extent of the challenge. That was supplied in submissions by counsel for the appellants and counsel for the respondents replied in light of

what he said. I have set them out above in paragraphs [26] and [27] for the appellants and paragraph [35] for the respondents. Having heard counsel I would not have decided that the appellants had satisfied the onus upon them to establish inadequacy of reasons. The Committee expressed their reasons in paragraph 31 by listing all the considerations that they were statutorily obliged to include under section 63(8)(a) and (b) those being the relevant provisions for the present application. The discretion vest in the Committee is very wide. That is perfectly understandable because as an arm of the local authority having governance over *inter alia* the vicinity and community of Stonehaven it was dealing with a local matter concerning local issues and involving the democratic and permitted representations of local people. Much was made in submissions of the role of Police Scotland. That was entirely correct. The respondents, and in particular their Committee had to consult the Chief Constable and any representations made by her had to be taken into account by the Committee in its decision making process. What weight the Committee elected to place upon them was for the Committee. The fact that it does not make express mention of that in its written reasons is not a mark of inadequacy. It does not necessarily invite the conclusion that the reasons were inadequate or unbalance or lacked transparency. The Committee addressed itself to the considerations that the 1982 Act obliged it to have regard to. It stated them all in their written reasons and provided for each why it reached the decision that it did. The standard of criticism that the appellants have to achieve is that the reasons are inadequate. I would not have been satisfied that the appellants had succeeded in that. I would have been satisfied that the reasons given by the Committee in the exercise of its wide discretion are adequate in the whole and extensive circumstances known to it at the point in time when it made its decision to prohibit the procession. I would have held that the decision passed the

test enunciated by Lord Emslie quoted in the preceding paragraph. Accordingly on this basis I would have repelled the appellants' first plea-in-law.

Breach of Article 11 – plea 2

[60] The appellants' second plea is concerned with the Committee's alleged breach of article 11. Paragraph 32 of the Statement deals specifically with the Committee's application of the article.

[61] Counsel for the respondents submitted that as a matter of relevancy where the appellants were saying that the Committee had acted in breach of article 11 they should have pled that and they have not. Counsel for the appellants made no mention of this in his submissions. I would have concluded that the appellants have averred enough to ground their challenge to the decision of the Committee for the reasons it gives in the Statement.

[62] Counsel for the appellants began his submissions on the alleged breach of article 11 by drawing propositions from the decisions in four cases; *The Sunday Times*, *Vogt*, *Platfform* and *Aberdeen Bon-Accord Loyal Orange Lodge*. Counsel for the respondents did not take exception to any of them and neither would I have done. They all provide assistance in interpreting article 11. I would have found particular and pertinent assistance in what Sheriff Cowan said in the *Aberdeen Bon-Accord Loyal Orange Lodge* case about the content, scope and application of article 11 at page 54 with all of which I agree.

[63] The rest of the submissions for the appellants I have set out above at paragraphs [21] to [23] and for the respondents at paragraphs [36] to [42]. Having heard counsel I would have preferred the submissions for the respondents. The appellants would have failed to persuade

me that they had satisfied the onus on them of establishing any of the six criticisms of the decision making process of the Committee amounted to a breach of article 11. Accordingly I would have repelled the appellants' second plea-in-law.

Error in law in performing their duties under the 1982 Act

[64] The third plea for the appellants is something of an enigma. It did not seem to me to be the subject of separate or discrete averments or submissions. I have difficulty in finding direct support for it or criticism of it in what was said on both sides in respect of the first and second pleas. Accordingly I would have repelled this plea-in-law for want of specific insistence.

Conclusion

[65] For all the foregoing reasons I sustained the first, fourth and fifth pleas-in-law for the respondents, repelled the second and third pleas-in-law for the respondents of consent, repelled the pleas-in-law for the appellants, dismissed the appellant's first crave and refused the appeal.

Expenses

[66] Counsel for the respondents moved for an award of the expenses of process in favour of the respondents because they had been successful and both counsel had agreed that expenses should follow success. I granted that motion.