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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY THE CHILDREN'S LAW CENTRE TO APPLY FOR JUDICIAL REVIEW

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Fiona Doherty KC and Christopher McCrudden (instructed by the Children's Law Centre) for the Applicant
Dr Tony McGleenan KC and Philip McAteer (instructed by the Departmental Solicitor's Office) for the Department of Finance
Donal Sayers KC and Bobbie-Leigh Herdman (instructed by the Equality Commission) for the Equality Commission for Northern Ireland

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Hearing dates: 7 October 2025, 8 October 2025, 6 November 2025 and 10 November 2025

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McALINDEN J

Introduction

[1] The applicant in this case is the Children's Law Centre, a charity and company limited by guarantee which seeks to protect the rights of children in Northern Ireland and in doing so provides legal advice and advocacy services. It does so in accordance with the principles set out in the United Nations Convention on the Rights of the Child ("UNCRC").

[2] In this application to apply for judicial review, it seeks to challenge the legality of the process which led to the enactment of the Northern Ireland Budget (No. 2) Act 2023 ("the 2023 Act"), an Act of the Westminster Parliament which received Royal Assent on 18 September 2023.

[3] The applicant seeks to impugn the failure of the Department of Finance (DoF") to conduct a cumulative equality impact assessment ("CEQIA") into the overall impact the budgetary provisions would have on children and young people.

[4] The cornerstone of this challenge is section 75 of the Northern Ireland Act 1998 ("the NIA") which obliges public authorities to have due regard to the need to promote equality of opportunity, including between persons of different age, in carrying out their functions. In particular, it is contended that this "due regard" duty encompasses an obligation to carry out a CEQIA when formulating budgetary proposals.

[5] The matter came before Humphreys J ("the judge") by way of a leave application on 9 November 2023. The learned judge delivered a reserved decision on the issue of leave on 31 January 2024 in which he granted leave in respect of the challenge against the DoF, the Northern Ireland Office ("NIO") and the Equality Commission for Northern Ireland ("ECNI") but refused leave in respect of the challenge against the Secretary of State for Northern Ireland ("SoSNI"). The judgment is reported at [2024] NIKB 4.

[6] Leave was granted in respect of the following issues:

(a) whether the DoF and the NIO in the absence of a functioning Northern Ireland Executive were obliged by section 75 of the NIA to conduct a CEQIA when formulating budgetary proposals; and

(b) whether the ECNI was obliged by the Schedule 9, para 1 to the NIA, to provide accurate and consistent advice on this issue.

[7] The argument that the first issue referred to in the previous paragraph was academic was rejected by the judge (see para [87] of his judgment). The litigation concerned events which occurred during a period when there was neither a functioning Northern Ireland Executive nor an Assembly. Consequently, the SoSNI, having received advice from the DoF and the NIO, was tasked with presenting a draft Northern Ireland budget to the Westminster Parliament. This led to the enactment of the 2023 Act, as described in para [2]. On 3 February 2024, the Northern Ireland institutions were restored. A Speaker of the Assembly was elected and First and deputy First Ministers were appointed and this led to the appointment of Ministers to each of the Northern Ireland departments.

[8] On 9 April 2025, the judge approved an order which disposed of the litigation against the ECNI and dealt with issue (b) set out in para [6] above. The ECNI accepted that it was not open to it to fail to offer advice in accordance with Schedule 9, para 1(b) to the NIA on the issue of which, if any, public authorities have a function or functions in connection with the Northern Ireland budget that would require them to conduct

equality impact assessments of the cumulative impacts of the draft budget as part of that public authority's obligation to comply with their duties under section 75(1) NIA.

[9] The ECNI then agreed to produce advice on those very matters. After consultation with the DoF, the ECNI published its advice on 1 October 2024 on the obligations that section 75 of the NIA places on those exercising functions in relation to the setting of the Northern Ireland budget, in particular, the DoF and, in the absence of functioning Northern Ireland institutions, the NIO.

[10] Without going into the terms of the advice in detail, what this advice sets out is, in essence, an affirmative answer to the question raised in issue (a) in para [6] above. As it is for this court to determine what the answer is to the question raised in issue (a) in para [6] above, this court takes the view that the agreed declaration and the advice that resulted from the making of that declaration which resolved the dispute between the applicant and the ECNI in this judicial review application does directly trespass into the issue set out in para [6](a) above. The views of the ECNI on the para [6] (a) issue are not determinative or even persuasive. Those views are noted and no more than that. It is for the court to determine issue (a) in para [6], guided by the recognised rules of statutory interpretation, avoiding the potential pitfall of giving undue weight to the views of ECNI whether expressed in this or any other advice note.

[11] At the hearing of this matter before me, some considerable emphasis was placed upon the nature, extent and outcome of subsequent discussions between DoF and ECNI in relation to the para [6] (a) issue. I do not consider it helpful to delve too deeply into the progress or outcome of those discussions. I simply note that the matter was reviewed on a number of occasions by the judge and that various position papers were submitted to the court. At a case management review on 13 March 2025, the judge dismissed the application against the NIO and determined that the application should proceed to a substantive hearing of the para [6](a) issue with the DoF as the only remaining respondent. On 2 May 2025, the ECNI sought leave from the court to intervene in the case and the court granted this application.

[12] There is a further, further, revised Order 53 statement in this case which is dated 26 March 2025. In it, the applicant challenges the legality of the process adopted by DoF leading to the announcement by the SoSNI of the setting of a budget for Northern Ireland for 2023-2024 in a Written Ministerial Statement to the House of Commons on 27 April 2023, which was subsequently incorporated into the 2023 Act. The applicant does not challenge the 2023 Act, nor does the applicant seek to challenge the overall sum of money allocated to SoSNI by HM Treasury. The applicant does not seek to challenge the decisions taken by the various Northern Ireland Departments in the spending of the sums allocated to each department. The applicant's challenge is to the decisions taken by DoF in deciding how to exercise its function of advising and making recommendations to the SoSNI as to how the sum of money allocated by HM Treasury would be distributed amongst the Northern Ireland Departments. In particular, the applicant targets the failure of the DoF to produce advice on the

cumulative impacts on equality of opportunity of the draft budget prior to the SoSNI's and Parliament's approval of the draft budget.

[13] In essence, it is the applicant's case that the DoF, in failing to provide such advice, was acting unlawfully in that it was acting in a manner which was incompatible with its section 75 NIA duty. The applicant now seeks a declaration that the DoF is a public authority carrying out functions relating to Northern Ireland within the meaning of section 75(1) NIA in providing advice and making recommendations in respect of the preparation of the Northern Ireland budget, including the preparation of the Northern Ireland budget for 2023-2024. It seeks a further declaration that, in respect of the preparation of the Northern Ireland budget for 2023-2024, the DoF failed to have due regard for the need to promote equality of opportunity in breach of section 75(1) NIA, in failing to advise and make recommendations as to the cumulative effects on equality of opportunity of budgetary proposals taken as a whole, and has thereby acted unlawfully.

[14] The applicant's case is that section 75 NIA places a statutory obligation on designated public authorities to ensure that they carry out their various functions in respect of Northern Ireland with due regard to the need to promote equality of opportunity between all people regardless of their gender, age, race, marital status, sexual orientation, level of disability, religious beliefs, political opinions or whether they have dependants or not. These same public authorities are also required to have regard to the desirability of promoting good relations between persons of different religious beliefs, political opinions or from different racial groups.

[15] The applicant argues that in providing advice and in making recommendations in relation to the Northern Ireland draft budget, the DoF was and is carrying out a function within the meaning of section 75 NIA. It is argued that the phrase having due regard to the need to promote equality of opportunity in this context means that the DoF when providing advice and in making recommendations in relation to the Northern Ireland draft budget, must also advise as to the cumulative impact on equality of opportunity of the draft budget. The duty imposed by section 75 NIA on the DoF goes beyond simply identifying what other departments have identified as the actual or potential equality impacts of budgetary proposals relating to each department taken separately. In essence, providing advice to the Minister of Finance on what should go into the draft budget is clearly a function caught by section 75 NIA and that "functions" in section 75 NIA go well beyond statutory functions, powers or duties. Reliance is placed on the case of *R (Jewish Rights Watch Ltd) v Leicester City Council* [2018] 4 All ER 1040 in which the English Court of Appeal held that the Public Sector Equality Duty ("PSED") applied in relation to the passing of a resolution by the assembly of councillors as this constituted the exercise of functions by the relevant council. This was the case even though the resolution would not have any substantive effect on the way in which the council carried out its procurement functions.

[16] It is argued that the DoF, by simply compiling the other Northern Ireland departments' indicative section 75 NIA assessments, made as part of their departmental returns to the DoF, and providing these separate assessments during the budget setting process, is failing to meet its section 75 NIA obligation to provide a CEQIA in respect of the overall budget proposals at a strategic level. The section 75 NIA duty requires the DoF to provide evidence of the cumulative effects of the draft budget proposals on particular groups, including children.

[17] It is further argued that the section 75 NIA duties in respect of budgetary decisions must be fulfilled before any concluded decision on the budget is made. It is not sufficient to carry out such an assessment after the relevant decisions have already been made. It is argued by the applicant that this case is not about the enforcement of Schedule 9 NIA obligations. Rather it is about determining whether in law this function of the DoF is within the ambit of section 75 NIA and is, therefore, caught by Schedule 9 NIA.

[18] It is argued that public bodies in the UK and domestic courts are very familiar with the concept of CEQIAs, including the three-dimensional nature of such assessments. Such assessments, it is argued are commonly undertaken in the disparate spheres of environmental protection and social welfare provision and reform. The three dimensions are the aggregative, interactive and longitudinal dimensions. The aggregative dimension involves the simple summing up of impacts from multiple policies on a specific group. The interactive or synergistic dimension considers how different policies might interact with each other, where the combined effect is different from the simple sum of the individual effects. One policy might exacerbate the effects of another, creating a synergistic reaction (a downward spiral of impacts on a vulnerable group). The longitudinal dimension involves tracing the compounding impacts of different policies over an extended period. It looks at the totality of interactive impacts over time which may last for many years beyond the life of the original actions that introduced them. This approach is particularly relevant in social welfare contexts, where an initial disadvantage can increase the risk of further disadvantages in the longer term.

[19] It is further argued that neither the indicative impact assessments carried out separately by each Northern Ireland government department prior to the approval of the draft budget nor the subsequent preparation of separate equality impact assessments by each department after it has been informed of its definite budgetary allocation are adequate substitutes for the CEQIA of the draft budget taken as a whole that should have been performed prior to the budget being finalised.

[20] It is argued that cumulative assessments of the impact of budgetary proposals are not only feasible but are now frequently considered to be a normal part of the budgetary process both at national and local levels in other jurisdictions with similar legal systems to NI. The applicant seeks to rely on the courts' interpretation of the Public Sector Equality Duty ("PSED") in England and Wales as an aid to the interpretation of section 75 NIA. It is argued that the obligation to have "due regard"

involves both procedural and substantive aspects. Reliance is placed on para [26] of *Bracking v SoS for Work and Pensions* [2013] EWCA Civ 1345 where emphasis is placed on the need to perform an assessment before any decisions on policy are taken.

[21] It is argued that by virtue of the Schedule 3 to the Public Services Ombudsman Act (Northern Ireland) 2016, the DoF is a public body for the purposes of section 75(3)(b) NIA. It is further argued that the word "functions" in section 75 NIA has its ordinary meaning, bearing in mind the assistance on interpretation to be gleaned from the interpretation section of the NIA (section 98) where one reads that: "functions" includes powers and duties, and "confer", in relation to functions, includes impose. Section 75(1) of the NIA limits the carrying out of functions by a public authority to "functions relating to Northern Ireland …"

[22] Reliance is also placed upon the provisions of section 64 NIA, the Departments (Northern Ireland) Order 1999 (Article 3) ("the 1999 Order") and the Departments Act (Northern Ireland) 2016. Section 64 of the NIA lays down the procedure for the approval of budget proposals by the Northern Ireland Assembly. Before the beginning of each financial year, the Minister of Finance is obliged to lay a draft budget before the Assembly, defined as a "programme of expenditure proposals for that year which has been approved by the Executive Committee in accordance with para 20 of Strand One of the Belfast Agreement." The Assembly may then, with cross-community support, approve the draft budget with or without modifications.

[23] It is argued that one of the roles of the DoF is to advise the Minister in respect of all areas of budgetary responsibility exercised by the Minister. Article 4(1) of the 1999 Order provides that the "the functions of a department shall at all times be exercised subject to the direction and control of the Minister." Article 4(3) of the 1999 Order provides that:

> "Subject to the provisions of this Order, any functions of a department may be exercised by –
>
> (a) the Minister; or
>
> (b) a senior officer of the department."

Article 4(6) then provides that:

> "nothing in the Order affects the operation of any statutory provision or rule of law which authorises or requires any functions of a department to be exercised in a particular manner or by particular persons."

[24] It is argued by the applicant that Article 4(6) of the 1999 Order is important in that section 75 NIA is a statutory provision that clearly "requires" the functions of the

department "to be exercised in a particular manner." The applicant's argument is relatively straightforward. The Minister of Finance has to prepare a draft budget which has to be brought to the Executive Committee. The Executive Committee may or may not approve this draft budget. If approved by the Executive, the Minister of Finance has to lay the approved draft budget before the Assembly. The Assembly may then, with cross-community support, approve this draft, with or without modifications.

[25] It is argued that the Minister cannot just conjure up a draft budget (which necessarily involves the proposed allocation of specific sums representing portions of the overall grant provided to Northern Ireland by the Westminster Parliament to Northern Ireland government departments) without considerable input from his department. The provision of such input by the department constitutes a function of the department which is subject to the section 75 NIA duty. The function that the applicant highlights as attracting the attention of section 75 NIA is not the function of finalising the draft budget, bringing the draft budget to the Executive or bringing the approved draft budget to the Assembly; it is the function of providing advice to the Minister of Finance about the contents of the draft budget before the draft is finalised and provided by the Minister to the Executive Committee, and, in particular, the cumulative impact that such draft proposals would have, paying due regard to the need to promote equality of opportunity. It is argued that when the DoF officials are exercising this advisory function, it matters not a jot whether the person being advised is the Minister of Finance or the SoSNI, the function is the same function in reality and the section 75 NIA duty applies equally in both instances. It is argued that by interpreting functions as including the giving of budgetary advice and making recommendations to the Minister or the SoSNI during the budgetary drafting process, the applicant is reflecting the views of the courts in England and Wales in respect of the budget setting process both at a national level (*Fawcett Society v Chancellor of the Exchequer* [2010] EWHC 3522 at paras [6] to [10]) and at a local level (*R (DAT and BNM) v West Berkshire Council* [2016] EWHC 1876 (Admin) at para [45] and *R (KE) v Bristol City Council [2018]* EWHC 2103 at para [60]).

[26] In relation to the meaning of the phrase "have due regard to the need to promote equality of opportunity …", the applicant argues that this means that a public authority must "take active steps to consider in good faith what it can do to further a goal that is considered to be of significant public importance …" (see para [98] of the applicant's skeleton argument). It is argued that the goal extends well beyond the simple non-discrimination obligation (whether that discrimination is direct or indirect). It is argued that the caselaw in respect of the equivalent duty which applies in England and Wales by virtue of section 149 of the Equalities Act 2010 ("EA 2010") (in particular, the *Bracking* case at para [26]) supports this interpretation. It is argued that Maguire J in *Re Toner's Application for Judicial Review* [2017] NIQB 49 at para [139] considered that the *Bracking* principles set out in para [26] of that judgment should apply to the interpretation of section 75 NIA and, in particular, whether the public authority has complied with its "due regard" obligations under section 75(1) NIA. It is argued that the *Bracking* principles apply to the DoF's functions in relation to the

provision of advice and guidance to the Minister or the SoSNI during the preparation of the draft budget. In essence, it is the applicant's case that the section 75(1) NIA obligation to have "due regard to the need to promote equality of opportunity" requires the DoF to assess the impact of its advice and recommendations to the Minister or SoSNI and further requires that the cumulative effect of proposals be analysed and given appropriate weight when formulating its advice and recommendations.

[27] In addition to relying upon the *Bracking* case, it is argued that the recent UKSC case of *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16 at paras [148], [153] and [238] confirms that the section 149 EA 2010 duty requires an impact assessment to be performed.

> "[148] The PSED in section 149 of the EA 2010 also requires public authorities or other persons exercising public functions to have due regard to the need to advance equality of opportunity between people with and without protected characteristics, taking account of any particular disadvantages, needs or low participation levels, and to foster good relations between such groups. These provisions are directed at increasing equality of opportunity (see the long title to the EA 2010) and are concerned with the same sort of group disadvantage as the provisions dealing with indirect discrimination, whether referable to differences between different groups of people, or to societal attitudes or structures.
>
> [153] … As we have said, the duties imposed by the EA 2010 require an ability to anticipate that particular rules, policies or practices might affect those who share a protected characteristic and have distinct needs or interests in consequence. Those upon whom the EA 2010 imposes duties (the duty-bearers) must regulate their conduct and practices to avoid unlawful indirect discrimination. Organisations considering taking appropriate positive action measures must be able to identify membership of a disadvantaged group sharing a particular characteristic. Public authorities subject to the duty in section 149 (the PSED) must be able to identify differently affected groups if they are to be able to analyse the features which may disadvantage some groups over others or affect relations between them, in order to analyse the impact of their policies.
>
> [238] As we have explained, all organisations subject to the PSED must have due regard, in considering their rules,

> policies or practices, to the matters set out in section 149, undertaking where appropriate an equality impact assessment in order to understand how and to what extent the policy in question will affect specific groups with different protected characteristics. Organisations and bodies that are subject to the PSED are required to collect data in order to fulfil this duty."

The applicant also relies on paras [8] to [14] of this judgment for its elucidation of the principles of statutory interpretation.

[28] Para [238] of the judgment refers to "undertaking where appropriate an equality impact assessment in order to understand how and to what extent the policy in question will affect specific groups with different protected characteristics." I note the qualified nature of the duty which is clear from the use of the phrase "where appropriate." The applicant also seeks to rely on the judgment of Fordham J in *R (on the application of Rowley) v Minister of the Cabinet Office* [2021] EWHC 2108 (Admin) at para [40] in order to assert that the type of equality impact assessment that is required to fulfil the section 149 duty is one that looks at cumulative impacts:

> "[40] The principles concerning compliance with the PSED are contextual in their application: *Powell* paragraph [44]. The extent of the "regard" which must be had is what is "appropriate in all the circumstances" and "weight and extent of the duty are highly fact-sensitive and dependent on individual judgment" (*Hotak* paragraph [74]). In the present case the following linked themes, regarding the principled application and enforcement of the PSED duty, are of particular significance: (i) importance; (ii) proactivity; and (iii) rigour, together with the recognised virtues of (iv) evidence-based thinking; and (v) legal sufficiency of enquiry."

[29] It is the applicant's contention that the need for "evidence-based thinking" and "rigour" will in some circumstances mean that a public authority must undertake work to assess the cumulative impact of related matters in order to be compliant with section 75 NIA. If the public authority does not have all the relevant material to enable it to assess the cumulative impact of related matters, there may exist a duty to acquire this material by engaging in consultation with appropriate organisations outside government to enable the public authority to be better informed about the impact of policies on different groups. The applicant seeks to rely on the case of *R(K) v Secretary of State for Work and Pensions* [2023] EWHC 233 (Admin) where such a duty of inquiry was engaged. Referring back to para [26] of *Bracking*, the applicant notes that the point about the duty to make inquiries including engaging in a consultation process is further reinforced by the reference and approval of a passage from *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201

(Admin) (Divisional Court) and that this same point is made in the later case of *R (on the application of Bridges) v Chief Constable of South Wales* [2020] EWCA Civ 1508 at paras [175] and [181].

> "[175] For present purposes we would emphasise the following principles, which were set out in McCombe LJ's summary in *Bracking* and are supported by the earlier authorities:
>
> (1) The PSED must be fulfilled before and at the time when a particular policy is being considered.
>
> (2) The duty must be exercised in substance, with rigour, and with an open mind. It is not a question of ticking boxes.
>
> (3) The duty is non-delegable.
>
> (4) The duty is a continuing one.
>
> (5) If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required.
>
> (6) Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then it is for the decision-maker to decide how much weight should be given to the various factors informing the decision.
> …
>
> [181] We acknowledge that what is required by the PSED is dependent on the context and does not require the impossible. It requires the taking of reasonable steps to make enquiries about what may not yet be known to a public authority about the potential impact of a proposed decision or policy on people with the relevant characteristics, in particular for present purposes race and sex."

[30] The core argument made on behalf of the applicant is that in compiling the other NI departments' indicative section 75 NIA assessments which were prepared as part of their departmental returns, and then providing these departmental indicative section 75 NIA assessments to the NIO during the budget setting process and prior to

the decision being made by the SoSNI as to how to allocate specific sums to individual NI departments, the DoF failed to meet its separate and additional obligations to prepare and provide its own equality assessments of the "overall budget proposals at a strategic level" and thus failed to provide "evidence of cumulative effects" of the budget on particular groups. It is argued that the absence of such a CEQIA both led to, and compounded, the failure of the NIO and DoF to consult on any such assessment and to mitigate any effects that such a cumulative assessment would have identified. It is argued that in circumstances where SoSNI was tasked with introducing a draft budget in which allocations to individual departments could be predicted to have multiple aggregative and interactive effects on one another, an assessment of their individual impact alone cannot be sufficiently rigorous to discharge the section 75 NIA duty of "due regard." Only an assessment of the cumulative impact of such allocations will result in a proper appreciation of their potential impact. The applicant argues that any subsequent impact assessments prepared and published by the individual departments after they have been notified of their departmental allocations is too late to affect the decision making process and cannot absolve the DoF of its statutory duty to prepare a CEQIA before any decisions on allocation are made either by the Executive Committee or the SoSNI.

[31] It is the applicant's submission that any CEQIA should be carried out and published before the Minister has made his recommendations to the Executive Committee. This is to enable interested individuals and groups to make appropriate responses to the proposals and for any responses which have been made by interested bodies and individuals to be available to the Minister before any recommendations are made to the Executive Committee. It is argued that the duty to perform a CEQIA is ongoing and such an assessment should be updated as more definition and granular detail is achieved through concrete decisions emerging during the decision-making process.

[32] In relation to the constitutional importance of section 75 NIA, it is argued that this provision finds its origin in para 3 of the "Rights, Safeguards and Equality of Opportunity" section of the Belfast Agreement. In addition to imposing a duty on public authorities to carry out their functions with due regard to the need to promote equality of opportunity, public bodies would also be required to draw up statutory schemes showing how they would implement this obligation. Such schemes would have to cover arrangements for policy appraisal, including an assessment of impact on relevant categories of individuals, public consultation, public access to information and services, monitoring and timetables. In *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 at para [11], the House stated that the provisions of the NIA: "consistently with the language used, should be interpreted generously and purposefully, bearing in mind the values that the constitutional provisions are intended to embody …"

[33] Section 75(4) NIA refers to Schedule 9 to the Act and places statutory obligations on designated public bodies to adopt equality schemes which include detailed plans for how those bodies intend to implement their section 75 NIA

obligations. The main focus in Schedule 9 is on the role, function and content of equality schemes. The ECNI has published and updated guidance entitled "Section 75 - A Guide for Public Authorities" which sets out what should be included in an equality scheme, including the arrangements which should be put in place by the public body in order to ensure that it fulfils its section 75 NIA duties. It is stipulated that the public body must then implement and adhere to the arrangements that it committed to in its equality scheme. The DoF is a designated public body for the purposes of section 75 NIA and, as a result, it has, with input from the ECNI, published an equality scheme which has been approved by the ECNI. This equality scheme has evolved and developed over time with the latest version being published in March 2023. The ECNI plays a central role in relation to investigating complaints of any failure by a public body to comply with the provisions of its equality scheme and to make recommendation to ensure future compliance.

[34] "Section 75 - A Guide for Public Authorities" is also important in that it discusses the nature and extent of the section 75 NIA duty. It states that section 75 NIA makes equality central to a whole range of public policy decision-making and that this approach is often referred to as "mainstreaming." The guidance notes that "mainstreaming" is described by the Council of Europe as being the reorganisation, improvement, development and evaluation of policy processes so that an equality perspective is incorporated in all policies at all levels and at all stages by the actors normally involved in policy-making. The guidance notes that focused attention on mainstreaming requires public authorities to engage directly with equality through all stages of policy-making and service delivery. It notes that the section 75 NIA duty requires more than the avoidance of discrimination. It urges public authorities to actively seek ways to encourage greater equality of opportunity through policy development. The guidance further urges those with responsibility for public policy to remember that inequality is real and to have this fact in mind in the decisions they take and to adjust or modify those decisions so that they can reduce its consequences on the lives of people.

[35] The guidance states that Schedule 9, para 4(2)(b):

> "requires public authorities to assess the likely impact of their policies on the promotion of equality of opportunity. The Commission recommends that effective assessment of the equality implications of a policy includes screening of all policies (see Annex 1 of this Guide) and consideration of undertaking an equality impact assessment.
>
> Section 75 is important in policy formation (new or proposed policies) and policy review (existing policies). It is important that public authorities use the assessment of policies for impact on equality of opportunity, including screening and equality impact assessment, as part of their

> policy development process, rather than an afterthought when policy has been established."

[36] It is important to remember that Schedule 9 to the NIA primarily deals with the duty imposed upon relevant public authorities to devise and submit equality schemes to the Commission for approval; that para 4 of Schedule 9 mandates that an equality scheme should demonstrate how the public authority proposes to fulfil its section 75 NIA duties; and that para 4(2)(b) focuses on:

> "assessing and consulting on the likely impact of policies adopted or proposed to be adopted by the authority on the promotion of equality of opportunity."

[37] The guidance also emphasises the importance of consultation. It notes that section 75 NIA is underpinned by the building of relationships between those who make and deliver public policy and those affected by such policy. Consultation can help authorities to become aware of problems their policies may pose to individuals which the organisation might not otherwise discover. Consultation can also help ensure that public policies meet their intended need and contribute to better service delivery and accessibility. The guidance states that public authorities will want to ensure that they are providing the best possible services within available public monies and that consultation can help achieve this aim.

[38] The applicant is at pains to emphasise that this judicial review is not about the DoF's failure to comply with its equality scheme as such a claim would be caught by *Neill* [2006] NICA 5 at paras [27] to [30], *Stach* [2020] NICA 4 at para [117] and *McMinnis* [2024] NICA 77 at paras [144] to [152]. The thrust of the applicant's case is that it is challenging the respondent's stance that section 75 NIA does not apply to the DoF in its role of providing advice and guidance to the Minister concerning the content of the proposed budget. The challenge is not about enforcement of an equality scheme. It is about the scope of the duty set out in section 75 NIA and whether that duty is triggered when the DoF is providing advice to the Minister about what should be going into the draft budget. It is common case that the DoF equality scheme does not contain any express or separate procedures for discharging section 75 NIA obligations in relation to the preparation of the annual Northern Ireland budget with or without NI ministers in place.

[39] The applicant argues that the architecture of the budget setting process is such that section 75 NIA can only find meaningful expression in this process if it imposes a duty upon the DoF to carry out a CEQIA of the proposals and recommendations put by the departmental officials before the Minister for approval, which said proposals are then transmitted to the Executive Committee for their consideration and approval. The applicant highlights the importance of para 20 of Strand One of the Belfast Agreement which states that:

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

It is interesting to note that the draft budget is described as being linked to "policies and programmes" which might give some support to the contention that it is neither a policy nor programme in its own right.

[40] Section 64 NIA deals with the preparation of draft budgets. The Minister of Finance, before the beginning of each financial year must lay before the Assembly a draft budget (a programme of expenditure proposals) for that year that has been agreed by the Executive Committee in accordance with para 20 of Strand One of the Belfast Agreement. At least 14 days before laying the draft budget before the Assembly, the Minister must lay before the assembly a statement of the amount of UK funding for that year as notified to the Minister by SoSNI. When laying the draft budget before the Assembly the Minister has to also lay a statement before the Assembly demonstrating that the amount of UK funding required by the draft budget does not exceed the amount of UK funding notified by SoSNI to the Minister. For the avoidance of doubt, the amount of UK funding required by the expenditure proposals must not exceed the amount notified by the SoSNI to the Minister. The Assembly may, with cross-community support, approve a draft budget laid before them with or without modification.

[41] The applicant argues that Northern Ireland government departments are subject to the duties imposed by section 75 NIA whereas Northern Ireland Ministers, the Executive Committee and the Assembly are not. Therefore, the only legitimate targets for the section 75 NIA duties are: the individual departments when they are making their returns to the DoF at the start of the budget setting process; these same departments at the end of the budget setting process when they know what their annual budget will be; and the DoF when providing advice and guidance to the Minister of Finance to enable him/her to carry out his/her section 64 responsibilities. It is argued that the individual departments, when making their returns can and should perform Equality Scheme compliant equality impact assessments in relation to each individual department's spending proposals and that all these individual department specific equality impact assessments can and should be provided to the DoF to enable the DoF officials to provide advice and make recommendations to the Minister of Finance. It is argued that in addition to assembling all these individual departmental spending proposals and equality impact assessments, the DoF officials have to put before the Minister the DoF's overarching budget proposals, options and recommendations in order for the Minister to prepare a make decisions on the contents of the draft budget which then has to go to the Executive Committee for consideration and approval, before being sent on to the Assembly for final approval and enactment.

[42] The crux of the applicant's case is that in order for the Minister to be properly advised on budget issues, in addition to the individual departments' equality impact assessments, he/she must be provided with an overarching CEQIA to be read along with the overarching budget proposals, options and recommendations provided by the DoF officials. It is conceded that the Minister is under no section 75 NIA duty when it comes to providing his or her recommendations or proposals to the Executive Committee; the Executive Committee is under no section 75 NIA duty when it comes to approving a draft budget and the Assembly is under no section 75 NIA duty when it comes to agreeing the final budget. In essence, the only possible focus for an assessment of the overall impact of budgetary proposals on equality of opportunity prior to final decisions being made is at the point in time when the DoF officials are providing advice, recommendations and guidance to the Minister to enable him/her to prepare a draft budget. The only public authority in the budgetary setting process, subject to section 75 NIA duties, that is properly sighted of all the relevant material is the DoF and it is for the DoF to use all that material to perform a CEQIA of the proposals and recommendations that find expression in the draft budget.

[43] The ECNI in its position paper and through the oral submissions made by Mr Sayers KC set out in detail its perception of its engagement with the DoF in relation to the issues of the DoF's functions in the process of preparing a draft budget and the nature and extent of the DoF's section 75 NIA duties when carrying out those functions. I do not propose to delve into the whys and wherefores of this engagement in this judgment. I simply acknowledge that the ECNI is broadly supportive of the applicant's arguments and it argues that if the court were to decide that the section 75 NIA duties really only attach to the functions of a decision maker, then the relevant decisions to which the section 75 NIA duties attach are the DoF's decisions as to what to put down in paper by way of advice, guidance and recommendations to the Minister in relation to what should go into the draft budget which is sent by the Minister to the Executive Committee.

[44] The ECNI is at pains to point out that the duty to have due regard to the need to promote equality of opportunity is context specific and this phrase imports a degree of flexibility in terms of what is required to fulfil that duty. Reliance is placed on para [45] of the *Marouf* decision [2023] UKSC 23 relating to the PSED that applies in GB. Lady Rose stated:

> "[45] It is clear that the concept of "due regard" is a flexible one. In *R (Sheakh) v Lambeth London Borough Council* [2022] EWCA Civ 457, [2022] PTSR 1315, the Court of Appeal said (para 56):
>
> > 'The authorities show that the concept of 'due regard' is highly sensitive to facts and context. How intense the 'regard' must be to satisfy the requirements in section 149 will depend on the circumstances of the decision-making process in

> which the duty is engaged. What is 'due regard' in one case will not necessarily be 'due regard' in another. It will vary, perhaps widely, according to circumstances: for example, the subject-matter of the decision being made, the timing of that decision, its place in a sequence of decision-making to which it belongs, the period for which it will be in effect, the nature and scale of its potential consequences, and so forth. When the decision comes at an early stage in a series of decisions, and will not fix once and for all the impacts on people with protected characteristics, the level of assessment required to qualify as 'due regard' is likely to be less demanding than if the decision is final or permanent. This may especially be so if the decision is also experimental and is itself conducive to a more robust assessment of equality impacts later in the process.'"

[45] In essence, the ECNI urge the court to confirm that the decision making process engaged in by the DoF in respect of the content of advice, recommendations and guidance which go to the Minister in respect of the drafting of the budget is a function to which section 75 NIA duties attach and this will enable the ECNI to re-engage with the DoF with a view to devising and approving an Equality Scheme which properly and effectively deals with this issue.

[46] On behalf of the DoF, Dr McGleenan KC argues that it is important not to lose sight of the fact that the decision maker in relation to the draft budget is the Executive Committee. This is clear from paras 19 and 20 of Strand One of the Belfast Agreement and section 20 of the NIA. He argues that the DoF is not the decision maker re the budget. He argues that the role of the Minister of Finance is precisely defined in section 64 NIA. He/she shall "lay before the Assembly a draft budget, that is to say, a programme of expenditure proposals for that year which has been agreed by the Executive Committee in accordance with para 20 of Strand One of the Belfast Agreement." If the Executive Committee's decision on agreeing a budget is not a decision which is amenable to section 75 NIA, and the approval of the draft budget with or without modification by the Assembly is not a decision which is amenable to section 75 NIA, how could the provision of a draft budget to the Executive Committee by the Minister of Finance possibly attract the section 75 NIA duties and, even more remotely, how could the provision of advice, guidance and recommendations by departmental officials to the Minister of Finance in respect of what finds its way into the draft budget which he/she then puts before the Executive Committee attract the section 75 NIA duties? He argues that the exclusion of section 75 NIA duties in respect of the SoSNI's, the Executive Committee's and Assembly's functions in general including their respective roles in the agreement and approval of the budget are

deliberate design features of the legislative scheme and that the provision of advice and guidance by departmental officials to a minister, as a matter of generally applicable principle, is not the adoption of a policy and is not the taking of a decision and is not, therefore, amenable to section 75 NIA. In short, departmental officials are not the decision makers when it comes to drafting the budget. They are far removed from the decision-making process and, indeed, departmental officials are not constitutionally entitled to make policy decisions.

[47] Dr McGleenan forcefully argues that it cannot be correct as a matter of law that providing advice to a minister on the content of a draft budget when the minister is not the decision maker in respect of that draft budget constitutes a policy-making or decision-making function to which section 75 NIA attaches. It is wrong in law to assert that there is a legal obligation on the DoF officials to perform a CEQIA on the advice they provide to the Minister of Finance on the content of the draft budget. Dr McGleenan also argues that the applicant is advocating for a position which is impracticable and unworkable in the context of the everyday functioning of government. There is little if anything to distinguish the advisory role of departmental officials in this instance from the advisory role performed by many public servants in providing advice to draft policy formulators and others who have a meaningful input into the finalisation of policies. If section 75 NIA attaches to the role performed by the DoF officials, then it must attach to the provision of advice on a whole host of issues both to ministers and others public actors such as the Chief Constable. Every bit of advice provided by civil servants and those working in public authorities would prima facie be subject to the section 75 NIA duties and the need for equality impact assessments and possibly consultation processes would all come in to play. This would place an unmanageable burden and strain on the effective and efficient operation of government and public administration.

[48] In short. Dr McGlenan argues that policy-making and decision-making are the matters which primarily are amenable to section 75 NIA. The exclusion of the Executive Committee, the Assembly and the SoSNI from the scope of section 75 NIA is a deliberate design feature of the legislative scheme and these combined elements must mean that the advisory role performed by department officials for the benefit of the Minister of Finance in respect of the preparation of a draft budget does not attract the section 75 NIA duties.

[49] Dr McGleenan places reliance upon paras [52], [55], [56], [62], [64] and [65] of the *Buick* [2015] NICA 26 decision and the provisions of the 1999 Order, in particular, Articles 3 and 4 to force home the point that civil servants are not decision makers and that they act at all times subject to the direction and control of ministers. The *Carltona* [1943] 2 All ER 560 principle does not apply to Northern Ireland government departments. To attribute independent decision-making functions to civil servants, it is argued, has no foundation in the NIA, was specifically rejected by the Court of Appeal in *Buick* and is contrary to the 1999 Order. In response to the *Buick* decision, the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 was enacted and section 3 (1) of this piece of primary legislation provides that:

> "The absence of Northern Ireland Ministers does not prevent a senior officer of a Northern Ireland department from exercising a function of the department during the period of forming an Executive if the officer is satisfied that it is in the public interest to exercise the function during that period."

[50] This exception only applies during the Executive formation period. Apart from this exception, section 3(7) emphasises that the normal constitutional principles apply. This provision states that:

> "Subsections (1) to (6) have effect despite anything in the Northern Ireland Act 1998, the Departments (Northern Ireland) Order 1999 … or any other enactment or rule of law that would prevent a senior officer of a Northern Ireland department from exercising departmental functions in the absence of a minister."

Therefore, in deciding what advice to give the Minister of Finance in relation to the content of the draft budget, civil servants in the DoF are not decision makers in the constitutional sense and are acting at all times subject to the Minister's direction and control.

[51] In relation to the issue of when and in what circumstances the section 75 NIA duty bites and what the section 75 NIA duty of having due regard actually requires in any particular case, Dr McGleenan seeks to rely on the *Fawcett Society* [2010] EWHC 3522 decision and, in particular, paras [6] to [10] and [15] of Ouseley J's judgment. This case involved a challenge to a UK budget on the ground that a CEQIA had not been carried out before substantive decisions on the contents of the budget were made. Ouseley J did not consider that a CEQIA was necessary when the: "cumulative impact, if there is one, is perfectly possible to see from the accumulation of separate impacts" (see para [8]). He also stated at para [10] that there:

> "are high level economic judgments as to when and how best to deal with the section 76 issues which arise. Whether it is dealt with at the stage of the Budget proposals themselves, fixing the spending envelopes or later during the detailed formulation or policy or its implementation, section 76 permits judgments of that sort to be made in carrying out the duty …"

[52] It is also clear from para [10] of his judgment that Ouseley J considered that such high-level economic judgments very much depend on the full context and circumstances in which the decisions are taken and that this is all part of the approach to "due regard" which involves a consideration of what is proportionate in relation to

relevance. The judge held that there is a level of macro-economic judgment of a political nature in relation to the choices as to when policy is formulated and formulated in such detail as attract the equality duty. The following passage from para [15] of the judgment is instructive:

> "It is perfectly sensible for the government to wait until policy has been adequately formulated for there to be a clear basis upon which its gender equality impact can be assessed. The point at which that is reached is, in my judgment, very much a question of rationality not of duty. It is not at issue but that the duty applies. The question is what is the point at which the government would have breached the duty to have due regard if it does not carry out such an assessment? Plainly it would have failed in its duty if by the time the policy is formulated fit for assessment it is not carrying out that assessment. The judgment of whether it has reached that position is, in my judgment, clearly a matter of rationality and there is no prospect of the government's assessment that it is sensible to wait being shown to being unlawful."

[53] The point that Dr McGleenan seeks to make is that as the section 75 NIA duty does not attach to the Executive Committee, the Assembly and SoSNI, irrespective of whether the Executive is up and running or not, the central part of the budgetary formation process does not come within the ambit of the section 75 NIA duty. If, as a matter of good governance, it is decided that the budget should be equality impact assessed, the government have a large measure of discretion as to how and when to perform this function. It is clear from the affidavit evidence submitted in this case that each individual department has an equality scheme agreed with the ECNI under which each department carries out an equality impact assessment and consultation process "for both their Resource Departmental Expenditure Limit (DEL) and Capital DEL funding envelopes" prior to approval of the budget with or without modification by the Assembly.

[54] In the year 2025-2026, the affidavit evidence reveals that after the Executive Committee had agreed a draft budget, this draft budget was put out for consultation together with a CEQIA which was prepared by the Minister of Finance. The individual departments also performed their own equality impact assessments at this stage which included individual departmental consultation processes and the result and responses of the CEQIA and consultation process and the individual departmental equality impact assessments and the individual departmental consultation processes were all made available to the Executive and the Assembly before the draft budget was finalised and adopted and the relevant legislation passed. Dr McGleenan also argues that there are additional embedded protections in the form of equality impact assessments which take place as part and parcel of the three in year

monitoring rounds which take place each year at regular intervals between the annual budgetary process.

[55] In relation to the year that is the subject of challenge (2023-2024) it is clear from the affidavit evidence that this budget had to be set at a time when the devolved institutions had collapsed. The First and deputy First Ministers were not in post from February 2022, with the remaining Ministers leaving office at the end of October 2022. The 2022-2023 budget was announced by SoSNI well into the 2022-2023 financial year on 25 November 2022 with the associated legislation being introduced into the Westminster Parliament on 12 January 2023 with Royal Assent being obtained on 13 February 2023. As a result of the late setting of the 2022-2023 budget, the 2023-2024 budgetary process commenced much later than would otherwise have been the case. Given this background and the wider political context, the normal process of proposing a draft budget followed by a formal period of consultation and the setting of a final draft budget was not possible without a major delay to that budget being in place for the 2023-2024 financial year. It was deemed essential for a budget to be in place as soon as possible to give the Northern Ireland departments certainty in respect of their allocations for the relevant financial year, thus enabling them to make decisions on spending, bearing in mind the imperative not to exceed spending limits.

[56] On 15 December 2022, DoF commissioned an information gathering exercise from the various Northern Ireland departments for the purposes of commencing the 2023-2024 budget setting process. DoF provided guidance to departments on the budget process and requested data from each of the Northern Ireland government departments. Departments were asked to provide analyses of the equality impacts of any potential savings and any new funding requirements identified. The departments were also informed that in addition to filling out the relevant annexes, they could also submit additional equality impact material to assist decision makers. Following receipt of the returns from the various departments, DoF decided it would be more useful to provide the departments with set scenarios which they could model. The DoF then wrote to all the departments on 6 February 2023 setting out scenarios of indicative allocations and requested the various departments to complete proforma responses setting out the actions that would be required to bring each department within its proposed spending limits. It was emphasised to the departments that, where possible, they should provide any equality implications of these scenarios and the departments were also reminded of the equality duties under section 75 and Schedule 9 NIA.

[57] Upon receipt of the departmental returns, and upon completion of the DoF's own internal equality analysis, the DoF forwarded all this documentation to the NIO on 21 March 2023 "without further addition, omission or analysis." The NIO then requested further information and the DoF wrote to each department on 4 April 2023 requesting further information including final spending proposals from each department. Each department was required to complete a proforma in order to outline the equality implications for the decisions proposed. These departmental returns were provided to the NIO between 19 and 21 April 2023. Once again, they

were provided to the NIO by DoF "without further addition, omission or analysis." The SoSNI then announced the proposed final budget in a written Ministerial Statement on 27 April 2023. The Northern Ireland Budget (No 2) Act 2023 received Royal Assent on 19 September 2023, having been introduced into the Westminster Parliament on 29 June 2023.

[58] It is clear that the budget setting process for the year 2023-2024 was different from the norm due to the collapse of the devolved institutions and was difficult due to both time pressures and financial pressures. The applicant's case is that the DoF, in the midst of this political crisis, was required to and should have performed a CEQIA including a consultation process before the SoSNI made the decisions regarding the finalisation of a draft budget. The respondent's case is that not only was this not required by section 75 NIA, it was utterly impracticable, given the unusual circumstances. The applicant argues that even though we are looking at past events, the court's assessment of these issues is required in order to inform the DoF's approach to future budgetary setting processes both in the context of the devolved institutions being in place and in the context of them collapsing, as such a possibility is far from remote. Dr McGleenan argues that the approach adopted by DoF in 2023-2024 was consistent with the advice/guidance then in place which had been provided by the ECNI to DoF in 2020. This was reflected in the relevant iteration of the DoF's Equality Scheme. In such circumstances, the decision of *McMinnis* [2024] NICA 77 would indicate that the scope for judicially reviewing the actions of DoF in the year 2023-2024 was very limited.

[59] Dr McGleenan also seeks to rely on a number of paragraphs of the judgment of Kenneth Parker J in the case of *R (JC and Another) v Lancashire County Council* [2011] EWHC 2295 (Admin), namely, paras [47] to [52]. In that case the judge held that it was settled law that the relevant statutory duty was not a duty to achieve a particular substantive result, whether to promote equality or otherwise, but to have "due regard" to the need to achieve those goals. Due regard is regard that is appropriate in all the circumstances. The public authority also has to pay regard to any countervailing factors which in the context of the function being exercised, it is proper and reasonable for the public authority to consider. The weight to be given to the countervailing factors is a matter for the public authority, not the court, unless the assessment by the public authority was unreasonable or irrational.

[60] In that case the applicant argued that the failure of the public to carry out a detailed assessment of the likely impact of the budgetary decisions on affected users of the services provided by the public authority at the time that the initial budgetary decisions were taken was unlawful in that this failure was contrary to the "due regard" duty. The judge held that it was necessary to examine carefully the circumstances in which the relevant decisions were being made and the precise nature of the decisions being taken. In that case the decision-maker had taken a preliminary decision in relation to its budget, fully aware that the implementation of proposed policies would be likely to have an impact on the affected users but not committing itself to the implementation of specific policies within the budgetary framework until

it had carried out a full and detailed assessment of the likely impact. The judge held at para [52] that there was nothing wrong in principle with such an approach. The judge concluded that:

> "…. it was sensible, and lawful, for the defendant first to formulate its budget proposals and then, at the time of developing the policies that are now under challenge, to consider the specific impact of proposed policies that might be implemented within the budgetary framework."

[61] Dr McGleenan also places reliance upon the judgment of Laing J in *R (DAT and Another) v West Berkshire Council* [2016] EWHC 1876 (Admin). In para [35] of her judgment, the judge followed the approach adopted by Dyson LJ in *R (Baker) v SoS for Communities and Local Government* [2008] EWCA Civ 141 and stated that "due regard" is such regard as is appropriate in all the circumstances, including the importance of the areas of life that are affected by any inequality of opportunity and the extent of the inequality and any countervailing factors as are relevant to the functions that the decision-maker is performing.

[62] He also highlights a passage from a judgment of Judge Cotter QC in *R (KE, IE and CH) v Bristol City Council* [2018] EWHC 2103 (Admin) which appears at para [90] of the judgment.

> "Careful consideration of the factual context is necessary in any public law challenge. It is always necessary to carefully examine the precise nature and extent of a decision and the surrounding circumstances. If the budget decision under challenge is sufficiently far removed from a final decision affecting the provision of an element of a service, then there is nothing wrong in principle in not undertaking a detailed assessment of the impact until specific policies have been formulated. The distance may be because the budget is sufficiently high level or, as in the case of a MTFP, not set in stone. Indeed, when setting a high-level national budget, it would often (but not invariably) be difficult to compile a sufficiently detailed consultation document or undertake a focussed impact assessment (although as conceded in *Fawcett* it may be both possible and necessary for certain elements). Also, if, as in the *JG and MB -v- Lancashire* case, the door remains open, following the future result of a targeted consultation, to avoid any cut and thus any reduction in services at all, and/or to gain funding from another service, again there is nothing wrong in principle in not undertaking a detailed assessment of the impact until the result and impact of the consultation is known. However, due regard under the

> PSED (and if necessary consultation), consultation under section 27 of the 2014 Act and regard under section 11 of the 2004 Act must be essential preliminaries to any significant, sufficiently focussed, and in financial terms apparently rigid, decision to impose a reduction in spending, even if taken as part of the setting of 'a budget.'"

In Dr McGleenan's view, the key point to take from this passage is the emphasis on apparently rigid decisions which are sufficiently focused and which actually involve defined cuts.

[63] Dr McGleenan also relies upon the case of *R (Sheakh) v Lambeth London Borough Council* [2022] EWCA Civ 457, paras [10] to [16]. In relation to the English section 149 EA 2010 duty, the Court of Appeal stated in para [10] that section 149 does not require a substantive result; it does not prescribe a particular procedure; it does not mandate an equality impact assessment at any particular moment in a decision-making process; it implies a duty of reasonable enquiry; and it requires the decision-maker to understand the obvious equality impacts of a decision before adopting a policy. The court should not engage in an overly legalistic investigation into the way in which the local authority has assessed the impact of the decision on the equality needs. The court, at para 11, also considered the *Bracking* case and stated that the eight principles should not be elevated to the status of requirements. At para [14] of the *Sheakh* case, the Court of Appeal quoted from the decision in *Haque v Hackney LBC* [2017] EWCA PTSR 769 at para [41] where the court stated that the section 149 duty:

> "… does not require an elaborate structure of secondary decision-making every time a public authority makes any decision which might engage the listed equality needs, however remotely."

[64] At paras [15], [16] and [56] of the *Sheakh* case, the Court of Appeal stated that once the equality implications have been identified, it is for the decision-maker to decide what weight he/she should give to those implications. The decision-maker should be concerned with the obvious impacts on equality, not with the detail of every conceivable impact. What constitutes "due regard" will depend on the circumstances, particularly the nature of the function being exercised and the stage that the decision-making process has reached. The court held that he concept of "due regard" is highly sensitive to the facts and context and stated that:

> "[56] … When the decision comes at an early stage in a series of decisions and will not fix once and for all the impacts on people with protected characteristics, the level of assessment required to qualify as due regard is likely to be less demanding that if the decision is final and permanent."

[65] As stated above, this passage was specifically approved of by the UKSC in *Marouf* [2023] UKSC 23 at paragraph [45]. It is argued by Dr McGleenan KC that in light of these authorities, the section 75 NIA duty mainly chrysalises in respect of actual decisions with fixed rigid consequences and that there is a space for discussion and advice in the decision-making process in which section 75 NIA is not engaged. Noting the applicant's reliance on the case of *R (Jewish Rights Watch Ltd) v Leicester City Council* [2018] 4 All ER 1040 Dr McGleenan KC points out that at paragraph at paragraph [27] of his judgment Sales LJ stated that although the PSED applied in relation to the passing of a resolution by the assembly of councillors as this constituted the exercise of functions by the relevant council and that this was the case even though the resolution would not have any substantive effect on the way in which the council carried out its procurement functions:

> "this was a feature of the case capable of having a bearing on the question of the extent of consideration required of the council in respect of the matters referred to in s 149(1) in order to satisfy the 'due regard' obligation in that provision."

[66] Returning to the issue of the DoF's functions, Dr McGleenan KC argues that section 98 NIA (which defines "functions" had to be read in conjunction with Part 3 of NIA "Executive Authorities." Section 20 states that the Executive Committee "shall have the functions set out in paragraphs 19 and 20 of Strand One of the Belfast Agreement." Section 22 NIA states that:

> "(1) An Act of the Assembly or other enactment may confer functions on a Minister (but not a junior Minister) or a Northern Ireland Department by name.
>
> (2) Functions conferred on a Northern Ireland department by an enactment passed or made before the appointed day shall, except as provided by an Act of the Assembly or other subsequent enactment, continue to be exercisable by that department."

[67] Section 23 goes on to describe prerogative and executive powers and states that the executive power in Northern Ireland shall continue to be vested in His Majesty and that in respect of transferred matters, the prerogative and other executive powers of His Majesty in relation to Northern Ireland shall (apart from a couple of specified exceptions) be exercisable by any Minister or Northern Ireland department. It is argued by Dr McGleenan KC that in relation to section 75, the reference to functions in that provision has to be read in conjunction with section 98 NIA and sections 22 and 23 NIA. In terms of functions, the statutory functions assigned by statute to the DoF are the functions which attract the attention of section 75 NIA. Section 64 NIA imposes a number of specific duties on the Minister of Finance in relation to the annual budget but the Minister is not specifically identified as being subject to the section 75 duty.

[68] Dr McGleenan KC also argues that the references in Schedule 9, paragraph 4(2) NIA to equality schemes having to state the public authority's arrangements for fulfilling the duties imposed by section 75 NIA in relation to assessing and consulting on the likely impact of "policies" and monitoring any adverse impact of "policies" give a clear steer as to what is actually captured by section 75 NIA. In essence advice is not a policy or a decision and is not captured by section 75 NIA. Dr McGleenan KC argues that the guidance issued by the ECNI in 2010 which is referred to in paragraphs [34] to [37] above, in its section on "Mainstreaming" specifically refers to section 75 NIA making equality and good relations central to a whole range of "public policy decision-making." In a section entitled "Why the duties are important" it is stated that section 75 is a policy tool and that those with responsibility for "public policy" should remember the reality of inequality and have it in mind in the "decisions" they take. In relation to DoF, it is accepted by Dr McGleenan KC that how the DoF spends its own allocated annual budget is a decision/function caught by section 75 and as a result this decision/function must be the subject of an equality impact assessment and this applies to all departments when they decide how to spend their allocated annual budgets.

[69] The crux of the DoF case is that the advisory role of its civil servants in preparing materials for the Minister who is not the decision maker but who prepares a draft for the Executive Committee again not the final decision maker is clearly not a function, decision or policy that attracts the section 75 NIA duties. The arguments put forward by the applicant for a CEQIA at this early stage of the decision-making process are not supported by the language of the relevant statutory provisions. The *Bracking* case, so heavily relied upon by the applicant, focuses on decisions, decision-makers and policies, particularly where policy decisions are rigid in respect of financial implications. Functions that do not involve such policy-making and decision-making are not captured by section 75 NIA.

[70] When properly analysed, the issues in this case can be easily resolved. In relation to the 2023-2024 budget, the uncontradicted evidence establishes that the DoF simply acted as an administrative conduit between the Northern Ireland government departments who were functioning without ministers and the SoSNI, there being no Executive Committee in place and no Assembly. SoSNI is not subject to the section 75 NIA duty and the DoF officials certainly were not subject to the section 75 duty as the bulk of the work undertaken by the DoF officials involved passing on the SoSNI's instructions and requests for information to the various Northern Ireland departments and passing on the departments' responses to SoSNI. DoF officials did not provide any advice or guidance to SoSNI in relation to the contents of the budget, nor were they under a duty to do so. They simply passed on the other departmental returns and the DoF's own return and these various returns included the individual departmental equality impact assessments. In terms of appropriate governmental lines of responsibility, if any officials had the responsibility of providing advice and guidance to the SoSNI on the contents of the Northern Ireland budget for that year, it would have been the officials in the NIO.

[71] Insofar as it is relevant, it is clear that DoF complied with the guidance that the ECNI had issued and which was current at the relevant time. The impact of the *McMinnis* decision would further militate against there being any scope for judicial review of the actions of DoF. There is no challenge to the thoroughness or timing of the individual departments' equality impact assessments which were carried out during the budget setting process or which were related to this budget setting process. The budget setting process was necessarily rushed during this period due to the continued non-functioning of the Executive and the Assembly. It would be inappropriate and unwarranted to place an independent section 75 duty on DoF officials in circumstances where the officials in DoF did not perform any function or make any decisions which resembled giving advice to the decision-maker in relation to the contents of the draft budget.

[72] In relation to present budget setting arrangements, no section 75 duties attach to the Executive Committee or the Assembly in respect of the budget setting process. The duty on the Minister of Finance is to lay the draft budget that has been agreed by the Executive Committee before the Assembly for approval, with or without modification. In the period between the Executive Committee agreeing the draft budget and the Assembly approving the budget, the individual departments publicly consult on their spending plans, having regard to the proposals contained in the agreed draft budget and they each carry out a departmental equality impact assessment. Further, the Minister of Finance puts the draft budget out for consultation and carries out a CEQIA. This is in the interests of good government and is not mandated by section 75 NIA. All the materials generated by these processes go the Executive and the Assembly before the Assembly finally approves the budget.

[73] The DoF has no statutory duty to prepare a draft budget for consideration and agreement by the Executive Committee. The Minister of Finance as a member of the Executive Committee has taken on the responsibility of preparing a draft budget for his/her Executive Committee colleagues. DoF officials naturally assist and advise the Minister of Finance in this regard. Article 4(1) of the 1999 Order provides that the "the functions of a department shall at all times be exercised subject to the direction and control of the Minister." It is within the scope of this ministerial direction and control that the DoF officials provide assistance and advice. The advice and assistance provided by officials to a minister cannot be subject to the section 75 duty because, if that were so, all instances of internal departmental advice would be subject to section 75 and, in effect, nothing would ever get done. Government in this country would grind to a halt due to the need to equality impact assess every piece of advice passing between officials and ministers. The Minister of Finance in assuming the role of preparing a draft budget is doing so as a member of the Executive Committee and he is performing this function which is not dictated by statute in order to enable all his/her colleagues on the Executive Committee to agree a draft budget. He/she, having assumed that role as a member of the Executive Committee, is not subject to the section 75 duty. In law, the DoF is not the body who prepares the draft budget. It is not the body that decides what does or does not go into the draft budget. That role

is performed by the Minister of Finance as a member of the Executive Committee. The role of the DoF which is not prescribed by statute is to assist and advise the Minister of Finance in the performance of his/her assumed role. Section 75 does not apply to the DoF officials' role which is at all times performed subject to the direction and control of the Minister of Finance.

[74] Even if it were the case that section 75 NIA duties attached to the activities of the DoF officials in advising and assisting the Minister of Finance; having regard to the distance between these officials and the decision-makers who firstly agree and then approve the budget, the requirement to have "due regard" to the need to promote equality of opportunity would not mandate the carrying out of a CEQIA by those officials, bearing in mind the initial individual departmental returns include equality impact assessments in respect of each department and also taking account of the fact that following the agreement of the draft budget by the Executive Committee, the individual departments then engage in consultation processes and equality impact assessments and the Minister of Finance engages in a consultation process and CEQIA and all these processes are completed in the period between Executive Committee agreement of the draft budget and Assembly approval of the budget. Further, the equality impact assessments that take place as part of the tri-annual in year monitoring rounds must all be taken into account when considering whether "due regard" has been had to the need to promote equality of opportunity by the officials working in the DoF when assisting and advising the Minister of Finance in his/her preparation of the draft budget. To require the DoF officials to perform a CEQIA as part of the role that the officials perform when advising and assisting the Minister would again stymie the effective and efficient operation of government and would have widespread consequences which would militate against actually getting things done in Stormont.

[75] The applicant's application for judicial review is dismissed. The applicant shall pay the respondent's costs, such costs to be taxed in default of agreement. It is open to the respondent to agree to waive its entitlement to costs. That is a matter entirely for it. The ECNI shall be responsible for its own costs.