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*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**IN THE MATTER OF AN APPLICATION BY PETER ROBINSON FOR
JUDICIAL REVIEW**

McCOLLUM LJ

I have had the opportunity of reading in draft the judgment prepared by my learned colleague Nicholson LJ. I agree with him that the appeal should be dismissed. I propose to add some comments of my own.

Because the judgments of the Lord Chief Justice and Nicholson LJ contain a comprehensive review of the history of the matter, full consideration of the arguments of counsel and reference to the relevant authorities and principles to be applied it is unnecessary and would be repetitive if I were to engage in the same exercise.

Moreover in reaching my view I have not found it necessary to go outside the words of the statute itself, the Interpretation Act 1978 and the Belfast Agreement.

I refer to the following provisions of the Belfast Agreement.

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Strand One

Democratic Institutions in Northern Ireland

3. The Assembly will exercise full legislative and executive authority in respect of those matters currently within the responsibility of the six Northern Ireland Government Departments, with the possibility of taking on responsibility for other matters as detailed elsewhere in this agreement.

- 5.(d) arrangements to ensure key decision are taken on a cross-community basis;
 - (i) **either** parallel consent, i.e. a majority of those members present and voting including a majority of the unionist and nationalist designations present and voting;

 - (ii) **or** a weighted majority (60%) of members present and voting including at least 40% of each of the nationalist and unionist designations present and voting.

Key decisions requiring cross-community support will be designated in advance, including election of the Chair of the Assembly, the First Minister and Deputy First Minister, standing orders and budget allocations. In other cases such decision could be triggered by a petition of concern brought by a significant minority of Assembly members (30/108).

(7) the Chair and Deputy Chair of the Assembly will be elected on a cross-community basis, as set out in paragraph 5(d) above.”

I also refer to the section of the Agreement headed “Validation, Implementation and Review”.

“Validation and Implementation

3. If majorities of those voting in each of the referendums support this agreement, the

Governments will then introduce and support, in their respective Parliaments, such legislation as may be necessary to give effect to all aspects of this agreement ”

The Northern Ireland Act 1998 is the legislation introduced in the United Kingdom to give effect to the Agreement.

Section 16 of the Northern Ireland Act 1998 provides for the election of the First Minister and deputy First Minister. The following are the relevant portions:

“16(1) Each Assembly shall, within a period of six weeks beginning with its first meeting, elect from among its members the First Minister and the deputy First Minister.

(2) Each candidate for either office must stand for election jointly with a candidate for the other office.

(3) Two candidates standing jointly shall not be elected to the two offices without the support of a majority of the members voting in the election, a majority of the designated Nationalists voting and a majority of the designated Unionists voting.

(8) Where the offices of the First Minister and the deputy First Minister become vacant at any time an election shall be held under this section to fill the vacancies within a period of six weeks beginning with that time.”

The wording of 16(1) and 16(8) may be contrasted; the former appears to indicate an expectation that the Assembly will be able to complete the election of the First and deputy First Ministers while the latter appears more readily to accept the possibility that a result will not be achieved.

We are concerned with Article 16(8) in these proceedings.

As I understand the requirement of this subsection it is that the procedure of an election is to be executed. That procedure is completed when the votes have been cast and counted.

Where a simple majority secures election a result is normally to be expected and may be assured if provision is made for a casting vote.

However it was eminently foreseeable that an election would not automatically result in the offices of the First and deputy First Minister being filled, the requirement being that the joint candidates secure a majority of those voting, those designated Nationalists voting and those designated Unionists voting.

An inconclusive election therefore, especially in the aftermath of an event that has resulted in the vacation of the offices, must have been within the contemplation of Parliament.

Section 12(1) of the Interpretation Act 1978 provides as follows:

(1) Where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires."

Had Parliament intended only one "election" to be "held", that intention would require to have been made manifest. Further elections therefore may be held within the six week period.

Do the words of Section 16(8) imply that no further election should be held after the expiration of six weeks from the date of vacation of the offices?

In my view there is nothing to support such an interpretation.

The imposition of a six week deadline for the holding of an election is a sensible one to avoid endless manoeuvring between parties which have little in common. It is not entirely surprising therefore that Lord Dubs should have had in mind the concept that, if no First and Deputy First Minister was elected within six weeks, deadlock would have been reached which could only be resolved by calling an election.

He put the matter with clarity and simplicity. "If the Assembly fails to make such an election within six weeks, it will be dissolved and the Secretary of State then sets the date for an extraordinary election".

It would have been clear and simple to enact the matter in the same terms.

However, this is not what Parliament has done. Section 32(3) provides:

"(3) If the period mentioned in Section 16(1) or (8) ends without a First Minister and a deputy First Minister having been elected, the Secretary of State shall propose a date for the poll for the election of the next Assembly: and

(4) If the Secretary of State proposes a date under sub-section (1) or (3) Her Majesty may by Order in Council -

(a) direct that the date of the poll for the election of the next Assembly shall instead of being determined in accordance with Section 31 be the date proposed; and

(b) provide for the Assembly to be dissolved on a date specified in the order."

Section 32(3) makes it clear that the sanction laid down therein, which is the requirement for the Secretary of State to propose a date for the poll for the election of the next Assembly, is activated even though Section 16(8) has been complied with but the election has not produced a result.

However, although the Secretary of State is required to propose a date he is given a discretion as to the choice of date and the Assembly is not to be dissolved under 32(4)(b) until after he has proposed a date, which has been adopted by the Privy Council.

Her Majesty by Order in Council may (or may not) direct that the date of the poll shall be the date proposed by the Secretary of State under Section 32(3) but no provision is made for the choice of a date other than that proposed by the Secretary of State or that determined in accordance with Section 31 which is 1 May 2003, so the Order in Council may not direct any date earlier than 1 May 2003 or the date proposed by the Secretary of State.

Interpretation of the true meaning of section 16(8) is not assisted by resolution of the issue whether the requirement is mandatory or directory.

Such a resolution might well be definitive of the effect of a provision requiring the performance of an act which brings about a definite result.

However under section 16(8) the procedure to be followed, however conscientiously observed, may not yield a result in the form of elected office holders.

The election of a First Minister and deputy First Minister is the result required for the effective functioning of the Assembly and is therefore the desirable object of the voting provisions.

It would seem perverse if Parliament intended to avoid such an election where the parties were capable of achieving it simply because six weeks had elapsed since the vacancy had occurred.

Only if no other construction were possible would I find it possible to so interpret it.

The manner in which failure to elect a First and deputy First Minister within 6 weeks is dealt with by Parliament could well have been by a provision requiring dissolution of the Assembly forthwith or within a fixed period after the expiry of the period of six weeks referred to in Section 16(1) or 16(8).

However the nature of the procedure laid down by Section 32(3) is such that Parliament clearly intended to allow the Secretary of State, in the situation contemplated by that subsection, to decide in his discretion that the Assembly should be allowed to continue to function for a period to be determined by him.

It is not necessary for the court to be satisfied that Parliament foresaw that on some occasion the deadlock envisaged by Section 32(3) might be about to be broken after the conclusion of six weeks. It is sufficient that Parliament enacted that a "breathing space", the length of which is to be

determined by the Secretary of State, should be capable of creation and that there was no prohibition on a further election being held during that period.

Obviously the proposal of a date for the poll for the election of the next Assembly by the Secretary of State is a matter open to judicial review. If a situation of total deadlock prevailed it would seem to be inappropriate for him to allow a non-functioning Assembly to complete an allotted session.

However if the Secretary of State were in a position to be sure that the deadlock could be or had been broken and that the election of a First and deputy First Minister was imminent then it does not seem in any way inappropriate for him to allow the Assembly to run its course by proposing the same date as that already laid down for the next election under the Act.

I do not find the wording of Section 32(4)(a) raises any doubt in my mind about the power of the Secretary of State to do so since that provision is merely to the effect that a different method, ie. the proposal of the Secretary of State, shall be used to determine the date of the poll rather than it being done in accordance with Section 31 and does not provide that the date itself should be a different date.

Even if I took the view that it was the intention of Parliament that the date proposed by the Secretary of State should be a different date from the statutory election date I would not regard it as appropriate to quash his decision when the choice of any proximate alternative would rectify the position.

If the choice of a proximate but different date would be valid then it is difficult to appreciate the mischief done by proposing the statutory election date.

In summary therefore it is my view:

- (1) Section 16(8) requires no more than that an election should be held within six weeks and does not prohibit the holding of a further election whether within or outside the period of six weeks, "as occasion requires".
- (2) It was mandatory for the Secretary of State to propose a date for the poll for the election of the next Assembly but he had a discretion in his choice of date and his discretion was exercised in a proper manner.

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