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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF APPLICATION BY SAFE ELECTRICITY A&T LIMITED AND PATRICK WOODS FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE MINISTER FOR THE DEPARTMENT FOR INFRASTRUCTURE AND THE EXECUTIVE OFFICE

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Ronan Lavery QC, Conan Fegan 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 Respondents
William Orbinson QC, Scott Lyness QC and Emily Neill (instructed by Carson McDowell LLP, Solicitors) for the Notice Party

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SCOFFIELD J

Introduction

[1] This case concerns the amendments made to the Northern Ireland Act 1998 ("the NIA") by the Executive Committee (Functions) Act (Northern Ireland) 2020 ('the 2020 Act') and the extent to which those amendments permit the first respondent, the Minister with responsibility for the Department for Infrastructure ("DfI"), to make planning decisions without recourse to the Executive Committee of the Northern Ireland Assembly in the absence (yet) of any amendments to the Ministerial Code.

[2] The applicants are opponents of the current plans for the development of a North-South Electricity Interconnector ('the Interconnector'), which are more particularly described below. They are concerned about the decision of the DfI

Minister made on 14 September 2020 to grant planning permission in respect of two associated planning applications relating to the development of the Interconnector.

[3] The applicants' primary ground of challenge is that this decision could not lawfully be taken by the Minister without her having referred the matter to the Executive for discussion and agreement in compliance with her obligations under the Ministerial Code; and that the amendments made to the NIA by the 2020 Act were insufficient on their own for this purpose. Their second ground of challenge, if driven to fall back on this, is that the 2020 Act itself was unlawful and *ultra vires* on a variety of bases. As I observed during the course of the hearing, it appears to me that the applicants' second ground of challenge is more significant than a mere back-up point and more properly falls to be dealt with first, given its broader significance (if correct). Accordingly, I deal with it first in the discussion below.

[4] Mr Lavery QC appeared for the applicants with Messrs Conan and Colm Fegan; Dr McGleenan QC appeared for the respondents – the Executive Office and the Minister with responsibility for the Department for Infrastructure – with Mr McAteer; and Mr Orbinson QC appeared for the notice party – the System Operator for Northern Ireland ("SONI"), the beneficiary of the planning permissions under challenge – with Mr Lyness QC and Ms Neill. I am grateful to all counsel for their comprehensive and helpful written submissions, which were supplemented by more focused but nonetheless valuable oral submissions at hearing.

The factual background

[5] It is unnecessary to dilate upon the factual background to this application in any great detail, since the outcome ultimately turns on questions of law. The only real factual dispute in the case was whether the grant of the impugned permissions was significant or controversial. Nonetheless, it is appropriate to provide a short summary of the factual position which has given rise to the issues of legal dispute which require resolution.

[6] The first applicant is Safe Electricity A&T Limited ("SEAT"), a private company limited by guarantee with its registered address at 190 Monaghan Road, Armagh. According to the applicants' Order 53 statement, it is a company established to act as a representative organ in respect of "the environmental concerns of a large number of the persons affected along the route of the proposed development of the North-South Interconnector." One such person is Mr Patrick Woods, the second applicant, a retired person who lives in the country, near the border, outside Armagh. Mr Woods is in ill health but is a regular walker outside his home. His evidence is that the route of the proposed Interconnector passes overhead at the road on which he regularly walks and that it will 'overhang' part of his land. He is concerned about the effect of the Interconnector, if built, upon his health, upon the value of his land, and upon the amenity of himself and his family who live nearby. Without taking any view on the strength or validity of

Mr Woods' concerns, he is in my view plainly someone with standing to bring the present challenge.

[7] An affidavit has also been provided from a company director of the first applicant, Mr John Woods. He describes SEAT as a company bringing together landowners, business people and interested parties from the counties of Armagh and Tyrone (the 'A&T' of the company title) "in a common effort to ensure that new electricity power lines be laid underground in the said counties", which reflects its objects as set out in its Memorandum of Association; and confirms that the company passed a resolution authorising the present proceedings to be brought in its name.

[8] The decisions under challenge are the decisions to grant planning permission in applications O/2009/0792/F and O/2013/0214/F. These decisions will facilitate development of the Interconnector, also referred to as the Tyrone-Cavan Interconnector. The proposals involve constructing and running a 400kV overhead transmission line from Woodland in County Meath in the Republic of Ireland to Turleenan in County Tyrone in Northern Ireland – over a distance of some 138 km in total, with 34 km of line in this jurisdiction. They will also involve constructing a new substation at Trewmount Road, Moy, Dungannon; and some 102 pylons in Northern Ireland.

[9] A public inquiry was convened by the Planning Appeals Commission ("PAC") to consider the proposals. Its commissioners reported in November 2017, recommending that planning permission be granted in respect of both applications, subject to the imposition of appropriate conditions. The Permanent Secretary of the DfI then granted planning approval for the project in January 2018, during a period when the Northern Ireland Executive was not functioning and there was no minister in charge of the Department. That decision was challenged by way of judicial review (including by the first applicant) and quashed by the court in light of the decision of the Court of Appeal in *Re Buick's Application* [2018] NICA 26.

[10] However, after the restoration of devolved government in January 2020, and indeed after the passing of the 2020 Act with which these proceedings are centrally concerned, it was announced that the Minister for the Department, Ms Mallon MLA, had granted full planning permission for the Interconnector (that is to say, in respect of both of the applications). It is this decision which is impugned in the present proceedings. Departmental submissions relating to the consideration of the applications and the Minister's decision have been provided to the court. It is common case, however, that the Minister did not refer the decision to the Executive Committee for it to discuss and agree upon the question of whether the planning applications should be granted or refused.

The applicants' challenge

[11] The applicants have not pursued any grounds of challenge relating to the planning merits of the development proposals or grounded on any alleged failure to

properly consider or apply relevant planning policy. Their objection is a constitutional one: simply that, under our present constitutional arrangements, the DfI Minister was the wrong decision-maker and was deprived of the ministerial authority she might otherwise enjoy in this case, in favour of the Executive Committee. This contention is mounted on a variety of bases. First, that the decision was cross-cutting (that is to say, that it cut across the responsibilities of two or more Ministers); second, that it was a significant decision; and, third, alternatively, that it was a controversial matter. On each of these grounds, the applicants contend that the substance of the decision required to be referred to the Executive for it to discuss and agree upon; and that the DfI Minister, acting alone, was shorn of her Ministerial authority to decide upon the applications. It is submitted that this is the result of the relevant provisions of sections 20 and 28A of the NIA, read alongside the applicable version of the Ministerial Code.

[12] The applicants do not deny that the amendments made by the 2020 Act were designed to permit the DfI Minister to take significant planning decisions without having to refer them to the Executive. However, they make two central points about the 2020 Act. First, they contend that it was ineffective on its own to secure the change in the law which it was designed to effect, since the Ministerial Code still reflects the position as it was before the 2020 Act was passed (and the Ministerial Code is itself given legal force by the un-amended provisions of section 28A of the NIA). Second, they contend that, even if that is not correct, it was not open to the relevant department (the Executive Office) to promote the Bill which became the 2020 Act, nor open to the Assembly to pass it. This is essentially on the basis that it conflicts with the Belfast (Good Friday) Agreement and/or the later St Andrews Agreement.

[13] The applicants primarily seek an order of *certiorari* quashing the DfI Minister's grant of planning permission; but they also seek a range of further declaratory relief in relation to the 2020 Act and, indeed, an order quashing section 1(4) of the 2020 Act and section 20(7) of the NIA.

Successive amendments to section 20 of the NIA before the 2020 Act

[14] When originally enacted in 1998, section 20 of the NIA was in the following terms:

> "(1) There shall be an Executive Committee of each Assembly consisting of the First Minister, the deputy First Minister and the Northern Ireland Ministers.
>
> (2) The First Minister and the deputy First Minister shall be chairmen of the Committee.

(3) The Committee shall have the functions set out in paragraphs 19 and 20 of Strand One of the Belfast Agreement."

[15] Accordingly, the Executive Committee was established and its chairmanship provided for. Its functions were simply described by reference to two paragraphs of the Belfast Agreement. They provided (and provide) as follows:

"19. The Executive Committee will provide a forum for the discussion of, and agreement on, issues which cut across the responsibilities of two or more Ministers, for prioritising executive and legislative proposals and for recommending a common position where necessary (e.g. in dealing with external relationships).

20. 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."

[16] Thus, the Executive was to deal with (what have come to be termed) 'cross-cutting' issues by way of discussing and agreeing upon them; and was also to set priorities and recommend common positions where necessary. Those functions, set out in paragraph 19 of Strand One of the Belfast Agreement would constitute its day-to-day business. In addition, it had the less frequent, although more strategic, function of agreeing a budgeted programme for government.

[17] Section 20 was then amended in 2007 by the Northern Ireland (St Andrews Agreement) Act 2006 ('the 2006 Act') to add section 20(4), which was in the following terms:

"(4) The Committee shall also have the function of discussing and agreeing upon –

(a) significant or controversial matters that are clearly outside the scope of the agreed programme referred to in paragraph 20 of Strand One of that Agreement;

(b) significant or controversial matters that the First Minister and deputy First Minister acting jointly have determined to be matters

that should be considered by the Executive Committee."

[18] The purpose of this amendment, arising from the St Andrews Agreement, was to seek to ensure that Ministers could not act unilaterally (or, in the political parlance, "go on a solo run") in relation to issues which were particularly significant or controversial but which were nonetheless not cross-cutting. Before this amendment, provided an issue fell squarely within a Minister's area of responsibility and was not cross-cutting, that Minister could make a particularly contentious policy decision without it being possible to contend that this was a matter which also needed to be discussed with and agreed upon by their Executive colleagues, however significant or controversial the issue may be.

[19] As discussed further below, the 2006 Act also put in place mechanisms to seek to ensure that all three categories of issue which were required to be brought to the Executive for discussion and agreement were actually brought to the Executive by the responsible Minister. Those three categories of issue were now cross-cutting matters, significant matters and controversial matters (where, in the latter two cases, the matter was either clearly outside the scope of the agreed programme for government and/or had been determined by the First Minister and deputy First Minister acting jointly to require consideration by the Executive).

[20] Section 20 was further amended in 2010 by article 23 of the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 ('the 2010 Order'). At that time, a further two sub-sections were added, in the following terms:

> "(5) Subsections (3) and (4) are subject to subsection (6).
>
> (6) Quasi-judicial decisions may be made by the Department of Justice or the Minister in charge of that Department without recourse to the Executive Committee."

[21] The purpose of these additions was to carve out an exception to the requirement that certain matters be referred to the Executive for discussion and agreement, namely certain decisions made by the Department of Justice (DoJ) or its Minister. These decisions are not described with any particular precision, other than by reference to their "quasi-judicial" nature; but would, by way of example only, include decisions on firearms appeals under article 74 of the Firearms (Northern Ireland) Order 2004. The intention was plainly to ensure that certain matters which were not deemed suitable for political wrangling should be excluded from potential politicisation by way of having to be debated and voted upon between the Ministers and parties having seats at the Executive table. The Explanatory Memorandum to the 2010 Order explains that article 23 gives effect to the element of the Hillsborough Castle Agreement, reached in February 2010, which sets out the relationship between the Justice Minister and the Executive.

[22] When each of the sub-sections set out in paragraphs [14], [17] and [20] above are put together, one has the version of section 20 of the NIA which was in force immediately prior to the changes made by the 2020 Act.

The genesis of the 2020 Act

[23] The operation of the provisions discussed above during the period of Ministerial absence, when devolved government in this jurisdiction had broken down from January 2017 to January 2020, was examined by the High Court and the Court of Appeal in *Re Buick's Application* – [2018] NIQB 43 and [2018] NICA 26 respectively. That litigation concerned a decision by the Permanent Secretary of the DfI to grant planning permission on the application by arc21 for a residential waste treatment facility at Hightown Quarry, Boghill Road, Mallusk. The decision had been taken by the Permanent Secretary in reliance on article 4(3) of the Departments (Northern Ireland) Order 1999. The essential issue in *Buick* was whether a departmental official making a decision in the absence of a minister (and, indeed, in the absence of an Executive) was entitled to side-step the regime for Executive referral and agreement discussed above; or whether, since the relevant Minister would have had no power to unilaterally make the decision requiring Executive referral and agreement had they been in post, the same constraint applied to a departmental official making a decision in their stead.

[24] In short, the Court of Appeal concluded that a senior departmental official making decisions in the absence of ministerial direction and control could not have a greater power to make decisions on cross-cutting, significant or controversial matters than a Minister in charge of their department would. This meant that a range of important decisions simply could not be made by departmental officials in the absence of a functioning Executive. The Court of Appeal's decision in *Buick* was addressed by way of legislative response in the provisions of the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 ('the 2018 Executive Formation Act') and the Northern Ireland (Executive Formation etc.) Act 2019 ('the 2019 Executive Formation Act'). These expressly allowed a senior officer of a department to exercise the functions of the department in the absence of a minister if they were satisfied that it was in the public interest to do so. These provisions addressed – or, rather, overrode – the issue identified by the Court of Appeal in *Buick* of the accountability deficit in significant decisions being taken by unelected civil servants.

[25] Nonetheless, DfI remained concerned about the potential impact of the Court of Appeal's judgment in other ways, which it considered would hinder the making of planning development control decisions in particular, even when devolved government resumed with a functioning Executive. The first respondent's deponent in these proceedings was Mr Alistair Beggs, the Director of Strategic Planning for the Department. His affidavit evidence describes the process of the DfI Minister bringing the seeds of what became the 2020 Act to the Executive in response to the

Buick judgment in the Court of Appeal; and exhibits relevant submissions. The impetus for the Bill which became the 2020 Act appears to have come from DfI in order to deal with a range of major planning applications which had stacked up, without determination, during the period of Ministerial absence and in order to avoid decisions on them having to be agreed by the Executive. The evidence before the Court shows that DfI had two main concerns which were the subject of consideration by its Minister along with her officials following her taking up post in early 2020. The first was that the Court of Appeal had given the phrase 'cross-cutting' too wide a meaning because of the reference to the development proposal in *Buick* involving the "interests" of other departments (there, DAERA and OFMDFM) in paragraph [52] of the judgment. Since many planning decisions will, in some way, engage the interests of other departments, DfI was keen to restrict cross-cutting decisions to those involving only the legal "responsibilities" of other departments.

[26] I have some doubt about the force of the advice given to the DfI Minister to the effect that, prior to the Court of Appeal's decision in *Buick*, determination of planning applications was never considered to engage cross-cutting constraints because, while planning applications may have been of interest to other departments, they did not engage their responsibilities. In at least two previous cases, the courts in this jurisdiction adopted an approach which suggested that matters in the planning sphere were 'cross-cutting' and required to be considered by the Executive on the basis that Ministerial responsibilities (other than strictly statutory responsibilities) were engaged in the "wider context": see *Re Central Craigavon Limited's Application* [2010] NIQB 73, *per* Morgan J at paragraph [28], in relation to the adoption of draft Planning Policy Statement 5; and *Re The Minister of Enterprise, Trade and Investment's Application* [2016] NIQB 26 ('the *BMAP* case'), *per* Treacy J at paragraph [45], in relation to the adoption of the draft Belfast Metropolitan Area Plan. It is correct that in both these cases, the decision at issue was the adoption of a regional planning policy or area plan, rather than a determination of a particular planning application. It is also correct that the Court of Appeal in the *Central Craigavon* case, which did not need to decide the issue, gave the approach of the High Court on this issue a lukewarm reception, observing that the matter was "one of some difficulty and complexity" which "may require closer examination and analysis at some future time" (see [2011] NICA 17, at paragraph [19]). Nonetheless, it was later followed by Treacy J in the *BMAP* case.

[27] In light of this, I consider the suggestion that *Buick* heralded a significant change in the courts' approach to have been somewhat overblown. Indeed, in the *BMAP* case in March 2016, Treacy J had expressly rejected submissions to the effect that the concept of 'cross-cutting' should be approached narrowly: see paragraphs [21] and [48]. As discussed below, the guidance on this issue in the Ministerial Code itself is consistent with issues being 'cross-cutting' in circumstances where they engage another Minister's policy responsibilities, even though that Minister had no direct statutory responsibilities (or none over and above those which might apply to all Ministers). Although the reference to the "interests" of a Department in

paragraph [52] of the Court of Appeal's decision in *Buick* has been fastened upon, in substance I do not consider the Court of Appeal's reasoning to have been inconsistent with, or a significant new departure from, earlier case-law in this field.

[28] In any event, the Department had understandable concerns about the effect of the Executive Committee becoming the *de facto* planning authority for major applications. That would remove the decision-making power from the Minister who was statutorily responsible for making these decisions. (Of course, that objection can be made in respect of *all* decisions which, under the NIA arrangements, are required to be decided by the Executive. If important or contentious issues are to be decided collectively, that necessarily entails a loss of authority on behalf of the presumptive decision-maker.) The reasons why DfI seem to have considered that it would be unacceptable for the Executive to assume this role within the planning system include the number of significant applications which it would then have to deal with; and the risk of such planning decisions then becoming, or being perceived as, political decisions as opposed to decisions made strictly on their planning merits (so increasing the risk of successful legal challenge). As to the first of these issues, if the Executive was to determine complex planning applications and do so properly, it would add significantly to the work of the Executive and both eat into the Executive's time to deal with other pressing matters and seriously slow down the planning decision-making process.

[29] In light of these concerns, the Department quite understandably took the view that it should seek to narrow the occasions on which planning decisions may require Executive approval and press for legislative intervention in this regard. The question of whether or not this was an acceptable alteration to the then current arrangements would ultimately be one for the Assembly. On 26 May 2020 the DfI Minister produced a draft Executive Paper, essentially asking the Executive to agree to officials urgently taking forward an amendment to the NIA to clarify that planning decisions could be taken by her Department without its Minister having to have recourse to the Executive in the way which had been previously required, at least in respect of some major applications. This prompted a range of responses from the Minister's Executive colleagues but it is fair to say that it attracted widespread support within the Executive (with only some disagreement as to whether, in the meantime, the Executive should act as planning authority for major applications or whether they should be deferred).

[30] A further draft Executive Paper was provided on 13 June 2020; but was not tabled at the Executive due to the proposed tabling of a paper by the Executive Office ("TEO") with an alternative, and broader, amendment to that suggested by the DfI Minister in response to the *Buick* judgment. Rather than simply dealing with an exception for the benefit of planning decisions on the part of the DfI Minister, a tightening of the concept of 'cross-cutting' more generally was proposed to be introduced and express provision was to be made for circumstances where no approved programme for government was in force. Again, a range of responses from other ministers was received; and there was some correspondence on the part

of the DfI Minister with TEO in relation to its paper. Ultimately, the TEO proposal was approved by the Executive, which led to the Executive Committee (Functions) Bill being brought to the Assembly with TEO as its sponsor department.

The effect of the 2020 Act

[31] The 2020 Act is a short but important Act. Its sole purpose is to amend section 20 of the NIA, which makes provision for the functions of the Executive Committee (discussed above). The Act does so in section 1, its only substantive provision. Section 3 provides the short title of the Act; and section 2 deals with commencement. The Act received Royal Assent on 25 August 2020 and came into effect the following day.

[32] Section 1(2) of the 2020 Act amended subsection (4) of section 20 of the NIA. Rather than the previous reference at paragraph (a) to "significant or controversial matters that are clearly outside the scope of the agreed programme referred to in paragraph 20 of Strand One of that Agreement", there was substituted the following text:

> "(a) where the agreed programme referred to in paragraph 20 of Strand One of that Agreement has been approved by the Assembly and is in force, any significant or controversial matters that are clearly outside the scope of that programme;
>
> (aa) where no such programme has been approved by the Assembly, any significant or controversial matters;"

[33] This amendment, with which no issue is taken in these proceedings, may to some degree be viewed as a 'tidying up' amendment to make clear what the approach should be where there was no agreed and approved programme for government. Where that is the case, significant and controversial matters require to be discussed and agreed by the Executive. This reinforces the view that the programme for government may act as a form of prospective approval for significant and controversial matters which might later be dealt with by a Minister. If the Minister's decision is consistent with the programme for government, as to which the Minister is generally given the benefit of the doubt (since, in order to require Executive approval, the matter must be "clearly outside" the scope of the programme), there is no need for it to be further referred to the Executive. In short, if the Executive has previously approved a decision through the programme for government, there is no need for it to be brought back. However, it could not be the case that, where no programme for government had been agreed, this resulted in *less* Executive scrutiny and involvement for matters which, since the 2006 Act, had required to be discussed and agreed upon by the Executive. Notwithstanding *obiter* comments which might be understood in that way in his decision in the *Central*

Craigavon case, Morgan LCJ made clear in his judgment in *Buick* (at paragraph [53]) that this should not be considered to be the case.

[34] The key amendments made by the 2020 Act for the purposes of this litigation are those made by section 1(3) and (4). Section 1(3) simply provides that, in section 20(5) of the NIA, there should be reference to subsections (6)-(9), rather than merely subsection (6). Accordingly, section 20(3) and (4) are now *subject to* additional provisions. In other words, the carve-outs or exceptions to Executive decision-making have been increased. The material exception relied upon by the DfI Minister in this case is in a new subsection (7), inserted by section 1(4) of the 2020 Act in the following terms:

> "(7) Decisions may be made by the Department for Infrastructure or the Minister in charge of that Department in the exercise of any function under—
>
> (a) the Planning Act (Northern Ireland) 2011 (except a function under section 1 of that Act); or
>
> (b) regulations or orders made under that Act,
>
> without recourse to the Executive Committee."

[35] This is designed to permit the DfI Minister to make operational planning decisions without recourse to the Executive. The exclusion from this exception of functions under section 1 of the Planning Act (Northern Ireland) 2011 ('the Planning Act'), which relates to the making of planning policy, means that the DfI Minister will still have to refer such policy to the Executive in circumstances where it otherwise meets a condition for Executive discussion and agreement.

[36] It may also be relevant to note that the new subsection (7) provides that certain decisions on the part of DfI or the Minister in charge of that department "may" be made without recourse to the Executive Committee. This gives the relevant Minister a discretion to determine such matters herself (which, for the reasons underpinning the amendment, is likely to be the normal course). However, the Minister is not precluded from referring the matter to the Executive for discussion and agreement where it would otherwise fall to them to consider. The relevant amendment simply removes the requirement upon her to do so.

[37] In addition, section 1(4) of the 2020 Act also inserted additional subsections (8) and (9) into section 20 of the NIA. These deal with cross-cutting issues, which are referred to in subsection (3) by reference to paragraph 19 of the Belfast Agreement. The purpose of these provisions is to bring greater definition to the question of what constitutes a cross-cutting matter and, essentially, to narrow the scope of that

concept as a means of requiring matters to be brought to the Executive for discussion and agreement. The new provisions read as follows:

> "(8) Nothing in subsection (3) requires a Minister to have recourse to the Executive Committee in relation to any matter unless that matter affects the exercise of the statutory responsibilities of one or more other Ministers more than incidentally.
>
> (9) A matter does not affect the exercise of the statutory responsibilities of a Minister more than incidentally only because there is a statutory requirement to consult that Minister."

Current position *re* Executive referral under section 20

[38] The net result of the amendments to section 20 above is that Executive Ministers are required to "have recourse" to the Executive – that is to say, to refer a matter to the Executive for discussion and agreement – in the following circumstances:

(1) Where the matter is cross-cutting (that is to say, where it affects the exercise of the statutory responsibilities of one or more other Ministers more than incidentally, which does not include a mere requirement to consult that other Minster) (see section 20(3), (8) and (9)); **or**

(2) Where the matter is significant **and/or** controversial **and** where:

  (a) it is clearly outside the scope of the agreed and approved programme for government (see section 20(4)(a)), *or*

  (b) no programme for government has been approved by the Assembly (see section 20(4)(aa)), *and/or*

  (c) it has been jointly determined by the First and deputy First Minister that it should be considered by the Executive Committee (see section 20(4)(b)); **except**

(3) Where the decision which would otherwise be subject to recourse to the Executive on the basis above is:

  (a) a quasi-judicial decision made by the Department of Justice or the Justice Minister (see section 20(5) and (6)), *or*

  (b) a decision made by the Department for Infrastructure or the Infrastructure Minister in the exercise of functions under the Planning

Act (except for a function under section 1 of that Act) or under regulations or orders made under that Act (see section 20(5) and (7)).

[39] In the present proceedings, the applicant objects to the 2020 Act having made provision for the exception at sub-paragraph 3(b) above.

The law-making power of the Assembly

[40] The legislative powers and competence of the Northern Ireland Assembly ('the Assembly') are dealt with in sections 5 and 6 of the NIA. The Assembly may make laws, to be known as Acts. This general law-making power is subject to sections 6 to 8 of the NIA, certain provisions of which are relevant in this case for reasons discussed at greater length below. The key limitation is that the Assembly may only make laws which are within its legislative competence. By virtue of section 6(1), "A provision of an Act is not law if it is outside the legislative competence of the Assembly."

[41] Legislative competence is principally dealt with in section 6. There are obvious limitations to the powers of the Assembly given its status as a devolved legislature for Northern Ireland. For instance, it cannot legislate for the law of a country or territory other than Northern Ireland (see section 6(2)(b)). It also cannot generally legislate for 'excepted matters', that is to say non-devolved matters such as the Crown, the Westminster Parliament, international relations, the defence of the realm, etc. (see section 6(2)(c)). The list of excepted matters is set out in Schedule 2 to the NIA. The prohibition on the Assembly legislating in relation to an excepted matter is not absolute, since an Act may deal with an excepted matter where that is ancillary to other provisions dealing with reserved or transferred matters. The meaning of "ancillary" for this purpose is defined in section 4(3). In such cases, however, the consent of the Secretary of State for Northern Ireland ('the Secretary of State') is required in relation to the Bill containing the ancillary provision which deals with an excepted matter (see section 8(a)).

[42] There are certain entrenched rights which the Assembly also cannot violate by means of the laws it passes, including rights under the European Convention on Human Rights (see section 6(2)(c)) and the prohibition on discrimination on the grounds of religious belief or political opinion (see section 6(2)(e)). There are also various legal rules which the Assembly has no competence to override, such as certain provisions of retained EU law (see sections 6A and 6(2)(d)). In addition, there are certain entrenched enactments some or all of the provisions of which the Assembly has no power to modify, including the Human Rights Act 1998 and the European Union (Withdrawal) Act 2018 (see section 7). The NIA itself is <u>not</u> one of those Acts, although, as discussed further below, certain of its provisions are excepted matters and so do not fall within devolved competence.

[43] When acting within competence, the legislative autonomy granted to the Assembly under the Northern Ireland devolution settlement is considerable. Section 5(6) provides as follows:

> "This section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland, but an Act of the Assembly may modify any provision made by or under an Act of Parliament in so far as it is part of the law of Northern Ireland."

[44] The sovereignty of the Westminster Parliament to legislate for Northern Ireland, even in relation to devolved matters, is therefore preserved (although that Parliament will normally only do so after a legislative consent motion has been sought from, and passed by, the Assembly). However, within its sphere of competence, the Assembly is entitled to pass laws modifying any provision made by an Act of Parliament in so far as it is part of the law of Northern Ireland. By section 98(1), 'modifying' is defined, in relation to an enactment, to include amendment or repeal. Thus, provided the Assembly is not acting beyond its competence as defined by sections 6-8 of the NIA, it may repeal any provision made by an Act of the Parliament of the United Kingdom as a matter of the law of Northern Ireland.

[45] Where Parliament wished to preclude the Assembly from so acting it might do so in a number of ways. It could render the relevant subject matter of the Assembly's (proposed) legislation an excepted matter; it could entrench the enactment the Assembly was proposing to amend or repeal; or it could simply legislate in clear terms to the effect that any provision in an Act of the Assembly purporting to amend or repeal a particular provision would have no force. In short, Parliament can always assert its will against a devolved legislature such as the Assembly even in relation to a devolved matter; but, in order to avoid the prospect of legislative 'ping-pong' over a contested provision, with successive amendments made by the Assembly and undone by Westminster, an intrusion into the current devolved settlement would likely be required.

[46] Within the sphere of devolved competence, there are two categories of matters which can in principle be dealt with by the Assembly. The first and simplest category is that of transferred matters. Such matters are fully devolved and authority to deal with them has been 'transferred' to the devolved administration (subject always to the sovereignty of Parliament mentioned above). The second category is that of reserved matters which might, in principle, be suitable for consideration by the devolved administration but which, for the moment, have been 'reserved' to be dealt with by Westminster. These include, by way of example only, matters such as civil aviation, competition law, human genetics and consumer safety in relation to goods. The list of reserved matters is set out in Schedule 3 to the NIA. There is no list of transferred matters because the way in which the devolution settlement works is that legislative competence for all matters has been transferred to the Northern Ireland Assembly *save for* those which have been excepted or

reserved from that transfer of responsibility. As section 4(1) of the NIA puts it, a transferred matter "means any matter which is not an excepted or reserved matter."

[47] Provision is also made for alterations to the devolution settlement by means of converting a reserved matter to a transferred matter (devolving it) or converting a transferred matter to a reserved matter (un-devolving it). The Secretary of State may take these steps by laying before Parliament a draft Order in Council amending Schedule 3 to the NIA so that a matter becomes, or ceases to be, a reserved matter (see section 4(2)). This must be approved by a resolution of each House of Parliament (see section 4(4)). There are some additional requirements where this is proposed, including in relation to different subject matters. Generally, however, such a change must not be made unless the Assembly has passed a resolution with cross-community support seeking the change (see section 4(3)).

[48] There is no limitation on the Assembly's power to legislate for transferred matters, other than those relating to legislative competence more generally. Where the Assembly wishes to legislate in respect of a reserved matter, the consent of the Secretary of State is required in relation to the relevant Bill (see section 8(b)).

The *vires* of the 2020 Act

[49] Against that background, I turn to the applicants' submissions on the *vires* of the 2020 Act. These may be dealt with relatively briefly. The applicants submit that it was not open to the Assembly to amend section 20 of the NIA because, in doing so, it made a significant alteration to the constitutional arrangements which had been agreed in the St Andrews Agreement and which were reflected in the Ministerial Code, each of which (it was submitted) has a higher constitutional status than the 2020 Act.

[50] In my judgment, the applicants' case on this issue cannot prevail for two simple reasons. First, the St Andrews Agreement has no direct legal force in domestic law; and, second, there is nothing to suggest that an amendment of section 20 of the NIA is outside the legislative competence of the Assembly.

[51] Only certain provisions of the NIA are entrenched under section 7(1)(c) of the NIA. Section 20 is not one of those provisions; and none of those specified are of any relevance to the issues raised by these proceedings. The contents of section 20 of the NIA, and indeed of section 28A, are reserved matters. That follows from a reading of paragraph 22 of Schedule 2 to the NIA and paragraph 42 of Schedule 3 to the NIA. Although Part III of the NIA is generally an excepted matter, sections 20 and 28A are not. Schedule 3 then identifies the following as reserved matters: "Any matter with which a provision of this Act falling within the following sub-paragraphs solely or mainly deals – (a) in Part III, sections 19, 20, 28, 28A and 28B."

[52] Since the functions of the Executive Committee (including what matters are required to be referred to it for discussion and agreement) under section 20 are a

reserved matter, rather than an excepted matter, they are within the legislative competence of the Assembly, subject only to consent of the Secretary of State to the Bill under section 8(b) of the NIA. Such consent was obtained in relation to the passing of the 2020 Act.

[53] I cannot accept that, outwith the provisions of the NIA, there is some additional constraint on the legislative competence of the Assembly arising from the terms of the Belfast Agreement or the St Andrews Agreement. I reject the submission, insofar as it is made, that any alteration of the constitutional arrangements for Northern Ireland require a similar such inter-party negotiation and agreement before they can be given legal effect. The Belfast Agreement was undoubtedly a historic development in terms of establishing a new system of government for Northern Ireland. However, that system of government is not immutable; nor was it considered to be within the terms of the Belfast Agreement itself, which expressly envisaged periodic review in the provisions set out in the 'Validation, Implementation and Review' section. Those provisions recognise that, "Each institution may, at any time, review any problems that may arise in its operation and, where no other institution is affected, take remedial action in consultation as necessary with the relevant Government or Governments." The alterations agreed to the system of Executive decision-making in the St Andrews Agreement represent one instance of seeking to improve the structures set up as a result of the Belfast Agreement. However, there is no bar to the Assembly (of which the Executive Committee forms part) reviewing and amending its own procedures.

[54] The principal effect of the devolution settlement reached in 1998, at least as far as Strand One was concerned, was that the Assembly would exercise "full legislative and executive authority" in respect of devolved matters. That is set out in paragraph 3 of Strand One of the Belfast Agreement. Lest there be any doubt, paragraph 4 provided that, "The Assembly – operating where appropriate on a cross-community basis – will be the prime source of authority in respect of all devolved responsibilities." Certain safeguards are built into this system, including arrangements that certain decisions are taken on a cross-community basis; but, save insofar as constrained by Parliament and fundamental principles of public law, the Assembly is the ultimate authority in this jurisdiction in respect of devolved matters. The Belfast Agreement, as an international agreement, is an aid to the interpretation of the NIA but is not enforceable as a matter of domestic law: see *Ni Chuinneagain's Application* [2021] NIQB 79 at paragraph [23]. The St Andrews Agreement does not appear to share the same status as the Belfast Agreement, which is backed up by an associated British-Irish Agreement between the respective Governments; but, even if it did, it would similarly not be directly enforceable.

[55] Although – as a measure of a devolved Assembly – the 2020 Act is not immune from judicial review on some common law grounds in the same way as an Act of the Westminster Parliament would be, the bar for judicial intervention is exceptionally high (see, in general, the discussion of this topic in *Axa General Insurance Limited v The Lord Advocate and Others* [2011] UKSC 46 at paragraphs

[46]-[52], *per* Lord Hope; and paragraphs [138]-[153], *per* Lord Reed). In these proceedings, no challenge is made to the Act on any public law ground other than the Act's supposed lack of *vires* on the basis discussed above. The suggestion on the part of the applicants that a duly passed Act of the Assembly, whilst within its powers under the NIA, can be unlawful by virtue of being *ultra vires* some provision of the Belfast Agreement or the St Andrews Agreement is unsustainable. Similarly, the suggestion that there is a constitutional hierarchy in terms of sources of law which sees the St Andrews Agreement at the top, to which the Ministerial Code and in turn the NIA itself are subservient, is a *non sequitur*.

[56] A variation on this argument was that the 2020 Act was outside the legislative competence of the Assembly because the content or intent of the Belfast Agreement and/or the St Andrews Agreement were excepted matters under the rubric of 'international relations', pursuant to paragraph 3 of Schedule 2 to the NIA. I reject that argument also. As explained above, section 20 of the NIA, which is the provision amended by the 2020 Act, is plainly and expressly a reserved matter, rather than an excepted matter. In any event, albeit the system of Executive decision-making in section 20 has been the subject of agreement in multi-party talks in which both the British and Irish Governments have been involved, it is wrong to view the (Strand One) arrangements for decision-making in the Executive to be a matter of "international relations" – involving relations with other territories or governments.

[57] The applicants' contentions that the 2020 Act was outside the competence of the Executive Office to propose or outside the competence of the Assembly to pass are rejected. Its subject matter was a matter on which the Assembly was entitled to legislate and in respect of which the only relevant condition (obtaining the consent of the Secretary of State) was discharged.

The Ministerial Code and section 28A of the NIA

[58] Having concluded that the 2020 Act was within legislative competence, the remaining – and more difficult – question is whether it has, without more, achieved the purpose it set out to. The applicants' submission is that the job remains only half-done. That is because the mechanism by which it was ensured that matters which ought to be considered by the Executive were indeed referred to it by ministers, who were deprived of their ministerial authority to act alone, involved three inter-locking features: the amendments to section 20 of the NIA made in 2006, a new section 28A of the NIA, and the provisions of the Ministerial Code. The 2020 Act effected changes to only the first of these. The central question raised by these proceedings is what residual effect, if any, results from a combination of the un-amended provisions of the Ministerial Code and the provisions of section 28A.

[59] As can be seen from the discussion above, section 20 of the NIA, in its various successive versions, provides for the functions of the Executive Committee. It does not impose any obligation upon a Minister to refer to the Executive Committee a

matter which, as a result of those functions, falls for consideration by the Committee. However, such an obligation (with a sanction) is plainly required in order to make the intended system effective: first, as a means of ensuring that the Executive is aware of issues being addressed by a Minister which it is within its proper function to discuss and agree upon; second, to ensure that the Executive has the opportunity to exercise that function; and, third, to ensure that a Minister cannot act unilaterally in a way which has legal effects and which it is then difficult, or impossible, for the Executive to undo. (The grant of a planning permission may be a good example of an issue which raises this third concern.)

[60] The means by which relevant obligations were imposed on Executive Ministers was through a statutory Ministerial Code. When the NIA was initially enacted, there was a Code of Conduct for Ministers, to which they were obliged to commit themselves through the Pledge of Office before taking up office. This was drawn from the Belfast Agreement and is set out in Schedule 4 to the Act. It obliged ministers to adhere to a variety of values, including the seven principles of public life, but contained nothing relating to a Minister's (then) obligation to refer cross-cutting matters to the Executive for discussion and agreement.

[61] That gap was plugged after the St Andrews Agreement, a central feature of which was that there should be a number of practical changes to the operation of the devolved institutions, including the introduction of a statutory Ministerial Code. One of the primary purposes of the Code was to be that Ministers would be required to refer to the Executive matters which up to then, and by the further amendments anticipated in the St Andrews Agreement, were required to be discussed and agreed upon by the Executive. In addition to making the amendments to section 20 of the NIA discussed above, the 2006 Act inserted a new section 28A into the NIA providing for the Ministerial Code (see section 5 of the 2006 Act). An additional safeguard against improper unilateral decision-making was a new section 28B allowing 30 members of the Assembly to raise the issue of whether a matter of public importance had been taken in contravention of the Minister's obligation under the Ministerial Code to refer a matter to the Executive.

[62] In due course, a Ministerial Code was agreed and adopted. It sets out the Ministerial Pledge of Office, the Ministerial Code of Conduct, and the seven principles of public life to which Ministers must adhere. Other than that, the statutory Code largely replicated the new provisions of the NIA relating to ministerial accountability, including those relating to the referral of cross-cutting, significant and controversial matters to the Executive. The most relevant section for present purposes is section 2.4, entitled 'Duty to bring matters to the attention of the Executive Committee', which is in the following terms:

> "Any matter which:
>
> (i) cuts across the responsibilities of two or more Ministers;

(ii) requires agreement on prioritisation;
(iii) requires the adoption of a common position;
(iv) has implications for the Programme for Government;
(v) is significant or controversial and is clearly outside the scope of the agreed programme referred to in paragraph 20 of Strand One of the Agreement;
(vi) is significant or controversial and which has been determined by the First Minister and deputy First Minister acting jointly to be a matter that should be considered by the Executive Committee; or
(vii) relates to a proposal to make a determination, designation or scheme for the provision of financial assistance under the Financial Assistance Act (Northern Ireland) 2009

shall be brought to the attention of the Executive Committee by the responsible Minister to be considered by the Committee."

[63] The principal duty imposed by this section of the Ministerial Code is to bring matters to the attention of the Executive. The Code obviously does not seek to prescribe what the Executive Committee acting collectively should then do. As is apparent from the discussion of the relevant provisions of the Belfast Agreement and the NIA above, the Executive Committee has the function of discussing and agreeing upon most of the matters required to be referred to it under section 2.4 of the Code. However, it is would be open to the Executive to agree that it was content to leave the matter to the relevant Minister – provided the matter was brought to its attention and it discussed and agreed upon that course of action. Morgan J certainly proceeded on that basis in *Re Solinas' Application* [2009] NIQB 43. Section 2.8 of the Ministerial Code notes that Ministers have affirmed the Pledge of Office, which includes a pledge to "support, and to act in accordance with, all decisions of the Executive Committee and the Assembly." In turn, that obligation also becomes part of the provisions of the Ministerial Code.

[64] Returning to section 2.4, it goes on to provide some guidance to Ministers as to how they should approach the question of whether a matter cuts across the responsibilities of two or more ministers. It does so in the following terms:

"Regarding (i), Ministers should, in particular, note that:

- the responsibilities of the First Minister and deputy First Minister include standards in public life, machinery of government (including the Ministerial Code), public appointments policy, EU issues, economic policy, human rights, and

equality. Matters under consideration by Northern Ireland Ministers may often cut across these responsibilities.

- under Government Accounting Northern Ireland, no expenditure can be properly incurred without the approval of the Department of Finance and Personnel."

[65] The clear import of this guidance is that the concept of cross-cutting matters should be given a wide interpretation; and that it will be common for matters to be considered to be cross-cutting where they fall within an area for which the First Minister and deputy First Minister have responsibility (not all of which are likely to be statutory responsibilities) or where expenditure is involved.

[66] Where a Minister is unsure, or for some other reason wants a determination to be made as to whether a decision they wish to take (or had taken) ought to be considered by the Executive Committee under section 20(3) or (4), section 2.5 of the Ministerial Code provides a facility for them to raise this with the Executive Committee, which should then respond with a determination (usually at its next meeting).

[67] As is noted above, however, the core provision of the Ministerial Code for the new regime ushered in by the 2006 Act was the duty in section 2.4 to refer relevant matters to the Executive. This duty, and the provisions of the Ministerial Code more generally, were given statutory force through section 28A of the NIA which provides, in material part, as follows:

"(1) Without prejudice to the operation of section 24, a Minister or junior Minister shall act in accordance with the provisions of the Ministerial Code.

(2) In this section "the Ministerial Code" means—

(a) the Ministerial Code that becomes the Ministerial Code for the purposes of this section by virtue of paragraph 4 of Schedule 1 to the Northern Ireland (St Andrews Agreement) Act 2006 (as from time to time amended in accordance with this section); or

(b) any replacement Ministerial Code prepared and approved in accordance with this section (as from time to time amended in accordance with this section).

…

(5) The Ministerial Code must include provision for requiring Ministers or junior Ministers to bring to the attention of the Executive Committee any matter that ought, by virtue of section 20(3) or (4), to be considered by the Committee.

(6) The Ministerial Code must include provision for a procedure to enable any Minister or junior Minister to ask the Executive Committee to determine whether any decision that he is proposing to take, or has taken, relates to a matter that ought, by virtue of section 20(3) or (4), to be considered by the Committee.

…

(10) Without prejudice to the operation of section 24, a Minister or junior Minister has no Ministerial authority to take any decision in contravention of a provision of the Ministerial Code made under subsection (5)."

[68] Section 28A(1) imposes upon Ministers a legal duty to act in accordance with all of the provisions of the Ministerial Code – either in its initial form (which remains in force) or in any amended or replacement version where the Code has been amended in accordance with the procedure set out later in section 28A. The reference back to section 24 is a reference to other limitations on Ministerial authority which are of no significance for present purposes.

[69] Section 28A(5) ensures that any Ministerial Code in force must contain a provision requiring Ministers to refer matters to the Executive which ought to be considered by it. It is this provision which required the Ministerial Code to contain a section which performs the function which section 2.4 of the Code presently does. Also important is section 28A(10). That is because it 'super-charges' the provisions of the Ministerial Code made under section 28A(5). All provisions of the Code have legal force as a result of section 28A(1); but contravention of provisions made under section 28A(5) carries a certain significance. Where such a provision of the Code has been contravened, the Minister has "no Ministerial authority to take any decision" in relation to the matter. I return to the interaction between section 28A(5) and (10) and the Ministerial Code later in this judgment. The clear intention of these provisions, however, is that the requirement to refer a matter to the Executive would have particular bite; and that a Minister could not ignore or breach that requirement and still retain their authority to act unilaterally.

Was the decision in this case cross-cutting, significant and/or controversial?

[70] The applicants have contended that the decision in this case required to be referred to the Executive on each of the three bases discussed above, namely that it was cross-cutting, that it was significant, and that it was controversial. They need only succeed in establishing one of these; but it is convenient to consider each in turn. Up until the filing of the respondents' skeleton argument, the applicants had anticipated that there was no issue being taken with their suggestion that the determination of the Interconnector planning applications was cross-cutting, significant and controversial within the meaning of those terms in section 20 of the NIA. This was partly because no issue was taken with these suggestions in the respondents' response to pre-action correspondence (and, although the notice party reserved its position on this, no active opposition was mounted to this limited aspect of the applicants' case by it either). In the respondents' skeleton argument, they stated that they did not concede that the decisions in this case were cross-cutting, significant or controversial – although they accepted that, in light of the judgment in *Buick*, the Court would find them to be at least significant and controversial. Their concern was simply to reserve the right to argue these matters further on appeal, as necessary.

Cross-cutting

[71] There are a number of bases on which the grant of planning permission for the Interconnector may be considered to be cross-cutting in a general sense. Given its significance of the economy, it might be said to cut across the responsibilities of the Department for the Economy. In addition, the Interconnector has been designated with the status of a Project of Common Interest (PCI) by the European Commission, with the Department of the Economy having a role as the delegated competent authority for this purpose. It is also being funded to a large degree by the European Union.

[72] Applying the approach to cross-cutting issues in *Buick* – and indeed that indicated by the guidance in the Ministerial Code (set out at paragraph [63] above) – I would conclude that the decision on the Interconnector planning applications was cross-cutting. Applying the new approach set out in section 20(8) of the NIA, as amended by the 2020 Act, and referred to at paragraph [36] above, the position is much less clear. It may well be that the decision still affects the exercise of the statutory responsibilities of the Minister for the Department of the Economy more than incidentally. However, I have not been provided with sufficient information to persuade me of this. I proceed on the basis, therefore, that the amendments made in the 2020 Act have successfully rendered the DfI Minister's decision non-cross-cutting for the purposes of section 20(3).

Significant

[73] The next question is whether the DfI Minister's decision was "significant" within the meaning of that term in section 20(4) of the NIA. In my judgment, the term "significant" is not merely used as the antonym of "insignificant." Rather, it relates to a matter of some importance and noteworthiness, judging that against the gamut of other responsibilities the Minister has. Significance might arise because of the financial implications of the matter (either in terms of cost or benefit) or because of the effects it will have on citizens in Northern Ireland. It is also conceivable that an otherwise run-of-the-mill decision might be significant because of its symbolic or precedent value. The category of 'significant' decisions is likely to be open-ended.

[74] Whether a decision or matter is 'significant' within the meaning of that term in section 20(4) is a matter of fact and degree, involving some element of judgement. In the first instance, that will be a question of judgement for the minister or department making the decision. That minister – with responsibility for the decision or policy in issue – should be best placed to determine whether the matter is one which is significant or not. However, the minister or department who is making the decision cannot have the final say on the matter. In particular, a minister cannot escape the plain purpose and intention of the statutory scheme by disclaiming the obvious significance of a matter with which they wish to deal. The primary forum for establishing whether a matter is significant where there is legitimate contention about this ought to be the Executive Committee itself.

[75] In the *Central Craigavon* case Morgan J considered that the matter at issue (the adoption of draft Policy Planning Statement 5) was unlikely to be significant or controversial because it had not raised any interest at Executive level and, even when other ministers learned of it, there was no enquiry about it or suggestion of controversy. Morgan J considered that:

> "Whether or not something is controversial or significant in this context must refer to those matters which members of the Executive might believe to be so."

[76] That approach was not challenged on the Department's appeal to the Court of Appeal, which proceeded on the basis that it was correct: see [2011] NICA 17, at paragraph [17]. Accordingly, where it is clear that other Ministers within the Executive consider the matter to be significant within the terms of section 20(4), the court will often readily be able to conclude that it is significant.

[77] However, it also seems to me that the matter cannot be finally determined by the Executive Ministers. If the Ministers within the Executive took the view that a matter of indisputable significance was not significant, for instance in circumstances where that view was *Wednesbury* irrational, the courts would not be bound by that view. Indeed, in the *Buick* case, the Court of Appeal was content to find that the

issue there was significant because of its importance to Northern Ireland-wide policy and compliance with EU Directives (see paragraph [53]).

[78] Returning to the circumstances of the present case, in the press release accompanying her decision to grant the relevant planning permissions, the DfI Minister is quoted as saying that the development of the Interconnector "remains of strategic importance for our island economy." She also referred to the PAC's consideration of the applications and that it had "endorsed the significant strategic importance of the development for Northern Ireland." The Minister went on to describe a number of the benefits of the project, including that it is crucial to handling growing electricity demand, to promoting greater competition and to protecting security of supply. In considering the matter at public inquiry the PAC had considered that there was "an urgent and compelling need for the proposed development"; and that there was an overriding national or regional need for it (on the grounds of competition, security of supply, the facilitation of the use of renewable energy in the technical limitations of the existing transmission system), amounting to imperative reasons of overriding public interest. The advice to the Minister from her officials on "presentational issues" was that the question of planning permission for the Interconnector "has been a matter of high public and political interest." Her advice was also that the proposed development was considered to be "of significant strategic importance for Northern Ireland at an international, national and regional level."

[79] It is also notable that the applications were for regionally significant development under section 26 of the Planning Act. Whilst there is no necessary or direct equivalence between regional significance under the planning regime and significance for the purposes of section 20(4) of the NIA, it would be strange if regionally significant development was not often significant for the purposes of the constitutional provisions which are under discussion. Indeed, that seems to have been one of the considerations which led to the DfI Minister in particular being relieved of the obligation to bring such matters to the Executive.

[80] In this case, the evidence suggests that the Minister in question plainly viewed her decision as significant. I consider that it is not properly open to her now to contend that it was not significant within the meaning of that term in section 20(4); and, indeed, that any contention that it was not significant would be *Wednesbury* unreasonable.

Controversial

[81] The phrase 'controversial' is also difficult to define for the purposes of section 20(4). There may be differing levels of controversy in relation to a proposed decision, ranging from mild disagreement to implacable hostility, on the part of one person affected or the public generally, and on grounds which are barely plausible to those which are cogent and compelling. A common sense approach to this matter

has to be taken. Not every decision which will displease some can be required to be referred to the Executive.

[82] Again, I consider that this is primarily a matter for the responsible Minister to consider in the first instance, making a dispassionate and good-faith assessment of whether the issue they are considering is controversial in the sense intended by the statute. In this area also, authority suggests that it is controversy *within the Executive Committee* which matters: see the reference to another Minister's objection in paragraph [33] of the *BMAP* case at first instance; and the observations of Morgan J in the *Central Craigavon* case referred to at paragraph [75] above. The Executive Committee itself will therefore be an important gauge in respect of the question of whether a matter is controversial. Where a matter is truly controversial, there is a good chance that some other Minister within the Executive will take, or will have taken, an opposing view. In *Buick*, the Court of Appeal was quite content to find that the matter in question was controversial on the basis of well-known political opposition to it on the part of another party in the Executive: see paragraph [53] of that decision.

[83] In the present case, there is no evidence of any dissent or controversy within the Executive Committee in relation to the granting of the planning applications. As I have observed above in relation to the question of whether a matter is significant, I do not consider that absence of objection within the Executive can alone be determinative. For instance, if the Executive parties were agreed on a course of action which caused universal public outcry, it could not plausibly be said that the matter was not controversial. The court will not exercise a high intensity of review where the Executive considers (or appears to consider) a matter to be non-controversial; but it should still exercise some element of supervisory jurisdiction over that judgement.

[84] In this case, over 6,000 letters of objection were sent in relation to the original proposal; and over 3,500 objections were provided after the submission by the planning applicant of its consolidated Environmental Statement. The Minister's officials advised her that there was "potential for positive and negative public and media response" to her decision on the application. The PAC also recognised that there would be environmental impacts which were significant and adverse in respect of residential amenity by virtue of visual impact, visual amenity and landscape character, and impact on the settings of scheduled monuments which are of regional importance. The Commission considered that the proposed development would produce some environmental impacts that were unavoidable and could not be adequately mitigated, although none of these were considered to be of such significance (either individually or cumulatively) to outweigh the overriding need for the proposed development and its associated benefits. The previous advice to the Permanent Secretary of the DfI, who made the decision which was subsequently quashed, from the Director of the Strategic Planning Division was that the proposal had "attracted a significant amount of public objection on a number of grounds." I have also been referred by the applicants to the terms of a debate in the Assembly,

following a question for oral answer to the Minister in relation to her decision, on Tuesday 15 September 2020. Both Sinn Féin and SDLP MLAs for the local area of Newry and Armagh raised concerns about the decision – although these seem to be localised concerns on behalf of constituents rather than reflecting a party position in either case.

[85] I have not found this issue easy to determine but, on balance, consider that the Minister's decision should be considered to involve a controversial matter, notwithstanding the absence of any significant objection to it within the Executive Committee. In light of the sustained and widespread public campaign against the grant of permission – on grounds which were rational given the conclusions of the PAC – I consider that any conclusion that the grant of planning permission for the Interconnector was not controversial would be *Wednesbury* unreasonable if a good-faith assessment of that issue was being made for the purpose of determining whether the issue should be referred to the Executive for consideration.

The Programme for Government

[86] At the time when the Minister's decision was taken, there was no programme for government agreed and approved. Accordingly, the question of the decision having be pre-approved by the Executive through that means did not arise.

The failure to amend the Ministerial Code

[87] It is clear from the materials provided to the court that, in the course of considering how to address the concerns which had arisen as a result of the *Buick* decision, the DfI considered that the Executive could seek to amend the Ministerial Code (to make clear that cutting across another Minister's 'interests' was not the same as cutting across their 'responsibilities'). However, as the advice correctly identified, an amendment to the Ministerial Code alone was unlikely to change the approach of the courts (and particularly the lower courts which would be bound by the Court of Appeal's decision in *Buick*) to the meaning of the relevant phrase in the Belfast Agreement (which was effectively incorporated by reference in section 20(3) of the NIA). Responding to a query from the Health Minister in a memorandum of 30 May 2020 however, the DfI Minister did note that the current version of the Ministerial Code reflected the wording of section 20 of the NIA which was then in force. She said that, "As such, if section 20 of the Act is amended it will be necessary to reflect those changes in the relevant parts of the Code." To similar effect is a passage in the final Executive paper from the First Minister and deputy First Minister, dated 22 June 2020, in relation to the draft Bill. At paragraph 9 of that paper, it is noted that: "Consequential amendments will also be required to paragraph 2.4 of the Ministerial Code, and a further paper will be brought to the Executive on this matter." As we now know, no amendment to the Ministerial Code has yet been made to reflect the amended statutory position achieved through the 2020 Act.

[88] The respondents' evidence has shed a little more light on what has happened in relation to this issue. Mr Jackson, a senior civil servant in the Executive and Central Advisory Division of the Executive Office has explained that, following Royal Assent being given to the Bill which became the 2020 Act, a submission dated 15 September 2020 to the First Minister and deputy First Minister, and an accompanying Executive paper, was prepared, recommending that the Ministerial Code should be amended to reflect the amendments to the NIA made by the 2020 Act. At the time of the swearing of his affidavit, and indeed at the time of the hearing, this issue had not been taken forward by the Executive Committee. The Executive paper again described the amendments to be made to the Ministerial Code as "consequential." It noted that should the Executive Committee agree the amendments, that they would also require the agreement of the Assembly by means of a cross-community vote. The precise terms of the proposed amendments to the Code do not require to be set out but, in summary, they reflected the amendments made to section 20 of the NIA by the 2020 Act. Significantly, although the proposed amendments made reference to the new statutory provisions relating to the concept of what was cross-cutting, the substance of the guidance set out in paragraph [64] above (which tends to suggest that many issues will cut across the responsibilities of the First Minister and deputy First Minister and of the Department of Finance) was proposed to be retained.

[89] The Executive paper in relation to the proposed amendments to the Ministerial Code also noted that the Westminster Bill dealing with the 'New Decade, New Approach' package of reforms would contain provision amending Schedule 4 to the NIA to reflect amendments agreed to be made to the Ministerial Code of Conduct (which forms part of the Ministerial Code). On this basis, it was noted that further amendment to the Ministerial Code would be necessary at some stage in the future; and that "Ministers may prefer therefore to defer decisions until that time on any further changes to the Ministerial Code, either as highlighted above or for other purposes, other than those that are necessary as a consequence of the [2020] Act." As the Code of Conduct is contained in Schedule 4 to the NIA and is an excepted matter, amendment of that part of the Act is being taken forward by the Secretary of State in a Bill which is proceeding through Parliament at the moment.

[90] In a further affidavit, Mr Jackson explained that the paper recommending the proposed amendments has not been referred to the Executive "pending ongoing consideration and joint agreement by the First Minister and Deputy First Minister to place this on the agenda for consideration." Mr Jackson's evidence is that it is considered that a comprehensive package of amendments to the Ministerial Code should be presented to the Executive and Assembly, rather than "episodic amendment." Accordingly, the present approach is to await the amendment of the Code of Conduct and make all relevant changes to the Ministerial Code at the one time. This has allowed the applicants in the present proceedings to contend that – whatever the position when section 20 of the NIA is looked at in isolation – the DfI Minister was and is still bound by the 2006 version of the Ministerial Code which

deprives her of decision-making authority in relation to matters which ought to be referred to the Executive as a result of section 28A(10) of the NIA.

The statements in the Assembly

[91] The applicants further submit that their analysis in this regard is supported by statements made by Mr Declan Kearney MLA, a junior minister in the Executive Office, in the course of the consideration of the Executive Functions Bill in the Assembly. On their case, Mr Kearney made it clear that the Ministerial Code would require to be amended before any planning decision could be taken by the DfI under the new regime. These statements, the applicants submit, support their case and undermine the case now made on behalf of both respondents (namely that amendment of the NIA alone was sufficient to relieve the DfI Minister of her obligation to refer the decision impugned in these proceedings to the Executive). The applicants further submit that, in addition to the rhetorical force of their reliance on Minister Kearney's statements, they have legal significance, since they can be taken into account as an aid to the interpretation of the NIA, as amended.

[92] On 28 July 2000, when the Executive Functions Bill was at final stage consideration, Mr Lyons, a junior minister in the Executive Office opened the debate, commended the Bill to the Assembly and moved that the Bill pass. A debate followed. Since the Bill had reached final consideration stage however, the question was simply whether the Bill should be passed. The time for amendment had passed. After some debate, the Deputy Speaker called on Mr Kearney, another junior minister from the Executive Office, to conclude. In the course of his contribution, however, he gave way to a number of other members.

[93] In particular, Mr Beattie MLA raised the issue of the Ministerial Code being "quite expansive" in terms of what was considered to be cross-cutting; and suggested that it would have to be amended to be less expansive. Mr Kearney's response was in the following terms:

> "I intended to address the ministerial code later in my remarks. Yes, there are matters pertaining to the ministerial code and, yes, the ministerial code will require to be amended. The ministerial code cannot be amended until the legislation completes its passage. An example of how we will address the ministerial code and the required amendment, consequential to the passage of the legislation, relates, for example, to functions. We will need to amend the functions in the Executive to ensure that that is reflected in the statutory functions."

[94] Continuing his contribution, Mr Kearney went back comments made by Mr Muir MLA and said this:

> "… he raised the issue of the ministerial code, and I can assure him that, yes, it will be updated. However, on his question as to whether planning issues can proceed prior to the amendment of the ministerial code, the answer to that is no. The ministerial code must be adjusted in order for the planning issues to proceed."

[95] In response, Mr Wells MLA suggested that the junior minister had "let the cat out of the bag" and that his acceptance that the Ministerial Code required amendment indicated that there was in fact no need to press forward with the Bill using the accelerated passage procedure. (The Bill had been presented as requiring urgent passage in order to allow the DfI Minister to work through the significant planning applications which had been 'parked' because of the complexity of the decision-making process where Executive referral and agreement were required. Mr Wells' point, however, was that, if the passage of the Bill alone would not unlock the DfI Minister's ability to process those applications, pending amendment of the Ministerial Code, the claimed urgency was undermined.) Mr Kearney's response was as follows:

> "I thank the Member, once again, for his intervention, but he misses the point. The legislation must be passed and adopted in order for us then to make the necessary adjustments to the ministerial code. On the basis of making the adjustments to the ministerial code, when we have concluded that process, we are in a position to start to address a number of the planning issues coming through from the Department for Infrastructure."

[96] The view expressed by Mr Kearney, particularly in the passage set out at paragraph [94] above, was that the Ministerial Code would require to be amended (to be brought into line with the law as amended by the Bill, once passed and enacted) before the DfI Minister would be able to avail of the new procedure to make certain decisions without recourse to the Executive.

[97] The plot thickened shortly afterwards, however, when the DfI Minister appeared to make clear that that was not her understanding. Media reports exhibited by the applicants from late July 2020 made clear that the Department was insisting that its Minister *would* be able to take major planning decisions once the Bill had become law. The report drew attention to the fact that this analysis appeared at odds with what Minister Kearney had told the Assembly. The report's assessment of the DfI Minister's position is, of course, borne out by her decision on the applications which are the subject of these proceedings, as well as a number of other significant applications, in advance of any amendment to the Ministerial Code having been made. Further news reports have speculated that there may have been difficulty securing the required cross-community support in the Assembly for amendments to the Code (although analysis provided by the respondents suggests that the Bill itself

passed with what would have amounted to cross-community support under section 4(5) of the NIA, had that been required, notwithstanding a significant DUP rebellion against the position of the party leadership).

[98] The plot thickened yet further when the Executive Office later appeared to resile from what Mr Kearney had stated in the Assembly. In a written question from Mr Allister MLA (AQW 6404/17-22), the First Minister and deputy First Minister were asked about what Mr Kearney had said and were asked whether his comments represented the position of TEO. The answer on behalf of TEO was as follows:

> "The position articulated reflected the provisions of section 28A of the Northern Ireland Act 1998 relating to the Ministerial Code and Ministerial authority for decision making. The Executive Office has seen legal opinion not available at that time, and we are content that the Ministerial Code may now be interpreted in the context of the provisions of the Executive Committee (Functions) Act 2020 in advance of its formal amendment."

[99] In layman's terms, it seems that Mr Kearney had expressed one legal view (based on an interpretation of the existing Code read with section 28A of the NIA) – a view shared and advanced by the applicants in these proceedings – but that TEO now considered that that view was (or might be) wrong on the basis of later legal advice which it had received (which reflects the case advanced by the respondents in these proceedings). This was despite the fact that, according to at least one of the media reports, TEO had issued a statement in late July standing over Mr Kearney's analysis in the Assembly chamber, in the following terms:

> "The Ministerial Code will require amendment to incorporate the exemption from referral to the Executive of planning application decisions to be taken by the Minister for Infrastructure. This was accurately reflected in the Junior Minister's comments. This amendment will be made as soon as possible when the Assembly returns."

[100] I have referred to the above exchanges at some length because the applicants have sought to rely on Mr Kearney's statements during the passage of the Bill as a guide to their proper interpretation under the doctrine in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593. As is well known, there are three conditions applicable before reference to Parliamentary materials is permitted for this purpose, namely that: (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a minister or other promoter of the Bill, together if necessary with such other parliamentary material as is necessary to understand such statements and their effect; and (c) the statements relied on are clear (see the summary provided by Lord Kerr in *R v Adams* [2020] NI 826, at paragraph [33]). I proceed on the basis that, provided these requirements are met, there is no

objection to the doctrine in *Pepper v Hart* being used to admit statements made in a devolved legislature as an aid to construction of legislation passed by that legislature.

Resolution of the effect of the amendments to section 20 of the NIA in the absence of corresponding amendments to the Ministerial Code

[101] I do not accept the suggestion implicit in the respondents' submissions that the Ministerial Code can effectively be amended (or its meaning materially changed), much less that the obligations it imposes on Ministers can be abrogated, without this being effected through the specific mechanism for its amendment under section 28A NIA. The Code is a statutory Code with significant legal effects and, although section 28A(2) contemplates that it may be amended from time to time or even replaced, any such exercise must be undertaken "in accordance with" the procedure set out in section 28A(3) and (4). Those provisions are in the following terms:

> "(3) If at any time the Executive Committee—
>
> (a) prepares draft amendments to the Ministerial Code; or
>
> (b) prepares a draft Ministerial Code to replace the Ministerial Code,
>
> the First Minister and deputy First Minister acting jointly shall lay the draft amendments or the draft Code before the Assembly for approval.
>
> (4) A draft Ministerial Code or a draft amendment to the Code—
>
> (a) shall not be approved by the Assembly without cross-community support; and
>
> (b) shall not take effect until so approved."

[102] It is clear from these provisions that any amendment to the Ministerial Code must be prepared by the Executive (and so will be subject to the requirements of Executive decision-making); that any amendments so prepared must then be laid before the Assembly by the First Minister and deputy First Minister acting jointly; and that any amendment requires to be approved by the Assembly and, moreover, approved with cross-community support. Most importantly, no such amendment shall take effect until this process has been observed and cross-community support in the Assembly has been given, on a properly informed and considered basis.

[103] Accordingly, the operative provisions of the Ministerial Code – those imposing duties on Ministers with which they are legally obliged to comply – cannot

be amended or altered without compliance with the formal statutory procedure set out in section 28A for this purpose. This cannot be, and was not, achieved by a legislative side-wind through the provisions of the 2020 Act.

[104] The resulting mismatch between the statutory regime contained in section 20 of the NIA and the operational machinery of the Ministerial Code designed to give effect to that statutory regime (and itself given statutory force by section 28A(1), (5) and (10)) is, without doubt, now somewhat of a mess. The result is that the current Ministerial Code appears to impose obligations of referral to the Executive Committee which go *beyond* those contained in the governing statutory regime.

[105] This is perhaps most obviously evident in the dissonance between what the Ministerial Code says about cross-cutting matters (see paragraph [64] above) and what section 20(8) and (9) says about cross-cutting matters (see paragraph [37] above). Indeed, in a submission from Mr Jackson to the First Minister and deputy First Minister of 15 September 2020 in relation to proposed changes to the Ministerial Code as a result of the 2020 Act (which changes have presently been put on hold for the reasons identified at paragraphs [89]-[90] above), it is noted that the current text of section 2.4 of the Code "no longer reflects the emphasis in the Act on statutory responsibilities" but rather "includes a range of policy responsibilities within which only some specific statutory functions are exercised."

[106] This does not necessarily give rise to any illegality, in my view, since there is nothing inherently wrong in the Ministerial Code going further than the scheme of the NIA would require it to. In certain circumstances, there may be good reason for a Code providing stricter obligations on a Minister than the bare bones of the obligations under the NIA might suggest. It gives rise to a particular problem in the present case, however, given that the requirements of section 2.4 of the Ministerial Code are backed by the sanction, or consequence, set out in section 28A(10). Does the removal of Ministerial authority arise where the Minister is required to refer a matter to the Executive for consideration under the Code but is not so required under section 20 of the NIA?

[107] My conclusion in relation to these issues is as follows. First, I accept the applicants' submission that the Minister has acted in breach of obligations under the current version of the Ministerial Code. As the Code has not been amended, and as the Minister remains under an obligation to comply with it pursuant to section 28A(1) of the NIA, the court must conclude that the Minister's obligations under that Code have not been properly discharged. In particular, the decision on the planning applications – which was both a significant and controversial matter – was not referred to the Executive Committee to be considered by it in the manner required by section 2.4 of the Code.

[108] However, it does not follow that every breach of the Ministerial Code will result in the Ministerial decision involving that breach being quashed. In this regard, there is plainly a distinction to be drawn between provisions of the

Ministerial Code which are made under section 28A(5) of the NIA and those which are not. In the former case, where there has been a contravention of the relevant provision, section 28A(10) provides that the Minister has "no ministerial authority to take any decision." There is an interesting issue as to whether, in circumstances where there is a clear contravention of such a provision, the decision is void as a matter of law by automatic operation of section 28A(10) or whether it still requires to be quashed (or declared void) by the court in order to overcome the presumption of *omnia praesumuntur rite esse acta* (that all things have been done correctly). In the appeal in the *Central Craigavon* case, Girvan LJ observed that these were "matters of difficulty and complexity which are not subject to a straightforward solution." He concluded that, in light of the factual developments in that case, the Court of Appeal did not consider it necessary to say anything further on the issue. Likewise, I do not propose to seek to answer that question, since it is unnecessary in the context of these proceedings. If and insofar as there is any discretion to decline to grant a remedy in the case of a clear contravention of a provision of the Ministerial Code mandated by section 28A(5), it would appear that that discretion is extremely limited in light of the provision of section 28A(10).

[109] In the present case, however, two significant issues arise for consideration. First, has there been a "contravention" of section 2.4 of the Ministerial Code for the purpose of section 28A(10)? Second, in light of the amendments to section 20 of the NIA, is section 2.4 of the Ministerial Code still to be viewed (wholly) as a provision of that Code "made under" section 28A(5)?

[110] In the *Central Craigavon* case, Morgan J considered that the breach of the Ministerial Code which had there occurred was technical in nature and did not amount to a "contravention" of the Code in the sense intended by section 28A(10). This approach was cited, without demur, by Treacy J in the *BMAP* case at first instance at paragraph [46]. In the appeal to the Court of Appeal in the *Central Craigavon* case, the question was not resolved since, as Girvan LJ observed at paragraph [19] of the judgment, that issue had by then become academic. For my own part, I have some doubt about whether Morgan J was correct to consider that, in order for section 28A(10) to come into play, the Minister's breach of the Ministerial Code had to be conscious or intentional. Nonetheless, his conclusion on this was a key part of the reasoning in that case and I should not depart from it at first instance unless persuaded that it was clearly incorrect, which I am not.

[111] Applying that approach to the present case, I do not consider that Minister Mallon 'contravened' section 2.4 of the Ministerial Code in the manner in which Morgan J interpreted that phrase in the context of section 28A(10) of the NIA. Albeit the Minister did not refer the substantive decision on the applications on their planning merits to the Executive Committee for that to be considered by the committee, this was very far from the type of case where the Minister has sought to 'go on a solo run.' On the contrary, the Minister kept her Executive colleagues informed at all material times in relation to her proposed course of action in relation to determinations on regionally significant planning applications which she

considered to be urgent. Her intention to secure a legislative amendment allowing her to take a decision on the Interconnector applications (amongst others) was both discussed and agreed with her Executive colleagues and supported by them.

[112] Moreover, the evidence establishes that, at a time when there were concerns as to how quickly the legislative change could be effected, the Minister was content for the Executive Committee to act as the decision-making authority in relation to a number of significant planning applications which required urgent decisions. It was in fact a number of her Executive colleagues who resisted that suggestion (albeit for understandable reasons). As discussed above, there also appears to have been no dissent or contention in the Executive, either before or after the Minister's decision, on the substance of the issue. In light of this, it seems to me that, as in the *Central Craigavon* case, the Minister's failure to comply with the strict terms of section 2.4 can be viewed as a technical failure on the particular facts, rather than a wilful or reckless disregard of the Code in circumstances where Executive referral was likely to make a difference to the outcome in substance.

[113] Additionally, section 28A(5) provides that the Ministerial Code "must" include certain provision. That is provision to require Ministers to bring to the attention of the Executive any matter which "ought, *by virtue of section 20(3) or (4)*, to be considered by the Committee." That is to say, where a matter ought to be considered by the Committee, the Ministerial Code must ensure that the relevant Minister is under an obligation to bring it to the Committee's attention. But in this case, having lawfully determined pursuant to section 20(7) that she would not refer the matter to the Executive, the planning decisions at issue in these proceedings were *not* matters which "ought, by virtue of section 20(3) or (4), to be considered by the Committee." Put another way, the Ministerial Code now requires referral to the Executive in circumstances which go beyond those required by section 20(3) or (4), which are now subject to section 20(7).

[114] The result of this analysis is that, in my judgment, insofar as the Ministerial Code now goes beyond what is required pursuant to section 20, it is no longer to be considered as a provision "made under subsection (5)" for the purposes of section 28A(10). Section 28A(5) is designed to ensure that the legal requirements of section 20 are reflected in the Ministerial Code; and section 28A(10) is designed to ensure that there is legal consequence where those legal requirements have not been met. But section 28A(5) only mandates inclusion within the Ministerial Code of such provisions as are necessary to comply with the requirements of section 20. Any decision to go beyond those requirements (whether consciously or, as in this case, by omission) is permissible, but will not be backed up by the automatic sanction contained in section 28A(10). In other words, section 28A(10) is properly to be interpreted as meaning that a Minister has no Ministerial authority to take any decision in contravention of a provision of the Ministerial Code *which is required to be* made under subsection (5). Where the Code goes beyond this, breach of (or, using the statutory wording, failure to act in accordance with) the Code will be unlawful

pursuant to section 28A(1) but will not automatically call into question the Minister's decision-taking authority under section 28A(10).

[115] I consider that this approach represents the proper interpretation of the statutory scheme as it now stands as a whole; but that it also reflects the constitutional principle at play that, since the Act confers executive authority upon Ministers (see section 23(2) of the NIA and paragraph [30] of the judgment in *Solinas*), to which section 28A(10) is a significant exception, that exception should be construed strictly. I also do not consider this interpretation to be inconsistent with previous authority in relation to sections 28A(5) and (10) in which it was emphasised that a Minister had no power to take a decision in violation of the Ministerial Code relating to an obligation to bring to the attention of the Executive "any matter that *requires* to be considered by it for discussion and agreement" [emphasis added] (see paragraphs [36] and [39] of the BMAP decision at first instance). In the present case, the Minister's decision did not require to be considered by the Executive for discussion and agreement by virtue of section 20(5) and (7).

[116] I have reached this conclusion without having to have recourse to the interpretative flexibility in relation to the NIA which was permitted by the House of Lords in *Robinson v Secretary of State for Northern Ireland* [2002] NI 390, at paragraph [11], where Lord Bingham said that the NIA was in effect a constitution for Northern Ireland and that its provisions should, consistently with the language used, be interpreted "generously and purposively" bearing in mind the values which the constitutional provisions were intended to embody. One of those values was that it was in general desirable that government should be carried on and that there should be no governmental vacuum. In a similar vein, it is in general desirable that Ministers should not be deprived of their Ministerial authority unless this is required in order to protect the proper role and function of the Executive Committee within our constitutional arrangements. (I assume for the moment that the invitation to interpret the NIA generously and purposively remains applicable, although the Supreme Court has very recently observed that the Scotland Act 1998 should be "interpreted in the same way as any other statute": see paragraph [7] of the judgment in the *Reference by the Attorney General and Advocate General for Scotland re the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42. One is, of course, as Lord Bingham recognised, always required to adopt an interpretation which is consistent with the language used.)

[117] Turning back to the applicants' reliance on Ministerial statements in the Assembly, I do not consider that this ought to lead to any different result. For the reasons given in paragraphs [113]-[115] above, I do not consider that any relevant provision of the NIA is ambiguous. Construed as a whole, I consider that the purpose and effect of the statutory scheme is clear. Even if I was wrong about that, I still would not consider the statements made by Mr Kearney in the Assembly to be admissible, much less determinative, in relation to the issue of construction which arises in these proceedings. Although the statements were made by a Minister promoting the Bill, they are not in my view clear in the sense intended in *Pepper v*

Hart. In the first instance, and most significantly, the statements were made in the course of the passing of the 2020 Act but, as is apparent from the discussion above, the key issue of interpretation which arises at this stage is the meaning and effect of sections 28A(5) and 28A(10) of the NIA – not any of the specific provisions of the Act which were the subject of the relevant Assembly debate. Minister Kearney's comments expressed a legal view about the effect of the NIA as a whole, once amended, *not* about the specific meaning of words in the provisions in the Bill he was commending to the chamber. Second, the statements do not appear to have been made as part of a pre-prepared speech or scripted contribution to the debate. Rather, they were *ad hoc* answers to questions posed in the course of debate. It is well established that such statements are less likely to enjoy the quality of clarity required in order to be relied upon as an aid to interpretation of the subsequent enactment. Third, albeit not as swiftly as one might have expected, after Mr Kearney had made his statements in the Assembly, they were being clearly disavowed in the Assembly by his own department (see paragraph [98] above). In light of these matters, I would not consider that Mr Kearney's statements should be admitted as an aid to interpretation in this case even if I considered that the relevant provisions of the NIA had the necessary quality of ambiguity to open the door.

Remedy

[118] Notwithstanding my decision in relation to section 28A(10) of the Act, there has nonetheless been a failure on the part of the first respondent to act in accordance with the Ministerial Code in its present form which falls foul of section 28A(1) of the NIA. Where there has been a failure to act in accordance with the Ministerial Code which represents a breach of section 28A(1), but does not engage section 28A(5) and (10), the court retains its usual discretion as to remedy. That follows as a matter of first principle and is also how Morgan J approached the issue in paragraph [36] of his judgment in *Solinas*.

[119] As to my discretion on the question of remedy, the factors mentioned at paragraphs [111] and [112] above are plainly relevant. The DfI Minister was prepared to allow the Executive to deal with significant planning decisions in the period before the necessary amendments to the NIA could be made to allow her to take these decisions herself. The Executive did not wish to do so. Although this did not amount to referring the relevant matter to the Executive for discussion and agreement in the relevant sense, it indicated a willingness to do so. In any event, no other Minister appears to have raised any concern about the substance of the Minister's decision.

[120] I also take into account, as outlined in the evidence and submissions of the notice party (SONI), that there has already been a significant delay to the overall Interconnector project due to delays in obtaining planning consent in Northern Ireland; and that there is in the PAC's view, and that of the relevant Minister, significant public interest in the project proceeding, for all of the reasons why it was considered to be a significant matter and of overriding public interest. In

addition, no challenge has been made by the applicants on any planning-related grounds.

[121] In light of these factors, it seems to me that this is a clear case where the grant of an order of *certiorari* would be inappropriate, notwithstanding the breach of the Ministerial Code under section 28A(1) of the NIA which I have found to be made out. A declaration in appropriate terms is in my view the obviously appropriate remedy.

Conclusion

[122] I have no doubt as to the legality of the 2020 Act, which has made a significant alteration to the balance of decision-making as between individual Ministers and the Executive Committee. These are matters entirely within the legislative competence of the Assembly (subject to obtaining the necessary consent of the Secretary of State, since they deal with a reserved matter). There can be no legal objection in the circumstances of this case to the elected legislature in this jurisdiction making such changes to our system of governance on the basis of its assessment of what is in the public interest.

[123] The conclusion I have reached in these proceedings on the second issue – namely whether the DfI Minister breached the Ministerial Code and was thereby deprived of Ministerial authority to take the decision which she did – does not reflect the full position urged upon me by either of the principal parties. I do not accept the respondents' contention that the plain wording of the Ministerial Code can be ignored or read down merely because the underlying statutory scheme has changed. However, I also do not accept the applicants' contention that breach of the current version of the Ministerial Code must have the same sanction as if the underlying statutory scheme had not been amended.

[124] The deprivation of Ministerial authority provided for in section 28A(10) of the NIA does not arise in this case either because the relevant Minister did not 'contravene' the Ministerial Code in the manner envisaged in that provision or, as I would prefer to hold, because the Ministerial Code now goes further than what is required by section 28A(5) of the NIA and it is only those provisions of the Code which *are* required by section 28A(5) which attract the additional protection set out in section 28A(10).

[125] In the circumstances, I will grant a declaration to the effect that the DfI Minister did not act in accordance with the provisions of section 2.4 of the Ministerial Code by failing to refer the significant and/or controversial decision on the relevant planning applications to the Executive Committee to be considered by it for discussion and agreement. As I hope I have made clear above, I do not consider that any failing in the Minister's part was culpable in the circumstances of this case. I consider that, in light of the nature of the breach and the fact that section 28A(10) is not engaged in this instance, I have a discretion as to the grant of an appropriate

remedy. I do not propose to grant any further remedy other than the declaration referred to above. In particular, there appears to me to be no warrant for the relief suggested by the applicants, namely that the planning permissions ought to be quashed.

[126] I would, however, urge the Executive Committee to proceed as expeditiously as possible with amendment of the Ministerial Code in order to reflect the new and modified requirements of section 20 of the NIA. Had the necessary amendments been made at the appropriate time, it is unlikely that these proceedings would have been brought.

Costs

[127] I will hear the parties on the question of costs but my provisional view is that, in light of the conclusions I have reached in the disposal of the case outlined above, the applicants should be entitled to 50% of their costs against the respondents (such costs to be taxed in default of agreement); and that there should be no order to costs as between the notice party and any other party.