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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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AND IN THE MATTER OF AN APPLICATION BY FERMANAGH AND OMAGH DISTRICT COUNCIL AND BELFAST CITY COUNCIL FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT OF AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS

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Denise Kiley KC and Emma McIlveen (instructed by Belfast City Council Legal Services Department) for the Applicants
Tony McGleenan KC and Philip McAteer (instructed by the Departmental Solicitor's Office) for the Respondent

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SCOFFIELD J

Introduction

[1] The applicants in these proceedings are two district councils: Fermanagh and Omagh District Council (FODC) and Belfast City Council (BCC) (collectively, "the Councils"). They challenge a decision made by the Permanent Secretary of the Department of Agriculture, Environment and Rural Affairs (DAERA) ("the Department") to cease all funding for non-farmed animal welfare services delivered by district councils. The decision was taken by the Permanent Secretary during a period when the Northern Ireland Executive and Assembly were not discharging their functions. Leave to apply for judicial review was granted in relation to the challenge to that decision. In addition, the Councils also seek to challenge a later decision made by the Minister responsible for the Department, once a Minister had again been appointed. This aspect of the application was dealt with on a rolled-up basis.

[2] Ms Kiley KC appeared with Ms McIlveen for the applicants; and Mr McGleenan KC appeared with Mr McAteer for the respondent. I am grateful to all counsel for their helpful written and oral submissions.

Factual background

[3] Prior to 2012, no single organisation in Northern Ireland was wholly responsible for the enforcement of animal welfare legislation in respect of non-farmed animals. The Welfare of Animals Act (Northern Ireland) 2011 ("the 2011 Act") – discussed in further detail below – made significant changes to this area of regulation. It provided district councils with statutory enforcement powers in relation to non-farmed animals, where enforcement had previously been the responsibility of the police. Accordingly, pursuant to the Act, since April 2012 district councils have exercised responsibility for the welfare of non-farmed animals (including domestic pets, horses and circus animals). The applicants emphasise that there is no way for this animal welfare service to generate income or revenue itself.

[4] The various councils have adopted a collaborative model for the delivery of animal welfare services, operating together on a regional basis, as described in the applicants' evidence. FODC, the first applicant, is the regional lead council; and BCC, the second applicant, provides legal services to the various councils in relation to these functions.

[5] Although operational responsibility for non-farmed animal welfare now rests with councils, the respondent (and previously, its predecessor department, the Department of Agriculture and Rural Development (DARD)) wholly funded the councils' delivery of those services from 2012 up to the commencement of the 2023-24 financial year. Between 2012 and 2016, FODC entered into an annual memorandum of understanding (MOU) with the respondent. Inter alia, this MOU dealt with the financial arrangements for the delivery of the regional animal welfare service. In the event, no further MOU has been created since 2016. However, the last MOU entered into provided that it would "remain in force indefinitely unless superseded by another MOU or equivalent document or terminated by either party."

[6] Between 2017 and 2022, the respondent provided a total of £1.25 million per annum in funding to FODC as the regional lead council. In the financial year 2022-23, the respondent provided an additional sum of £110,000 to cover additional costs incurred by councils in the delivery of animal welfare services (giving a total allocation of £1.36 million for that financial year). It was anticipated that, had councils received similar funding in 2023-24, it would have had to have been raised further to meet ongoing staff costs.

[7] These proceedings firstly concern a decision taken on 23 August 2023 ("the first impugned decision"), almost five months into the financial year 2023-24. On that date, the respondent wrote to FODC advising that it was unable to provide funding to support councils in the delivery of services for non-farmed animal

welfare. This represented a cutting-off of the funding for that financial year mid-year. The applicants say that the decision was made abruptly and without consultation. It was communicated to councils on 23 August 2023 and had immediate effect. The Councils are concerned because this decision had significant, unplanned financial implications for them (and other councils in Northern Ireland) and has, on their case, put animal welfare services in a precarious position.

[8] Devolution was restored in February 2024. From that time, there has been a Minister in place who is in charge of the Department, Mr Andrew Muir MLA. Since his appointment there has been subsequent correspondence between the Minister and FODC. On 22 April 2024, the Minister informed FODC that it was not anticipated that funding would be available in future ("the second impugned decision"). The applicants also seek to challenge that decision taken by the Minister which, they contend, suffers from essentially the same legal flaws as infected the Permanent Secretary's earlier decision. However, the Minister also stated that, following an additional allocation of resources to the Department, he had decided that a one-off allocation of £625,000 would be made to councils as a contribution to their costs which had been incurred for delivery of non-farmed animal welfare enforcement services for the year 2023-24. Mr McGleenan referred to this as a transitional payment. I return to the potential significance of this below. It is clear, however, on the evidence available to the court, that the present position is that the Department no longer intends to continue funding the relevant services on behalf of councils.

[9] The above summary sets out a high-level overview of the facts relevant to this challenge. In order to understand and resolve a number of the arguments made by each party however, it is necessary to delve into a considerable amount of further detail in relation to a number of events.

Consideration of funding before the passage of the 2011 Act

[10] The issue of the provision of funding to councils to enable them to deliver the services (which would newly fall to them if the 2011 Act was passed as proposed) was considered in the course of the Assembly's scrutiny of the relevant Bill. The applicants rely upon a number of statements or representations made on behalf of the Department during this process to found claims of both procedural and substantive legitimate expectation in these proceedings. There were five relevant meetings of the Committee for Agriculture and Rural Development ("the ARD Committee") to which I was referred: those on 19 October 2010, 2 November 2010, 16 November 2010, 23 November 2010 and 30 November 2010 respectively.

[11] At the meeting on 19 October 2010, Mr Willie Clarke MLA, a member of the ARD Committee and himself a councillor, observed that district councils did not have the high level of experience in this area which the Department had. He thought that the new legislation would have "massive resource implications for local government" and asked what that would mean for local government. The

Departmental official giving evidence to the committee on that occasion (Ms Kate Davey) responded in two parts, firstly dealing with veterinary expertise and then turning to the issue of funding. On the latter of these, she said as follows:

> "The second issue is the general resourcing of councils. We advised the Committee on that. In the Budget 2010 exercise, we submitted a bid for £750,000 to help implement the powers on non-farm animals that we see transferring to councils. Obviously, that bid has not yet been decided."

[12] This issue was picked up again at the ARD Committee meeting of 2 November 2010, during which the committee was further considering the Bill. On this occasion, the Departmental official giving evidence (Ms McMaster), in the context of discussing one of the clauses which provided additional powers to council inspectors, made the following statement:

> "The Committee was concerned that clarification should be received in respect of funding for councils, should the Department's bid for budget in 2010 not be met. I can talk about that. We have submitted a bid for £760,000 of funding as part of Budget 2010 to assist the district councils to enforce new powers in the Bill in respect of non-farmed animals.
>
> We cannot pre-empt the outcome of the bidding process. The coalition Government has announced the outcome of the spending review, and the Northern Ireland Executive knows the budget available to it for the next few years and will assess the implications of the spending review and decide how to allocate the available money to Departments. The position is that the bid has been made. If, at this stage, the Department were to set out a contingency plan in case the bid was not met, it would undermine the bid."

[13] On being pressed by the Deputy Chairperson of the committee that ratepayers might be concerned that they would end up having to fund the cost of the service, Ms McMaster went on to say the following:

> "Absolutely. We met with representatives of district councils last Thursday, and the issue of funding for the work that will come to them was one of the concerns that they raised. We explained to them the basis of the bid and the volume of work that we estimate will be involved. We are aware that it is a concern for the councils that, if

> the functions become the responsibility of the councils, funding would be provided, given the current economic climate. If it were not provided, that would increase the pressures that councils are under."

[14] Ms McMaster went on to outline some further discussions that there had been, in particular with representatives of the Northern Ireland Local Government Association (NILGA) and the Society of Local Authority Chief Executives and Senior Managers (SOLACE). Ms Davey added that the DARD Minister was aware of the councils' and the committee's concerns in relation to funding issues and would consider them in the light of the outcome of the funding bid which the Department had made.

[15] At the next meeting, on 16 November 2010, the Minister herself attended before the Committee. Having been asked by the Chairperson of the committee to comment on the impact which councils' enforcement responsibilities would have on the ratepayer, the Minister made the following comments:

> "I am aware of the concerns that councils and Committee members have about the new functions passing to councils without funding. As my officials have advised, I have included a bid for £760,000 from the 2010 Budget to assist councils and funding at work. The purpose of that funding is to assist district councils to implement the new powers in the Bill around non-farmed animals.
>
> … To summarise; we have bid for £760,000 for councils over the next comprehensive spending review (CSR) to implement powers in respect of non-farmed animals."

[16] The Minister made clear that some functions – separate licensing and registration functions under what was then clause 12 – would be undertaken on a full cost recovery basis so that there was no financial burden on district councils or the ratepayer. The costs of those functions were therefore treated separately from those included in the Department's funding bid. When pressed by a committee member as to whether funding was "guaranteed over the next CSR period", the Minister offered the following clarification:

> "I have bid for £760,000 funding per annum over the next CSR period. I am making a commitment to the committee if that bid is not met, I will re-evaluate the priorities within my department's budget and will make that money available over the CSR period, so that councils will not be taking on the responsibility without the funding to go with it. That bid is for £760,000, and that is what I am prepared to put on the table."

[17] Therefore, despite the comment at an earlier meeting that it would "undermine the bid" if the Department set out a contingency plan for the event that its funding bid was not successful, the Minister in this meeting *did* commit to providing the necessary funding (£760,000 per annum) out of her own departmental budget if that was required. Significantly, however, that was only in respect of the CSR period, namely the years 2011-12 to 2014-15. That was underscored in the Minister's response to a further question shortly afterwards, in which she said:

> "The figure for funding that I quoted today is guaranteed over the CSR period. With the best will in the world, we will enter a new administrative period next spring. We will guarantee that funding over the course of the next CSR period, which is four years. I cannot make commitments for the next Minister and the one after that. I have already put my neck on the line on the issue."

[18] When the Minister referred to "a new administrative period next spring" that was a reference to the then forthcoming Assembly election in May 2011. Notwithstanding the Minister's observation that she could not make commitments for the next Minister, who may or may not have come from her political party, she did profess to guarantee funding for the next four years, ie beyond the election but only for that particular spending cycle. The respondent relies heavily on the Minister's observation that she could not make commitments for the next Minister or indeed the Minister to follow that.

[19] A week later, the Committee convened again, on 23 November 2010. The Minister was not present on this occasion, but Departmental officials were. In the course of her evidence Ms Davey said this on behalf of the Minister:

> "The Minister has also asked us to reiterate to the Committee the assurances in respect of the work transferring to the councils that she provided last week. She assures you that she will guarantee funding of £760,000 for the next Budget period."

[20] A committee member raised the concern that the £760,000 was "for the first year only", after which councils would be left on their own. Ms Davey clarified that that was not the case. This would not be a one-off payment but, rather, "the Minister has confirmed that she has guaranteed the funding for the Budget period", which was for four years. Ms McMaster on behalf of the Department clarified that this would be a payment of £760,000 per year. Ms Davey then provided the following additional clarification in a passage which is important in the context of this case:

> "Last week, the Minister said that if she was the Minister in four years' time she would, without a doubt, want to guarantee it. This is as far as she, in her period as Minister, can take something forward. It is the intention that this will roll forward. We can guarantee that, if the funding were to be changed by a subsequent Minister, the proposal would come back to the Committee before that would happen. However, the intention in putting that money in is that the process should roll on into subsequent comprehensive spending review (CSR) periods. It is outside the Minister's control to do that, but the Department can guarantee that it will come back to the committee to highlight, at least, the fact that there are likely to be changes, should such changes occur in the future."

[21] In response, the committee Chairperson observed that the guarantee of funding after the current CSR period was "worthless." Ms Davey took issue with that characterisation, making clear that it was the Department's "intention" that the funding would continue to roll on and reiterating that, "The Department can give a guarantee to the Committee today that it will come back to advise you should there be any change or any likelihood of change." As to what might happen if a different Minister was later appointed, Ms Davey said this:

> "If the Department gives a guarantee, it will come back to the Committee. Of course, the Minister can make whatever decisions he or she wishes to make, but at least the Department has given the undertaking to advise you of that. There would be an opportunity for the Committee to discuss the matter with officials and any subsequent Minister."

[22] It is clear from this that the Departmental officials were drawing a distinction between the ongoing provision of funding to councils (as to which no guarantee could be given, merely an assurance that the present Minister's *intention* was that funding would continue to be provided after the relevant CSR period) and, on the other hand, a commitment that, if the approach to funding was to change, the Department would advise the Committee in advance in order to provide it with an opportunity to discuss the matter (as to which a guarantee on the part of the Department could be given and would be honoured).

[23] This distinction was evident in Ms Davey's further answer, when pressed, as follows:

> "The Minister has given a guarantee [of funding] for four years. A Minister can make decisions but here she is also

> answerable to the Committee, whether he or she is the current Minister or the next Minister. That Minister would have to come back to the Committee and, at least, tell the Committee. The Minister can only guarantee that which is within her control."

[24] The final ARD Committee meeting addressing this issue was held on 30 November 2010. Mr Clarke MLA observed that retaining the annual £760,000 budget would be essential if councils were to take on the additional powers. He said that he understood that the Minister could only stand over her mandate and that it was difficult to look into the future; but said that councils needed a fall-back position and needed to know that, if the funding was later withdrawn, the Department would look at things again and take the relevant powers back 'in-house.' The Department was asked again what guarantees it could provide in relation to that. Ms McMaster on behalf of the Department responded as follows:

> "Concerns were raised on the security of the funding. We are aware of those concerns, but the Minister and the Department are committed to providing a baseline of £760,000 each year for the duration of the forthcoming Budget period. The Committee will be aware that the Minister has entered a bid in the Budget 2010 process for £760,000 a year to assist councils with that work. The Minister has given a firm commitment that the £760,000 will be allocated through the Department's budget even if that bid is unsuccessful and that that funding will be entered as a baseline for the next Budget period to assist councils with enforcement of the Bill.
>
> The Minister has asked us to highlight that, if there is any proposal to change funding in the future, the Committee would be advised of that and that it would be open to scrutiny by the Committee. The Department has no reason to believe that any future Minister would seek to change that position. The Welfare of Animals Bill has obtained cross-party support, and we do not anticipate that a Minister from a different party would change that provision in the future."

[25] On 22 February 2011 the Bill passed its final stage in the Assembly. During her final contribution to the debate, the Minister returned to the issue of funding and, inter alia, made the following statements:

> "The Chairperson of the Committee for Agriculture and Rural Development outlined the Committee's concerns that enforcement work for non-farmed animals would

> pass to councils. I fully appreciate that many Members are also councillors. Therefore, I understand the desire for reassurance about the enforcement powers for non-farmed animals passing to councils. As I have advised the House before, I do not intend to place an unfunded burden on district councils and ratepayers; hence, I have guaranteed annual funding of £760,000 for this Budget period. As Members will know from our parallel work on the Dogs (Amendment) Bill, the additional income that councils will receive from increased dog licence fees and fixed penalty receipts is estimated to be between £1 million and £1.3 million. That additional funding must be spent on dog warden services. However, it will free up substantial resources within councils, which could be redirected to animal welfare. I remind Members that enforcement agencies, including councils, must enforce the legislation, but will be able to exercise discretion as to how best to prioritise their actions within the available resources. In the current financial climate, it is unrealistic to expect unlimited funding for animal welfare. We all have to accept that cases will have to be prioritised."

[26] A short time later, the Minister added the following:

> "I want to restate the guarantees I gave previously to the Committee for Agriculture and Rural Development and to the House. My Department will provide annual funding of £760,000 over the next Budget period to allow councils to implement the provisions in the Bill that refer to non-farmed animals. The powers in the Bill for councils to appoint inspectors will not be enacted until 12 months after Royal Assent is granted so that there can be full engagement with councils. Therefore, they will have time to prepare for implementation."

The Memorandum of Understanding

[27] As noted above, an MOU was entered into between the Department and FODC on an annual basis up until 2016. In 2016 a further MOU was entered into which continues to set out the parties' mutual intentions. At section 3, the purpose of the MOU is described as being, inter alia, to establish a framework between the Department and the regional lead council; to clarify the cooperative approach to monitoring the implementation and enforcement of the 2011 Act; and to set out the financial arrangements. (There were a variety of different MOUs exhibited in the papers before the court, particularly in the affidavit evidence of the respondent. As well as the overarching MOU between the Department and FODC as the lead

regional council, it appears that separate MOUs were also entered into between the Department and sub-regional councils. There is some discrepancy between the wording and numbering of a number of these MOUs but the key provisions discussed below appear to be in materially similar form throughout.)

[28] The MOU also provides for the establishment of a Council Shared Board. This consists of a group of senior council officers brought together to make decisions in respect of aspects of animal welfare enforcement, including certain expenditure. The Department is represented on the Board at Grade 7 level. This is variously referred to as the Project Board (which is the terminology I have adopted in this judgment) or the Strategic Partnership Board. I understand that it was created in 2015 as a means of liaison between central and local government. Its terms of reference identify one of its key objectives as being, "To co-ordinate the passage of information to and from Councils and acting as a conduit for information flow to and from central government." The evidence is that finance is a standing item on the agenda at Project Board meetings.

[29] As to financial arrangements, section 9 of the MOU is potentially significant. It is in the following terms:

> "Confirmation of the amount of funding for Animal Welfare will be provided by DAERA to the Board in advance of the start of each financial year. A draft budget summary will then be submitted to the Department by the Board and the budget available split over the 5 regions based on previous experience. The Animal Welfare budget available will be managed via Memorandums of Understanding between the Department and the Regional Lead Council and sub-regional Councils. Due to variable sub-regional demands on the service, the use of the budget allocated will be flexible to allow for the movement of financial resources between sub-regions in year. Councils will ensure that the Service is delivered in the most efficient and effective manner to ensure value for money. Councils will monitor expenditure on a monthly basis and if there is a potential significant variation on the profiled spend, then they will liaise with DAERA and take appropriate action e.g. bid for additional resources, surrender monies, make necessary modification to service provision, etc."

[30] Additional provision in relation to funding allocation, in-year monitoring, finance timelines, quarterly profiles and quarterly claims are provided in sections 10-13 of the MOU. There is no guarantee of any particular level of funding from the Department contained within the MOU; however, it is fair to say that the MOU is drafted in the expectation that the Department would be providing funding to the

councils year-on-year. Yet further provision in relation to finance is contained at Annex A to the MOU. This emphasises the status of the Permanent Secretary of the Department as its Accounting Officer.

[31] Section 16 of the MOU deals with its legal status. It provides that the MOU "constitutes a statement of mutual intent between the Department and the Regional Lead Council" but "it does not constitute a legally binding obligation." The provision goes on: "While each Party has specific responsibilities arising from this MOU, it creates no rights in favour of either Party."

[32] The MOU was to be subject to biennial review but could also be amended in a variety of ways by agreement between the parties. Section 23 provides that the MOU may be terminated by either party with such termination being in writing and providing at least one month's notice of termination to the other party.

The period leading up to the Permanent Secretary's decision

[33] Having earlier sent correspondence seeking a funding decision well in advance of the commencement of the 2023-24 financial year, on 16 March 2023 FODC wrote to the Department asking for additional funding to properly resource the animal welfare service in that year. This was as a result of increased costs being experienced in relation to the seizure of animals and associated variable costs including the current collection of animals, veterinary and legal fees, litigation delays and public sector pay awards. Ms Godfrey, the Permanent Secretary of the Department, responded on 3 April 2023. This correspondence refers to the increase in funding which had been made available in the 2022-23 financial year (see para [6] above). It also said this (with the underlined emphasis in the original):

> "As I have explained in my letter to Roger Wilson in his capacity as chair of SOLACE, the unprecedented pressures on the NI block this year are well documented as is the uncertainty about the budget position for 2023-24. Until the Secretary of State confirms the DAERA budget, we are simply not in a position to advise on whether <u>any</u> funding will be available to support councils in discharging their responsibilities in this area.
>
> I am only too conscious that this uncertainty is far from ideal and I will ensure that you receive a fuller update on whether any funding is likely to be available for 2023-24 once we have the necessary clarity on budgets."

[34] The reference in this letter to Ms Godfrey's earlier correspondence to Mr Wilson is a reference to a letter of 30 March 2023. That letter was not directed specifically at the issue of animal welfare services funding but, rather, more

generally to the question of financial support which was available to councils from DAERA. The relevant portion is in the following terms:

> "This letter therefore explains that, within DAERA, we are not in a position to confirm any funding for councils for 2023-24 at this point and their ability to provide funding will be entirely dependent on the budgets set for us by the Secretary of State being at a sufficient level to allow funding for purposes beyond statutory and contractual obligations. On current predictions and bearing in mind the obligation I carry as Accounting Officer to ensure that the Department lives within the budget allocated to it, I also wanted to let you know that it seems at this time unlikely that we will be able to provide financial support to councils at the levels previously provided.
>
> I can assure you that, as soon as we know more ourselves, we will provide further clarity."

[35] Northern Ireland departments were later provided with allocations arising from the budget exercise overseen by the Secretary of State, in the absence of a functioning Northern Ireland Executive. He published a written ministerial statement on 27 April 2023 outlining the outcome of the 2023-24 budget process. For the Department, the relevant figure is the allocation for its Resource DEL, which was £579.8 million. This equated to a £3.5 million reduction.

[36] Once this allocation had been provided, Mr Andrews of the Animal Identification and Welfare Policy (AIWP) section of the Department sent an email to Mr Kennedy of FODC on 2 May 2023 in the following terms:

> "I have been informed that whilst DAERA has been provided with an allocation for 23/24, our own Finance Directorate has yet to finalise individual allocations for business areas, including our own.
>
> My understanding is that, like many departments, DAERA has faced a budget cut, when compared to previous years. Furthermore, the Department has a number of existing pressures which need to be accounted for, as well as inflationary pressures, within this smaller allocation. Therefore, at this stage, it is still a waiting game to see what monies will be allocated to Groups.
>
> So, in short, I have nothing concrete to advise you which I realise is frustrating for you and all councils. However, I

> will provide you with as much detail as I can, as soon as I hear."

[37] In May 2023, the Department launched the June Monitoring Round process. Significantly, on 19 May 2023, there was a submission from Roger Downey, the Finance Director of the Department, to the Permanent Secretary seeking approval of the Department's opening, internal 2023-24 non-ringfenced Resource DEL allocations, amongst other approvals. The timing of this submission was said to be urgent because, whilst indicative budgets had been provided to business areas, clearance by 25 May would allow the officials to confirm allocations and enable appropriate business planning for 2023-24. The submission drew attention to the £3.5 million reduction in the Department's non-HMT funded Resource DEL budget; and also, to two new statutory obligations which were being prioritised within the opening baseline (the Office of Environmental Protection and Mobuoy Remediation). The submission also identified the bovine tuberculosis (bTB) programme statutory obligation pressures and inflationary contractual pressures totalling £19.1 million. In relation to the bTB programme, bTB incidence was running at 10.8% which was the highest over 20 years. Taking account of all of the proposed actions, the Department was facing £19 million of opening Resource DEL residual pressures, ie a £19m shortfall, largely arising from the bTB programme and from inflation and increased running costs.

[38] As one of the ways to reduce these pressures the submission from the Finance Director contained the following recommendation (amongst others):

> "It is also proposed that the £1.3m Animal Welfare Funding to Councils budget should be reallocated to the statutory obligation pressure on the TB programme. Implementing the saving would not have any impact on this programme provided the councils use their own funding to cover the Animal Welfare funding as it is their statutory responsibility to undertake this work."

[39] The remainder of the deficit was simply to be managed through further internal monitoring rounds, with additional appropriate actions being considered in order to ensure that the funding gap was closed at the end of the financial year. In any event, the Minister was asked to agree that the £1.3 million Animal Welfare Funding to Councils budget should be reallocated to the statutory obligation pressure on the bTB programme. The submission of 19 May 2023 recognised that, with the exception of the proposed reduction in animal welfare funding to councils, all other savings were to be found from running costs.

[40] The Permanent Secretary responded to the submission by way of memorandum on 22 May 2023. She indicated that she was content to allocate the budgets largely as proposed but also provided comments on each of the individual

decisions for the record. This included the following decision in relation to animal welfare funding:

> "On the £1.3m Animal Welfare Funding, I am minded to agree your proposal that this funding is allocated to the statutory obligation pressure on the bTB programme but, before confirming this particular decision, I would like to receive a note from senior VSAHG colleagues providing an assessment of the risks and benefits of allocating this funding to bTB compensation rather than to assist councils. I should be grateful if Robert [Huey] would liaise with you and arrange to provide this assessment for my consideration so that I can finalise my decision-making on this proposal."

[41] An annex to the memorandum noting the various decisions similarly stated that the Permanent Secretary was "minded to agree" that the £1.3m Animal Welfare Funding to Councils budget should be reallocated to the statutory obligation pressure on the bTB programme "subject to receipt of a further assessment of the risks and benefits." This memorandum was copied to Mr Huey of the Veterinary Service Animal Health Group (VSAHG) within the Department, amongst other officials.

[42] A meeting of the Project Board was held on 6 June 2023. Both parties rely on what transpired at this meeting and upon the content of the minutes relating to it. It is significant because, at this stage, the Permanent Secretary had made her 'minded to' decision which is referred to above. Notwithstanding this, the applicants say that this proposed position was not disclosed to councils at the Project Board. They complain that it ought to have been, particularly when one of the purposes of the Project Board was to provide visibility and discussion in respect of just such matters. In the section of the meeting and the minutes dealing with statistics and finance, the Departmental funding for the financial year does not appear to have been addressed head-on. A variety of materials were discussed setting out the budget profile and the funding which was being sought; and reference was made to the earlier correspondence seeking a budget of £1.36 million.

[43] Such discussion as there was on this issue appears to have occurred at an earlier point in the meeting when an update was provided on a review report (relating, I was told, to a review of the legislation). The final draft report had been produced in relation to payment mechanisms and it was noted as follows: "However this has been shelved as no budget has yet been allocated for Animal Welfare." The ensuing discussion is minuted as follows:

> "Chris [Andrews, of the Department] advised the bid has been submitted in June monitoring round for £1.36M to take into account the uplift of salaries along with inflation

> which was supported by the Director and Chief Veterinary Officer and is subject to an ongoing decision making process. The 22/23 accruals will be funded. Chris advised has made a capital bid for six new Animal Welfare vans.
>
> Chris advised of issues with TB funding and that they have a statutory obligation to pay farmers so have to prepare for all eventualities. Fiona [Douglas, Western Region of Councils] questioned highlighted [sic] Councils concerned that we are nearly a full quarter in and he may have had to put other staff at risk. Fiona said that DFC provided 3 months' notice and would've anticipated same from DAERA particularly with a MOU in place. Fiona to email [Chief Executive] Alison McCullagh this afternoon to write to the Permanent Secretary.
>
> Helen [Morissey, Belfast City Council] advised of how other departments are already consulting with the council e.g. gritting of roads etc. Fiona advised Councils will be very wary of additional powers from central Government going forward due to the uncertainty of funding. Sally [Courtney, Eastern Region of Councils] to brief her Chief as Chair of SOLACE after meeting."

[44] On 12 June 2023, Mr Neal Gartland, the Director of the Animal Health and Welfare Policy Division (AHWPD) within the Department, responded to the Permanent Secretary's request for an assessment of the risks and benefits of reallocating the animal welfare budgets to the bTB programme. The submission referred to the ARD Committee's concerns, at the time of the passing of the 2011 Act, about the ability of local councils to fund the new animal welfare enforcement work. It referred to the earlier Minister's agreement to delay implementation for a time, and to her commitment to provide funding to local councils in the CSR period up to 2014-15. However, it did *not* refer to the commitment given by the Department to the ARD Committee at that time to bring the matter back to the committee if a significant change in the funding arrangements was being considered.

[45] Mr Gartland's submission provided further details about expenditure on budgets in this area in the intervening years, noting that the Department had maintained an annual resource budget of £1.25 million for non-farmed animal welfare since 2015-16, as agreed by successive ministers, and that the Department currently had appropriate approvals in place to continue funding at that level until 2023-24. The submission continued as follows:

> "10. Importantly, there is no obligation under the 2011 Act for the Department to fund local councils for animal

> welfare enforcement work. Nor is there any suggestion that this Departmental funding was intended to have permanency. Indeed, it could be argued that the support provided by the Department has enabled the councils to develop and embed the necessary structures for managing and administering the enforcement of animal welfare, which was the intention of the then Minister.
>
> 11. Nevertheless, the complete cessation of funding for the Council animal welfare service has the potential to attract significant negative criticism from Council management, key stakeholders and the media. Animal welfare remains an emotive issue and removing funding entirely would give councils little or no time to secure alternative funds. Although Councils are legally bound to provide an animal welfare enforcement service, it is likely that removing funding at this juncture would lead to disruption of the service. In practical terms, given that local councils have relied on this finance and have an expectation it will continue to be funded by the Department, there may be no public service to safeguard the welfare of domestic pets, horses and donkeys for up to a 12-month period."

[46] Mr Gartland went on to explain some possible practical implications. As councils would have no opportunity to consider transitional arrangements, they may choose to put animal welfare officers whom they employed (whose positions were wholly financed by Departmental funding) on protective notice and invoke redundancy proceedings. There would be limited capacity on the part of the councils to fulfil their statutory obligations under the 2011 Act, reducing the likelihood of breaches of animal welfare being recorded, investigated and prosecuted. It was identified that this may lead to adverse reaction, particularly where allegations of poor animal welfare occurred in very public circumstances, which was already a focus of attention from animal welfare charities and some media. It was noted that, at the Project Board meeting on 6 June, council officers had advised that there was no contingency within their budgets to fund animal welfare enforcement should the Department be unable to provide financial resource. Council officers had stated that council Chief Executives would seek a meeting with the Permanent Secretary as a matter of urgency to seek clarity on funding and to discuss potential transitional arrangements.

[47] The submission of 12 June concluded by drawing attention to the fact that the compensation bill under the Department's bTB programme was a statutory obligation, unlike the funding to local councils for welfare enforcement. It noted that any decision would require extremely careful handling and robust 'lines to take' on why the Department had had to take the decision. On my reading of the

submission, no benefits of the proposed decision are highlighted other than reducing the prospect of significant legal difficulties if the Department was unable to pay ongoing bills for bTB compensation.

[48] The Permanent Secretary responded to Mr Gartland on 26 June 2023 thanking him for his memo which she indicated she had found very helpful. The primary theme of this memo was the contrast between the *statutory* obligation to pay bTB compensation and the *discretionary* nature of funding for councils' animal welfare enforcement. The Permanent Secretary said it was not an easy decision but that she was struggling to see how the Department could deliver on the requirement to live within its allocated budget while delivering its statutory obligations at the same time as providing funding to councils which was not statutorily required. She indicated that she would like to be able to consider any associated section 75 and rural needs impacts before she made a final decision. This memo noted that the Department would also need to communicate with councils and Ms Godfrey therefore asked for a draft letter to be provided. This draft correspondence was to explain the difficult position the Department was in, to assure councils that the Department would communicate a decision as soon as it had been reached, but to also indicate that the Department could not at this stage guarantee that any funding would be available in the current financial year.

[49] In the meantime, there had been two further developments. First, a briefing session for DAERA stakeholders was held on 15 June via remote conferencing. Ms Courtney from Lisburn and Castlereagh City Council attended (in place of the Chair of SOLACE). Departmental officials give a presentation on the 2023-24 budget including the Block Resource DEL position, the impact on the Department's Resource DEL, with a £3.5 million cut and other inescapable pressures. It appears that in the question-and-answer session the issue of the impact on animal welfare funding for the incoming year was raised. An action point was that an update was to be provided to Ms Courtney on animal welfare funding (by Mr Huey of the Department). This rather suggests that a meaningful level of detail was not provided at the meeting.

[50] Second, as planned at the Project Board meeting on 6 June, Ms McCullagh (the Chief Executive of FODC) had written to the Permanent Secretary on 20 June 2023 on behalf of SOLACE. The correspondence objected that at the Project Board meeting Departmental representatives were unable to provide any assurance on the animal welfare budget for 2023-24, nor even a timeline as to when the Department would be in a position to inform councils of the outcome of budget decisions. The Permanent Secretary was asked if she could advise as a matter of urgency when the Department would be able to tell councils of the decision and a meeting was offered if that would be helpful. (It seems likely that the receipt of this correspondence is one of the reasons why, in her memo of 26 June 2023, the Permanent Secretary asked officials to provide her with draft correspondence in an attempt to improve the communication in this regard.)

[51] On 3 July 2023 Ms Godfrey responded to the SOLACE letter apologising for the delay, referring to the financial challenges which the Department faced, and indicating that it had been "continuing to explore all options to close the very sizeable affordability gap" which the Department faced. The letter concluded as follows:

> "Our starting point in managing the DAERA budget is to ensure that we can discharge our own statutory obligations and deliver our core public services and this process is requiring exceptionally difficult decisions to be made. As soon as we have completed the prioritisation work needed to ensure that we can deliver our own statutory obligations and have identified how best to close our current funding gap, we will provide further clarity to you.
>
> It would be sensible at this stage, reflecting the extremely difficult financial position we face, for local councils to work and forward plan on the basis that it is unlikely, unless the financial position changes, that the Department will be able to provide the level of discretionary funding that has been available in previous years."

[52] A further submission furnished to the Permanent Secretary on 9 August 2023 provided the outcome of the equality impact assessment and rural needs impact assessment, each of which was essentially neutral. The submission also referred to legal advice (as to which privilege has not been waived, and which is redacted in the copy of the document provided to the court); and to engagement with the Department of Finance Public Spending Directorate and the Department for Communities Local Government Division. The result of these exchanges was an indication from the Department of Finance that when a Northern Ireland department legislated to provide functions that will be carried out by local government, there was no expectation that funding would flow from central government to resource any such function; and the councils were autonomous and had the power to raise funds or borrow money themselves.

The Permanent Secretary's decision

[53] The Permanent Secretary's decision was communicated two days later, on 11 August 2023, in a memo from Ms Godfrey to Mr Gartland. She referred back to her decision of 22 May 2023 which had incorporated an in-principle decision to reallocate funding previously provided to councils for animal welfare enforcement purposes in order to ensure that the Department could meet its own statutory obligations in relation to bTB compensation. She referred to the further materials which had been provided to her, the exceptionally difficult budgetary situation which the Department faced and the Secretary of State's guidance for making

decisions under the Northern Ireland (Executive Formation, etc) Act 2022 ("the 2022 Act"). The memo confirmed the decision of 22 May and noted that the next step would be to communicate with local councils.

[54] As mentioned at para [7] above, the decision was communicated to councils in a letter of 23 August 2023, which was the catalyst for the present proceedings. This correspondence rehearsed the difficult circumstances and financial pressures. With the Department's work on resource allocation having been completed, it noted that the Permanent Secretary was very sorry to advise that the Department was "unable in this current financial year to provide funding to support councils in the delivery of their statutory responsibilities for non-farmed animal welfare." It nonetheless assured the councils that the Department continued to prioritise animal welfare and remained committed to discharging its *own* statutory responsibilities in respect of farmed animals under the 2011 Act. The letter concluded as follows:

> "I know the unavailability of DAERA funding for 2023-24 will come as disappointing news to council colleagues who are having to manage their own budgetary challenges. I will, however, keep the situation under review and will let you know if the budgetary position changes in the months ahead in a way that would allow me to revisit this decision."

[55] The applicants' evidence sets out a range of implications which they say the decision has had on councils. In the first instance, it has had significant unplanned financial implications for all councils in Northern Ireland. Since they had not budgeted to meet expenditure for animal welfare services in the 2023-24 financial year, each council has had to seek approval to provide unplanned funding towards the service to make up the shortfall in expected funding from the Department. The applicants say this approach has meant that the scale of previous delivery of animal welfare services could not be continued, with adjustments to response times and reduction in overall animal seizures (with the likelihood that animal welfare charities may be asked to take in more animals for re-homing).

[56] The second affidavit of Mr Kennedy, the applicants' deponent, provides evidence that the number of animals seized by councils and the number of prosecution actions commenced had both decreased in 2023 as compared to 2022. More improvement were notices issued in 2023 in an attempt to avoid more costly enforcement actions which might otherwise have been taken. Further procedures have been agreed by councils aimed at reducing costs incurred by animal welfare services. Filling two vacant animal welfare officer (AWO) permanent posts required to bring the service to its required staff quota was initially not possible, although a full complement of staff was achieved again in August 2024 on short-term contracts only. The contract for care and collection services was not renewed. Rather, services were simply being procured outside the earlier contract terms, which had unfortunately led to the contractor charging significantly increased costs. Some

regions were operating without a contract for veterinary service. As a result, animal welfare charities had reported an increase in the number of animals they needed to take in for rehoming.

[57] In further rejoining evidence on behalf of the Department, the respondent takes issue with the suggestion that the cessation of Departmental funding was solely responsible for the statistical trends upon which the applicants rely. The Department says that the nature of the service is demand-led and that there are many variables which could impact upon the statistics. Whilst that may be so, I accept the thrust of the applicants' argument and evidence that the removal of funding provided by the Department undoubtedly had some deleterious effect on councils' service provision in this area.

[58] The applicants' evidence is also that representatives from the Department have not attended any of the Project Board meetings since the Permanent Secretary's decision to withdraw funding, notwithstanding the provisions of the MOU which had not been formally terminated. Other than the additional injection of funding by the Minister (discussed immediately below), it appears that the Department has largely washed its hands of the previous cooperation under the MOU in respect of councils' responsibilities in this area.

The Minister's further decision

[59] Devolution was restored in early February 2024 and a Minister came into post at that point, towards the end of the 2023-24 financial year. On 15 March 2024 the Chief Executive of FODC wrote to the new minister urging him to reconsider the decision taken by the Permanent Secretary and to reinstate the full funding required by councils for the delivery of their animal welfare functions.

[60] The Minister made a further decision in relation to the funding of councils' animal welfare responsibilities which was communicated to councils on 22 April 2024. That decision had two elements. First, from additional funding which had been made available to the Department, the Minister allocated £625,000 to councils in respect of their animal welfare responsibilities for the 2023-24 financial year. Second, however, the Minister confirmed that it remained the position of the Department that it was not anticipated that funding would be available in future years.

[61] The correspondence on behalf of the Minister was in the following terms (in material part):

> "As you are aware, in the face of a difficult budgetary settlement, the Department took a number of decisions to help ensure we can discharge our own statutory obligations and live within our budget allocation. This meant that there was no funding available to local

> councils to support the service (which is not a DAERA responsibility) for the last financial year. This remains the position of Department. In the absence of any additional future funding from the Northern Ireland Executive to support you in delivering the service I do not anticipate, at this juncture, that finance will be available in future years.
>
> Nevertheless, I am conscious that my Permanent Secretary did give an assurance that, should budgetary position change for 2023/24, the Department would consider of any support could be provided to councils for that financial year.
>
> Following an additional allocation of Resource DEL to my Department by the Executive in February 2024 I have accordingly decided that a one-off allocation of £625k is now made available as a contribution towards costs incurred for delivery of the non-farmed animal welfare enforcement service for 2023/24."

[62] This additional funding was paid to councils by the end of June 2024 (representing approximately half of the costs which had been incurred by the councils by the financial year 2023-24).

[63] The court has again been provided with a copy of the relevant submission to the Minister which supported his decision in this regard. This is a submission from Mr Gartland of the AHWPG, which seeks approval that the additional funding of £625k which had been made available be allocated to councils for delivery of the enforcement service "as a transitional payment." The submission also sought the Minister's approval "that this decision is not revisited in future years (unless the bid for funding for 2024/25 is met by the Executive) as there is no statutory obligation for the Department to provide funding." When being advised as to the financial implications of the decision he was being invited to make, the Minister was told that the further payment would be "final one-off payment" and that, subject to the outcome of these proceedings, "it would not be intended to provide any further financial support to local councils for delivery of the service." In short, this was envisaged to be the last such payment made by the Department to support councils in the provision of the relevant services.

[64] On 15 August 2024 SOLACE received correspondence from the Department indicating that it would be unlikely that the Department would be in a position to provide any funding to councils for animal welfare enforcement in 2024-25. Although the Minister had endorsed a bid to the Executive for such funding for councils in the 2024-25 financial year, due to pressures on the NI block grant those bids had not been fulfilled.

Relevant statutory provisions

[65] Although the functions to be exercised by district councils which give rise to the funding issue at the heart of this case are contained within the 2011 Act, few of its provisions are directly relevant to the present dispute. Under that Act, the Department retains a number of functions. For instance, it may issue codes of practice for the purpose of providing practical guidance in relation to the Act under section 16. A range of powers are given to inspectors under the Act (as well as to constables). Insofar as inspectors' powers relate to non-farmed animals, they are persons appointed for that purpose by a council (see section 45(1)). Councils are given powers to prosecute proceedings for any offence under the Act by section 29.

[66] The respondent highlights that there is no obligation within the 2011 Act for it to fund councils for animal welfare work. It also places reliance on the Local Government Finance Act (Northern Ireland) 2011 which empowers it to make payments to local councils for such purposes and such amounts and subject to such conditions as it may determine, highlighting that this power is discretionary only. The relevant section of that Act is section 29. Grants made under that section must be made with the consent of the Department of Finance.

Summary of the parties' positions

[67] In their written submissions, the applicants have indicated that they do not invite the court to interfere with the respondent's budget management process, on the basis that they recognise that the respondent is faced with competing budgetary priorities and the question of where the correct balance lies is ultimately an issue of judgement for the respondent. Nonetheless, the applicants contend that the respondent has clearly failed to comply with its public law obligations in making the impugned decision.

[68] There are four strands to the applicants' challenge. The first is that they have a substantive legitimate expectation that the respondent would continue to fund the delivery of animal welfare services by councils, which the impugned decisions unlawfully frustrated. This is based on elements of what was said to the ARD Committee before the passage of the 2011 Act; the regulatory impact assessment (RIA) undertaken by the Department to support the introduction of the 2011 Act; the continuous practice of funding the services since 2012; and the MOUs entered into in this regard.

[69] The second strand relates to the procedure, or lack of procedure, by which the decision was taken. The applicants assert that no consultation whatsoever took place in advance of the decision, which was a breach of their procedural legitimate expectations. Relatedly, there is a complaint that neither decision was referred back to the relevant Assembly scrutiny committee for consideration. Third, the applicants contend that the decision was irrational (although this is linked to the Department's failure to consult) and left material considerations out of account. Fourth and

finally, the applicants rely upon the respondent's failure to undertake a fresh RIA before making the impugned decision.

[70] The respondent relies heavily upon the fact that its prior provision of funding to councils for these services was discretionary and not pursuant to a legal duty under the 2011 Act. It further notes that it cannot provide such funding without Department of Finance approval. In its submission the applicants have "over-priced" the exchanges which took place in the ARD Committee before the legislation was passed. The respondent raised a general point that, since the decisions under challenge in these proceedings, related to the allocation of scarce resources and the adequacy of funding provided by central government, they were in fact non-justiciable (relying on authorities such as *Re Hutton and Devlin's Application* [2024] NIKB 76 and *Department of Justice v Bell* [2017] NICA 69). Insofar as the decisions are justiciable, the respondent denies that there was any legitimate expectation that funding would continue indefinitely; or any procedural legitimate expectation which was breached, particularly in view of the fact that the Assembly was not sitting at the time of the first impugned decision. Finally, it contends that an RIA was not necessary in relation to the decision.

[71] I consider separately below each strand of the applicants' case.

The respondent's objection in relation to justiciability

[72] Before moving on to address the detail of the applicants' arguments, it is convenient to deal with the respondent's objection that, since the impugned decisions relate to the allocation of resources on the part of central government, they are not justiciable. I considered and rejected essentially the same argument in *Re Disability Action NI's Application* [2025] NIKB 39, at the first para [28] and at paras [33] to the second para [27]. (There is an obvious error in the paragraph numbering of the published version of that judgment.) I had also previously addressed a similar but less developed argument in *Re Mid-Ulster District Council's Application* [2025] NIKB 20 (where the respondent department did not contend that the subject matter of the application was *entirely* non-justiciable but, rather, argued instead for a very light-touch review insofar as any consideration of the merits of the decision was concerned: see paras [55]-[60]). Both of those judgments are supportive of the respondent's case to some degree, in that they are illustrative of the funding pressures which departments faced during the period of the suspension of devolution and the difficult decisions which such departments felt they had to take, often at short notice, in order to stay within their reduced budgets which had been set at Westminster.

[73] As I held in the *Disability Action NI* case, it does not appear to me that the context of the decisions renders them entirely non-justiciable. They are still amenable to judicial review on standard public law grounds. However, it is questionable whether an outcome-rationality challenge can get off the ground. At the very least, the court will engage only in an extremely light-touch review where

the challenge goes to the consideration which has been given to the decision by the department. It is not for the court to seek to allocate scarce public resources in a case such as this. However, nothing in the authorities relied upon by the respondent supports the view that a procedural challenge to the decision-making cannot be examined in substance, or upheld, by the court. In other words, although the decision is one for the Department, if it has failed to approach the *process* of decision-making in a lawful way, the matter can be sent back to it for further consideration. (I also note the Privy Council's conclusion at para [49] of *United Policyholders Group v Attorney General of Trinidad and Tobago* [2016] 1 WLR 3383, which was relied upon by the applicants, to the effect that the economic implications of assurances given by a decision-maker ought not to go to the question of whether the assurances are capable of giving rise to a legitimate expectation but, rather, are relevant to the separate question of whether it is permissible for the decision-maker to depart from any assurances previously given.) I accordingly consider that it is appropriate to deal with the substance of the applicants' grounds of challenge.

Legitimate expectation generally

[74] In their written and oral submissions, the parties have addressed in some detail the authorities in recent years which discuss whether and when the courts will enforce a legitimate expectation, whether substantive or procedural, which has been engendered by a public authority but then later frustrated by its actions. I do not propose to rehearse, or set out in detail, the content of those authorities for present purposes.

[75] Nonetheless, a helpful starting point is the judgment of Laws LJ in *Bhatt Murphy (a firm) v The Independent Assessor* [2008] EWCA Civ 755. That describes the three basic categories of legitimate expectation: first, the paradigm case of a procedural expectation, where the public authority has promised to follow a particular procedure, usually involving consultation; second, a substantive expectation, which is more rare and more rarely enforced, where the authority has promised to preserve an existing policy; and, third, the secondary case of procedural legitimate expectation where, without any promise, the public authority has established a policy distinctly such that it must consult those entitled to rely on its continuance before effecting any change. In each case, the overarching rationale for the courts' supervision is the duty to act fairly and the court will intervene only where breach of the legitimate expectation is so unfair as to amount to an abuse of power.

[76] In this case the applicants contend that they enjoyed both substantive and procedural expectations. The former requires a clear, unambiguous and unqualified commitment to provide a substantive benefit. The latter can arise in different ways but guarantees only a particular process, rather than the continuation of the substantive policy.

Substantive legitimate expectation

[77] I accept the thrust of the respondent's submission that there is nothing in the statements made by or on behalf of the Department in the 2010-2011 period of consideration of the draft Bill which can amount to a substantive legitimate expectation on the part of the applicants that funding would continue to be provided by the Department indefinitely or even for any particular period beyond (at most) the end of the CSR period referred to by Minister Gildernew. In my view, it is clear that her evidence to the ARD Committee was to the effect that she would guarantee the provision of funding to councils from the Department for four years only and at a level of £760,000. This was a clear guarantee from the Department, even in the event that its bid for central funding for this purpose from the Department of Finance was not met. The Minister was frank in observing that, after that, matters would be beyond her control.

[78] Both the Minister and her officials, on a number of occasions and at different committee meetings, made clear that the guarantee of funding was only for the then current CSR period or Budget period. The Minister hoped and intended that further funding would be provided following that period and indicated that the spending would be "entered as a baseline for the next Budget period" (ie that the Department would ask to be allocated the funds for that purpose). In my view, however, there is no proper basis for considering that a substantive legitimate expectation was raised as to the continued provision of funding beyond the relevant budget period. On the contrary, the Minister was careful to hedge her assurance so that this did not arise. After the conclusion of the CSR period to which Minister Gildernew was referring, the guarantee offered was of a different character, namely that the issue would be brought back to the ARD Committee for further scrutiny and debate.

[79] In a nuanced argument, Ms Kiley submitted that there was a substantive legitimate expectation that funding would continue to be provided by the Department unless and until the matter was brought back to the committee by a new Minister in order for it to scrutinise a proposal that funding be withdrawn. I cannot accept the submission, which seeks to elide the distinction between a substantive and procedural legitimate expectation. I discuss below whether there was a promise of a particular process; but any such promise related to the *procedure* to be followed and not to the ongoing provision of funding at a particular level pending referral back to the committee. One must keep separate the concepts of a promise of the *substantive* benefit being continued (the funding) and the promise of a *procedural* benefit (referral back to the Committee): see *Bhatt Murphy*, at para [33]. If a promised procedure is not provided, that can give rise to a valid challenge and the potential of a remedy being granted by the court. It does not generally constrain the authority as to the ongoing provision of the substantive benefit *pending* the adoption of the promised procedure.

[80] Assuming that a legitimate expectation of such a type (which would be a hybrid between a procedural and substantive legitimate expectation) could arise and

be enforced, I nonetheless do not consider that such an expectation arose in the present case. In any event, I also would not have held that it was so unfair as to be an abuse of power for the Permanent Secretary to have made a funding decision for 2023-24 without referral back to the relevant scrutiny committee. There were particularly difficult circumstances which arose in this case, involving both a requirement to deliver significant savings (by virtue of the budget allocations determined in Westminster) and the fact that the devolved institutions were not operating as intended at that time (including the absence of any relevant Assembly scrutiny committee). As the respondent forcefully submitted, at the time of the first impugned decision, there was no Assembly scrutiny committee in place because of the collapse of devolution. I reject the argument that, in those circumstances, there was nothing the Department could do other than continue the funding to councils at existing levels. To so hold would unduly tie the Department's hands in terms of its own budget management and would also fly in the face of the purpose and effect of the 2022 Act.

[81] The applicants also relied upon the statement in the submission from Mr Gartland of 12 June 2023 that councils would "have an expectation [the service] will continue to be funded by the Department." In my judgment, this observation does not bear the weight which the applicants sought to place upon it. It is in my view simply to be read as an observation, as a matter of fact, that councils would be expecting funding to continue; rather than using the term in a technical legal sense or referring back to any particular commitment which had been made previously. (Having said that, I do not consider the observation made in the previous paragraph, that there was not "any suggestion" that the Departmental funding "was intended to have permanency" to be an accurate or fair summary. When Minister Gildernew and her officials were addressing the ARD Committee that was *precisely* the intention which was being communicated, albeit the Minister recognised that she could give no guarantee in this regard.)

[82] I also consider that reliance on the 2011 RIA in advance of the coming into force of the new Act is misplaced in this regard. It noted that councils would have new costs associated with the enforcement of the provisions in respect of non-farmed animals under the Act and went on to say: "Annual funding of £760k has been guaranteed for Councils to enforce the Act…" This was a statement of the position outlined by the then Minister. It was plainly not meant, or communicated to the councils, as a promise that such funding would continue indefinitely, over and above the limited commitment which the Minister had expressed to the ARD Committee and in the Assembly chamber.

[83] Even if there was a substantive legitimate expectation, I can see no reasonable prospect of the court holding that it was so unfair as to be an abuse of power to fail to meet this expectation in the circumstances. That would involve the court inserting itself into the detail of resource allocation in circumstances where the Permanent Secretary (as she was required to do in the absence of a Minister) considered it to be in the public interest for her to make the decision. She had regard to the relevant

guidance issued by the Secretary of State for such decisions during that period, including the primary principle that departments must control and manage expenditure within the limits of the appropriations set out in the Budget Acts and the Secretary of State's statement, as well as the imperative to comply with statutory obligations. The respondent's reliance on what is said at para [76] of Lord Kerr's judgment in *Re Finucane's Application* [2019] UKSC 7 is apposite.

[84] For those reasons, I reject the applicants' case that the Permanent Secretary or Department was legally bound to continue funding the relevant services in the 2023-24 financial year either at the level set out in the preceding year or earlier preceding years.

[85] I would simply add that the ARD Committee was, as it transpires, right to be concerned, perhaps even suspicious, about whether funding from central government to district councils would continue into the future beyond the limited guarantee provided by the Minister at the time. However, there is force in Mr McGleenan's submission that it was open to the Assembly, had it wished, to amend the Act to provide a duty upon the Department to fund these services, albeit they would be delivered by councils.

Procedural legitimate expectation

[86] The applicants' case is stronger, in my judgment, when one turns to the issue of procedural legitimate expectation. There are really three elements to this aspect of the applicants' case: (1) that there was a guarantee that the matter would be referred back to the relevant Assembly scrutiny committee in advance of a change in the Department's approach to funding, such that the Permanent Secretary and/or the Minister was required to bring the matter back to the committee before making any significant decision about the non-continuation of Departmental funding for the relevant services; (2) that, even in the absence of a functioning committee, that guarantee incorporated a promise that councils would be given notice of any such proposed decision and an opportunity to respond in advance; and (3) that, in any event, there was a right to notice and consultation before the policy changed as a matter of fairness (under the 'secondary case of procedural legitimate expectation' outlined in the *Bhatt Murphy* case).

The paradigm case – the promise of committee referral

[87] At the meeting of 23 November 2010, it was made clear on behalf of the Department that there was a guarantee that, if the funding would be changed by a subsequent minister, the proposal would come back to the committee before that would happen (see paras [20]-[23] above). At that meeting the fact that this was a guarantee which the Minister could give – notwithstanding that she could not make any guarantees about the future continuation of funding – was emphasised on several occasions. Although formulated in a number of different ways, the guarantee was given that if the funding position was to be changed by a subsequent minister,

the proposal would come back to the committee before that would happen or to highlight that there was likely to be changes. This would enable the committee to object, to seek to persuade the minister to relent, or to (presumably) to try to explore other ways in which replacement funding might be secured.

[88] This position was reiterated at the following meeting on 30 November 2010 when the relevant Departmental official indicated that the Minister had asked her officials to highlight to the committee that if there was any proposal to change funding in the future, the committee would be advised of that and would be able to scrutinise it (see para [24] above). Again, the reference to there being a "proposal" to change the funding is indicative that the committee would be informed in advance.

[89] I have concluded that this commitment clearly gives rise to a legitimate expectation that, if there was to be a change to the position whereby the Department provided funding for the relevant services on the part of councils, this would be brought back to the ARD committee (or its successor) in advance for its input. The promise was expressly made, and repeated, with the clear intention that it would bind the Department in future.

[90] Was it then an abuse of power for the Permanent Secretary in mid-2023 to fail to bring the matter back to the committee? In my view, it was not. This is for the simple and prosaic reason that no such committee was in existence at that time for the Permanent Secretary to engage with. One might argue that the commitment given to the committee in 2010, when examined closely, related only to a decision by a future minister (ie that it pre-supposed the normal operation of the devolved administration at the time of any further decision). The assurances repeatedly refer to what a subsequent minister might do. Whether the expectation was limited in that way or not, however, I do not consider that it was an abuse of power for the Permanent Secretary to fail to consult a committee which was not in existence.

The asserted right of notice and consultation pursuant to the express promise

[91] Probably for the above reason, Ms Kiley advanced a more sophisticated argument that the promise of further committee referral in advance of a decision to de-fund council animal welfare services was, in fact, simply a means of ensuring (or included a correlative guarantee) that the councils themselves would be given notice of any proposed change in that regard and an opportunity to make representations in relation to the proposed decision. Notice to the committee would obviously involve a public indication of what was in contemplation, which would allow other interested parties to engage with the Department about its proposed change in funding arrangements.

[92] For its part, the respondent relied strongly upon the fact that the commitment referred to at para [89] above was clearly given to *the committee*, rather than to the councils.

[93] Whilst the applicants' argument in this regard is superficially attractive, I do not consider it can be upheld. It is clear that the committee members were advancing concerns on the part of the councils (and indeed that some of the committee members were themselves councillors). Nonetheless, the specific guarantee provided by the Minister on behalf of the Department was simply that *the committee* would have an opportunity to have input into any change of approach on the part of the Department. Whilst a side-effect of that may have been that interested councils also therefore had an opportunity to engage, this was not the purpose or aim of the guarantee which the Minister gave in 2010. In short, I do not consider that the applicants in these proceedings can rely upon the guarantee of committee consultation as effectively representing a guarantee of a quite different procedural benefit, namely notice and consultation to the councils themselves. If any such right or expectation existed, that would have to arise on a different legal basis.

The secondary case – the requirement of prior notice and the opportunity for representations

[94] The applicants also contend that they were entitled to notice of the proposed decision and an opportunity to make representations on the basis of what is referred to as the secondary case of procedural legitimate expectation. Ms Kiley eschewed any reliance on simple common law fairness. This aspect of the case is founded on the category of legitimate expectation discussed in paras [32], [41]-[42] and [47]-[49] of the judgment of Laws LJ in *Bhatt Murphy*. It is an exceptional case where notice and/or consultation will be required as a result of the consistent application of a policy in the absence of any express promise that a particular procedure will be followed in advance of any change (see para [41]); and this will not often be established (see para [49]). As Laws LJ stated at para [49] of his judgment:

> "Accordingly for this secondary case of procedural expectation to run, the impact of the authority's past conduct on potentially affected persons must, again, be pressing and focussed. One would expect at least to find an individual or group who in reason have substantial grounds to expect that the substance of the relevant policy will continue to enure for their particular benefit: not necessarily for ever, but at least for a reasonable period, to provide a cushion against the change. In such a case the change cannot lawfully be made, certainly not made abruptly, unless the authority notify and consult."

[95] Although not without some hesitation, I have concluded that the applicants did have a legitimate expectation of notice and consultation on the above basis in the advance of the first impugned decision. There are a number of factors which are relevant in this regard. First, the relevant services had been fully funded by the Department for some 12 years in advance of the change of position in August 2023.

Although this had in practice been dependent upon the provision of central funds to the Department by the Department of Finance, when the initial arrangement came into force the Department had made clear that (at least for several years) it was prepared to provide the funding from its own budget, if necessary. Second, it is relevant that the Department had committed to providing notice to the Assembly scrutiny committee in advance of any change of approach to funding. Although, as I have held above, the applicants cannot rely upon this directly as against the Permanent Secretary, it is relevant more generally to the fairness of changing the Department's approach without *any* notice or consultation. Third, the group of those affected (the district councils providing the services) is limited. Fourth, and perhaps most persuasively, both the establishment of the Project Board and the terms of the MOUs expressly envisage the free and frank exchange of information between the Department and the councils for the purpose of ensuring transparency and participation in relation to funding discussions and decisions. Authority establishes that the existing relationship and context between the parties can be relevant to the establishment of this category of procedural legitimate expectation (see *R (Luton Borough Council) v Secretary of State for Education* [2011] LGR 553, at paras [93]-[96], where, much like the Project Board arrangements in this case, there was ongoing dialogue on a 'partnership' basis). Although the respondent is of course right that there is no statutory obligation upon the Department to provide this funding, that is the very reason why the arrangements for coordination and transparency manifest in the MOU and Project Board were so important. Set in that particular context, I consider that the applicants had substantial grounds to expect that they would be notified and consulted before the Department changed its approach.

[96] Mr McGleenan's submission that the Department would therefore have to consult anyone who might be affected by the budgetary allocations is in my view overstated. As indicated above, Ms Kiley did not rely upon a common law obligation of consultation. Rather, she confined her case to one of secondary procedural legitimate expectation on the basis of the conglomeration of circumstances highlighted above. In addition, on the facts of this case, the submission to the Permanent Secretary of 19 May 2023 made clear that, with the exception of the proposed reduction in animal welfare funding to councils, all other savings would be found through running costs. The animal welfare funding was uniquely hit. The procedural expectation I have found is not one of general or public consultation but, rather, a right on the part of a limited and focused group (the beneficiary councils) to notice and an opportunity to make representations in advance of the change in approach.

[97] In light of the finding at para [95] above, the next questions are whether the Department either *discharged* its obligation to give notice and permit the councils an opportunity to make representations in advance of the Permanent Secretary's decision *or* whether it was not so unfair as to amount to an abuse of power for it *not* to discharge that obligation in the circumstances of the case by reason of some other countervailing public interest. The respondent relied upon each of these points in

the alternative. I do not consider that either would represent a basis for failing to uphold the applicants' secondary procedural legitimate expectation for the reasons given below.

[98] As to the giving of notice, the respondent relies upon the correspondence from the Permanent Secretary of 3 April 2023 (see para [33] above). This appears to have been viewed as having discharged any obligation of consultation at the time itself. That appears from section headed "consultation and engagement" at the end of the 19 May 2023. After dealing with ongoing consultation and engagement with senior management of budget holders across the Department itself, the submission turns to the issue of animal welfare funding to councils. It refers to the Permanent Secretary's letter to the Chair of SOLACE of 30 March 2023 and the letter to the Chief Executive of FODC dated 3 April 2023. The submission concluded on this issue with the following statement:

> "Councils have therefore been made aware of the potential change in funding of their statutory duty in relation to animal welfare and no responses of concern have been received."

[99] It is right that, at that point, the 3 April correspondence indicates that the Department was not in a position to advise on whether any funding would be available. However, the letter referred to the fact that there was uncertainty which was far from ideal and included a commitment that the Permanent Secretary would "ensure that you [FODC] receive a fuller update on whether any funding is *likely* to be available for 2023-24 once we have the necessary clarity on budgets" [italicised emphasis added]. In communications around that time, there was a variety of other indications that the Department would provide as much further clarity as it could and would do so as soon as it could. For instance, in the letter to SOLACE of 30 March 2023 (referred to in the Permanent Secretary's letter of 3 April), Ms Godfrey had indicated that as soon as the Department knew more itself, it would provide further clarity (see para [34] above). To like effect, in Mr Andrews' email of 2 May 2023 he indicated that he would provide as much detail as he could, as soon as he heard (see para [36] above). In summary, that correspondence merely indicated that there was uncertainty, meaning that the Department was not in a position to take any decisions (even in principle), but that it would engage further with the councils when it had more information.

[100] In my judgment, the respondent failed to do so, in a manner which was unfair, once it was in possession of further information but in advance of the ultimate decision communicated on 23 August 2023. In particular, after the respondent had received notice of its budget allocation on 27 April 2023, and the Permanent Secretary had made her decision in principle on 22 May 2023, there was no communication of that in-principle decision nor opportunity for the applicants or councils to engage in relation to it, notwithstanding that the Permanent Secretary had herself determined that further information about the risks of the decision

would be of assistance. The applicants say that these could have been, and should have been, the subject of consultation with them. The impression I have gleaned from the evidence is that, between 22 May 2023 and 23 August 2023, the Department was careful *not* to give notice of its proposed decision until the position had been finalised and was a *fait accompli*.

[101] Reliance was placed by Mr McGleenan on the content of the minute of the Project Board meeting of 6 June and the indication that people would have to "prepare for all eventualities." (It is unclear whether this is a reference to the Department, to councils, or both; although I assume, taking the matter at its height in support of the respondent's case, that it was an indication that councils should prepare for all eventualities). However, there is nothing to suggest that the DAERA representative advised the Board that the Department was, at that time, considering a specific proposal to cease funding for the animal welfare service entirely. Moreover, it was after this, in Mr Gartland's submission of 12 June 2023, that he observed that councils still had "an expectation" that the animal welfare service "will continue to be funded by the Department." It was also before the meeting of 6 June that Mr Andrews had indicated that he would provide as much information as soon as possible. Notwithstanding that assurance, there is no evidence to suggest that the substance of the Permanent Secretary's minded-to decision of 22 May was disclosed at that meeting. In my judgment, this is what should have been disclosed (at that meeting or at or about that time) in order to meet the legitimate expectation which had been engendered of notice and an opportunity to make representations before the change in approach from previous years.

[102] In my view, the Permanent Secretary's letter of 3 July – indicating that all options were still being explored, that further clarity would be provided after further prioritisation work had been completed, and that the Department would be unlikely to be able to provide "the *level* of discretionary funding" which had been available in previous years – was also far from frank and candid. As the Department accepts (and as expressly noted, for instance, in the memorandum from Ms Godfrey to Mr Gartland of 11 August 2023) an in-principle decision had been taken as early as May to reallocate funding previously provided to councils to the bTB compensation scheme so that *no* funding would be available to support the relevant animal welfare services. There is no reason why that proposed decision could not have been disclosed to councils in advance of it being finalised in order that they could participate in the further consideration the Permanent Secretary wished to undertake.

[103] When asked why the Department could not simply have informed the councils of the decision in principle which was taken in May, the respondent's response was simply that there was no obligation to consult and that it would be unworkable to have to consult everyone who would be adversely affected by multi-faceted budget allocations. Whilst those may be legitimate objections to a case based on common law fairness, they do not arise in a case such as this where,

exceptionally, a secondary procedural legitimate expectation arose to consult a small number of interested persons.

[104] For the above reasons, I consider the applicants have, exceptionally, established a procedural legitimate expectation on the secondary basis outlined in *Bhatt Murphy* in the circumstances of this case. As in the *Luton Borough Council* case, there was no pressing reason why, despite the difficult circumstances in which the Department found itself as a result of the budget allocations made at Westminster, the applicants could not have been given a short opportunity to press their case before the Permanent Secretary made her final decision. There was no overriding public interest which precluded any consultation at all. Such an opportunity could readily have been provided between 22 May 2023 and 23 August 2023. On the available evidence, I consider that the Department was seeking to withhold its proposed course from the applicants rather than giving them notice of it in order to enable informed representations. I conclude that this frustration of the expectation was so unfair as to amount to an abuse of power in the circumstances.

What, if anything, should the court now do about that?

[105] In summary, I find that, as at 23 August 2023, the first impugned decision was taken in breach of the applicants' procedural legitimate expectation that they would be given notice of a significant proposed change of approach – from full Departmental funding of the relevant services to no Departmental funding at all – and a proper opportunity to make representations in relation to that. Whether or not that would actually have made a difference at the time, had such an opportunity been given, may be a matter for debate. However, on the basis discussed above, the applicants were at least entitled to an opportunity, on a more informed basis, to seek to persuade the Permanent Secretary to change course.

[106] What, if anything, however, should the court do about that at this stage? We now have the benefit of hindsight in relation to later developments, in particular the Minister's decision of 22 April 2024. That decision was taken after these proceedings had been commenced and after the Department was therefore aware of the full detail of the applicants' concerns and the claimed impacts of the first impugned decision. Having taken those matters into account, the Minister (with the benefit of additional monies which had been allocated to the Department) took a further decision in relation to the 2023-24 financial year. As noted above, this resulted in a provision of a further tranche of funding to councils for animal welfare services in respect of that year in the sum of £625,000.

[107] Notwithstanding the finding at para [104] above, it would clearly be inappropriate in my view for the court to seek to quash the Permanent Secretary's decision. There are two reasons for this. First, it was plainly superseded and replaced by the Minister's later decision, which was taken with the benefit of all (or at least many) of the points which the applicants would have sought to make to the Permanent Secretary had notice and an opportunity for representations been

afforded. Second, as indicated in the remedies ruling in the *Mid-Ulster District Council* case (*Re MUDC's Application (Ruling on Relief and Costs)* [2025] NIKB 36, at paras [21]-[23]), where the relevant financial year has now passed, it is generally unrealistic to expect that the allocation can be quashed and revisited. In such a challenge it may simply become too late to unwind what has been done in respect of a previous financial year.

The promise of committee referral revisited

[108] That leads me to the challenge to the second element of the Minister's decision, namely that, in future years, the Department would not be providing funding to councils for their animal welfare services; that is to say, that the payment made in respect of the 2023-24 financial year was the final such payment which would be made (see paras [61] and [63] above).

[109] It is clear from the terms of the Permanent Secretary's letter setting out the first impugned decision that it related solely to funding for the 2023-24 financial year. Indeed, it would be odd if the Permanent Secretary was purporting to make a decision with greater temporal effect, given the possibility that this would fall to be reconsidered by a minister if and when appointed to the Department. Accordingly, the decision which was made by the incoming minister in 2024 was of triple significance: first, revisiting the position as to the allocation for the 2023-24 financial year which had just ended; second, as to potential allocation of funding for the incoming 2024-25 financial year; but, third, in terms of setting a new baseline and/or the provision of funding in future years. Not only did it supersede the Permanent Secretary's earlier decision for the then current financial year but it was indeed much more significant. It was clear from the communication of that decision, the underlying submission (which is now available to the court), the 'transitional' nature of the payment of £625,000 and the respondent's submissions that it represented an indefinite cutting-off of Departmental funding for the animal welfare services provided by councils. From then on, this would be the starting position, unless, at some unspecified date in the future, the Executive decided to provide the Department with additional funding for this purpose (presumably without the Department having requested it, since the intention was plainly not to do so in future, assuming the bid for 2024-25 was not met).

[110] I have reached a different conclusion in relation to this decision, compared with the Permanent Secretary's earlier decision, in respect of the failure to consult the Committee. When the Minister's decision was taken in April 2024 to end the provision of Departmental funding indefinitely, there *was* of course an appropriate Assembly scrutiny committee. It too was back up and running. A decision of this nature – namely that the Department would no longer seek to fund the provision of animal welfare services by councils – was precisely the type of decision in respect of which Minister Gildernew's procedural guarantee was provided. It was a shift in policy of a different order from the decision made by the Permanent Secretary in the circumstances of mid-2023. The ARD Committee was assured that such a decision

would not be taken unless the proposal had been brought to it in advance for scrutiny and input. That did not happen, notwithstanding that the Minister's decision was taken after the lodging of these proceedings when it was clear that the applicants relied upon the clear and unequivocal representation made in 2010 that such a decision would be brought back. No good reason has been given as to why this proposed decision was not referred to the relevant scrutiny committee for its input.

[111] The respondent relied upon the fact that the Minister, since his appointment, had appeared before the Committee on a number of occasions, including on 6 March 2024 (before his decision in April); that the Minister and the Director of Finance had since appeared before the Committee; and that, at no point, had the Committee taken issue with the reduction or ending of funding in respect of council provision of animal welfare services. However, none of that represents the Department delivering upon the procedural guarantee which was previously given on its behalf. The Department ought to have raised the proposed decision for future years with the relevant committee, set out its reasoning for its proposed course and permitted the committee an opportunity to debate the matter and make representations. It is not for the court to speculate upon whether this may have resulted in some form of different decision.

[112] Despite the fact that the promise was not made directly to the councils, that is not determinative of their ability to rely upon it. The principle of good administration – by which public bodies ought to deal straightforwardly and consistently with the public – generally requires that, where a public body has given a plain assurance, it should be held to it (see *Bhatt Murphy*, at para [30]). The councils were plainly aware of the promise to bring the matter back to the relevant Assembly committee, which was made in order to protect their position. It is entirely reasonable for them to rely upon it. I also do not consider that the provision of an element of 'transitional' funding is adequate to mitigate the breach of the procedural promise. (Mr McGleenan relied upon what was said by Sedley LJ in para [70] of the *Bhatt Murphy* case in this regard.) That payment was made retrospectively in respect of the previous financial year, rather than prospectively. More fundamentally, however, it was no replacement for the specific guarantee of Assembly input and scrutiny before a significant change of policy in this area in respect of future funding.

[113] For those reasons, I conclude that the applicants succeed in their case of paradigm procedural legitimate insofar as it relates to the Minister's decision, in principle, that Departmental funding would no longer be offered to councils for the relevant services in future years. That is precisely the type of decision which the Department previously promised would not be taken without advance notice to the committee and an opportunity for the committee to engage with it.

Irrationality

[114] The applicants also relied upon irrationality as a ground of challenge, although this was essentially an argument that the respondent had failed to take relevant considerations into account by failing to consult them or others. I do not consider that this argument, as framed by the applicants, adds anything material to the applicants' other procedural challenges.

[115] The Department's replying evidence set out the context in which the Permanent Secretary made the first impugned decision, namely that of having to make a range of difficult choices about how to allocate a constrained budget. A range of additional difficult decisions were taken at the same time, whereby different business areas had funding reductions imposed (including reducing running costs across all groups in the Department) and various staffing costs were reduced. The Permanent Secretary sought additional information before making her final decision. As noted above, there is very limited if any scope for an outcome irrationality challenge to succeed in this context. I dismiss this ground of challenge.

The failure to conduct a Regulatory Impact Assessment (RIA)

[116] Finally, the applicants also alleged illegality on the part of the Department as a result of its failure to carry out an RIA in order to inform its decisions. This aspect of the challenge is pleaded and was addressed (albeit briefly) in the applicants' skeleton argument, although it was not pressed in oral submissions by Ms Kiley.

[117] The relevant guidance ('Northern Ireland Regulatory Impact Assessment Guidance (Version 1.3, July 2023)) includes the following helpful summary of when an RIA will be required (with bold emphasis in the original):

> "**When to do an RIA**
>
> An RIA should be considered for every policy and strategy as part of good policy making in line with the Policy Development Cycle (see the Policy Link section on The Executive Office website and in particular – A Practical Guide to Policy Making in Northern Ireland.) It may well be that in certain circumstances it can be screened out at the screening stage in the policy making process. For any policy that has an impact (positive or negative) on the wider business community in Northern Ireland then an RIA must be developed. **This includes both legislative and non-legislative policies**.
>
> **For the purposes of this guidance it is assumed that use of the terms 'business community' and 'wider business**

community' means all businesses, charitable, voluntary and social enterprise organisations.

Regulation can be defined as: a rule or guidance with which failure to comply would result in the regulated entity or person coming into conflict with the law or being ineligible for continued funding, grants and other applied for schemes. This can be summarised as all measures with legal force imposed by central government and other schemes operated by central government.

This guidance is an instrument of good governance and will not give rise to an expectation in those persons/organisations to be impacted by a particular policy or regulation being developed, that an RIA would be appropriate if the policy/regulation initiative will have an impact on a sector of the wider business community in Northern Ireland. Officials should however be very clear on their stated reason for opting to screen out doing an RIA. Furthermore officials should be mindful of options available to stakeholders (such as Judicial Review) if they believe strongly enough that an RIA would have been appropriate in individual cases."

[118] There are cases where an RIA will be required and, potentially, extremely significant for the decision at hand. In my view, this case is not one of those. I have had regard to the detailed guidance provided by the Department for the Economy to other departments, cited above. The respondent notes that this guidance states that an RIA is not required in certain cases. In particular, in a section immediately following that quoted above, entitled 'When not to do an RIA', it provides that:

"If, as a result of undertaking the screening process, it is considered that the policy does not have an impact (positive or negative) on the wider business community then an RIA does not need to be completed. It is, however, appropriate to publish the reason for screening out preparing an RIA as part of the consultation document in order to afford stakeholders the opportunity to consider the reason and if necessary challenge it. To have this aspect of policy development challenged at this stage by external stakeholders is more advantageous and effective than risking the potential of a legal – and more costly – challenge post-implementation.

It should be noted that the RIA process is not necessary for certain identified activities:

- where policy changes will not lead to costs or savings for business;
- road closure orders; or
- changes to statutory fees by a predetermined formula such as the rate of inflation."

[119] It is the Department's position that the cessation of central government funding to councils to support animal welfare enforcement will not lead to costs or savings for business, such that an RIA was not required. The applicants argue that the Department has failed to appreciate that the change in policy has the potential to impact animal welfare charities and businesses across Northern Ireland with whom councils enter into arrangements for veterinary and care and collection services. They complain that the failure to conduct an RIA, or even an RIA screening exercise, means that the Department did not have all the relevant information before it to allow it to make a rational decision.

[120] FODC leads on the procurement and operation of the contract arrangements for care and collection services for four of the five regions. Northern Region has its own contract with a care provider. In relation to veterinary services, each region has their own contract (although in may cases this is with the same contractor). The applicants' evidence is that assistance from animal welfare charities has been a major factor in keeping care and collection costs as low as possible. Informal arrangements were in place with a number of local animal welfare charities in relation to accepting animals that have been voluntarily surrendered to animal welfare. For its part, the respondent takes issue with the applicants' suggestion that the removal of DAERA funding will mean that councils and animal welfare charities will incur greater costs to look after animals involved in welfare cases.

[121] In the absence of fuller argument and evidence on this issue, I have not been persuaded that the applicants should succeed in relation to it. In the first instance, it is not clear to me that the decisions at issue are regulatory within the meaning of regulation which must be assessed under the guidance. The guidance is also drafted with a view to it not giving rise to any legitimate expectation that an RIA will be conducted. I doubt whether that is legally effective, at least in every case (as the guidance itself seems to recognise in its reference to potential judicial review). However, I do not consider that it was irrational for the Permanent Secretary *not* to conduct an RIA in advance of her decision in August 2023, although there appears to be no obvious reason why one could not have been requested, at least in some form, when the Permanent Secretary had requested a number of other assessments. I am troubled by the failure to conduct even a screening exercise in relation to an RIA, assuming that the decision would have been caught by the guidance. However, in light of the respondent's evidence, it seems likely that the Department would have concluded that there was insufficient likely impact on businesses to warrant a full RIA at that stage. Again, that view is unlikely to have been irrational. I bear in mind that, from her perspective, the Permanent Secretary was only making a decision in

respect of one financial year and was not purporting to set out any new policy direction.

[122] There is perhaps a greater argument that the Minister's decision in April 2024, which would have more lasting significance in this area and was not simply limited to one financial year, ought to have been the subject of an RIA. However, I am still in doubt as to whether a decision of this nature falls within the scope of regulation which must be assessed under the relevant guidance. In addition, at the time of the Minister's decision, in light of the impacts highlighted by the applicants in their evidence, such impacts on business as may have been in issue were likely to have already materialised. Generally, I considered the applicants' evidence on this aspect of their claim to be fairly speculative.

[123] In the circumstances, I do not find this aspect of the applicants' case to be made out.

Conclusion

[124] In summary, the applicant's claim based on substantive legitimate expectation fails. I do, however, consider that the applicants had an expectation of being provided with advance notice and an opportunity to make representations before funding from the Department for their animal welfare services was discontinued. I would therefore have been inclined to set aside the Permanent Secretary's decision on this basis. However, it seems to me that that decision has plainly been superseded by the later decision of the Minister (which also embraced a funding decision for the 2023/24 financial year, as well as a more general decision about the ongoing position in the future). For the detailed reasons given above, I conclude that the making of that decision by the Minister without giving advance notice to the relevant Assembly committee was in breach of a procedural legitimate expectation. I grant leave on that aspect of the applicants' claim (which was dealt with on a rolled-up basis) and will allow the application on that basis. The remaining aspects of the applicants' claim are dismissed.

[125] I will hear the parties on any remaining issues of relief and on costs.