Judicial Communications Office

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COURT OF APPEAL FINDS INFRASTRUCTURE MINISTER DID NOT BREACH MINISTERIAL CODE

Summary of Judgment

The Court of Appeal[1] today set aside a declaration made by the High Court that the Department for Infrastructure Minister did not act in accordance with the Ministerial Code by failing to refer a planning decision relating to the North-South electricity interconnector to the Executive Committee[2]. The decision should provide clarity given the public interest in planning decisions being made in an efficient and effective way.

Legal Framework

In 2018, the Court of Appeal, in the case of *Re Buick's Application* [2018] NICA 26, decided that the Minister in that case had breached the Ministerial Code by failing to refer a significant and controversial decision to the Executive Committee pursuant to section 2.4 of the Ministerial Code. This prompted a period of discussion within Government and resulted in legislative change.

Section 20 of the Northern Ireland Act 1998 ("NIA") provides for the establishment of an Executive Committee which has the functions described in paragraphs 19 and 20 of the Belfast Agreement including to provide a forum for the discussion of, and agreement on, issues which cut across the responsibilities of two or more Ministers. Following amendments in 2006, 2010 and 2018, section 20 was further amended by the Executive Committee (Functions) Act (Northern Ireland) 2020 ("the 2020 Act"). In particular, this inserted a new sub-section (7) which provided that planning decisions may be made by the Department for Infrastructure ("DfI") or the Minister in charge of that Department without recourse to the Executive Committee. This amendment came into effect on 25 August 2020.

Section 28A(1) of the NIA imposes upon Ministers a legal duty to act in accordance with all of the provisions of the Ministerial Code. Section 2.4 of the Ministerial Code sets out the matters that a Minister must bring to the attention of the Executive Committee.

The High Court held that the current Ministerial Code imposes obligations of referral to the Executive Committee which go beyond those contained in the governing statutory regime (for example, the amendments made by the 2020 Act have rendered the DfI Minister's decision non-cross-cutting for the purposes of section 20(3) of the NIA). The High Court judge thought the Ministerial Code should be amended to reflect the legislative changes brought about by the 2020 Act and, in the absence of that, found that the Minister had breached the Code but not to the extent that her decision could be quashed.

Argument on Appeal

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[1] The panel was Keegan LCJ, Treacy LJ and Horner LJ. Keegan LCJ delivered the judgment of the court.

[2] The planning application was granted by the then Minister, Nichola Mallon, on 8 September 2020 with final planning approval issued on 14 September 2020.

The Court of Appeal considered that the case could be solved by a simple examination of the relevant statutory provisions. It said the context of the statutory provisions was clear given that the express purpose was to remove the requirement for the Minister to refer planning decisions to the Executive to obtain its agreement:

> "This was a clear policy choice following the *Buick* decision given force by the subsequent statute enacted by Parliament which amended the NIA."

The court considered the "plain and ordinary" meaning of the words used in the relevant legislative provisions. In a written submission provided by the Attorney General, it was argued that it was open to the court to adopt an interpretation of section 28A(1) NIA which reads the references in the Ministerial Code as amended by the 2020 Act and to read the obligations in paragraph 2.4 of the Ministerial Code as applying to the altered statutory position. The Court considered this argument was correct and said the appeal should be allowed for the following reasons:

- The language of the 2020 Act which amends the NIA is set in clear and unambiguous terms. The 2020 Act is described as an Act to make provision concerning the decisions which may be made by Ministers without recourse to the Executive Committee and specifically subsection 20(7) which allows DfI or the Minister in charge to exercise a planning function without recourse to the Executive Committee. Section 20(5) of the NIA (functions of the Executive Committee) is now subject and subordinated to the new provisions including section 20(7).

- Section 28A(1) of the NIA requires a Minister to act in accordance with the provisions of the Ministerial Code. Section 28A(5) provides that 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. However, the reference in section 28A(5) to section 20(3) and (4) of the NIA is to the provisions as amended and therefore, it follows that subsections (3) and (4) are now subject to section 20(7) which is that the Minister for Infrastructure may make a planning decision without recourse to the Executive Committee. The mandatory matters which must be referred to the Executive Committee are not applicable to planning decisions when analysed in this way.

- The statutory basis for the Ministerial Code is section 28A NIA. Since section 20(3) and (4) are now, by virtue of section 20(5), expressly subject to section 20(7), such planning decisions are not, in light of the statutory changes, matters which "ought, by virtue of section 20(3) or (4), to be considered by the Committee."

The Court said it followed, therefore, that the Minister in this case was under no obligation to bring the matter to the Executive Committee: "Since such planning decisions are not now matters that require to be considered by the Committee, the Minister is not acting in contravention of the Ministerial Code." The Court also considered there was no need to amend the Ministerial Code. It said there was an over complication of this issue before the High Court and that the judge underestimated the effect of the section 20(5) amendment which brought section 20(7) into play. It said the judge fell into error in deciding that the Minister was in breach of the Code or that some amendment was required:

> "We must reverse that conclusion. In doing so we stress that the judge did not have the benefit of the Attorney General's argument which has been of considerable assistance to us along with the focused submissions of counsel. In our view the statutory interpretation we have set out above is a clear answer to this case. Therefore, it is not necessary to consider the alternative arguments regarding Parliamentary sovereignty and implied repeal."

Conclusion

The Court allowed the appeal and set aside the declaration made by the High Court.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Judicial Communications Officer
Lady Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921
E-mail: Alison.Houston@courtsni.gov.uk