Northern Ireland Unreported Judgments

[2018] NICA 26, (Transcript)

Re Buick's Application for Judicial Review

COURT OF APPEAL

MORGAN, STEPHENS, TREACY LCJJ

06 JULY 2018

Administration – Public law – Restrictions on Ministerial power – Legal constraints applying to extent of Departmental decision-making – Discharge of executive authority – Northern Ireland Ministers ceasing to hold office following election – Northern Ireland Departments continuing to exercise functions through senior civil servants – Department of Infrastructure granting planning permission for major waste treatment centre and energy from waste incinerator – Judge holding Department having no power to grant impugned permission in absence of Minister in charge – Whether Judge erring – Northern Ireland (St Andrews Agreement) Act 2006 – Northern Ireland Act 1998, s 16B(2)(a) – Departments (NI) Ord 1999, art 4(1)

06 JULY 2018

MORGAN, STEPHENS LCJJ:

[1] This appeal concerns a successful challenge to the power of the Department of Infrastructure ("the Department") to grant planning permission for a major waste treatment centre and energy from waste incinerator at Hightown Quarry, County Antrim. The background was the resignation on 9 January 2017 of the deputy First Minister ("DFM") as a result of which by virtue of s 16B(2)(a) of the Northern Ireland Act 1998 ("the 1998 Act") the First Minister ("FM") also ceased to hold office. (The 1998 Act was amended by the Northern Ireland (St Andrews Agreement) Act 2006 ("the St Andrews Agreement Act") and it is to the Act as amended that reference is made throughout this judgment.) Because of political difficulties between the two largest parties, the DUP and Sinn Fein, it was not possible to fill the vacancies. The then Secretary of State proposed 2 March 2017 as the date for an election pursuant to s 32(3) of the 1998 Act. The election was duly held on that date as a result of which all Northern Ireland Ministers ceased to hold office. Because of the continuing political difficulties between the parties the mechanisms for the appointment of new Ministers failed. The Northern Ireland Departments continued to exercise their functions through senior civil servants. Keegan J held that in the absence of a Minister in charge the Department did not have the power to grant the impugned permission. This decision is of critical importance to the conduct of government through the Northern Ireland Departments since no such Department has had a Minister in charge since 2 March 2017.

Background

[2] On 27 March 2014 the former Department of the Environment ("DoE") received a planning application from the Notice Party, Arc 21. Arc 21 is a group of local councils whose members cater for the disposal of waste comprising 60% of the Council collected waste in Northern Ireland. In April 2014 it was determined that the application fell within the scope of the special procedure under Art 31 of the Planning (Northern Ireland) Order 1991 in that it would involve a substantial departure from the Development Plan for the area to which it related, be of significance to the whole or a substantial part of Northern Ireland and affect the whole of the neighbourhood in which it was situated.

[3] The planning system in Northern Ireland was reformed in April 2015 with the commencement of the Planning Act (NI) 2011 ("the 2011 Act"). The 2011 Act conferred planning powers on both local councils and the DoE. Section 26 of the 2011 Act provided that the DoE had to determine planning applications which it considered to be regionally significant and the DoE accordingly took responsibility for this application. In July 2015 officials within the DoE made a submission to the then Minister, Mark H Durkan of the SDLP, recommending that he issue a Notice of Opinion to grant planning permission.

[4] The Minister declined to accept the recommendation. He had concerns about possible harm to human health and considered that the facility might create a market for waste thereby adversely impacting on recycling and waste reduction. Acting on the direction of the Minister a Notice of Opinion setting out draft reasons for refusal of planning permission was issued on 23 September 2015. On 16 October 2015 the agent for Arc 21 exercised its right under section 26(11) of the 2011 Act to request a hearing before the Planning Appeals Commission ("PAC") in respect of the Notice of Opinion.

[5] In January 2016 DoE received advice from its Environmental Policy Division ("EPD") which explained that under new EU targets there was a significant increase in the percentage of waste to be recycled with a significant reduction in the amount permitted to go to landfill. These targets were material to the issue of need for the proposed facility.

[6] On 5 May 2016 Assembly elections took place as a result of which all Ministers ceased to hold their office. On 8 May 2016 the DoE was dissolved by section 1 of the Departments Act (Northern Ireland) 2016 and its planning functions were transferred to the Department. A new Minister, Chris Hazzard of Sinn Fein, was appointed to the Department on 25 May 2016. The Department sought directions from the Minister in order to prepare its statement of case for the PAC hearing. He was provided with a submission detailing the reasons for refusal and the new evidence from EPD, together with a recommendation that the statement of case should reflect the latest information and that the Department should adopt a neutral stance at the PAC hearing. The submission noted that the Minister, as the final decision maker, would consider and take into account the PAC report before determining the application and that he was not obliged to accept any or all of the Commission's recommendations. The Minister agreed and that was the approach taken by the Department at the hearing in October 2016.

[7] As indicated earlier, following the resignation of the deputy First Minister on 9 January 2017 Assembly elections were held on 2 March 2017 on which date all Northern Ireland Ministers again ceased to hold their offices. The Commissioner's report issued on 8 March 2017 and recommended that full planning permission for the development should be granted subject to conditions. The Department shared the report with colleagues in the EPD which had since become part of the Department for Agriculture, Environment and Rural Affairs ("DAERA"). On 24 March 2017 EPD welcomed the recommendation and stated that it was content that the PAC report accurately reflected its departmental strategic and policy positions in relation to

waste management.

The planning decision

[8] On 28 July 2017 DAERA sent a memo to the Department setting out the consequences of delay in reaching a determination on the planning application. There was a risk that project costs would increase as a result of previously agreed and time bound funding arrangements having to be renegotiated. Increasing project risk through delay or stopping the project would have consequences for waste management, economic policy and compliance with EU Directive requirements. Northern Ireland was facing a significant issue as a result of decreasing landfill capacity especially from the mid-2020's that was likely to significantly raise disposal costs for local councils and could encourage increased illegal waste activity. This project was the only remaining major local government led procurement with the potential to contribute to meeting Northern Ireland-wide targets for recycling and landfill diversion. Northern Ireland exported a significant proportion of its municipal waste to waste to energy facilities. There was current uncertainty as to the longer term viability of exporting waste especially in light of the current Brexit situation. It was essential, therefore, that Northern Ireland had its own energy from waste infrastructure operating as soon as possible in order to mitigate against the risk.

[9] On 16 August 2017 the Strategic Planning Division of the Department submitted a memo noting that the PAC had accepted that there was an identified need for the sub-regional facility and concluded that the development would not cause harm to human health. The support of DAERA was noted. The PAC rejected the various objections to the development and the Strategic Planning Division considered that it was in the wider public interest that planning permission should be granted subject to appropriate planning conditions.

[10] The Chief Planning Officer, who took into account legal advice, sent a memo on 24 August 2017 to the Permanent Secretary, Mr May, recommending that planning permission be granted as soon as possible because the potential risks to the project that would arise from further delay were not in the public interest. In coming to that decision she took into account–

(a) the strategic importance of the development for the region;

(b) DAERA's views on the potentially damaging implications of further delay;

(c) the uncertainty regarding a timeframe for the return of the Northern Ireland Executive; and

(d) the legal difficulties associated with departing in a material respect from the PAC recommendation without proper planning grounds for doing so.

[11] By memo dated 29 August 2017 the Permanent Secretary replied to the Chief Planning Officer noting that the recommendation to grant planning permission was one that had been made in line with the policies set out for such matters in the absence of a Minister. The Permanent Secretary also had regard to the legal advice and the DAERA view on the importance of timely decision-making. He agreed with the recommendation to grant planning permission as soon as possible. Planning permission was granted on 13 September 2017.

[12] In his affirmation Mr May made the following points explaining his decision to exercise the powers of the Department in the public interest to grant planning permission subject to conditions.

(a) He noted the prior ministerial decisions but said that any such view must be reconsidered in light of the content of the PAC report. It was clear from consideration of that report and the views of the professional planning officials within the Department that the planning merits of the application clearly favoured a decision to grant planning permission subject to conditions. The Department could only depart from those recommendations lawfully for proper planning reasons and there were no such reasons in this case.

(b) He was influenced by the strategic importance of the development for the region as a whole and in particular for the local Councils. There was no clearly identifiable timeframe within which an Executive Committee might be formed and a new Minister appointed.

(c) He had the benefit of detailed advice from DAERA regarding the prejudice to the public interest from further delay in determining the application.

(d) He took account of the fact that a planning decision of this nature would ordinarily have been taken by a Minister on behalf of the Department. He was aware that Ministers had legal obligations which arise under the Ministerial Code and s 28 of the Northern Ireland Act 1998. He took account of the established custom and practice under the Code. No previous Environment Minister or Infrastructure Minister had ever referred an individual planning application to the Executive Committee for agreement prior to its determination.

(e) He was aware that DAERA, the primary Department with a direct interest in the outcome of the application by reason of its responsibility for waste policy, strongly supported the grant of planning permission.

In his affirmation he also clarified that there was no policy for taking decisions of this nature in the absence of a Minister.

The relationship between Ministers, Departments and civil servants in other jurisdictions

Westminster

[13] There is no controversy about the arrangements for the exercise of prerogative and executive power in Westminster which are helpfully discussed in Halsbury's Laws of England, Constitutional and Administrative Law, (Volume 20 (2014)). By constitutional convention the monarch appoints the Prime Minister, usually from the largest party after the election, and on the advice of the Prime Minister appoints Ministers to the Office of Secretary of State. Those appointed hold office until they resign or are replaced. On the dissolution of Parliament the Secretaries of State continue in office until new appointments are made.

[14] Each of the Secretaries of State is capable of performing the duties of all or any of the Departments of government and during their appointment are entitled to exercise executive and prerogative authority. Government departments are generally established by prerogative or statute but consist of unincorporated bodies of civil servants who support the relevant Minister in the exercise of the relevant functions. Where a Minister resigns any of the other Secretaries of State can exercise executive and prerogative power in respect of the area for which the Minister was responsible. That is an aspect of collective responsibility. The arrangements are designed, therefore, to ensure that there is no gap in the ability to exercise statutory, executive and prerogative power by Ministers who are answerable politically to Parliament.

[15] Civil servants are accountable to their Ministers but it is the Ministers alone who are accountable to Parliament. Civil servants do not exercise statutory, executive or prerogative power. The constitutional position was set out by Lord Greene MR in *Carltona v Commissioner of Works* [1943] 2 All ER 560:

> "In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no Minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the Department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the Minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently perform the work, the Minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."

Scotland

[16] Both Scotland and Wales have devolved arrangements but in respect of the matters with which this appeal is concerned there is little difference between them and the relevant points can be made by looking at the Scottish provisions. The First Minister ("FM") is nominated by the Parliament by virtue of s 46 of the Scotland Act 1998 ("SA"). Once nominated the FM is appointed. By virtue of s 45(3), the FM shall cease to hold office if a person is appointed in his place. The FM, therefore, continues in office after the dissolution of Parliament. Section 45(2) provides for resignation and requires resignation if the Scottish government no longer enjoys the confidence of the Parliament. Where the office of FM is vacant the Presiding Officer designates a person to exercise the functions of the office.

[17] The FM appoints Ministers with the agreement of the Parliament. Ministers may be removed or resign but by virtue of s 47(3) of the SA continue in office after the dissolution of Parliament. The FM, Ministers and the Lord Advocate and the Solicitor General for Scotland, who are also recommended for appointment by the FM, form the Scottish Government and are collectively known as the Scottish Ministers. By virtue of ss 52 and 53 statutory, prerogative and executive powers in respect of devolved matters are exercisable by the Scottish Ministers collectively. There is an express exclusion of the exercise of prerogative and executive powers by a Minister of the Crown in respect of devolved matters. There are no provisions for Departments but s 51 provides for the establishment of a civil service. Civil servants have no statutory, prerogative or executive powers.

[18] From this review of the governmental structures of Westminster and the other devolved institutions some established constitutional principles emerge.

(a) Statutory, prerogative and executive powers are exercised by politically accountable Ministers.

(b) In order to ensure continuity, Ministers continue in office after the dissolution of Parliament. If a Minister resigns the functions for which that Minister exercised responsibility can be exercised by any other Minister. That is connected to the principle of collective responsibility.

(c) Departments do not have statutory, prerogative or executive powers. The establishment of Departments and their functions are essentially matters for politically accountable Ministers.

(d) Civil servants do not exercise statutory, prerogative or executive powers. They are accountable to Ministers but it is Ministers who are accountable to Parliament.

(e) Where civil servants exercise functions or take decisions the *Carltona* principle applies.

Northern Ireland

The Agreement

[19] The governance arrangements for Northern Ireland are set out in the 1998 Act. The long title of the Act says that it is an Act to make new provision for the government of Northern Ireland for the purpose of implementing the Agreement reached at multi-party talks in Northern Ireland ("the Agreement"). The Agreement was the subject of referenda in Northern Ireland and the Republic of Ireland and was overwhelmingly endorsed in both jurisdictions. It, therefore, provides the context against which the 1998 Act should be construed.

[20] Strand One of the Agreement deals with the proposed democratic institutions in Northern Ireland. Provision is made for an Assembly at para [3] which states that the Assembly will exercise the legislative and executive authority in respect of those matters currently within the responsibility of the six Northern Ireland Government Departments. Paragraph [14] provides that executive authority is to be discharged on behalf of the Assembly by a First Minister and Deputy First Minister ("FMDFM") together with up to 10 Ministers with Departmental responsibilities. The FMDFM are to be jointly elected on a cross community basis.

[21] Paragraphs [16] and [17] of Strand One of the Agreement provides that the posts of Ministers are to be allocated to parties on the basis of the D'Hondt system by reference to the number of seats which each party has in the Assembly. The Ministers constitute the Executive Committee which is convened and presided over by the FMDFM. The functions of the Executive Committee are set out at paras [19] and [20] of Strand One:

> "19 The Executive Committee will provide a forum for the discussion of, and agreement on, issues which cut across the responsibilities of two or more Ministers, for prioritising executive and legislative proposals and for recommending a common position where necessary (eg in dealing with external relationships).
>
> 20 The Executive Committee will seek to agree each year, and review as necessary, a programme incorporating an agreed budget linked to policies and programmes, subject to approval by the Assembly, after scrutiny in Assembly Committees, on a cross-community basis."

[22] Paragraphs [22] to [24] deal with Ministers. The Agreement provides that all of the Northern Ireland

Departments are to be headed by a Minister. Ministers have to affirm the Pledge of Office undertaking to discharge effectively and in good faith all the responsibilities attaching to their office. Unlike the position in the other jurisdictions it was intended that Ministers should have full executive authority in their respective areas of responsibility, within any broad programme agreed by the Executive Committee and endorsed by the Assembly as a whole. The intent of the Agreement, therefore, was that there should be no collective responsibility in respect of the areas allocated to individual Ministers.

[23] A Committee structure for oversight of the work of the Ministers and their Departments was established in paras [8] and [9] of Strand One. Each Committee was designed to have a membership which was in broad proportion to party strengths in the Assembly and had a scrutiny, policy development and consultation role with respect to each Department.

The 1998 Act

[24] It is probably helpful to understand the workings of the 1998 Act by reference to its application in these particular circumstances. Section 16B(2) provides that if either the FM or the DFM ceases to hold office at any time, whether by resignation are otherwise, the other shall also cease to hold office at that time. Where those offices become vacant s 16B(3) provides that they should be filled within seven days by applying the procedure set out under s 16A(4) to (7), where the nominating officer of the largest political party of the largest political designation nominates a member of the Assembly to be the FM and the nominating officer of the largest political party of the second largest political designation nominates a member of the Assembly to be the DFM.

[25] The nominating officer of the largest political party of the second largest political designation did not nominate a member of the Assembly to be the DFM as a result of which section 16B(8) provides that no person may take up office as FM or DFM after the seven day period. As we shall see the only way round this prohibition is primary legislation extending the period within which the FM and DFM might be appointed.

[26] The failure to fill the posts of FM and DFM engaged s 32(3)(b) as result of which the Secretary of State was required to propose a date for a poll for the election of the next Assembly. The Secretary of State proposed the date of 2 March 2017 and the election was duly held on that date. Until that date the Northern Ireland Ministers other than FMDFM were still in office but s 16A(2) provides that the Ministers should all cease to hold office on the date of the poll.

[27] Section 31(4) provides that an Assembly elected under s 32 should meet within the period of eight days beginning with the day of the poll at which the Assembly was elected. That meeting took place on 9 March 2017 and by virtue of s 16A(3) was required to fill the offices of FMDFM and the Northern Ireland Ministerial offices appointed under the D'Hondt system within 14 days. That did not occur in broadly the same circumstances as led to the election and again the time set by s 16A(8) as the period for such appointments has now passed. The failure to fill the offices of FMDFM meant that no determination of the functions to be exercised by the holder of each Ministerial office pursuant to s 17(1)(b) could be made and no new Northern Ireland Ministers appointed.

[28] In the round, therefore, the office of FMDFM has been vacant since 9 January 2017 and no Ministers have been in place since 2 March 2017. The Northern Ireland (Ministerial Appointments and Regional Rates) Act 2017 (“the 2017 Act”) extended the deadline for appointment to Ministerial office until 29 June 2017 but that deadline has long passed and the Secretary of State has for the last year been subject to the requirement under s 32(3)(a) to propose a date for the poll for the election of the next Assembly.

[29] Section 20 provides that the Executive Committee of each Assembly consists of the FM, the DFM and the Northern Ireland Ministers. The FM and DFM are the chairmen of the Committee. The chair determines the agenda for meetings of the Executive Committee and as a result, therefore, there have been no such meetings since 9 January 2017. Section 20(3) provides that the Committee shall have the function set out in paras [19] and [20] of Strand One set out at para [21] above. The Committee also has the function of discussing and agreeing upon–

(a) significant or controversial matters that are clearly outside the scope of the agreed programme referred to in para [20] of Strand One of that Agreement;

(b) significant or controversial matters that the First Minister and deputy First Minister acting jointly have determined to be matters that should be considered by the Executive Committee.

[30] I considered these provisions in *Central Craigavon Limited's Application* [2010] NIQB 73. The operation of these provisions is closely connected to the related matter of the restrictions upon Ministerial power contained in s 28A of the 1998 Act.

> "28A Ministerial Code
>
> (1) Without prejudice to the operation of section 24, a Minister or junior Minister shall act in accordance with the provisions of the Ministerial Code…
>
> (5) The Ministerial Code must include provision for requiring Ministers or junior Ministers to bring to the attention of the Executive Committee any matter that ought, by virtue of section 20(3) or (4), to be considered by the Committee…
>
> (10) Without prejudice to the operation of section 24, a Minister or junior Minister has no Ministerial authority to take any decision in contravention of a provision of the Ministerial Code made under subsection (5)."

[31] The relevant provision of the Ministerial Code for the purpose of this application is para [2.4].

> "2.4 Any matter which–
>
> (i) cuts across the responsibilities of two or more Ministers;
>
> (ii) requires agreement on prioritisation;
>
> (iii) requires the adoption of a common position;
>
> (iv) has implications for the Programme for Government;
>
> (v) is significant or controversial and is clearly outside the scope of the agreed programme referred to in paragraph [20] of Strand One of the Agreement;

(vi) is significant or controversial and which has been determined by the First Minister and deputy First Minister acting jointly to be a matter that should be considered by the Executive Committee; or

(vii) relates to a proposal to make a determination, designation or scheme for the provision of financial assistance under the Financial Assistance Act (Northern Ireland) 2009

shall be brought to the attention of the Executive Committee by the responsible Minister to be considered by the Committee.

Regarding (i), Ministers should, in particular, note that–

the responsibilities of the First Minister and deputy First Minister include standards in public life, machinery of government (including the Ministerial Code), public appointments policy, EU issues, economic policy, human rights, and equality. Matters under consideration by Northern Ireland Ministers may often cut across these responsibilities;

under Government Accounting Northern Ireland, no expenditure can be properly incurred without the approval of the Department of Finance and Personnel."

[32] Contrary to the approach taken in the SA the 1998 Act contains no provisions in relation to the role of civil servants but states that the Northern Ireland Departments existing on the appointed day shall be the Northern Ireland Departments for the purposes of the Act. By virtue of s 17(3) the FMDFM were to ensure that the functions exercisable by those in charge of the different Northern Ireland Departments were exercisable by the holders of the different Ministerial offices. That clearly reflects the intention of the Agreement that Ministers should head Departments and be politically accountable for what happened within those Departments.

[33] Section 22 is important in the context of this appeal. It provides that an Act of the Assembly or other enactment may confer functions on a Minister or a Northern Ireland Department by name. There was a saving provision for functions conferred on a Northern Ireland Department by an enactment passed or made before the appointed day.

[34] Section 23(1) provides that executive power in Northern Ireland shall continue to be vested in Her Majesty. That, of course, is a variation on the terms of the Agreement. Section 23(2) provides that in respect of transferred matters the prerogative and other executive powers shall be exercised on Her Majesty's behalf by any Minister or Northern Ireland Department. Although there is no express exclusion of the executive and prerogative powers of a Minister of the Crown as in the Scotland Act, the Agreement did not contemplate such a Minister having prerogative or executive power in respect of transferred matters and the better view is probably that such Ministers are excluded from exercising prerogative or executive power in respect of such matters.

[35] There were two exceptions. The Royal prerogative of mercy is exercisable only by the Minister in charge of the Department of Justice. It follows that there has been no power to exercise that prerogative in Northern Ireland in respect of transferred matters since 2 March 2017. The second exception concerns the power of FMDFM to act in respect of the Northern Ireland Civil Service and the Commissioner for Public Appointments for Northern Ireland.

Departments

[36] The first thing to note about this review of the provisions of the 1998 Act is that unlike Westminster or the other devolved institutions there are periods of time when there is no Minister in place. That has always been the statutory architecture in respect of this legislation. The original provisions of the 1998 Act contemplated a period of up to six weeks for the election of the FMDFM after a poll with the appointment of Ministers coming later. Those provisions were considered by the House of Lords in *Robinson v Secretary of State for Northern Ireland* [2002] NI 390 where it was recognised that there was also some flexibility in that timescale.

[37] That flexibility was removed by the amendments effected under the St Andrews Agreement Act and could only be altered by primary legislation such as the 2017 Act. The terms of s 32(3), however, never contained a time limit for the exercise of the Secretary of State's function to propose a date for the poll for the election of the next Assembly. It is evident, therefore, that the 1998 Act envisaged the possibility that a further election would be required if the FMDFM were not appointed and that Ministers would not be in place until that second election had resolved the difficulty of appointing the FMDFM.

[38] The question then becomes whether, in the absence of Ministers, Departments can exercise statutory functions and, if so, what legal constraints apply to the extent of Departmental decision-making. Article 4 of the Departments (Northern Ireland) Ord 1999 ("the 1999 Order") deals with the exercise of the functions of a Department. Article 4(1) provides that the functions of the Department "shall at all times be exercised subject to the direction and control of the Minister". Article 4(3) provides that any functions of the Department may be exercised by–

(a) the Minister; or

(b) a senior officer of the Department.

Article 2 provides that a senior officer of the Department refers to a member of the Northern Ireland senior civil service. Article 5 establishes each Department as a body corporate.

The trial judge's decision

[39] The rationale for the decision is contained at para [42] of the judgment.

> "42 In my view the provisions of the 1999 Order are clear. The language is expressed in mandatory terms by inclusion of the word *shall*. The other words are also clear. However, the issue is really whether they should be qualified to take into account current circumstances. The Respondent is effectively asking the Court to read Article 4(1) of the 1999 Order to mean that *direction and control* only applies when a Minister is in place and *at all times* is also subject to that qualification. I am not attracted to this argument for the following reasons. Firstly, it offends the ordinary and natural meaning of the provision. Secondly, it is not in keeping with the legislative context namely the 1998 Act which forms the basis for government in Northern Ireland and which provides for ministerial oversight. Thirdly, I do not consider that Parliament can have intended that such decision making would continue in Northern Ireland in the absence of Ministers without the protection of democratic accountability. Fourthly, in terms of effect, the rubric suggested by the Department would mean that civil servants in Northern

> Ireland could effectively take major policy decisions such as this one for an indefinite period. This is not a purdah situation where there is a short gap. Rather there is a protracted vacuum in existence pending the restoration of executive and legislative institutions or direct rule."

[40] The judge noted the general frustration among civil servants and others about the need to take important decisions. She also recognised that delay had an effect on the implementation of public waste and environmental development at national, European and international level. She rejected the submission that because the outgoing Minister had indicated that a neutral stand should be taken at the PAC hearing the Permanent Secretary could be said to have been acting in accordance with the direction and control of the previous Minister.

Submissions

[41] Mr McGleenan QC appeared for the Appellant with Mr McLaughlin and Ms Curran. He relied upon the observations of Lord Bingham in *Robinson v Secretary of State for Northern Ireland* [2002] NI 390 at para [11] where he said that the 1998 Act was in effect a constitution and that its provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions were intended to embody. That is consistent with the approach to construction set out by Lord Reed and Lord Thomas in *In re Agricultural Sector (Wales) Bill* [2014] 1 WLR 2622. There was no significant dispute that this was the correct approach to adopt.

[42] The Appellant relied upon the passage of the Northern Ireland Budget Act 2017 and the Northern Ireland Budget (Anticipation and Adjustments) Act 2018. The first of those Acts provided for expenditure in Northern Ireland during the financial year ending 31 March 2018 and the second Act approved the adjusted allocation of resources of £18 billion for that year. The Appellant and Mr Fordham QC, who appeared with Ms Neill for the intervener, SONI Ltd, submitted that the principle of statutory interpretation discussed by Leggatt J in *R(N) v Walsall MBC* [2014] PTSR applied. At para [55] Leggatt J said:

> "Even without explicitly requiring the courts to give a term in existing legislation a particular meaning, or to apply a specified rule when interpreting the term, Parliament may act in a way which treats the term as having a particular meaning and signals its approval of the meaning."

Later at para [59] he said:

> "If Parliament has proceeded on the basis that an existing law has a particular meaning at a time when, if Parliament had understood the law to have a different meaning, it is reasonable to infer that it would have acted differently, that may properly be treated as an implied directive as to how a previously ambiguous law should be interpreted."

It was submitted that since Parliament had approved the expenditure of such large sums of money for the entirety of the year ending 31 March 2018 it must follow that Parliament approved such expenditure by senior civil servants since there were no Ministers in place throughout that year.

[43] Mr McGleenan relied upon the statutory power contained in ss 22 and 23 of the 1998 Act giving statutory, prerogative and executive functions to the Department. That was a point of difference with the other devolved constitutional arrangements which Parliament had expressly included. Unlike the other constitutional arrangements the 1998 Act provided for periods of time when Ministers were not in place as

set out above. It was not the statutory intention that government should cease to function during these periods. He pointed to a range of matters which he submitted clearly would have to be accommodated during such period such as the determination of Social Security claims, the slaughter of animals exposed to infection, the inspection of children's homes, the protection of children, the grant or refusal of planning permissions and the issue of planning enforcement or stop notices.

[44] Article 4(1) of the 1999 Order was empowering. Where a Minister was in place he was entitled to direct and control the department both in terms of policy and general management. The provision did not say that the functions of the Department may only be exercised subject to the direction and control of a Minister. Article 4(3)(b) providing that the function of the Department may be exercised by a senior officer of the Department was necessary to reflect the statutory powers given to departments and to ensure the availability of decision-making when there was no Minister appointed to the Department.

[45] Mr Fordham supported this analysis and submitted that once it was clear that the Department had power to make decisions conferred upon it there remained the constraints that are relevant in any public law case and in particular an obligation to ensure that the exercise of the powers was in the public interest. He accepted that there was no political accountability to a Minister but that the use of power was accountable under the rule of law. Mr Beattie QC appeared with Mr McAteer for the notice party in support of these submissions.

[46] Mr Scoffield QC appeared with Mr Anthony for the Respondent. He submitted that the plain reading of art 4(1), and the inclusion of the words “at all times”, required a Minister to be in place before departmental functions were exercised. That was consistent with the Agreement which provided no support for departmental power other than under the direction and control of a Minister. It was consistent with constitutional principle that civil servants made decisions under Ministerial oversight and in this instance ensured that the proper functioning of the Executive Committee was not circumvented.

[47] In this case there was no Ministerial direction. The Minister in 2015 had decided to refuse the application. A different Minister in 2016 agreed to take a neutral stand at the PAC hearing on the basis that he would be free to accept or reject any recommendation. The Northern Ireland Civil Service Code of Ethics provides that civil servants support Ministers in developing and implementing their policies and in delivering public services. Civil servants are accountable to Ministers. That was reinforced by “Managing Public Money” issued by the Department of Finance which stated that the Minister in charge of a department was responsible for its policy and business but the Accounting Officer was responsible for the organisation of the officials in the department. Civil servants should provide politically impartial advice.

[48] This was a cross-cutting issue. The determination of the planning application was clearly critical to the development of waste management policy by DAERA. The decision also impinged on the method by which Northern Ireland would seek to achieve the requirements of an EU Directive which engaged the responsibilities of FMDFM. Such matters were for the Executive Committee to determine and the obligation to have such a determination could not be circumvented by a departmental decision.

[49] The decision was also significant and controversial. The papers indicated that Sinn Fein was opposed to the use of incinerators for waste management. There is no dispute that their opposition was well-known. The Minister in place in July 2016 was a Sinn Fein Minister. The decision was plainly politically controversial. Given its importance for waste management policy in Northern Ireland it was also significant. On those grounds also it was a decision that could only be made by the Executive Committee.

Consideration

[50] The operation of the statutory provisions of the 1998 Act in somewhat similar circumstances was considered by Lord Bingham in *Robinson* at para [15].

> "It is plain from the wording of section 32(3), as the Secretary of State has accepted from the outset, that on expiry of six weeks without an effective election he became subject to a duty to propose a date for the poll for the election of the next Assembly. Parliament thereby expressed its intention that in this eventuality the Secretary of State should have not only a power but a duty to bring matters to a head. There was to be no protracted stalemate, no persisting vacuum in the conduct of the devolved government. But Parliament imposed no temporal limitation either on the making of the proposal or on the date proposed. If there appeared to be no prospect of an imminent and effective election under section 16(8), or if the Assembly resolved under section 32(1) that it be dissolved forthwith, the Secretary of State would no doubt be expected to propose a very early date for a poll. If, on the other hand, the Assembly resolved on dissolution at a future date earlier than its normal terminal date, the Secretary of State might no doubt be expected to propose a date further in the future. And if an effective election under section 16(8) appeared to be imminent, one would expect the Secretary of State to pause in order that the political process might take effect and, if it did, to propose a date in the future which would take account of that effective election."

[51] In this passage he recognised that there may be periods of varying length where there may be no Minister in place. He also recognised at para [11] of that judgment that it was generally desirable that government should be carried on and that there should be no governmental vacuum but that was in the context of seeking to promote the participation by unionist and nationalist communities in shared political institutions. This lends some support to the view that the provisions of the 1998 Act giving departments statutory, executive and prerogative powers was intended to facilitate the operation of government in the absence of Ministers. We consider that art 4(1) of the 1999 Order is ambiguous but can be read as merely empowering Ministers to exercise direction and control over departments when in place. Article 4(3) of the 1999 Order also supports that interpretation.

[52] When, however, looking at the extent of the power given to departments the context of the Agreement and the surrounding features of the 1998 Act impose significant limitations. We are satisfied that the decision in this case is a cross-cutting decision involving the interests of DAERA because of its waste management function and FMDFM because of the impact on compliance with EU Directives. Paragraph [19] of the Agreement provides that the Executive Committee will provide a forum for the discussion of, and agreement on, issues which cut across the responsibilities of two or more ministers. Section 20(3) expressly attributed that function to the Executive Committee and s 28A of the 1998 Act provides a mechanism to ensure that the authority of ministers is limited accordingly. There is no support in the Agreement for the suggestion that cross-cutting matters can be dealt with by departments in the absence of ministers and the allocation of responsibility for such matters within the 1998 Act to the Executive Committee can only be properly interpreted as excluding the departments from the determination of such matters.

[53] We also consider that the issue of incineration as a means of waste disposal is controversial having regard to the political views expressed within the papers and that the issue is significant having regard to the importance of this issue for waste management policy in Northern Ireland and compliance with EU Directives. Section 20(4) provides that the Executive Committee shall have the function of discussing and agreeing upon significant or controversial matters that are clearly outside the scope of the agreed programme referred to in para [20] of Strand One. There is no agreed programme. In certain obiter remarks of mine in *Central Craigavon Ltd's Application* I suggested that not all significant and controversial matters in those circumstances might need to be referred to the Executive Committee. With the benefit of further argument I am satisfied that the purpose of this provision is to ensure that significant and controversial

matters are brought before the Executive Committee unless they had previously been agreed within the context of the programme referred to in para [20] of Strand One.

[54] We consider, therefore, that this was a significant and controversial matter which again required determination by the Executive Committee. It would be contrary to the letter and spirit of the Agreement and the 1998 Act for such decisions to be made by departments in the absence of a Minister.

[55] We are reinforced in these views by our recognition of the constitutional position of civil servants. That role is to advise Ministers and be accountable to them. The Appellant's submissions would effectively turn civil servants into Ministers. Such a remarkable constitutional change would require the clearest wording and we do not consider that the Northern Ireland Budget Act 2018 provides any basis for the implication of such a major departure from established constitutional principles.

[56] That is sufficient to deal with the appeal. We have not in this appeal heard argument on the precise limits of any power of the departments to take decisions but it follows from our analysis of the constitutional position of civil servants that any decision which as a matter of convention or otherwise would normally go before the Minister for approval lies beyond the competence of a senior civil servant in the absence of a Minister.

[57] We have considered whether there is any temporal limitation on the exercise of the limited powers available to departments in the absence of Ministers. Having regard to the scheme of the Act it can be argued that the exercise of such power should continue for so long as the Secretary of State is lawfully exercising judgement under s 32(3) and for the period set by her for a poll. We understand that proceedings have been initiated challenging whether the Secretary of State has unlawfully failed to act in accordance with her duty under s 32(3) of the 1998 Act. We therefore express no view on that issue.

Conclusion

[58] The decision made by the Department was crosscutting, significant and controversial. It was, therefore, a decision which could only be taken by the Executive Committee. Accordingly the appeal is dismissed. It is doubtful that any significant weight can be placed on the views of a Minister who has lost office as the political responsibility for responding to what has occurred in the interim is that of the incoming Minister. Observations on the limited powers available to senior civil servants in the absence of a Minister are contained within the judgment but we express no final view on the competence of Departments to make decisions during periods when no Minister is in place.

TREACY LJ

[59] I agree that the appeal must be dismissed. At its core this appeal involves a point of statutory construction concerning art 4(1) of the Departments (NI) Ord 1999 (“the 1999 Order”). However I respectfully

disagree with para [51] of the main judgment that art 4(1) of the 1999 Order is ambiguous. The 1999 Order provides as follows:

> "Exercise of functions of a department
>
> 4 (1) The functions of a department shall *at all times* be exercised subject to the direction and control of the Minister.
>
> (2) Without prejudice to the generality of paragraph (1), the Minister may in pursuance of that paragraph–
>
> (a) distribute the business of a department among the officers of the department in such manner as he thinks fit;
>
> (b) by Minute laid before the Assembly assign any specified functions of the department to such officers of the department as he may determine under such designation as he may determine.
>
> (3) *Subject to the provisions of this Order*, any functions of a department may be exercised by–
>
> (a) the Minister; or
>
> (b) a senior officer of the department.
>
> ..."

[My emphasis.]

[60] The Department argues that executive authority defaults to Departments in the absence of a Minister. Counsel for the Department, Mr McGleenan QC, while acknowledging at para [86] of his written argument that the concept of executive authority defaulting to departments in the absence of a Minister may "appear unusual" and out of step with "familiar constitutional principles", submits that this result is simply an aspect of the unique devolution settlement in NI. He submits that the arrangements for devolution in NI are different and permit civil servants to act without being accountable to Ministers. Reliance was placed on (i) ss 22 and 23 of the 1998 Act, (ii) the fact that the 1998 Act provides for periods when Ministers are not in place and (iii) that it was not the intention of the legislature that governments should cease to function during these periods. Mr McGleenan contends that Art 4(1) is merely empowering, entitling a Minister, when he was in place, to direct and control the Department, and that the provision does not say that the functions of the Department may only be exercised subject to the control of a Minister.

[61] I agree with the reasoning of Keegan J at para [42] of her judgment:

> "42 In my view the provisions of the 1999 Order are clear. The language is expressed in mandatory terms by inclusion of the word *shall*. The other words are also clear. However, the

> issue is really whether they should be qualified to take into account current circumstances. The Respondent is effectively asking the Court to read Article 4(1) of the 1999 Order to mean that *direction and control* only applies when a Minister is in place and *at all times* is also subject to that qualification. I am not attracted to this argument for the following reasons. Firstly, it offends the ordinary and natural meaning of the provision. Secondly, it is not in keeping with the legislative context namely the 1998 Act which forms the basis for government in Northern Ireland and which provides for ministerial oversight. Thirdly, I do not consider that Parliament can have intended that such decision making would continue in Northern Ireland in the absence of Ministers without the protection of democratic accountability. Fourthly, in terms of effect, the rubric suggested by the Department would mean that civil servants in Northern Ireland could effectively take major policy decisions such as this one for an indefinite period. This is not a purdah situation where there is a short gap. Rather there is a protracted vacuum in existence pending the restoration of executive and legislative institutions or direct rule."

[62] Her conclusion is supported by the following considerations. It is common case that the devolved constitutional arrangements elsewhere in the UK do not permit civil servants to act without being accountable to Ministers. The Department however argues that the arrangements for devolution in NI are different permitting civil servants to exercise executive authority in the absence of a Minister. If parliament had intended to introduce such a radical and anti-democratic departure from the constitutional norms which apply elsewhere in the UK it would have said so in clear and express terms. Not only does one search in vain for clear and express language mandating such an outcome but one finds that there is statutory provision in clear and express terms to the contrary effect in art 4(1) of the 1999 Order. It is common case that these provisions are part of a package of measures intended to give effect to the Agreement.

[63] The 1998 Act in its Preamble states that it is an Act to make new provision for the government of NI *for the purpose of implementing the Belfast Agreement*. Strand One of the Agreement is entitled "democratic institutions in NI". There is no provision in the Agreement that Executive authority defaults to Departments in the absence of a Minister. On the contrary the contention that executive authority does default to Departments in the absence of a Minister is in my view incompatible with the provisions in paras [3], [14], [19], [20], [22] and [24] of Strand 1 of the Agreement:

> "STRAND ONE
>
> DEMOCRATIC INSTITUTIONS IN NORTHERN IRELAND
>
> ...
>
> 3 The Assembly will exercise full legislative and executive authority in respect of those matters currently within the responsibility of the six Northern Ireland Government Departments, with the possibility of taking on responsibility for other matters as detailed elsewhere in this agreement.
>
> ...
>
> Executive Authority
>
> 14 Executive authority to be discharged on behalf of the Assembly by a First Minister and Deputy First Minister and up to ten Ministers with Departmental responsibilities.

...

19 The Executive Committee will provide a forum for the discussion of, and agreement on, issues which cut across the responsibilities of two or more Ministers, for prioritising executive and legislative proposals and for recommending a common position where necessary (eg in dealing with external relationships).

20 The Executive Committee will seek to agree each year, and review as necessary, a programme incorporating an agreed budget linked to policies and programmes, subject to approval by the Assembly, after scrutiny in Assembly Committees, on a cross-community basis.

...

22 All the Northern Ireland Departments will be headed by a Minister. All Ministers will liaise regularly with their respective Committee.

...

24 Ministers will have full executive authority in their respective areas of responsibility, within any broad programme agreed by the Executive Committee and endorsed by the Assembly as a whole."

[64] I consider that it is clear from the terms of the Agreement set out above that the Department's argument that executive authority may be exercised by Departments in the absence of a Minister is inconsistent with the express terms of the Agreement. The default position contended for by the Department is profoundly undemocratic. If correct Departments in NI would be empowered, in breach of fundamental constitutional principle, to act without being accountable to Ministers. This would be a striking consequence for an Agreement which was intended to usher in a new era of accountable governance and power sharing.

[65] The Department's argument is also inconsistent with the Civil Service view of the constitutional arrangements by which it is governed, contained in NI in its Code of Ethics. At paragraph [1] the Code states that the "Civil Service supports Ministers in developing and implementing their policies, and in delivering public services. *Civil servants are accountable to Ministers*". This is in keeping with the traditional UK constitutional model as set out in the Civil Service Code [see also Halsbury p 36].

[66] The 1998 Act provided for short periods when Ministers would not be in place. The subsisting or enduring authority of the previous Minister within the temporal limits envisaged by the 1998 Act enabling Departments to function constitutionally and in furtherance of the Act are far removed from the "protracted stalemate" and "persisting vacuum in the conduct of devolved government" (referred to by Lord Bingham in *Robinson* at para [15]) which is a central feature of the present case.

[67] Even if art 4(1) were ambiguous it ought to be construed consistently with established constitutional principle and the Agreement.

Judgment accordingly.