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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY DISABILITY ACTION NORTHERN IRELAND FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT OF HEALTH

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Hugh Mercer KC and Robert McTernaghan (instructed by Phoenix Law) for the Applicant
Tony McGleenan KC and Philip McAteer (instructed by the Departmental Solicitor's Office) for the proposed Respondent

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SCOFFIELD J

Introduction

[1] The applicant, Disability Action Northern Ireland (DANI), is a registered charity and is described in its evidence as the largest Northern Ireland-wide pan-disability organisation working with disabled people, whose work promotes and upholds the human rights of disabled people in the community in Northern Ireland. It has been a funded organisation under the Department of Health's core grant funding (CGF) scheme ("the Scheme" or the "the CGF Scheme") for over 20 years. It is a disabled-persons-led organization, delivering services developed by disabled people for disabled people.

[2] By these proceedings the applicant seeks to challenge the decision on the part of the Department of Health ("the Department") to reduce the funding available to it. In particular, it challenges the proposed respondent's decision of 22 May 2023 by which it decided that it would not provide CGF to the applicant for the full 2023/2024 year, determining that it would cease provision of such funding to the applicant with effect from 30 September 2023 (six months into the relevant financial year). Thereafter, the Department upheld the original decision in a further decision of 5 June 2023. This review decision is also challenged but, for convenience and

simplicity, I will treat the initial decision and the later confirmatory decision as one composite impugned decision.

[3] Mr Mercer KC and Mr McTernaghan appeared for the applicant; and Mr McGleenan KC and Mr McAteer appeared for the Department. I am grateful to all counsel for their helpful written and oral submissions.

Factual background

[4] The background to the applicant and its valuable work in supporting disabled people in Northern Ireland is set out in some detail in the grounding evidence which has been provided in these proceedings. For present purposes, it is unnecessary to set this out in significant detail. However, I proceed on the basis (and do not understand it to be challenged by the Department) that DANI has for many years been active and effective in advocating for and supporting disabled people in Northern Ireland in many ways; and that it has been able to do so in part because it has received significant amounts of CGF from the Department through the Scheme over many years.

[5] The Department makes grants to voluntary organisations under Article 71(2) of the Health and Personal Social Services (Northern Ireland) Order 1972 ("the 1972 Order"): see further para [23] below. It does so, inter alia, under its CGF Scheme. This scheme provides financial support for community and voluntary organisations which either deliver front-line services based on identified need or provide central support services which are in line with the Department's strategic and policy objectives, in particular the vision for the health and social care sector articulated in the Department's October 2016 publication 'Health and Wellbeing 2026 – Delivering Together.' Financial contributions ranging from £5,000 to £200,000 towards core costs are offered through the Scheme on the basis that specified outputs and outcomes will be delivered by the receiving organisation.

[6] On 24 October 2022, the then Minister for Health, Robin Swann MLA, launched the application process for the Department's 2023/24 CGF Scheme with the amount of grant available being advertised as £3.6m. For the first time, the Scheme was to be opened up to applications from previously unfunded organisations, subject to the necessary funding being made available to the Department for the relevant financial year. It was envisaged that organisations which applied would compete for the available funding. On 18 November 2022 DANI submitted an application to the Department for CGF for the year 2023/24, seeking an amount just shy of £181,000.

[7] Some months after the deadline for submitting applications had passed, the Permanent Secretary of the Department (Mr Peter May) wrote to applicants to the Scheme on 21 March 2023 to advise them of the outcome of the competitive call for applications. This was a period when the Department was operating without Ministerial direction and control because, on 3 February 2022, the First Minister had

resigned and the Northern Ireland Executive collapsed. Although a number of Ministers remained in post in a caretaker capacity until later in 2022, by this time Northern Ireland departments were operating without any Ministerial input.

[8] As it happened, the CGF Scheme competition was significantly over-subscribed, with the Department receiving 256 applications. The total value of the bids made was in excess of £25m, well beyond the limited budget of £3.615m which was available.

[9] The Department also identified a further issue in the course of the competition process relating to the amount of funding being applied for by individual organisations. The Scheme guidelines permitted applications for amounts ranging from £5,000 to £200,000; but there were many more bids for higher amounts (over £100,000) than the Department had anticipated. This meant that the Department's ability to distribute the fund across as wide an array of service areas as had previously been the case was likely to be restricted, with fewer organisations (and therefore fewer service users, the Department considered) being likely to benefit. The Department also noted that the process raised concerns about how well-informed individual organisations were about the CGF Scheme's objectives, which are about helping organisations to function, rather than enabling them to exist in the first place. It seems that some 70% of the applications received did not meet the standard required to be deemed eligible for assessment.

[10] Additionally, the Permanent Secretary had to notify applicants that the Department's budget situation had significantly deteriorated since the launch of the competition and that it was therefore uncertain whether it would be able to maintain funding at the 2022/23 levels. Having considered all of these issues, the Permanent Secretary decided not to proceed with the 2023/24 competition but, rather, to roll over the 2022/23 arrangement with organisations which had previously received a CGF grant. To some degree, this was to the applicant's benefit, as it no longer had to compete for an award of funding under the Scheme. However, the arrangement was put in place only for an initial period of three months, until there was greater clarity on the Department's 2023/24 budget. The key portion of the letter of 21 March 2023 dealing with next steps is in the following terms:

> "Finally, since we launched this exercise, the budget situation has materially worsened to the extent that there is no guarantee that we will be able to sustain funding at the 22/23 levels. On that basis I have concluded we could only make a three-month offer at this stage pending greater budget clarity.
>
> That brings me to next steps.
>
> Based on all of the above, I have decided not to proceed with the current competition but to roll over current

> arrangements with the existing organisations that benefit from a core grant for another period. That period will initially be for three months until we have greater clarity on the 23/24 budget."

[11] On 22 May 2023, the Permanent Secretary wrote again to Scheme applicants, including DANI, to provide further clarity regarding the CGF Scheme in 2023/24 following the Department having been advised of its final budget. This is the primary decision under challenge in these proceedings. The key portions of this correspondence are in the following terms:

> "The Department has now received its final budget for 2023/24. Regrettably, this has resulted in the need to make a number of very difficult financial decisions across health and social care. These decisions are being taken with great regret and reluctance.
>
> Unfortunately, it will not be possible to provide core grant for the full 12-month period in 2023/24. Funding will be provided for the first six months only, ending on 30 September 2023. No core grant funding will be available from October 2023 through to March 2024."

[12] Section 64 of the Northern Ireland Act 1998 (NIA) sets out the procedure for the approval of budget proposals by the Northern Ireland Assembly. In the present case, however, this mechanism was not used because of the collapse of the devolved administration at the relevant time. Instead, the Secretary of State for Northern Ireland (SSNI) announced the proposed budget by way of written ministerial statement in the House of Commons on 27 April 2023, which was later given effect by the Northern Ireland Budget (No 2) Act 2023 ("the 2023 Act"). It was the announcement of the resource budget by the SSNI in late April 2023 which gave rise to the position communicated to the applicant by the Department some weeks later.

[13] On the same date as the Permanent Secretary's letter, 22 May 2023, DANI wrote back to Mr May seeking a review of his decision, outlining the importance of the CGF to the organisation and the difficulties then being faced by DANI and disabled people in the midst of the cost-of-living crisis. Similar correspondence was sent to the Head of the Civil Service, Ms Jayne Brady. On 5 June 2023 the Permanent Secretary responded with further information, indicating that the resource budget set by the SSNI had resulted in the Department facing a significant funding gap of some £732m, in turn resulting in it having to take forward some £360m cost reduction measures to reduce the gap. His correspondence emphasised again the regret on the part of the Department in relation to the decision and that it had sought to protect the direct provision of services, which overall constituted a much larger investment by the Department in the voluntary and community sector than the CGF

Scheme. In Ms Brady's response of 8 June 2023 she reiterated these points and indicated that the best way to engage with the Department on the implications of the decision taken was by means of the equality impact assessment (EQIA) which was then being undertaken.

[14] The Department had recognised that an EQIA in relation to its budgetary allocations was required and consulted on this, but with the consultation commencing on 22 May (the date of the decision which the applicant challenges) and closing on 14 August 2023. The applicant relies upon the following observation in the Department's EQIA:

> "The reduction in spending on the Department's core grant scheme is also likely to impact on organisations that are run for the benefit of people with disabilities. Whilst this funding is not spent on services directly it is recognised that any reduction in funding to such organisations may make it more difficult for them to continue to provide the same level of support."

[15] The Department's case is that it has required all of its arm's-length bodies to implement savings in back-office services; and that the decision to limit the CGF Scheme, which primarily is for back-office services, is consistent with other decisions the Department has taken.

[16] The applicant's affidavit evidence sets out in some detail what it describes as the dire situation and effects which the impugned decision had (and was expected to have) at the time of the lodging of these proceedings. The applicant contends that the impugned decision will give rise to an objectively very significant and disproportionate detriment for disabled people in the community. Its evidence is that the impugned decision will see the loss of services to in and around 35,000 disabled people and 75,000 families and carers. This will have a knock-on effect in terms of the ability of disabled people in the community to gain access to benefits, transition from hospital care, access key housing adaptions, access information and advice, take advantage of their full employment rights, access vocational training courses, etc.

[17] The evidence upon which the applicant relies includes evidence from a representative of DANI, an employee of the organisation and also a service user. In convincing and moving terms, it sets out the positive effects which services and projects provided through DANI can provide to disabled people when at their lowest ebb and/or in highly vulnerable circumstances. One notable example is its Onside Project (delivered in partnership with the Northern Ireland Housing Executive). For the court's part, the excellent and life-altering work carried out by DANI in support of disabled people is not in doubt.

[18] There is, however, some dispute about the extent of the impact which the reduction in funding will or could have on DANI. The Department's written submissions indicate that DANI's 2022/23 CGF covered only five posts: Head of Policy, Information, Advice and Advocacy; a public affairs and engagement officer; an administrator; and two information officers. 100% of the salary of each of these posts was provided for by the grant. The application for the 2023/24 grant was also in respect of five salaries in the same terms. The Department – which again points out that the core grant is intended to help organisations fully function rather than to enable them to exist – contends that it is not clear how the reduction in funding will have the impact which is claimed by the applicant. It also draws attention to the fact that the application submitted by the applicant in November 2022 indicated that it (DANI) anticipated a financial surplus of a figure approaching £130,000 for the relevant financial year (albeit anticipating the receipt of CGF), with reserves available towards running costs as necessary.

[19] The more recent affidavit evidence of Nuala Toman, Head of Policy at DANI, sets out the immediate impacts on the organisation of the ending of the core grant. It has resulted in the redeployment of five members of staff, an end to some of the organisation's work in the fields of human rights and policy, and a limitation on involvement in the ongoing Covid-19 Public Inquiry, amongst other things. Perhaps of most distress to disabled people in the community is the ending of information and advice services on a regional basis.

[20] There does appear to be some force in the proposed respondent's submission that the overall impact on the applicant will not be, or should not be, as disastrous as the picture presented in the applicant's evidence. In the application form, an organisation seeking CGF Scheme funding is required to set out other funding sought and secured by it. In the case of DANI, it receives public funding from a variety of sources, including other departments (such as the Department for Communities, the Department for Infrastructure and the Department for Education), as well as European funding and funding from some HSC Trusts for contracted services which it provides. Its actual funding for 2021/22 was some £5.9m, with the anticipated figures for 2022/23 and 2023/24 being £5.8m and £6.1m respectively. Wages and salaries (inclusive of national insurance and pension contributions) were in the region of £3.2m to £3.4m in each of those years. As the applicant's affidavit evidence notes, the effect of the decisions is that, for the relevant financial year, DANI received £61,832 from the CGF Scheme, rather than the expected £123,864. Even assuming that the applicant's 'loss' was in the order of £120,000 (the difference between the CGF it sought and what it ultimately received), this is a small proportion of its overall income and expenditure, including on wages. That said, it is clear that CGF has previously been used to fund important and strategic roles within the organisation, the loss of which (if those roles are indeed lost) will undoubtedly impact service provision.

[21] The application for leave to apply for judicial review in the present case was made in late August 2023, at the very end of the three-month time limit contained in

RCJ Order 53, rule 4. The proceedings were launched before the applicant had received the proposed respondent's response to pre-action correspondence. The applicant requested that the court stay the proceedings until this had been received and the applicant had had an opportunity to consider it. Further to the Department's pre-action response having been received, at the applicant's invitation the court again agreed to take no further action until DANI advised whether, and how, it wished to proceed. There was then a hiatus in the proceedings for some eight months. (This was partly due to the applicant's junior counsel being appointed to judicial office in the intervening period.) In late May 2024, the applicant radically amended its Order 53 statement, dropping a contention that the Permanent Secretary lacked power to take the relevant decision in the absence of the Minister; but adding a number of additional challenges, including the human rights and Windsor Framework (WF) grounds. It also lodged further evidence and asked that the matter proceed, which required the fixing of a leave hearing. By the time the leave hearing was arranged and listed at a date convenient to the parties, it was well into the 2024/25 financial year.

[22] This case raises similar issues in some respects to a challenge brought by the Children's Law Centre (CLC). In that case, the CLC sought to challenge an alleged failure on the part of the SSNI and Department of Finance (DoF) to comply with equality duties under section 75 of the NIA in the process leading to the enactment of the 2023 Act by failing to conduct a cumulative equality impact assessment (CEIA). On 31 January 2024, Humphreys J granted leave in the case: see *Re Children's Law Centre's Application* [2024] NIKB 4 ("the *CLC* case"). The focus was upon the failure to conduct a CEIA into the overall impact the budgetary provision would have, in that instance on children and young people. I return to those proceedings below. Significantly, unlike in the present case, the Equality Commission for Northern Ireland (ECNI) was a proposed respondent. Moreover, after leave was granted in the *CLC* case, the ECNI commenced further inquiry into the matter. The result of that process was made available to me after the leave hearing in the present case; and the parties were invited to make any further submissions they wished in relation to it (although, in the event, neither took up this opportunity in a meaningful way). This was in the form of a new piece of advice and guidance, entitled 'Budgets and Section 75 – A Short Guide.' It applies, inter alia, to individual Northern Ireland departments, such as the proposed respondent in this case, when managing their own departmental budgets.

Relevant statutory provisions

[23] Article 71(2) of the 1972 Order provides, under the heading 'Arrangements with and assistance to voluntary organisations', as follows:

> "The Ministry may, on such terms and subject to such conditions as it may, with the approval of the Ministry of Finance, determine, give assistance by way of grant or loan or partly in one way and partly in the other, to a

voluntary organisation providing services similar or related to any of the health or social care."

[24] Section 75 of the NIA provides, insofar as material, as follows:

> "(1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity—
> …
>
> (c) between persons with a disability and persons without; …
>
> …
>
> (4) Schedule 9 (which makes provision for the enforcement of the duties under this section) shall have effect.
> …
>
> (5) In this section—
>
> "disability" has the same meaning as in the Disability Discrimination Act 1995; …"

[25] Schedule 9 to the NIA makes detailed provision for the enforcement of equality duties under section 75, including through the making of equality schemes showing how relevant authorities propose to fulfil the duties imposed by section 75. It also makes provision for the ECNI to investigate suggestions that a relevant authority has failed to comply with its equality scheme (whether raised by way of a complaint or of its own motion). Investigation reports issued by the ECNI can recommend that the public authority concerned take action and may refer a failure to take such action within a reasonable time to the SSNI (who may in turn give directions to the public authority).

Summary of the parties' positions

[26] The applicant contends that this is not a general challenge to the exercise of discretion in relation to the allocation of resources but, rather, a focused challenge based on the special protection of disabled people as a class; and one in which procedural fairness is at the heart of the case, since the proposed respondent failed to engage and consult with the applicant in advance of the decision. Although the case was more widely pleaded, in his oral submissions Mr Mercer focused on the applicant's grounds relating to section 75 of the NIA, consultation and procedural fairness, and breach of Article 2 WF.

[27] In terms of the section 75 challenge, the applicant argues that conducting an EQIA only *after* the decision had been taken was plainly a breach of the requirements of the Department's equality scheme and its obligations under section 75 of the NIA. It further argues that a complaint to the ECNI under Schedule 9 to the NIA would not amount to an adequate alternative remedy such as to operate as a bar to judicial review.

[28] The proposed respondent argues that the subject matter of these proceedings is non-justiciable because of the nature of the decision at issue, which was a multifactorial decision regarding the allocation of resources at a macro-economic budgetary level. Even if the matter is "technically justiciable", Mr McGleenan asserted that this is an area where the highest degree of deference should be accorded to the decision maker.

[29] As to the further merits of the claim, the Department argues that the core allegation grounding the applicant's claim is breach of section 75 of the NIA and that this is also non-justiciable in the circumstances of this case, having regard to the alternative remedy provided in Schedule 9 to that Act. It says that this is particularly so in the present case as there was an ongoing inquiry by the ECNI into matters concerning budgetary decision-making and compliance with section 75, including in particular the issue of cumulative impact assessment.

[30] The Department argues next that the proposed application is academic because it relates to the 2023/24 budget and, at the time of the leave hearing (and, indeed, when the applicant applied to lift the stay it had earlier requested), the financial year to which the process applied had ended; and it is unrealistic for the applicant to seek an order of certiorari in relation to budget decisions in relation to the 2023/24 budget which had by then been implemented in full. As a result, the Department contends that no practical relief can now be granted, leaving aside the inherent improbability (in its submission) that the court would ever have granted any such intrusive relief.

[31] On the substance of the section 75 claim, the Department contends that it did have due regard to the need to promote equality of opportunity. It relies upon the context detailed in the EQIA that, following the SSNI's budget announcement, the Department was facing a funding gap of some £732m prior to implementing savings measures. It further contends that it recognised that there would be an impact on a number of section 75 groups, including disabled people, and therefore that a full EQIA was required. On the timing of the EQIA and lack of consultation ground, the proposed respondent contends that the exceptional circumstances surrounding the late receipt of the departmental budget, and the need to consequently allocate that budget, did not permit consultation prior to the decision being made.

[32] As to the human rights grounds, the proposed respondent contends that the applicant is not a victim for the purposes of section 7 of the Human Rights Act 1998 (HRA) and that those claims are in any event unarguable. Finally, the proposed

respondent says that the Windsor Framework argument is also unarguable, particularly in light of the decision of the Court of Appeal in *Dillon and Others' Application* [2024] NICA 59 which reversed the first instance decision in that case on the issues of reliance on the EU Charter of Fundamental Rights and in light of the approach it set down as to the engagement and breach of Article 2 WF.

Justiciability

[33] The first issue to be determined is the proposed respondent's reliance on blanket non-justiciability because of the nature of the decision in this case. As noted above, the Department contends that, since this is a judicial review of a multi-factorial decision regarding the allocation of scarce resources, involving questions of policy and discretion in the complex area of budgetary arrangements in the context of major cutbacks, it should be treated as non-justiciable. (A separate assertion of non-justiciability, in relation to the section 75 ground, is also relied upon by the Department and is addressed discretely below.)

[23] In this regard, Mr McGleenan relied heavily on the judgment of Gillen LJ in *Department of Justice v Bell* [2017] NICA 69, a case involving a challenge to the adequacy of the funding provided by the Department of Justice to the Police Ombudsman in order to discharge his functions. In that case, Gillen LJ addressed a number of relevant authorities and proposed the following "seemingly uncontroversial" principles at para [19]:

> "(a) Normally, the question whether the Government allocates sufficient resources to any particular area of state activity is not justiciable.
>
> (b) A decision as to what resources are to be made available often involves questions of policy, and certainly involves questions of discretion. It is almost invariably a complex area of specialized budgetary arrangements taking place in the context of a challenging economic environment and major cutbacks on public spending. There should be little scope or necessity for the Court to engage in microscopic examination of the respective merits of competing macroeconomic evaluations of a decision involving the allocation of (diminishing) resources. These are matters for policy makers rather than judges: for the executive rather than the judiciary.
>
> (c) The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the

Court must necessarily be in holding a decision to be irrational. Where decisions of a policy-laden nature are in issue, even greater caution than normal must be shown in applying the test, but the test is sufficiently flexible to cover all situations.

(d) Provided the relevant government department has taken the impugned decision in good faith, rationally, compatibly with the express or implied statutory purpose(s), following a process of sufficient inquiry and in the absence of any other pleaded public law failing, such a decision will usually be unimpeachable.

(e) However when issues are raised under Articles 5 and 6 of the European Convention on Human Rights and Fundamental Freedoms as to the 18 guarantee of a speedy hearing or of a hearing within a reasonable time, the Court may be required to assess the adequacy of resources, as well as the effectiveness of administration.

(f) Nonetheless in general a court is ill-equipped to determine general questions as to the efficiency of administration, the sufficiency of staff levels and the adequacy of resources.

(g) There is a constitutional right of access to justice and access to the courts.

(h) Powers ought to be exercised to advance the objects and purposes of the relevant statute."

[24] I do not read this decision as providing a blanket immunity against challenge by way of judicial review for decisions which are budgetary or allocative in character. In the first instance, the principle set out at sub-paragraph (a), upon which the Department relies, is expressed in qualified terms: "normally", but not always, such decisions will not be justiciable. Second, however, it is clear, when reading that principle in the context of the others which are set out, that the judge was referring to the justiciability of such decisions in an irrationality challenge directed towards the *merits* of the decision. That is the obvious reading of sub-paragraph (a) when read together with sub-paragraphs (b) and (c). (Whether this is indeed a jurisdictional bar or simply a shorthand way of describing the extremely limited prospects of the court overturning allocative decisions of certain types, given their unsuitability for judicial assessment, may perhaps be a matter of debate.) Thirdly, and perhaps most importantly in the context of the case made by

the proposed respondent here, sub-paragraph (d) of Gillen LJ's summary makes clear that there *are* grounds upon which the High Court, in the exercise of its supervisory jurisdiction, may interfere with decisions of the character under discussion. Such decisions must still be approached by the relevant authority compatibly with the express or implied purposes of the statutory scheme under which it is acting (and the authority must direct itself properly in law in this regard); there must have been a process of sufficient inquiry; and there must be no "other pleaded public law failing." Other such failings might include procedural impropriety, procedural unfairness, or process irrationality.

[25] As I recently held in *Re Mid-Ulster District Council's Application* [2025] NIKB 20 ("the *MUDC* case"), another judicial review about a reduction in funding provided by central government, at para [60]:

> "In accordance with the principle set out at sub-para (d) of para [19] of *Bell* (see para [56] above), provided the Department has taken the impugned decision in good faith, rationally, compatibly with the express or implied statutory purpose(s), following a process of sufficient inquiry and in the absence of any other pleaded public law failing, its decision must be considered unimpeachable. That does not exclude any possibility of supervision of the Department's decision, or the grant of relief in relation to it, but it significantly limits the nature of the grounds upon which such relief is likely to be granted and the intensity of any review alleging irrationality. In particular, the scope for review on the basis of 'outcome rationality' is negligible: see also the *McMinnis* case in the Court of Appeal (discussed below), at paras [77] and [80]. Although review on the basis of 'process rationality' remains available in this context, this will very much be light-touch review given the nature of the issues in play. (I use here the helpful terminology demarking different types of rationality challenge recently explained again by Chamberlain J in *R (KP) v Foreign Secretary and Home Secretary* [2025] EWHC 370 (Admin), at paras [55]-[57].)"

[26] I note that Humphreys J reached the same conclusion in the *CLC* case (see para [75] of his judgment), namely that, as the challenge was to the *process* followed in the setting of the budget, and not simply a merits challenge to the adequacy of the allocations, the court could and should proceed to determine the merits. Mr Gerald Simpson KC sitting as a Temporary High Court Judge (referred to hereafter as 'Simpson J' for convenience) expressed himself in different and more broad terms at para [49] of his judgment in *Re Hutton and Devlin's Application* [2024] NIKB 76 (a challenge to a decision on the part of Tourism NI to withdraw a grant funding

scheme as a result of budget cuts imposed on it), upon which the Department relies, finding for the respondent on the issue of non-justiciability. However, I note that Simpson J in that case nonetheless went on to consider the other issues raised in the application, including procedural challenges, in case he would have been wrong to have dismissed the case in its entirety on the basis of non-justiciability (see para [50] of his judgment). For my part, I consider that he was right to do so. The rationality challenge advanced in the *Hutton* case could properly be viewed as non-justiciable for the reasons given by Simpson J (and he also found it to be unarguable for the same reasons in para [63] of his judgment). However, I prefer to follow the approach set out in the *CLC* and *MUDC* judgments (neither of which was available at the time of the decision in the *Hutton* case).

[27] Accordingly, I would not dismiss the application for leave in this case on the basis of non-justiciability, save in relation to the simple irrationality ground, which was in any event not pursued with any vigour in written submissions, and not at all in oral submissions, on behalf of the applicant.

Academic nature of the proceedings

[28] The Department then invites the court to dismiss this application as being academic (in conjunction with its case that there is or was also an alternative remedy in respect of some of the applicant's complaints). The reasons why the matter is advanced as being academic are threefold:

(i) First, the financial year to which the process applied (2023/24) is now over. At the time of the leave hearing, the following financial year (2024/25) was well advanced (and indeed has also now recently concluded). The next budget process was to relate to what is now the current financial year (2025/26).

(ii) Second, it was argued that it was unrealistic and irrational for the applicant to seek an order quashing the budget decision in relation to a financial year which had been implemented in full, bearing in mind that the discrete issue challenged by the applicant could not be divorced from the overall budget of which it formed part. On this basis, the proposed respondent suggested that no practical relief could now be granted (and that it was in any event inherently improbable that the court would ever have granted any such intrusive relief requiring substantive reconsideration of budgetary allocations).

(iii) Third, the Department argued that the present case would have no precedent value and was unlikely to be repeated, given the facts that the ECNI was already conducting an inquiry into equality assessment requirements in relation to budget decisions and that, given that the Assembly and a functioning Executive had now returned, the same situation (of departments

having to deal at short notice with a budgetary settlement imposed by the SSNI) would not recur.

[29] In this regard, the proposed respondent again relied upon the judgment of Simpson J in the *Hutton* case. In the course of his judgment the judge quoted from the ninth edition of *De Smith's Judicial Review*, which noted (at para 1.047) in relation to allocative decisions that "if the court alters such a decision the judicial intervention will set up a chain reaction, requiring a rearrangement of other decisions with which the original has interacting points of influence …"; and (at para 1.109) that one of the reasons why polycentric decisions are not ideally amenable to judicial review is that "the reallocation of resources in consequence of the court's judgment will normally involve the interests of those who were not represented in the initial litigation." These issues sound on the appropriate relief to be granted in such a challenge. The judge addressed the question of the academic nature of the proceedings in that case, and their utility (or lack of utility), at paras [67] to [75] of his judgment. By the time of the leave hearing, the events for which the applicants had sought funding had concluded; the proposed respondent's budget for the 2023/24 year had been allocated; and there was "no suggestion anywhere that there [were] additional funds available which could be used to provide funding to the applicants long after the event" (see para [67]). In those circumstances, he held that there was no reason to think that any benefit could accrue to the applicants if the impugned decision was quashed (see paras [71] and [74]); nor did he see any utility, assuming the applicants were successful, in granting a declaration or order requiring the respondent to re-take the decision (see paras [71] and [73]-[74]). He would therefore have dismissed the application solely on the basis that it was academic, in addition to the other conclusions he reached justifying that course.

[30] The Department also relies on the case of *R (The Fawcett Society) v The Commissioners for HMRC* [2010] EWHC 3522 (Admin), at paras [18] to [20], in which Ouseley J referred to the particular need for expedition where proceedings were brought challenging government budgetary decisions, so as to avoid the very type of difficulties which arose in the *Hutton* case and which the Department says arise in this case. It argues that the present application was not pursued urgently at the time and ought to have been if the applicant wished to avoid an unanswerable case that its claim had become academic.

[31] It is important to keep conceptually distinct two separate questions: first, whether the case is actually academic as between the parties (which is an intensely practical question); and, second, whether, if so, the court should nonetheless exercise its discretion to hear the case for some reason of public interest. On the first of these issues, the Department's case resolves to the assertion that it is (in the words of its written submissions) "far too late now to unpick the budget processes for 2023/24."

[32] In considering this issue, it is sometimes necessary for the court to form a view about the applicant's prospects of obtaining any relief or, more particularly, some form of relief which will have a practical effect (see, for example, McCloskey

J's comments at para [10] of his judgment in *Re Bruce and Dogru's Application (Leave Stage)* [2011] NIQB 60). Put shortly, there may be some cases where the case is *not* academic if the court would or may grant relief which seeks to wind back the clock; and other cases where, if this is not a realistic possibility, the case should properly be viewed as academic because it will not give rise to any practical benefit for the applicant.

[33] Some of the considerations relevant to the grant of particular remedies in this context were addressed in the ruling on remedy in the *MUDC* case: see *Re Mid-Ulster District Council's Application (Ruling on Relief and Costs)* [2024] NIKB 36, at paras [14] to [24]. A challenge to a budgetary decision such as the one at issue in the present case is unlikely to give rise to a quashing order where the relevant financial year has ended. Leaving aside the consequential impacts which would arise were such a decision to be quashed and fall for reconsideration in-year, where the financial year has ended and a new financial cycle has commenced, there are additional complications in trying to find additional funds which would give rise to any practical advantage to the applicant.

[34] In his submissions in the present case, Mr Mercer candidly accepted that the grant of certiorari would no longer be appropriate and indicated that this form of relief was not being pursued. Instead, the primary relief sought was declaratory in nature. In short, the applicant is not pressing for a re-opening of the budgetary decision but, rather, vindication that the decision was not taken properly. For what it is worth, I consider this concession to have been properly made in the circumstances of the present case. In the *MUDC* remedies ruling, which also related to the 2023/24 financial year and a funding decision based on cuts required by virtue of the SSNI's budget statement, I reached the view that an order of certiorari was inappropriate. Similar considerations arise in the present case. As was made clear in that ruling (see para [24]) there may be cases where such an order will be appropriate, notwithstanding the complications. I also recognise that there is something unattractive about a proposed respondent relying upon the submission that, unless a case is brought and determined with exceptional expedition, the applicant is 'timed out', even if their case is extremely strong. In the present case, however, particularly in light of the dire financial circumstances which the Department faced and the applicant's conduct of the present proceedings, seeking a quashing order would, indeed, have been unrealistic.

[35] Accordingly, the case is academic, as a matter of practicality, in terms of the CGF made available to DANI for the 2023/24 financial year. (Humphreys J reached a similar conclusion in the *CLC* case, at para [85], albeit he considered there was good reason to nonetheless address the section 75 issue in that case.) Is there a good reason for the court to permit the application to proceed notwithstanding that, with a view to granting declaratory relief only? I have determined that there is not. Although the applicant argued that future budgetary awards would be guided by the outcome of the case, there is no discrete point of statutory construction which requires clarification. There is force in the point made by the Department that the

impugned decision in this case arose at a particular point in time and in circumstances which may never be repeated. Although (as Mr Mercer submitted) the Assembly and Executive may fall again, it is unnecessary to proceed on the basis that this is likely. In any event, the key aspect of the case relates to the Department's obligations under section 75 of the NIA. The obligations of public authorities in relation to the setting of their budget, and the overall budget, has been examined by the ECNI and is also to be further examined in the *CLC* case, in which leave was granted and which has not yet been concluded. Although, as Mr Mercer further submitted, a number of issues in this case may not be addressed in the *CLC* case, namely the lack of consultation, procedural fairness and WF grounds, the first two of these are highly fact specific. The third, for reasons given below, is in my view unarguable.

[36] I consider that, properly analysed, this case is academic as between the parties; and have not been persuaded that there is a good reason in the public interest to proceed even so to hear and determine the case (if an arguable case had been raised). In light of the detailed arguments presented on the remaining issues, however, I nonetheless express the court's conclusions in respect of them below.

Section 75 case

[37] The applicant says that the proposed respondent had a clear section 75 duty to consult with the applicant (and others) but, as the Department admits, failed to do so in advance of its decision, which is contrary to Chapter 3 of its equality scheme. DANI relies in particular on section 3.2.1 of that scheme which indicates that:

> "Consultations will seek the views of those directly affected by the matter/policy, the Equality Commission, representative groups of Section 75 categories, other public authorities, voluntary and community groups… and such other groups who have a legitimate interest in the matter."

[38] The proposed respondent answers this in two ways: first, by contending that the claim should fail *in limine* because of the remit of the ECNI to investigate; and, second, by contending that, in the circumstances of the case, there was in any event no breach of its equality scheme. I deal with each of these arguments in turn.

[39] The Department contended that this aspect of the applicant's challenge was also non-justiciable and/or not amenable to judicial review on the basis of the alternative remedy available to it under Schedule 9 to the NIA. In advancing this argument, the Department relied upon the familiar quotations from *Re Neill's Application* [2006] NI 278 (at paras [27]-[28] and [43]) and other similar dicta, such as para [20] of *Peifer v Castlederg High School and Another* [2008] NICA 49. It argued that there was nothing exceptional about this case such as to render it suitable for judicial

intervention. It further argued that the grant of leave in the *CLC* case was a reason not to grant leave on another case on similar issues, rather than the contrary.

[40] The applicant accepted that, as noted in the *CLC* case, judicial review is not the ordinary, default method for enforcement of equality obligations under section 75 of, and Schedule 9 to, the NIA. However, it relies upon the fact that in that case Humphreys J did allow for court enforcement in some cases of last resort (see paras [76] to [79] of the *CLC* decision). The applicant also relies upon the fact that, in one of the few cases where section 75 has been successfully invoked in a judicial review challenge, *Re Toner's Application* [2017] NIQB 49, it related to the same protected group within society, namely disabled persons. The applicant further relies upon *Re McMinnis' Application* [2023] NIKB 72, at paras [175]-[176], and asserts that this case is a further example of one where the public authority has simply side-stepped any proper equality assessment and has done so on an arguably irrational basis and where the impact on the protected group is likely to be particularly serious. Mr Mercer argued that the case therefore fell within the potential exceptions (identified in the High Court ruling in *McMinnis*) to the general rule against the Judicial Review Court hearing and determining section 75 claims. He argued that there was no particular fact-finding required in this case; and that only the court process would provide a real opportunity to influence the Department's decision.

[41] The Court of Appeal has since dealt with the appeal in the *McMinnis* case: see *Re McMinnis' Application* [2024] NICA 77; and I examined the implications of this in the *MUDC* case (supra), at paras [102] to [115]. As in that case, in the present case it is clear that the applicant's challenge amounts to a complaint that the Department failed to comply with its equality scheme. That is a matter about which complaint could be made to the ECNI under para 10(1) of Schedule 9 and which the ECNI would be empowered to investigate. In those circumstances, following the reasoning of the Court of Appeal in *McMinnis*, there is no proper basis upon which I could depart from the strong general rule that judicial review should not be entertained (even assuming the court has jurisdiction) in these circumstances. Leave should be refused on the section 75 complaint on that basis alone.

[42] It is therefore unnecessary to determine the argument on the merits of this ground. However, I am bound to say that it is not as strong as the complaint in either the *McMinnis* or *MUDC* cases. In each of those cases, a decision or policy was 'screened out' of further equality assessment on a questionable basis (irrationality in *McMinnis* and ex post facto consideration in *MUDC*). In the present case, the Department recognised that its proposed decision *would* have effects on organisations such as the applicant and its service-users (see para [14] above) and decided that a full EQIA was required, announced and commenced at the time the impugned decision was communicated. It concluded, and stands over the assertion, that it was not possible to conduct that full EQIA in advance of the decision, or in advance of its being put into effect. However, the Department contends that this was in fact *permitted* by its equality scheme, which provides (at para 3.2.9) as follows:

> "The consultation period on Section 75 matters normally lasts for a minimum of twelve weeks to allow adequate time for groups to consult amongst themselves as part of the process of forming a view. However, in exceptional circumstances when this timescale is not feasible (for example, implementing EU Directives or UK wide legislation, meeting Health and Safety requirements, addressing urgent public health matters or complying with Court judgements), the Department may shorten timescales to eight weeks or less before the policy is implemented. The Department may continue consultation thereafter and will review the policy as part of the Department's monitoring commitments.
>
> Where, under these exceptional circumstances, the Department must implement a policy immediately, as it is beyond the Department's authority's [*sic*] control, the Department may consult after implementation of the policy, in order to ensure that any impacts of the policy are considered."

[43] The scheme therefore permits the Department to shorten a consultation period or, in exceptional circumstances, to consult *after* implementation of the policy. The circumstances where this is permissible are not defined or exhaustively listed. Here, the proposed respondent contends that the exceptional circumstances surrounding the late receipt of its budget, after the financial year had commenced, and the need to consequently allocate that budget and make significant costs savings, did not permit consultation prior to the decision being made. It contends that this is permissible under the foregoing provisions of its equality scheme, provided that (as it did) it consults thereafter. In this case the Department consulted on its full EQIA with the consultation commencing in May 2023 and closing on 14 August 2023, at a time when, if possible and appropriate, there was more chance of remedial action being taken than now.

[44] The question whether these actions did or did not comply with the Department's equality scheme in all of the circumstances are matters which would be well suited to investigation, consideration and assessment by the ECNI. To some degree this may depend upon what pre-warning the Department had of the impending scale of reductions which were likely to result from the SSNI's budget announcement. The terms of the ECNI recently published guide (see para [22] above) strongly emphasise the need to undertake the equality assessment exercise in advance of the decision and "not merely as a 'rearguard action'" and, therefore, also emphasise the advisability of commencing the process as soon as proposals crystallise. This is not a case, however, where there has necessarily been a clear-cut breach.

Lack of consultation

[45] The applicant also alleges that it was unlawful for the Department not to consult with it, or give it an opportunity to make representations, in advance of the decision. This is presented not only as a breach of the Department's equality scheme (see above) but also as a breach of legitimate expectation and of the requirements of procedural fairness in the circumstances.

[46] For its part, the Department accepts that, in normal circumstances, it would consult on its draft budget allocation as part of an EQIA process and only take actual allocation decisions following closure of the consultation and confirmation of the final budget. However, in the present case, given that the budget was allocated by the SSNI on 27 April, the Department says it was placed in an exceptional position and left with no choice but to proceed with cost reduction measures and then only subsequently proceed with consultation. The Department considers that, under the Northern Ireland (Executive Formation etc) Act 2022, the decision to reduce CGF was necessary in order for the Permanent Secretary to fulfil his duty to balance budgetary and service delivery concerns, because to ignore financial constraints would be in breach of his legal duties. (It seems to me that this is really a reference to the Permanent Secretary's obligation to have regard to statutory guidance issued pursuant to section 3 of the 2022 Act which indicated, inter alia, that senior officers of Northern Ireland departments had to take into account "the primary principle that departments must control and manage expenditure within the limits of the appropriations set out in the Budget Acts, and as set out in the Secretary of State's statement to the House of Commons of 27 April.")

[47] The Department further contends that to delay these measures until after it had consulted would have meant that the financial position would have deteriorated further, which may have led to more severe cuts to services later in the year, with consequently greater adverse effects on service delivery and on groups such as patients and clients. Instead, in response to the budget allocated, the Department argues that it had to take decisions at pace in order to manage within the limited funding which had been allocated. It says that this is evidenced by the fact that the budget was only allocated by the SSNI on 27 April, resulting in an urgent submission to the Minister of 15 May, a decision on 16 May, and notification of that decision on 22 May 2023. The Department further relies upon the fact that it ensured six months of funding was provided to the core grant organisations in order to provide sufficient time for them to plan and prepare for the funding reduction.

[48] The first question is whether there was a duty to consult the applicant in the circumstances (leaving aside the duty to consult on the EQIA or screening decision arising by virtue of the Department's equality scheme, discussed above). Mr Mercer accepted that there was no general common law duty of consultation but relied on the terms of the Department's equality scheme and the fact that DANI had been a long-term recipient of CGF Scheme funding (albeit this required an application on an annual basis and there was no guarantee of an award).

[49] I do not accept that the applicant was owed an individual duty of consultation before the Department reduced the budget allocation available to the CGF scheme simply because it had previously been a consistent recipient of such funds. If such an obligation arose, it would apply to all those who had previously been regular recipients of the funding. However, in my view a legitimate expectation of consultation did not arise in the circumstances. There was no promise of consultation. Moreover, although the applicant had been fortunate enough to receive CGF in the past, and was reliant on it, it was (or should have been) aware that, in this particular process, there was no guarantee that it would be successful in its application or, even if it was, that funding of any level or amount would be provided.

[50] In this regard, the Department relies upon the fact that, when DANI submitted its application for CGF Scheme funding, the application form signed on its behalf contained a declaration which stated, amongst other things, the following: "I understand that the receipt of any funding is subject to the Department of Health identifying budget cover for the Core Grant Scheme in the 2023/24 financial year." In light of this, the Department submits that, at the point of the application, DANI was aware (a) that it was competing against other organisations for funding and may not be successful, and (b) that even successful organisations may not receive funding because this was subject to the Department's final budget allocation. To like effect, the Department relies upon the fact that in 2016/17 it permanently reduced core grant allocations to all community and voluntary sector organisations by 25%, including the present applicant. Accordingly, the 2022/23 allocation was around 75% of the allocation received in 2015/16. Thus, the Department contends, the applicant was aware of the possibility of reduction of available funding under the scheme. The message about possible non-availability of funding was also restated by the Permanent Secretary, the Department says, at a core grant "learning event" hosted by the Northern Ireland Council for Voluntary Action (NICVA) on 21 April 2023 and attended by the applicant amongst others.

[51] The Department did not rely, but could have also relied, upon the fact that *some* opportunity for engagement with it arose, with some forewarning of the direction of travel, between its letter to Scheme applicants of 21 March 2023 and the ultimate decision on 22 May 2023, including after the budget allocations were made public by the SSNI in Parliament on 22 April 2023. Organisations such as the applicant were free to make whatever representations they wished during that period.

[52] It is only if there was an obligation to consult the applicant that it could have an arguable case on its procedural fairness challenge. I do not consider there was a general obligation to consult at large in this case. Nor do I consider that there was a legitimate expectation of consultation (either arising from a promise or settled practice of consultation, or as a prerequisite to lawfully removing a benefit which the applicant was entitled to expect would continue) given the context described above,

save for that which arose in the context of the Department's equality-proofing (addressed separately above). (I note again that Simpson J reached a similar conclusion in an analogous context in the *Hutton* case, at paras [58]-[62]; as did I in another analogous context in the *MUDC* case, at paras [130]-[135].) The competitive nature of the process in this case, coupled with the express disclaimers about funding not being guaranteed, militate strongly against a right to notice and the right to make representations. In those circumstances, I do not consider that procedural fairness required specific and individual consultation with the applicant; or indeed with the other Scheme applicants affected by the initial decision on 21 March 2023 or the later decision of 22 May 2023. Accordingly, I also consider the procedural fairness claim to have no realistic prospect of success.

[53] That means that I need not examine the question of whether, if such a duty arose, it was lawful in the exigencies of the circumstances in this case to dispense with compliance with the duty. Authority suggests that, in cases of urgency, a decision will not be unlawful by reason of lack of opportunity to make representations (where it otherwise might) if this is impracticable in the circumstances. In the applicant's submission, the court should require the Department to produce *evidence* to show that it was impossible for it to consult. For the reasons given above, that is unnecessary, since a prima facie obligation to consult did not arise on the facts of the case.

Irrationality

[54] The applicant's irrationality challenge was faintly pursued, if at all. As discussed above (see paras [24]-[27]), insofar as this was a simple challenge to the adequacy of the funding provided, it is unarguable. The Department was plainly faced with a dire financial situation. It has explained that CGF represents only a small proportion of the overall funding provided by the public health and social care sector to the voluntary and community sector, with the bulk of the funding allocated for the direct provision of services. The Department avers that it sought to protect this direct provision funding as much as possible for the relevant financial year, despite the very challenging budgetary settlement. It took a rational decision to abandon the full competitive process (see para [10] above) and roll over funding to those organisations which had received CGF under the Scheme in the previous year. It sought to manage the reduction for those organisations by providing six months' worth of funding (extended from the initial three months). In view of the pressures it faced, it cannot be said that its approach was irrational. An element of the applicant's case – linked to its section 75 and absence of consultation challenges – was that the Department made its decision without the benefit of necessary input from affected organisations such as DANI. However, the Department plainly recognised that such organisations, and those whom they serve, would be impacted by the reduction in CGF. This was taken into account. The difficulty was simply the extent of cuts which had to be made to live within the available budget and the need to prioritise the limited funds available.

Convention grounds

[55] In its pleaded case and written submissions, the applicant also relied upon various breaches of Convention rights, namely articles 6, 8 and 14 ECHR. The article 6 claim was not developed in the written submissions. As to article 8, the applicant relied upon the broad ambit of article 8 and contended that it protects the right to establish and develop relationships with other human beings and the outside world, with the Department "now actively blocking that development for service users." It was argued that the applicant's article 8 rights were engaged because of the clear harm which was being caused to both the applicant and its service users by the reduction in funding. It further argued that a fair balance had not been struck in this case, particularly as the decision-maker did not address all relevant factors.

[56] As to breach of article 14, the applicant relied upon the fact that its service users are a protected group in Northern Ireland and the Department's own EQIA recognised that the impugned decision would have significant adverse effects on disabled people, compared to able-bodied people. The case was presented as one of indirect discrimination, since the measure (the cessation of Scheme funding mid-year) was one of general application but with disproportionate prejudicial effects on the particular group. The applicant also argued that there was no justification for the measure in evidence before the court from the Department.

[57] The Department did not accept that there was any substance to these claims, largely for the reasons advanced in opposition to the remainder of the applicant's case. However, it also argued simply that the applicant was not a victim for the purposes of section 7 of the HRA and has no locus standi to make a Convention claim. Having reflected on the proposed respondent's arguments in this regard, the applicant did not pursue the Convention arguments at the leave hearing, preferring instead to focus its rights-based challenge on the WF ground, addressed below.

[58] I consider the applicant was right not to proceed with its Convention claims. Without needing to decide the matter, it seems unlikely that the applicant, a company and charity, could satisfy the requirement of victim status for the purpose of the article 8 and 14 claims. (The article 6 claim was not advanced at all and no A1P1 claim was made). Pursuant to section 7(1) and (7) HRA, a person claiming that a public authority has acted unlawfully under section 6 may bring proceedings against that authority "only if he is (or would be) a victim of the unlawful act" within the meaning of article 34 ECHR. This requirement was considered by the Supreme Court, albeit in a different and more complex context, in *Re Northern Ireland Human Rights Commission's Application* [2018] NI 228 (see, in particular, the decision of Lord Mance on behalf of the majority on the standing issue at paras [42] and [48] to [73]). The Department argued here that the applicant has no power to bring an *actio popularis*; and nor does it have powers comparable to those now available to the Northern Ireland Human Rights Commission (see section 71 of the NIA, as now amended). It seems to me that there is force in these submissions. The applicant is a body corporate and not *itself* a disabled person, albeit (as noted above) it is

disabled-persons-led. It does not enjoy a private life in any relevant respect; and has not been discriminated against on the basis of any protected characteristic possessed by it. In truth, it brings these proceedings (insofar as reliance on human rights arguments are concerned) in a representative capacity, but in a way which is not countenanced or permitted by section 7.

The Windsor framework

[59] I turn then to the applicant's case in relation to Article 2 WF. It provides as follows, under the heading 'Rights of individuals':

> "1. The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.
>
> 2. The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards."

[60] The applicant contends that the reduction in funding of which it complains in this case is in breach of Article 2(1) WF. It relies upon the six-stage test for assessing such a claim which is set out at para [54] of *Re SPUC's Application* [2023] NICA 35 and which was endorsed in the *Dillon* case (albeit it need not be rigidly applied in every case):

> "The appellant, in making this challenge, has to establish a breach of Article 2 satisfying the six elements test, namely:
>
> (i) A right (or equality of opportunity protection) included in the relevant part of the Belfast/Good Friday 1998 Agreement is engaged.

(ii) That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020.

(iii) That Northern Ireland law was underpinned by EU law.

(iv) That underpinning has been removed, in whole or in part, following withdrawal from the EU.

(v) This has resulted in a diminution in enjoyment of this right; and

(vi) This diminution would not have occurred had the UK remained in the EU."

[61] As to these tests, first, the applicant contends that the phrase "civil rights" within the Rights, Safeguards and Equality of Opportunity (RSE) section of the Belfast Agreement includes the right to be free from discrimination and the right to dignity. Second, it contends that these rights were given effect, in whole or in part, in Northern Ireland on or before 31 December 2020 by means of EU law, referencing the ECHR but also including articles 10 and 19 of the Treaty on the Functioning of the European Union (TFEU) and the Employment Equality Framework Directive (Directive 2000/78/EC). Third, it says that the laws of Northern Ireland giving effect to these rights were underpinned by this EU law. Fourth, that this underpinning has been removed in whole or in part following withdrawal from the EU. Fifth, that this has resulted in a diminution in the enjoyment of the rights contained within the relevant part of the Belfast Agreement. Sixth, that this diminution would not have occurred had the United Kingdom remained in the EU.

[62] As to the third question – the underpinning of relevant rights in domestic law by EU law - the applicant relies on a very wide range of EU law rights, namely Articles 1, 7, 21, 24, 25, 26, 34(2), 41, 47, 51, 52 and 53 of the EU Charter of Fundamental Rights (CFR); the fact that non-discrimination policy is part of EU competence (relying on Articles 10 and 19 of the TFEU); and the Employment Equality Framework Directive.

[63] In Mr Mercer's oral submissions, he submitted that disability rights were within the RSE section of the Belfast Agreement. There is little doubt that this is so, given the express reference within that section to "the right to equal opportunity in all social and economic activity, regardless of… disability…" Mr Mercer further submitted that they were given effect in Northern Ireland law through a variety of legislation including the Disability Discrimination Act 1995; and that these rights were underpinned by a variety of the provisions of EU law mentioned above. In general terms, there is no real contention about that.

[64] The key dispute in relation to this aspect of the claim, however, was whether there had been any relevant diminution in rights in the form of the decision impugned in these proceedings; and, even if so, whether such diminution would or could nonetheless have occurred if the UK had remained within the EU.

[65] The proposed respondent contends that, on the Court of Appeal's analysis in *Dillon*, Article 2 WF "can be invoked in cases where pre-existent statutory rights, underpinned by European Law are diminished post exit from the EU by subsequent legislative amendment or provision"; but that the Windsor framework "is not a free-standing ground upon which to challenge administrative decision-making as the applicant seeks to employ it in this case." Its firm contention is that, in all relevant respects, the rights available to disabled people in the law of Northern Ireland have not been materially altered.

[66] In response, Mr Mercer submitted that diminution could not occur merely by way of legislative amendment which changed or reduced the content of such rights but, rather, also included measures which reduced their practical effectiveness. Since a number of the rights included an obligation to take positive measures, he submitted, the removal of positive or practical mechanisms to give effect to, or support, the practical effectiveness of such rights could represent a diminution in those rights in contravention of the non-diminution guarantee in Article 2 WF. In this case, ultimately, the removal of funding represented the diminution in rights, with DANI being a bridge both between disabled people and services accessed by them and between disabled people and government. He argued that DANI was "part of the effective application of the relevant rights."

[67] The closest the applicant came to identifying a concrete provision of EU law which applied in this territory, bearing in mind that the Court of Appeal in *Dillon* held that reliance on the CFR on a free-standing basis was inadequate to ground an Article 2 WF claim (see paras [137]-[149]) is the Directive, and in particular the provisions of Article 5 relating to the provision of reasonable accommodations for disabled persons. The applicant referred, inter alia, to its work relating to access to computers, training and the internet. I accept that DANI provided useful services in this area. However, the applicant's analysis – that the diminution in rights arises because the proposed respondent has cut access to the above through its funding decision – is overly simplistic.

[68] Indeed, in my judgment, there are a number of fundamental flaws in the applicant's analysis in relation to the WF. At the most basic level, EU law did not guarantee any particular level of funding for representative or community groups such as the applicant. The removal of such funding does not, therefore, even arguably represent a diminution precluded by the non-diminution guarantee in Article 2(1) WF. I set out some additional reasoning in respect of this conclusion below.

[69] In summary, I accept the proposed respondent's submission that, for the non-diminution guarantee to be engaged in relation to rights, there must be a reduction either in the *legal substance* of the relevant right or in the *legal mechanisms* for its enforcement. In *Dillon*, the Court of Appeal recognised that a relevant diminution in rights could occur in either of these ways: by the right itself being altered and reduced in substance or, absent that, by legal remedies for the enforcement of the right being reduced (see paras [84] and [149]). However, in each instance, this will most often (if not invariably) arise by way of legislative intervention of some kind.

[70] So, in *Dillon*, the Court of Appeal considered that it was for the domestic courts to contrast "the current position in national law with what went before" in order to determine whether there had been a diminution in rights and whether this could lawfully have occurred during the UK's membership of the EU (see para [86] of Keegan LCJ's judgment). Moreover, the third *SPUC* consideration is whether the relevant "Northern Ireland *law*" (not merely practice) which gave effect to the right was underpinned by EU law.

[71] In my view, this reflects the plain meaning and intention of Article 2 WF, as incorporated into domestic law. The UK Government and the EU were agreeing that relevant rights (within the RSE section of the Belfast Agreement) would not be legally altered further to the UK's exit from the EU, *not* that within the broad ambit of any such right there would be no practical changes in the future by way of administrative decision or otherwise which rendered individuals somehow less well off. Had that been the intention, the text of Article 2 would have been in very different terms.

[72] It is no surprise, therefore, that Article 2 WF cases such as *Dillon* (challenging the Northern Ireland Troubles (Legacy and Reconciliation Act 2023), the *Northern Ireland Human Rights Commission and JR295* case ([2024] NIKB 44, challenging the Illegal Migration Act 2023) and the *SPUC* case (challenging Regulations made by the SSNI) were addressed to primary or delegated legislation formally altering legal rights enjoyed by individuals.

[73] It is, of course, possible to objectively determine what formal legal protections were in force in relation to RSE rights at the relevant time (that is, at 31 December 2020) in order to assess whether these have since been diminished. If the applicant's argument were correct, it would be much harder to assess whether, practically speaking, there had been some alteration in the support structures for such rights as between that time and the time of the complaint. The role of the court in addressing an Article 2 WF challenge based on alleged diminution in rights, as explained and illustrated in the authorities referred to above, is to conduct an audit of the legal rights available both before and after exit from the EU to determine whether rights have been diminished in breach of the non-diminution guarantee. That is a role to which the courts are well suited, comparing different legal provisions and texts (as noted by the Court of Appeal in *Dillon* at para [86]). The court's role in such a

challenge is not to conduct a more wide-ranging assessment of fact as to whether individuals have the same awareness of, or ease of access to, the mechanisms for enforcement of those rights.

[74] Moreover, Article 2 itself makes a distinction between, on the one hand, rights (and safeguards and equality of opportunity) which are addressed in Article 2(1) and, on the other hand, the "related work" of institutions and bodies to assist in upholding human rights and equality standards which are addressed in Article 2(2). The applicant is not a body set up pursuant to the Belfast Agreement for this purpose; but its work is in many ways analogous to that of some such bodies. The structure of Article 2 suggests that the obligation to facilitate such work (which is limited to those bodies set up pursuant to the Belfast Agreement) is separate and distinct from the non-diminution guarantee set out in Article 2(1).

[75] That is sufficient to deal with the applicant's claim under the non-diminution of rights guarantee in Article 2(1) WF. There has been no material modification of any of the rights in question in Northern Ireland law. All the applicant challenges is a reduction in funding to it as a representative, advocacy and advice organisation. That does not represent a relevant diminution in rights.

[76] The applicant's claim was not presented, in the alternative, as representing a breach of the guarantee of non-diminution in "safeguards" or "equality of opportunity" also contained within Article 2(1) WF, assuming (without deciding) that these represent additional guarantees or prohibitions in Article 2. However, I also consider that no arguable claim in relation to this aspect of Article 2(1) could be made out. Even assuming – which I respectfully doubt – that a diminution in funding of the type complained of in these proceedings could represent a diminution of safeguards or equality of opportunity, the applicant would still have to show that this had 'resulted from' the UK's withdrawal from the EU, that is to say, that the diminution could not or would not have occurred had the UK remained within the EU (see the *SPUC* questions (iv)-(vi)).

[77] I see no basis for the argument that, had the UK remained within the EU, it would have been unlawful (as a matter of any underpinning EU law) for the Department to have reduced the CGF Scheme funding in the way in which it has done. Facing the same financial pressures which it did, it would have reached the same decision; and there would have been no basis in EU law to challenge that. As noted above, those provisions do not speak to the level of funding which has to be made available to an organisation such as the applicant. That being so, this is a further reason why the WF ground is unarguable in my view.

Further issues

[78] The applicant pleaded a number of other issues, such as breach of the United Nations Convention on the Rights of Persons with Disabilities and the United Nations Convention on the Rights of the Child; and failure to take into account a

number of relevant matters (including those Conventions, the fact of non-consultation and the impact on the organisations which had been funded). These were not pursued in writing or orally. In relation to the Conventions, I do not consider that these would have assisted the applicant (considering, for instance, the observations of the Supreme Court in *R (SC and Others) v Secretary of State for Work and Pensions* [2021] UKSC 26, at paras [74]-[96] of the judgment of Lord Reed). The other grounds do not add materially to those already addressed above.

Conclusion

[79] I consider that much of the applicant's claim is justiciable, contrary to the respondent's first and most fundamental objection to the grant of leave in this case. However, the claim is academic in light of how things have moved on since the impugned decision and the applicant's (proper) concession that a quashing order is not a realistic outcome of the proceedings. I see no reason in the public interest why the court would proceed to determine the claim at a substantive hearing in those circumstances, particularly when a key element of the challenge (the section 75 ground) has already been examined to some degree by the ECNI in its recent process which was prompted by the *CLC* case and when this could in any event have been the subject of a complaint by DANI to the ECNI.

[80] Moreover, in light of the Court of Appeal judgment in the *McMinnis* case, it would be wrong to grant leave in relation to the section 75 ground because the applicant enjoyed an appropriate, and perhaps exclusive, alternative remedy. The irrationality, lack of consultation, and WF grounds are in any event unarguable for the reasons given above; and the applicant did not pursue the Convention grounds, as a result of the legitimate objection to its standing to do so.

[81] It should go without saying that the result of this application is no reflection at all on the good work of the applicant organisation which, I have no doubt, has been and continues to be of the very greatest benefit to many disabled people. Nor is the court concerned with the substantive question of whether the applicant, or other organisations, require or are deserving of more funding. It is clear that the Department regretted the reductions in CGF to which it felt bound to give effect. The conclusion I have reached is simply that, for the legal reasons I have set out, it is inappropriate to permit this case to proceed to full hearing. The application for leave to apply for judicial review is accordingly dismissed.