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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY SEAN NAPIER FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE FIRST MINISTER OF NORTHERN IRELAND; JUNIOR MINISTER MIDDLETON OF THE EXECUTIVE OFFICE; THE MINISTER FOR THE ECONOMY; THE MINISTER FOR EDUCATION; AND THE MINISTER FOR THE ENVIRONMENT, AGRICULTURE AND RURAL AFFAIRS

RULING ON APPLICATION FOR MANDATORY ORDERS

Ronan Lavery QC and Colm Fegan (instructed by McIvor Farrell, solicitors) for the Applicant
Tony McGleenan QC and Philip McAteer (instructed by the Departmental Solicitor's Office) for the third to fifth respondents (the Minister for the Economy; the Minister for Education; and the Minister for Agriculture, the Environment and Rural Affairs)

SCOFFIELD J

Introduction

[1] On 11 October 2021, I granted the applicant in these proceedings a declaration in the following terms:

> "The respondents' decision to withdraw from the North-South Ministerial Council was and is unlawful because it frustrates, is contrary to, and is in breach of the legal duties and responsibilities contained within Part V of

the Northern Ireland Act 1998 and, specifically, sections 52A and 52B."

[2] The terms of this declaration had been agreed between the parties. I gave a short explanatory judgment ([2021] NIQB 86 – "my earlier judgment") setting out the basis for the applicant's application for judicial review and the basis on which the declaratory relief was granted. This judgment should be read in conjunction with my earlier judgment for ease of understanding.

[3] I also granted the applicant liberty to apply – that is to say, permission to bring the application back before the court without the need to issue fresh proceedings – in the event that he wished to seek further relief from the court but in the hope, and indeed expectation, that this would be unnecessary. Regrettably, the respondents have failed to remedy the admitted unlawfulness to which their (partial) boycott of the North-South Ministerial Council (NSMC) gives rise.

[4] The applicant now asks the court to grant further relief, in the form of an order or orders of *mandamus*, requiring the respondents (and, for the moment, principally the first respondent, the First Minister) to take certain actions, backed with the threat of sanctions for contempt of court in the event of non-compliance. This judgment addresses the issues of principle relating to the grant of such relief in the present circumstances.

Factual background

[5] The factual background giving rise to these proceedings is set out briefly in paragraphs [8]-[16] of my earlier judgment. The proceedings have their genesis in a speech made by Sir Jeffrey Donaldson MP, the leader of the Democratic Unionist Party (DUP), on 9 September 2021, in which he indicated an intention on the part of DUP Executive Ministers to "immediately withdraw from the structures of Strand Two of the Belfast Agreement relating to north south arrangements…", that is to say, the NSMC and related all-island implementation bodies.

[6] At the time of my earlier judgment, several meetings of the NSMC had not proceeded as a result of the respondents' withdrawal from it. In light of the evidence put before the court and the respondents' response to the proceedings, I was satisfied that there was a policy on the part of DUP Ministers of not attending at NSMC meetings and that this was calculated to thwart the operation of that Council. As I also recorded, the respondents quickly conceded that this was unlawful.

[7] Since the grant of the declaration in these proceedings, some NSMC meetings have proceeded and others have not. For instance, on 14 October a sectoral meeting in relation to health and food safety was able to proceed. It was attended by Minister Swann of the Ulster Unionist Party (UUP) as the appropriate minister, along with Junior Minister Kearney of Sinn Féin as the accompanying minister. It has been suggested that the DUP party position allows for Strand Two business

relating to health to continue unimpeded and that the First Minister's involvement in approving the arrangements for this meeting on 14 October reflected that position.

[8] The Peace Plus programme funding – which had been a particular concern of the applicant's at the time when these proceedings began (see paragraph [13] of my earlier judgment) – was approved at this meeting, with the NSMC approving the programme proposals which had been prepared by the Special EU Programmes Body. Ordinarily, one would have expected this issue to have been discussed and agreed at the sector-specific Special EU Programmes Body meeting of the NSMC which had been anticipated to be held on 22 October (with Minister Murphy of Sinn Féin attending as the appropriate minister and the fourth respondent attending as the accompanying minister). The Joint Communiqué relating to the health and food safety meeting on 14 October indicates that the Peace Plus programme was an agenda item transacted after the health and food safety matters had been discussed. In addition, a range of Board appointments were approved in relation to not merely the Food Safety Promotion Board but also to the Board of the Foyle, Carlingford and Irish Lights Commission; to the Board of InterTrade Ireland; to the Board of the North-South Language Body; as well as the approval of Directors of Tourism Ireland.

[9] In addition, an inland waterways meeting was able to proceed on 3 November 2021 because the appropriate minister was Minister Mallon of the Social Democratic and Labour Party (SDLP) and the accompanying minister was Minister Swann of the UUP. Evidently, the date and agenda for this meeting were approved by the First Minister, enabling it to proceed, notwithstanding that it did not involve health issues.

[10] However, on 15 October the anticipated meeting in relation to the environment did not proceed; nor did the meeting in relation to aquaculture and marine matters which had been planned for the same date. The meeting in relation to the Special EU Programmes Body, mentioned above and anticipated to take place on 22 October, also did not proceed. Further meetings which appear not to have been able to occur were a meeting in relation to tourism proposed for 10 November; a meeting in relation to trade and business development proposed for 24 November; and a meeting in relation to transport proposed for 26 November. On each occasion, a DUP Minister would have been the appropriate or accompanying minister in accordance with the planning which had been undertaken after these meetings had been provisionally scheduled further to the last NSMC plenary meeting in July 2021.

[11] The work of the NSMC is plainly therefore being impeded as a result of the non-participation by DUP Ministers in the arrangements necessary for the Council to meet and do business on occasions when a DUP Minister would be required to attend either as the appropriate minister or accompanying minister.

[12] The applicant is particularly concerned about the next two meetings of the NSMC which were anticipated to take place this month, namely a plenary meeting

of the Council and an institutional meeting of the Council. I explain below the nature of these meetings; but they are thought by many to be of more significance than the sectoral meetings which each deal with a particular area of cross-border cooperation. At the NSMC's last plenary meeting on 30 July 2021, December 2021 was identified as the month during which it would be appropriate to hold both of these meetings. They are of a different character than the sectoral meetings, as their names suggest.

[13] Some further detail about the nature and purpose of such meetings is contained in a document entitled, '*Meetings of the North/South Ministerial Council: Procedural Guidance for Departments*' published by the NSMC Joint Secretariat in October 2020 ('the Procedural Guide'), with a copy of which I have been provided. In a meeting in plenary format, the Northern Ireland Executive delegation is led by the First Minister and deputy First Minister and the Irish Government delegation is led by the Taoiseach and the Tánaiste. The task of a plenary meeting is to take an overview of co-operation on the island and of the North-South institutions. At plenary meetings, the Council also agrees a schedule of Council meetings for the next six months and considers the overall work programme. A meeting in institutional format brings together the Northern Ireland Executive (ordinarily represented by the First Minister and deputy First Minister) and the Irish Government (ordinarily represented by the Minister of Foreign Affairs) to consider institutional and cross-sectoral issues, including issues relating to the European Union, and to resolve any disagreements. Each of these types of meetings can be seen, therefore, to be more strategic in nature than the more frequent sectoral meetings.

[14] The applicant has brought the matter back to court to seek mandatory relief which (at this stage at least) will have the effect of moving forward the administrative arrangements for these two important meetings, in the hope that this will result in them being held and being fruitful. Whether this is a realistic hope – or an object which is capable of delivery through the exercise of the court's powers – is a matter to which I return below.

[15] In any event, some initial steps to this end were taken by the relevant officials whose responsibility it is to plan and prepare for such meetings. For instance, on 22 October 2021, Mr Losty, the Northern Ireland Joint Secretary to the NSMC, sent a submission to the respective Private Secretaries of the First Minister and deputy First Minister asking that they agree the date and venue for the NSMC Plenary meeting to be hosted by the Northern Ireland Executive in December this year. That agreement was not forthcoming.

The respondents' representation

[16] Before turning to a discussion of the legal submissions advanced by the respective parties and the resolution of the application before the court, it is appropriate to say something about the representation of the respondents in these

proceedings. The position referred to in paragraph [39] of my earlier judgment was refined further as the proceedings progressed. Mr McGleenan QC has told the court that he now appears for the third to fifth respondents only; and that the first and second respondents (the First Minister and Junior Minister Middleton, who also occupies a ministerial position within the Executive Office) are unrepresented.

[17] The reason provided for this state of affairs is that, since the first and second respondents are involved in these proceedings by virtue of their ministerial positions, the joint nature of the offices of First Minister and deputy First Minister is such that they could only be represented (and put forward any positive case) with the agreement of the deputy First Minister, which has been withheld. Some further detail in relation to this position has been provided in the documentation recently provided by the Executive Office (TEO) – as to which see paragraphs [21] and [53] below. This discloses that the deputy First Minister was asked whether she wanted to participate in defending the proceedings and, if not, whether she would be content that the first two respondents were able to defend their position through the Departmental Solicitor's Office (DSO). The terse response was as follows: "This is a joint office and I am not content for FM or JFM to defend their position via DSO." Whilst this might initially appear an unduly obstructive position to adopt, it is to be viewed against the background of the respondents having promptly accepted in the first phase of these proceedings that their withdrawal from the NSMC was unlawful but nonetheless having continued it after the court had granted declaratory relief.

[18] In any event, I am satisfied that no unfairness has resulted to the first and second respondents by reason of their lack of representation, since there is such a correlation between their position and that of the represented respondents that the substance of their position has, I believe, been accurately and properly put before the court; and, in any event, the disclosed materials contain a lengthy letter from the First Minister (to the deputy First Minister), dated 9 November 2021, in which he sets out the basis for his position and the legal analysis which he considers supports it. Although I cannot know, that letter appears to me to have the hallmarks of correspondence written for a wider audience than merely its formal recipient, perhaps even including this court.

[19] For this reason, I do not need to consider in more detail the question of whether it is correct to assume that the holder of either the office of First Minister or deputy First Minister cannot be separately represented in legal proceedings where, as here, the case is brought against one of them only as a result of their personal actions. In the *de Brun* case (discussed below), it seems that both the First Minister and the deputy First Minister were separately represented – although it is unclear how this position came about or whether there was agreement between the First Minister and deputy First Minister in that case that this was appropriate. The issue might boil down to one of public funding. For my part, I find it difficult to see how (for instance) the First Minister in the present case would not be permitted to defend his actions through representation of his own choosing and at his own expense,

when it is only his actions, rather than those of the deputy First Minister, which are under challenge.

[20] As matters have turned out, I do not consider that this issue has to be resolved in these proceedings (at least at this stage). That is because, as noted above, I consider that the First Minister's position has been adequately represented through the communications from him which have recently been disclosed and through the submissions made on behalf of the other respondents who are represented and who share his analysis of the situation. Mr McGleenan confirmed at a review hearing that the first and second respondents were fully sighted in relation to the proceedings and that, if there was any divergence between the issues which they wished to raise and the submissions advanced on behalf of the third to fifth respondents, he would expect to be informed. This provided me with considerable further reassurance in relation to this issue.

[21] The other concern I had in relation to the position which arose as a result of the non-agreement between the First Minister and deputy First Minister was that this would in some way result in the court not being provided with as full an explanation of the factual position as was required in this case. As is well known, judicial review proceedings entail a duty of candour. Particularly where leave to apply for judicial review has been granted, an obligation falls upon each respondent to explain to the court what they have done and why. In a case such as the present, I cannot accept that the joint nature of the offices of First Minister and deputy First Minister could in some way negate or undermine the operation of the duty of candour by (through a lack of agreement) precluding a respondent from putting before the court information or documentation which would otherwise be required to be disclosed. Some consideration was given in this case to ways in which this concern could be resolved. As it happens, after some urging, there was agreement to provide a range of materials relevant to the issues, and to the proposed arrangements for a variety of NSMC meetings discussed above, which were then disclosed by TEO, for which the court is grateful.

The 'scheduling defence'

[22] Since the grant of the declaration in this case, it has become clear that the respondents now rely on the notion that, in fact, no legal duty has crystallised in respect of attendance at particular NSMC meetings (or notifying an intention to attend) because a variety of such meetings have not been 'scheduled' and that such a meeting only becomes scheduled when the First Minister and deputy First Minister, acting jointly, sign off on the date and agenda. At the Assembly Executive Committee on 13 October, the first respondent is reported as having said that, "A scheduled meeting only becomes such whenever the Executive Office has signed off on that"; and that there would be no scheduled meeting which a Minister would have to attend "until such a meeting becomes officially sanctioned by the Executive Office." Mr Lavery QC referred to this in submissions as the respondents' "scheduling defence."

[23] To similar effect, in *inter partes* correspondence relating to whether or not certain of the respondents would attend anticipated meetings of the NSMC, the DSO responded to say that there was "no scheduled meeting", so that the issue of the Minister giving notification under section 52A(4) of the Northern Ireland Act 1998 (NIA) "does not therefore arise."

[24] The view taken by the respondents on this issue, however, is perhaps most clearly articulated in the correspondence of 9 November 2021 from the First Minister to the deputy First Minister, referred to above. This was sent in response to a note from the deputy First Minister of the previous day requesting that the First Minister nominate a replacement unionist Minister to attend the proposed meeting of the NSMC in tourism sectoral format on 10 November, in light of the third respondent not proposing to attend. In his response, the First Minister suggests that the deputy First Minister's protestations "may be based on a fundamental misapprehension as to whether a meeting has been scheduled or not", continuing that it was the First Minister's "clear and genuinely held view that no such meeting has been scheduled (or a date set in the terms of the legislation)", such that the responsibility upon him to nominate another minister to attend did not arise. The letter went on to posit that, even if a responsibility to nominate had arisen, that "would not permit a meeting to proceed as no agenda would have been agreed." There would require to be "further political negotiation" in relation to that, and potentially Executive approval depending upon what was to be considered at the meeting. The First Minister suggested that, to resolve the question of whether or not he was under the duty to nominate another minister to attend, "the crucial question is when, legally, a date is set."

[25] The First Minister's letter then went on to discuss four possible options as to how a date could be argued to be set for a NSMC meeting. I do not propose to set out in detail the discussion contained in the letter in relation to this. It suffices to summarise the four possibilities mentioned, namely (a) that the dates are set at NSMC plenary meetings; (b) that they are set by officials in the NSMC in conjunction with departmental officials; (c) that the dates are set when agreed by the relevant ministers; and (d) that the dates could only be set when agreed between the First Minister and deputy First Minister. For his part, the First Minister felt that the last of these options was both most consistent with the statutory scheme "and the primacy role afforded to the FM and dFM" and most reflective of how the system had operated in practice. On the basis of this, it was suggested that a date which did not have the approval of the First Minister and deputy First Minister could only ever be regarded as provisional. The First Minister concluded by pointing out that he had not agreed a date for the forthcoming meeting (the meeting which had been anticipated for 10 November); nor had he agreed the agenda. Therefore, he said, "no meeting, or certainly no meeting of any purpose could take place."

[26] A flavour of the deputy First Minister's response of 10 November can be obtained from the following extracts:

> "While your correspondence centres on legal and technical detail, I wish to provide a practical response.
>
> Put simply, your party has declared publicly that you are engaged in a political boycott of the North-South Ministerial Council meetings in protest at the Brexit Protocol. This is the sole reason that NSMC meetings involving DUP Ministers have not taken place since your party declared this boycott.
>
> The High Court has ruled for Executive Ministers to do so is to act unlawfully.
>
> …
>
> You are focusing on practical arrangements and scheduling of meetings as cover for a publicly declared and unlawful boycott and with the intention, by deploying secondary, technical matters of avoiding contempt of court while persisting with an unlawful boycott, in breach of the Ministerial code, NI Act 1998 [*sic*]."

[27] It seems clear from the exchanges between the First Minister and the deputy First Minister that it has been "custom and practice" since the inaugural meeting of the NSMC for Civil Service officials to make the practical arrangements for scheduling and arranging meetings. The deputy First Minister has suggested that officials attempted to "provide this factual account to the court" in these proceedings but that the First Minister sought to amend that, to which she could not agree. In turn, the First Minister has suggested that the Permanent Secretary of TEO declined to stand over the draft provided by officials in the NSMC. It seems, therefore, that agreement cannot even be reached on a simple description of how this process has operated in the past.

[28] As one would expect, the represented respondents' skeleton argument put considerably more meat on the bones of the legal analysis contained within the First Minister's correspondence. However, the central propositions advanced on behalf of the respondents resolved to these:

(i) The obligation on the First Minister and deputy First Minister contained in section 52A(1) of the NIA, acting jointly, to provide the Assembly with information relating to the date and agenda of a NSMC meeting indicated that these matters had to be agreed between the First Minister and deputy First Minister.

(ii) Until these matters had been agreed, the statutory machinery in the remainder of section 52A and in section 52B, by which Ministers were required to attend such a meeting or nominate (or have nominated) another attendee in their place, simply did not come into play.

[29] In support of this analysis, Mr McGleenan focused on the reference to the First Minister and deputy First Minister "acting jointly" in relation to these matters in section 52A(1); to the reference to the names of Ministers attending a meeting only being required to be supplied "once determined under this section" (*i.e.* after the date and agenda had been notified, which appeared to be a prior step); and to the requirement that Ministers notify their intention to attend or not "in any event no later than 10 days before the date of the meeting" (*i.e.* again, after the date for the meeting had been set). He might also have referred to the fact that the appropriate Minister is identified by reference to the matters included in the agenda for each meeting (see section 52A(2)), so that the required attendees can only be finally identified after the contents of the agenda are known.

[30] There is a superficial attraction to the analysis outlined above and, in most if not all cases, it will make perfect sense for the First Minister and deputy First Minister to agree the date and agenda for each NSMC meeting and for the further arrangements to follow from that. However, the question is whether such agreement is *required* before any obligation can ever arise on the part of a Minister to give notification under section 52A(4) or, indeed, on the part of the First Minister and deputy First Minister to make a nomination under section 52A(5) and/or (7).

[31] For my part, I am not persuaded that agreement between the First Minister and deputy First Minister is always required under section 52A(1) as a necessary prerequisite for further obligations under that section to arise. The key obligation in section 52A(1) is that the First Minister and deputy First Minister "give to the Executive Committee and to the Assembly the following information in relation to the meeting", namely the date, the agenda and (once determined) the Ministers who are to attend. The obligation is one of notification and transparency. It is to pass on information. The section does not expressly require the First Minister and deputy First Minister to agree the date and agenda for the other obligations to come into play. There may be other ways in which those matters can be determined or settled; although the obligation for the First Minister and deputy First Minister to give information in relation to them, and to do so jointly, will remain unaffected.

[32] In short, section 52A(1) is silent as to how the date and agenda for a meeting of the NSMC is to be set. This is essentially left to the NSMC, and each participating administration, to determine through their own processes in accordance with the Belfast Agreement and the NSMC's own agreed procedures.

[33] Paragraph 2 of Strand Two to the Belfast Agreement states:

> "All Council decisions to be by agreement between the two sides. Northern Ireland to be represented by the First Minister, Deputy First Minister and any relevant Ministers, the Irish Government by the Taoiseach and relevant Ministers, all operating in accordance with the rules for democratic authority and accountability in force in the Northern Ireland Assembly and the Oireachtas respectively."

[34] Paragraph 3 sets out the different formats in which the Council will meet including, at (ii), "in specific sectoral formats on a regular and frequent basis with each side represented by the appropriate Minister." Paragraph 4 makes specific provision in relation to agendas:

> "Agendas for all meetings to be settled by prior agreement between the two sides, but it will be open to either to propose any matter for consideration."

[35] The two key requirements which emerge from these references are that any agreement must be by agreement "between the two sides" (that is to say, agreed between the two administrations) and within the rules for democratic authority and accountability in each jurisdiction. This appears to me to leave room for a variety of ways in which dates and agendas may be agreed. By way of example only, if a sectoral meeting of the NSMC agreed and decided upon the date and agenda for its next meeting, and there was no limitation on the authority of the appropriate minister to do so, it does not seem to me that there is anything in the NIA which would require the First Minister and deputy First Minister to later agree the date and agenda again. The decision made at the NSMC meeting would satisfy the two key requirements identified above. Similarly, if officials of each administration agreed a date and agenda, within the authority permitted to them by the respective appropriate ministers, I see no reason why that could not be sufficient in law to formally 'schedule' a meeting (a term which is not used within the NIA) and engage the First Minister's and deputy First Minister's obligations under section 52A(1) to provide that information to the Executive Committee and the Assembly.

[36] Indeed, this approach appears to be consistent with the NSMC Joint Secretariat's own guidance, set out in the Procedural Guide referred to above, with an '*NSMC Meetings Flowchart*' with which I was provided, and with the '*Memorandum of Understanding on Procedure agreed by the NSMC on 13 December 1999*' which is now an appendix to the Procedural Guide. These documents are not always entirely consistent but they envisage that dates for meetings can be agreed (although sometimes merely proposed or agreed as a provisional date) at a plenary session or agreed at each sectoral meeting; and/or can be confirmed through officials. They also refer to the agenda for meetings being agreed through the NSMC Secretariat and/or in a working group meeting (chaired by the Joint Secretaries) between relevant officials in advance of forthcoming meetings. Although there is

occasional reference to securing prior political or Ministerial agreement to agendas for meetings of the Council, it is nowhere noted that these can only be agreed by the First Minister and deputy First Minister on the part of the Northern Ireland administration. A variety of the documentation provided in the proceedings in relation to planned meetings also suggests that it has not been the case in the past that the First Minister and deputy First Minister have always been required to agree the date or agenda, although it is right that either could insist on doing so before giving their consent to the giving of information under section 52A(1) or that either could seek to challenge an apparently agreed matter through the Executive decision-making process. I return to this issue below.

[37] In summary, I have significant doubts about the correctness of the First Minister's analysis that dates of meetings and agendas *must* be agreed between him and the deputy First Minister before a NSMC meeting is 'scheduled' and the obligations under section 52A(1) of the NIA come into play. Part V of the NIA is silent on these matters and, for the reasons given above, it seems to me that a meeting can be formally arranged in a variety of ways – as has apparently occurred in the past – without the First Minister and deputy First Minister being involved, provided that the relevant arrangements are agreed between both administrations and the relevant party on the Northern Ireland side is acting within their democratic authority. That might involve an appropriate minister making their own arrangements or an official on his or her behalf doing so with the minister's authority. When the arrangements are operating normally, there is no reason as a matter of law for the First Minister and deputy First Minister to necessarily be involved in what are essentially administrative matters.

[38] Of course, given that there is a requirement for anyone dealing with these matters on behalf of the Northern Ireland administration to act "in accordance with the rules for democratic authority and accountability in force in the Northern Ireland Assembly", it will always be open to a Minister to restrict the authority of an official acting on his or her behalf to agree a date or an agenda. That follows both as a matter of common sense and from the legal fact that an officer of the Minister's department is subject to the Minister's direction and control pursuant to Article 4(1) of the Departments (Northern Ireland) Order 1999. Similarly, a Minister may also have their authority restricted by virtue of their obligation to act in accordance with decisions of the Executive Committee or where their actions require to be referred to the Executive for discussion and agreement under section 20(3) or (4) of the NIA, as amended (although it is difficult to see how the fixing of a date or of an agenda would readily fall within that category). For these reasons, it makes sense for such matters to have the fiat of the First Minister and deputy First Minister; but I am unpersuaded that, as a matter of law, this is required in every instance for a NSMC meeting to be 'scheduled.'

[39] However, I do not consider that it is necessary to determine these issues finally in these proceedings. That is for three reasons. First, there is insufficient evidence before the court to persuade me that any of the relevant meetings

mentioned above had been formally scheduled by some means other than through the agreement of the First Minister and deputy First Minister. Certainly, there is nothing to suggest that the anticipated plenary or institutional meetings had been scheduled in some other way. Second, it is clear that, in respect of those meetings, the First Minister and deputy First Minister are the Ministers on behalf of the Northern Ireland administration who would be required to agree the dates and agendas (or give authority to TEO or NSMC officials to do so on their behalf) and that this has not been done. Third and most importantly, even assuming that the respondents are correct in law that the necessary first step before any other legal obligation under sections 52A or 52B of the NIA comes into play is the agreement between the First Minister and deputy First Minister as to the date of a NSMC meeting and its agenda, it is nonetheless clear in my view that the first respondent has been acting unlawfully in declining to do so (for the reasons set out at paragraphs [46]-[50] below).

The legality of the refusal to 'schedule' meetings

[40] In *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 it was a DUP Minister (the then Finance Minister, Peter Robinson MLA) who invoked the jurisdiction of the High Court to seek to ensure that a Minister (there, a Minister of the Crown, the Secretary of State for Northern Ireland) complied with their legal obligations under the NIA. In the course of his judgment when the case reached the House of Lords, Lord Bingham (at paragraph [11]) noted that the NIA was "in effect a constitution" for Northern Ireland and held that its provisions "should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody." This approach has been consistently applied by the courts of Northern Ireland: see, for example, *Re Buick's Application* [2018] NICA 26 at paragraphs [19] and [40], *per* Morgan LCJ; and *Re JR80's Application* [2019] NIQB 1 at paragraphs [12] and [111], *per* McCloskey J. The NSMC, along with the Assembly and the Strand Three arrangements for the British-Irish Council, represents an important and integral part of the constitutional arrangements for Northern Ireland's governance.

[41] The Strand Two arrangements in the Belfast Agreement were also expressly designed to be interdependent with the operation of the new Northern Ireland Assembly established by Strand One. Paragraph 13 of Strand Two notes that, "It is understood that the North/South Ministerial Council and the Northern Ireland Assembly are mutually inter-dependent, and that one cannot successfully function without the other." The applicant has quite properly drawn attention to the fact that it is not consistent with the settlement achieved in the Belfast Agreement for the respondents to seek to operate one institution, the Assembly, but not the other, the NSMC.

[42] This issue was touched upon by Kerr J (as he then was) in *In re de Brun and McGuinness' Application* [2001] NIQB 3 ("the *de Brun* case"), in which he commented

that the provision made in section 52 of the NIA "reflects the recognition in the Belfast Agreement of the importance of the Council as an integral part of the constitutional changes brought about by the Agreement and the Council's position as a component of the government of Northern Ireland, interdependent with the Assembly."

[43] The *de Brun* case involved a challenge to decisions of the then First Minister, David Trimble MLA, not to nominate two Sinn Féin Ministers for participation in meetings of the NSMC. This was at a time when section 52 of the NIA was in its original version, before amendment by virtue of the Northern Ireland (St Andrews Agreement) Act 2006 and the Northern Ireland (St Andrews Agreement) Act 2007, and when, therefore, the concept of an "appropriate minister" identified by reference to the subject matter of the NSMC meeting agenda and the minister's departmental responsibilities, who was *entitled* to attend the meeting, had not yet been introduced into the Act. The First Minister declined to nominate Sinn Féin Ministers for participation in NSMC meetings because he took the view that this would be likely to persuade Sinn Féin to use its influence to secure the decommissioning of paramilitary arms in accordance with the Belfast Agreement. Two Sinn Féin Ministers challenged the First Minister's refusal to nominate them for attendance at NSMC meetings on a variety of bases, including that his decision had been taken for an impermissible purpose collateral to the relevant statutory provisions.

[44] In considering the duty to nominate ministers to attend NSMC meetings under what was then section 52(1), Kerr J observed that the duty to act jointly "clearly implies that they [the First Minister and deputy First Minister] should conscientiously seek to agree" on nominations. Secondly, they were required to make nominations which were consistent with the statutory scheme (in that case, in order to ensure cross-community participation in the Council). It was only within these bounds that the relevant Ministers enjoyed a discretion, which discretion was to be "exercised in a manner that is consonant with the purpose" of the relevant statutory provision. In that case, it was held to be unlawful for the First Minister to exercise his nomination power simply to achieve a political end (namely to seek to induce the Minister concerned, or their political party, to act in a particular way). That was a purpose collateral to that of the relevant statutory provision.

[45] Kerr J's conclusion in this regard was also upheld on appeal: see [2001] NI 442. The Court of Appeal again rejected the First Minister's argument that he was entitled to exercise his discretion as to nomination in a manner calculated by him to further *another* purpose of the Belfast Agreement and the NIA, namely decommissioning. The purpose of the particular statutory power he was called upon to exercise, which formed the subject matter of the proceedings, was to foster North-South links through the operation of the NSMC. In giving the judgment of the court, Carswell LCJ commented, at 452, as follows:

> "The purpose of s 52 is to enable the working of the NSMC to proceed. The power of nomination was

> conferred on the first Minister and deputy first Minister in order to further that purpose, and they are obliged to use their power to carry out the statutory purpose."

[46] Assuming that the respondents' legal analysis is correct and that the First Minister and deputy First Minister are required to agree a date and agenda for each meeting of the NSMC – or that, in the particular circumstances of the case, it has fallen to them to do so – that function ought also to be exercised in line with the statutory purpose of section 52A of the NIA. That is to say, as was the case in *de Brun*, the duty to act jointly clearly implies that the First Minister and deputy First Minister should conscientiously seek to agree those matters; and agreement should not be withheld for reasons which are extraneous to the statutory purpose, that purpose being to ensure the efficient and effective operation of the NSMC.

[47] Where does that leave the actions of the First Minister, of which the applicant complains, in refusing or declining to agree meeting dates or agendas in respect of the NSMC meetings which had been planned and anticipated to occur in October to December of this year but which have now not been able to proceed? The respondents were able to offer no reason – other than the policy of DUP withdrawal from Strand Two (which they have already conceded to be unlawful) – for the First Minister's failure to agree or confirm dates and failure to agree or confirm agendas. Nor is any reason, much less a good reason, identified in the First Minister's correspondence with the deputy First Minister which has been disclosed to the court. That correspondence focuses on why the First Minister considers he is required to agree dates and agendas but offers no substantive reason as to why, in any particular case, he was unable to do so.

[48] The obvious conclusion to be drawn from the materials which have been placed before the court in these proceedings is that the first respondent's failure to agree a date for the various meetings of the NSMC which have not gone ahead, or currently cannot go ahead, is not as a result of any good faith failure to agree following a conscientious attempt to do so but, rather, merely in pursuance of the respondents' withdrawal from Strand Two structures. In other words, it is simply a wrecking or spoiling tactic undertaken in order to avoid the operation of the statutory requirements that Ministers attend and participate, or replacements are nominated to attend and participate in their place, pursuant to sections 52A-52C of the NIA.

[49] This is a case, like the *de Brun* case, where the First Minister's functions are being exercised (or not exercised) for a reason which is simply designed to increase political pressure on other actors and which does not seek to fulfil the purpose of section 52A of the NIA, or Part V of that Act more generally. Rather, the First Minister's motivation was, at best, wholly extraneous to the statutory purposes of section 52A and, at worst, calculated to actively undermine those purposes.

[50] In summary, the First Minister's approach to matters following the grant of the declaration in this case may well have ensured that the second to fifth respondents have not acted unlawfully or been placed in a situation where they felt they should do so; but that objective has only been achieved by further unlawful actions on his part. As Mr Lavery pointed out, if the relevant obligations could simply be side-stepped by meetings not being scheduled by the First Minister, the respondents could have (and, he submits, would have) defended these proceedings in their entirety, rather than conceding that they were acting unlawfully. As the deputy First Minister more pointedly suggested, the failure to agree dates and agendas has been used "as cover for a publicly declared and unlawful boycott."

[51] At paragraph [3] above, I described this boycott as partial. I did so because it is clear that some meetings of the NSMC have been permitted to proceed and have been facilitated by the First Minister in order that they may do so. The DSO correspondence has confirmed, for instance, that the meeting in relation to health which proceeded on 14 October "was scheduled when the FM/DFM signed it off." Two meetings have proceeded at which DUP Ministers were not expected to attend in any event. One of those was clearly related to health (which has been said to be an exception to the DUP's present policy); the other not. Even at the meeting which dealt with health matters, it seems clear that a number of items of business were transacted which were not health-related (see paragraph [8] above). A case has been made that *part* of the EU funding related to the Peace Plus programme will ultimately be spent on, or related to, health matters. Much of it, however, will not. These issues have been the subject of a number of written Assembly questions by Jim Allister MLA, to which my attention has been drawn in the course of the proceedings. Mr Allister appears to advocate that the DUP's boycott should go further, either in relation to stymying *any* NSMC business or by way of withdrawing from the devolved structures more generally in protest.

[52] From the court's perspective it is difficult to know whether the facilitation of the non-health-related business which the First Minister has permitted to proceed should be approbated or not. On the one hand, for the reasons given above and in my previous judgment, the First Minister and the rest of the respondents to these proceedings should be facilitating the operation of the NSMC as normal and legitimately pursuing their political agenda by other means available to them which do not involve acting contrary to their legal obligations under the NIA. Viewed in this way, any mitigation of their unlawful actions is to be welcomed. Practically speaking, the approval of the Peace Plus programme funding was a matter which was causing significant concern to the applicant and others when these proceedings were commenced; and that issue has now been resolved. On the other hand, it is difficult to see the transaction of certain limited business which the respondents have permitted to proceed as anything other than a cynical attempt to mitigate the potential political cost of their boycott of the NSMC at the expense of cheapening respect for the rule of law.

The applicant's present focus in this application

[53] As noted above, since the issue of the declaration in this case, there have been a number of NSMC meetings which had been planned but which have not proceeded. The court requested that consideration be given to a range of documentation and information being provided by TEO in relation, for instance, to the process required to propose, schedule and agree NSMC meetings. For quite some time, in the absence of joint ministerial agreement to do so, TEO was not in a position to provide this information and the proceedings were therefore unable to be advanced on a properly informed basis. Although a number of NSMC meetings could not proceed during that period, the applicant's pragmatic position was that some such meetings are more important than others. The applicant now focuses his concerns on the plenary meeting of the Council which – in the agreed indicative timetable which was agreed at the plenary NSMC meeting in July 2021 – was due to be held this month, December 2021. In addition, there was planned to be an institutional meeting of the Council this month also. For the reasons discussed above, these meetings are seen to be of particular significance.

[54] As a result of this, the applicant asks the court to make mandatory orders, *inter alia*, compelling the First Minister to 'schedule' the meeting and agree an agenda in advance, and then attend and participate in the meeting, as well as nominating other relevant Ministers to attend; and compelling the remaining respondents to attend and participate. Despite the detailed menu of orders sought in his skeleton argument, in oral submissions Mr Lavery suggested that the court should adopt an "incremental approach", first ordering that the date and agenda be agreed and then waiting to see how the first respondent, and in turn the other respondents, reacted. It was candidly accepted that, if only limited compliance or non-compliance resulted, further orders from the court were likely to be sought, either by way of enforcement or by way of compelling the next step to be taken towards the successful conclusion of business at the NSMC meetings.

[55] I address below the respondents' submissions in relation to the propriety of granting a mandatory order requiring the subject of the order to agree a matter or matters with a third party. In broad terms, the respondents are correct that this would be a highly unusual order. In the present case, the applicant makes the valid point that there ought not to be anything particularly contentious about the issue of settling upon a mutually convenient date. Although the agreement of an agenda is unquestionably a matter of more substance, that too may turn out to be a relatively uncomplicated matter, if the process is embarked upon in good faith, in light of the fact that (a) the general purpose and function of both institutional and plenary meetings of the Council has already been defined and agreed (see paragraph [13] above); (b) it is in any event open to either side to propose any matter for consideration or action at any time (see paragraph 5.2 of the Memorandum of Understanding appended to the Procedural Guide); and (c) agreeing to a matter being considered on the agenda is not in any way a commitment to agreeing any particular outcome when that item comes to be discussed. The applicant therefore

urges me to take the first step by granting a mandatory order requiring the first respondent to agree these matters, which would in turn trigger the further obligations in relation to nomination in the remainder of section 52A of the Act.

The grant of mandatory orders in judicial review

[56] An order of *mandamus* has been described by Lord Scarman as "the most elusive of the prerogative writs and orders" (*R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, at 650). To similar effect, McCloskey J in *R (Sultana) v Secretary of State for the Home Department* [2015] UKUT 00226 (IAC) observed that "the remedy of a mandatory order is rarely granted." Although there is a conceptual distinction to be made between an order of *mandamus* compelling the carrying out of a public law duty and a mandatory injunction, which may also be granted in judicial review (see section 18(1)(e) of the Judicature (Northern Ireland) Act 1978) and which might be considered a more flexible remedy, the principles on which either of these mandatory orders will be granted in the present context are similar.

[57] There are a number of reasons why mandatory orders are comparatively rare in judicial review. The first is that, where declaratory relief has been granted (as it was in this case), responsible public authorities can generally be expected to comply with their legal obligations as explained by the court. In the landmark case of *M v Home Office* [1994] 1 AC 377 concerning the powers of the court in respect of Ministers and government departments acting on behalf of the Crown, Lord Woolf said this (at 422-423):

> "The fact that, in my view, the court should be regarded as having jurisdiction to grant interim and final injunctions against officers of the Crown does not mean that that jurisdiction should be exercised except in the most limited circumstances. In the majority of situations so far as final relief is concerned, a declaration will continue to be the appropriate remedy on an application for judicial review involving officers of the Crown. As has been the position in the past, the Crown can be relied upon to co-operate fully with such declarations."

[58] For this reason, as noted in my earlier judgment (see paragraph [36]), courts often prefer to grant a declaration that a body is under a duty to perform a certain act and then rely upon the authority concerned to carry out its duty: see also Supperstone, Goudie and Walker, *Judicial Review* (6th edition, 2017, LexisNexis) ("Supperstone"), at paras 16.47 and 16.66. However, there are a variety of other principles which operate to limit the grant of mandatory orders – whether by way of *mandamus* or final injunctions – in judicial review. These are evident from a consideration of some of the leading texts in this field, including Supperstone (*supra*); Auburn, Moffett and Sharland, *Judicial Review Principles and Procedure* (2013,

OUP) ("Auburn"); Fordham, *Judicial Review Handbook* (7th edition, 2020, Hart) ("Fordham"); Woolf, Jowell, Donnelly and Hare, *De Smith's Judicial Review* (8th edition, 2018, Sweet & Maxwell) ("De Smith"); and Lewis, *Judicial Remedies in Public Law* (6th edition, 2021, Sweet & Maxwell) ("Lewis"), several of which were opened to me at the hearing and all of which I have considered on this issue. The references below to the relevant passages from these texts are obviously not exhaustive.

[59] The following basic principles are evident from the learning on the topic, each of which operates as a guide, subject to the circumstances of the particular case under consideration:

(1) Rarity in general: As noted above, mandatory or coercive orders are rare in judicial review. The just result is more often achieved by the grant of a constitutive remedy such as a quashing order and/or an educative remedy by way of declaration. Nonetheless, mandatory orders remain an important tool within the courts' toolkit to do justice in an appropriate case and where there is a proper basis for compelling a particular action on the part of the respondent.

(2) Need for clarity as to obligation: Mandatory orders are most appropriate in cases where the relevant public authority has a clear statutory duty to do a certain thing (see Supperstone, para 16.47; and Lewis, para 6-051). This means that, in practice, the situations where the courts are willing and able to order a public authority to do a specific act are limited. A mandatory order is most suitable where the obligation to act is clear and the act to be performed is also clear. That is not to say, however, that an implied statutory duty may not be enforced by way of mandatory order where the court has identified the relevant obligation.

(3) Rare where discretion involved: Generally, a mandatory order will not be granted compelling a particular outcome where the public body in question enjoys a discretion – unless (exceptionally) the discretion may only lawfully be exercised in one particular manner in the circumstances of the case – although an order may be granted securing performance of the duty to *exercise* the discretion (see Supperstone, para 16.47; and Auburn, para 30.73).

(4) Need for clarity as to act required: A mandatory order will also not normally be granted unless the court can specify precisely what the public body needs to do in order to perform its duties; and such an order should be framed in terms which make it clear what the public body is required to do and also therefore to allow a clear assessment to be made as to whether the order has been complied with (see Lewis, para 8-009; and Auburn, para 30.08). That is not to say that a court may not, for instance, grant an order requiring a particular purpose to be achieved within a particular timescale (where there is a public law obligation to achieve the purpose in question); but the court will

be more cautious as the complexity of the result to be achieved or the steps required for that purpose increases.

(5) Presumption against continuing supervision: In general, a mandatory order will not issue to compel the performance of a continuing series of acts which the court is incapable of superintending (see De Smith, para 18-036). Nor will a mandatory order be granted if it will require close supervision by the court to ensure that it is being observed, or ongoing monitoring of the exercise of the public body's functions (see Lewis, para 8-009; and Auburn, para 30.08).

[60] In summary, the simpler, cleaner and crisper the act to be required on the part of the public authority, the more likely it is that a mandatory order will be granted. This reflects the overarching requirements both of legal certainty and of ensuring that the court remains within the proper constitutional bounds of its own role, namely to enforce the law but generally to leave the substance of decision-making to the body to whom that has been entrusted by Parliament.

[61] It may also be helpful to say something about what might happen if a mandatory order were to be made in this case but not complied with. Where a public authority fails to comply with a court order in judicial review, although the normal sanctions for contempt of court (such as imprisonment, sequestration or a fine) are at the court's disposal, a mere finding of contempt rather than a penalty is often considered sufficient to mark the gravity of the situation, with punitive sanctions generally considered inappropriate in this sphere (see De Smith, para 18-045; and Lewis, para 6-069). In *M v Home Office*, it was considered that making a finding of contempt alone would generally vindicate the requirements of justice where a Minister was concerned and that it would not be appropriate to use the court's punitive powers, at least in cases where the Minister was acting in his official capacity and it was not a case of personal contempt on his or her part. By way of example, in *R (Lamari) v Secretary of State for the Home Department* [2012] EWHC 1895 (Admin), where the Administrative Court made a finding of contempt against the Home Secretary in respect of a "wholly remarkable and unacceptable" decision, it imposed no further penalty save in relation to costs.

[62] In his discussion of these issues in *M v Home Office*, Lord Woolf pointed out that this general approach does not mean that it cannot be appropriate to make a finding of contempt against a Minister personally, rather than against him in his official capacity (as a departmental figurehead), provided that the contempt relates to his own default rather than to that of officials within the department for which he is responsible. This would be highly unusual, although it appears to be the territory in which the court finds itself in the present case. Where contempt on the part of a government department is concerned, Lord Woolf observed that "the object of the exercise is not so much to punish an individual as to vindicate the rule of law by a finding of contempt", which "can be achieved equally by a declaratory finding of the court as to the contempt against the minister as representing the department."

Further remedy to be granted in these proceedings

[63] Having carefully considered the submissions of the parties and the legal principles summarised above, I have concluded that it would not be appropriate to grant a mandatory order in this case, notwithstanding the obvious impediment to the work of the NSMC to which the respondents' actions give rise. There are essentially four (distinct but overlapping) reasons for this conclusion. They are addressed separately below.

[64] First, I accept Mr McGleenan's submission that a mandatory order in this case would be particularly unusual since it would involve compelling the first respondent to agree something with someone else (in this case, the deputy First Minister). Although there is force in the observations set out at paragraph [55] above, to the effect that the agreement of a date and agenda for the relevant meetings ought not to be complicated or contentious if a conscientious attempt to reach agreement is made in good faith, and in Mr Lavery's submission that courts have previously granted mandatory orders compelling the achievement of a result within a certain timeframe which involves further deliberation or unspecified steps on the part of the authority concerned, neither of these considerations is a complete answer to the concern identified in Mr McGleenan's primary submission.

[65] There are a range of reasons why it *may* turn out to be difficult to agree a date for a plenary or institutional meeting of the Council, not least because of the wide range of participants in such meetings whose diary commitments would require to be accommodated. There may also be legitimate political considerations relating to the precise timing of such meetings, of which the court is entirely unaware, which would or could affect the prospects of business being able to be transacted successfully at the Council meetings. As I have already adverted to, there may also be substantive considerations which could properly be taken into account as to what should, or should not, be included on the agenda for such meetings. These are matters upon which the court is unsighted.

[66] Of most concern, however, is that the first respondent's compliance with an order to agree a date and agenda would be (at least to some degree) dependent upon the actions of third parties, whom Mr McGleenan described as his political opponents. Leaving aside for a moment the fact that the implied obligation to seek to secure agreement on these administrative issues conscientiously and in good faith ought to exclude or reduce mere political manoeuvring in relation to them, I accept that it would be highly unusual for a mandatory order to be made requiring a respondent to reach agreement with a third party. Their compliance with that order would therefore be outwith their own personal agency. Generally as a matter of law, agreements to agree are unenforceable because of the lack of precision in the resulting obligation. Mr Lavery was unable to point to a case where a mandatory order had been made requiring agreement with a third party to be secured (as opposed to further deliberation within the respondent authority itself). In the present case, the situation is complicated further by the fact that the first respondent

would be required to agree these matters not only with the deputy First Minister but also, in turn, with the Irish administration (whose actions in this context lie entirely outside the jurisdiction of this court). These are extremely powerful considerations weighing against the grant of even the initial order which the applicant seeks.

[67] It would be open to the court, of course, to make an order simply requiring the first respondent to conscientiously seek to agree those matters and, in so doing, further requiring him not to take into account considerations which are extraneous to the statutory purpose. However, that order lacks the precision which one would ordinarily hope to achieve in a mandatory order. Ascertaining whether or not it had been complied with may be difficult. I can readily determine that this has not happened to date. Indeed, no attempt to do so even appears to have been made; but the position would be more complicated if the first respondent had made some attempts which had proven unfruitful.

[68] Second, it seems clear to me that making a mandatory order in this case is likely to represent only the start of an ongoing process of seeking to supervise and police the DUP Ministers' engagement with the NSMC in a manner which is not appropriate. The respondents have not reacted as the court would have hoped in response to the declaration which has been granted in these proceedings. A calculation has apparently been made – which the court deprecates in the strongest possible terms – that respect for the rule of law is outweighed by the political advantage to be secured by the respondents' boycott of the NSMC. In my view, it is unrealistic to suggest that, if the first respondent is compelled to agree a date and agenda for forthcoming NSMC meetings, the respondents will thereafter simply engage with the NSMC in the normal conscientious manner one would usually expect. It is virtually inevitable, in my view, that further orders would be required in order to seek to secure the provision of notifications of intention on the part of DUP Ministers and/or to secure their attendance or the nomination of other Ministers to attend in their stead. The more intervention which is, or may be, required by the court in terms of ongoing supervision, the less appropriate it will be for a mandatory order to be granted. The matter is complicated further by the fact that the Act itself seeks to allow for contingencies, for instance if a Minister has a valid reason for not attending, and that the statutory machinery in this area involves a number of sequential and inter-locking actions.

[69] Third, I also accept the submission that, once the court embarks upon a course of seeking to compel substantive engagement in NSMC meetings, it would have stepped into the political sphere, or at least towards it, in a way which the authorities suggest is to be avoided. In addition to the principles governing the grant of mandatory orders summarised at paragraph [59] above, there are a range of more general principles which guide the courts' actions in relation to the grant of remedies in judicial review. There is often a fine, but important, distinction to be drawn between cases on the one hand where a court is asked to decide a political question (which it cannot) and cases on the other hand where a court is merely asked to perform its appropriate constitutional role of ruling on the legality of actions on

the part of political actors, albeit in a context of political controversy. This distinction was expressly adverted to by Lady Hale and Lord Reed in paragraph [31] of their joint judgment in the Parliamentary prorogation case (*R (Miller) v Prime Minister* [2020] AC 373).

[70] I am satisfied that the declaration previously made in these proceedings and that set out at paragraph [75] below fall clearly on the former side of that line. I accept Mr McGleenan's submission, however, that the making of a mandatory order, followed by further orders which are likely to be necessary to ensure that the court's initial order has utility, will give rise to ineluctable momentum towards crossing that line. In the *de Brun* case, Kerr J bluntly recognised, applying *Re Williamson's Application* [2000] NI 294, that there would be decisions taken in a political context which should be immune from judicial review because of the subjective nature of the decision and the political considerations which inform it. This leads on to the next consideration.

[71] Fourth, the court's order must have some ultimate utility. Even assuming the First Minister was compelled to agree a date and an agenda, and a DUP Minister was then compelled to attend a NSMC meeting, the court could not further compel them to conduct any meaningful business at that meeting, to take any substantive decision or to agree any particular matter proposed. As discussed in exchanges with counsel at the recent hearing, the relevant Ministers could filibuster or simply decline to agree and it would in my view plainly be outside the court's powers to compel any substantive outcome on a matter which had been raised for discussion at the Council.

[72] Mr Lavery made the perfectly proper point that the statutory scheme requires the attending Ministers to "participate", which is a term defined by reference to provisions of the Belfast Agreement in section 52C(5) of the NIA. However, that statutory phrase remains extremely open-textured. It would be extremely difficult for the court to reach a conclusion that a Minister had not 'participated' in a NSMC meeting in other than the most obvious cases. In any event, even assuming a DUP Minister attended and participated or that the court could compel the nomination of a UUP Minister to attend as a stand-in for a DUP Minister (either as the appropriate or accompanying Minister, so as to satisfy the cross-community requirements), such a Minister can only act within the authority provided to him or her by the Executive (or within the authority not removed from them by the Executive). That follows from the requirement in the Ministerial Code that Ministers act in accordance with decisions of the Executive Committee and, more obviously in this context, from the provision in paragraphs 2 and 6 of Strand Two of the Belfast Agreement that attending Ministers must operate "in accordance with the rules for democratic authority and accountability in force in the Northern Ireland Assembly" and take decisions "within the defined authority of those attending, through the arrangements in place for co-ordination of executive functions within each jurisdiction." It would therefore be open to the respondents through decision-making in the Executive Committee – including by means of the

requirement for 'call-in' of certain matters to be discussed and agreed at Executive level under section 20(3) and (4) of the NIA and/or the cross-community voting mechanism set out in section 28A(8)(c) of the NIA and reflected in paragraph 2.12 of the Ministerial Code – to dictate, at least to a significant degree, what could and could not be agreed by those attending the Council. The scope for court intervention in relation to the political decision-making in that forum would be extremely limited.

[73] In short, there is force in Mr McGleenan's submission that the statutory scheme is built on the assumption of a level of goodwill between the power-sharing parties representing the Northern Ireland administration – or at least business-like and pragmatic cooperation between them – which does not presently appear to be present in the Strand Two context. The court cannot force the respondents to contribute in good faith where they have set their face against this; nor can it mandate or secure agreement on issues to be discussed and agreed within the NSMC, which are matters well outside the proper territory of justiciability. In summary, without good faith participation in the structures of the NSMC on the part of the respondents, the court cannot ensure that the Council is able to meet and do business as the statutory scheme intended. This leads to the risk that the rule of law would in fact be further undermined by a pantomime of the court's coercive powers being continually invoked to no ultimate, substantive benefit.

[74] As the discussion at paragraphs [61]-[62] highlights, even if a mandatory order were made and not complied with, the standard approach would be to make a finding of contempt and not (as some might assume) to have the relevant Minister led off in shackles. If personal default on the part of a Minister was to be established, as might well occur in this case, penal powers are available in principle against the offending Minister; but there are public interest considerations weighing against the imprisonment of a serving Minister with departmental responsibilities. In any event, a fine would usually be the most appropriate penalty for an initial breach. Whatever penalty were to be imposed however, this is unlikely to result in substantive agreement being reached on issues raised for consideration within the NSMC and, if it did, there are questions as to the propriety of the court securing the achievement of a substantive political outcome through the use of its coercive powers, given the doctrine of separation of powers. As I have also previously said, the court is further astute to avoid its process being misused for political gain by the respondents, or any of them, being able to portray themselves as martyrs for the political cause of opposition to the Northern Ireland Protocol.

[75] Accordingly, in light of all of the above considerations, I propose only to grant further declarations, in the following terms:

> "1. The First Minister and deputy First Minister, when called upon to act jointly to agree a date or agenda for a meeting of the North-South Ministerial Council (NSMC), are under implied statutory obligations (a) to conscientiously seek to agree

those matters; and (b) not to withhold agreement for purposes which are extraneous to the statutory purpose of Part V of the Northern Ireland Act 1998, that purpose being to ensure the efficient and effective operation of the NSMC.

2. The First Minister's failure to conscientiously seek to agree a date and agenda for the NSMC meetings which had been anticipated to be held in October to December 2021 but which were unable to be held (or in respect of which further arrangements could not be made) because of that failure, and his failure to do so in pursuance of his party's withdrawal from the Strand Two arrangements set out in the Belfast Agreement, were unlawful."

[76] For the reasons given above, I do not propose to grant any form of mandatory order seeking to compel the First Minister to agree a date and agenda for forthcoming NSMC meetings. In the final analysis, the consequences of the respondents' continued withdrawal from the NSMC are matters which are better addressed in the political sphere, both within the Assembly and electorally.

Conclusion

[77] Lest there be any temptation for the respondents to represent this decision as a vindication of their position however, the following comments ought properly to be made in conclusion.

[78] Almost two months have passed since the court made the earlier declaration in these proceedings. The respondents have continued on the course which they conceded was unlawful. A variety of business on matters of cross-border interest has not been able to be progressed in the meantime. That is because Ministers are acting in plain breach of what they know to be their legal obligations to participate in the Strand Two structures.

[79] In *Re McNern's Application* [2020] NIQB 57, McAlinden J warned (at paragraph [29]) that adherence to the principles embodied by the rule of law was fundamental in a society such as ours, emphasising the need for those in positions of leadership "to promote, support and demonstrate assiduous adherence to the principles of the rule of law." I drew attention to the same or similar obligations, grounded in the terms of the Ministerial Pledge of Office and Ministerial Code, in paragraph [41] of my earlier judgment.

[80] Each of the respondents in these proceedings affirmed the Ministerial Pledge of Office committing themselves, *inter alia*, to discharge in good faith *all* the duties of their ministerial office; to participate fully in the North-South Ministerial Council, as

well as in the Executive Committee and the British-Irish Council; to uphold the rule of law, including by way of support for the courts; and to support the rule of law "unequivocally in word and deed and to support all efforts to uphold it." By their actions which are the subject of these proceedings the respondents, and principally the first respondent by his actions following the grant of the court's declaration in October, are in abject breach of their solemn pledge.

[81] It is no answer that the respondents wish to protest what they perceive as a political injustice. For present purposes, the court is entirely unconcerned with the merits of the respondents' criticisms of the Northern Ireland Protocol. The *de Brun* case established that, no matter how worthy one's political goal, and even assuming it relates to the full implementation of other aspects of the Belfast Agreement, a Minister cannot act in clear violation of the ministerial obligations which they have assumed.

[82] In recent months there have been – thankfully, sporadic – acts of violence claimed by or attributed to those who, like the respondents, oppose the operation of the Northern Ireland Protocol. These actions have been justly condemned by, amongst others, the respondents' party leader. The actions of those who choose to flout the criminal law for political ends, particularly where the use or threat of violence against person or property is concerned, are of course particularly extreme and wholly unacceptable. However, it is incumbent upon those in political leadership to reflect on the example set when they choose to wilfully ignore clear legal obligations to which they are subject. It is not difficult to conceive that condemnation of others' law-breaking may be less influential when political leaders are themselves content to publicly disregard the law in instances of their own choosing.

[83] It is also regrettable that there is no independent mechanism for determining complaints against a Minister for alleged breach of the Ministerial Code. The Northern Ireland Assembly Commissioner for Standards has responsibility for determining complaints against Ministers where it is alleged that they have breached the Ministerial *Code of Conduct* – set out in paragraphs 1.5 and 1.6 of the Ministerial Code – but not those provisions which would be more directly relevant in this case (mentioned in paragraphs [40]-[41] of my earlier judgment). As I have observed above, in an area of such political contention as that in which these proceedings arise, the primary accountability mechanisms are likely to be in the political arena. Where, however, the respondents' actions are calculated to seek to secure political advantage, that arena may also fail to give rise to any effective sanction. Mr McGleenan, entirely rightly but with excessive understatement in my view, accepted during the course of his submissions that this situation was "unsatisfactory." From the court's perspective, it is both profoundly concerning and depressing that the respondents hope to secure political advantage by openly flouting their legal obligations.

Costs

[84] Further to my earlier judgment, I made an order that the respondents bear the applicant's costs of these proceedings up to that point (such costs to be taxed in default of agreement). No contrary submission to this proposal was made on behalf of the respondents, for understandable reason. I also observed (at paragraph [44] of my earlier judgment) that, in light of how the proceedings had progressed at that stage, it was difficult to see how the legal costs associated with them could be considered to be anything other than a lamentable waste of public funds at a time of significant pressure on public finances. That is because the respondents quickly conceded that their position of acting in concert to thwart the operation of the NSMC was unlawful, notwithstanding a failure to make any concession in the course of pre-action correspondence.

[85] The observation made about waste of public funds was made on the assumption that the respondents would be indemnified out of public funds, both in respect of their own legal costs and in order to meet the adverse costs order made against them. That is not a matter for me. The costs order applies against each respondent personally but it is a matter for others whether or not an indemnity from public funds will be provided, as would normally be expected where a public office-holder is the subject of a challenge in respect of the exercise of their functions. As was raised at one of the review hearings in relation to this phase of the proceedings, however, many may consider it difficult to see why the respondents should benefit from public funding in relation to proceedings challenging a wilful failure to exercise the responsibilities of their office, rather than as a result of errors made in the course of exercising those responsibilities.

[86] I will hear the parties on the costs of this second phase of the proceedings. However, in light of the declarations set out at paragraph [75] above and the respondents' continued boycott of the NSMC – which they have accepted to be unlawful and notwithstanding the court's earlier declaration – principally through the actions of the First Minister which are described above, it provisionally seems to me that the appropriate order would be for the first respondent to bear the costs of this further phase of these proceedings. The applicant's application for further relief has been made necessary by the first respondent's actions to continue to thwart the meetings and business of the NSMC, in the face of the court's earlier declaration. Albeit the applicant has not secured the mandatory relief he has sought, further relief has been granted in the terms of the additional declaratory relief set out above. Before resolving the issue of costs, however, it appears to me that it would be appropriate for the respondents, and the first respondent in particular, to be permitted to make representations in relation to it; and I would urge that the necessary arrangements be made to permit this to occur.