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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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

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

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HUMPHREYS J

Introduction

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

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

[3] The applicant eschews any challenge to the legislation itself but rather seeks to impugn the failure to conduct a cumulative equality impact assessment ('CEIA') into the overall impact the budgetary provisions would have on children and young people.

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

[5] The proposed respondents are the Secretary of State for Northern Ireland ('SoSNI'), the Northern Ireland Office ('NIO'), the Department of Finance ('DoF'), collectively 'the state parties', and the Equality Commission for Northern Ireland ('ECNI').

The Budget

[6] Section 64 of the NIA lays down the procedure for the approval of budget proposals by the Northern Ireland Assembly. Each financial year, the Minister of Finance is obliged to lay a draft budget before the Assembly, defined as a "programme of expenditure proposals for that year which has been approved by the Executive Committee". The Assembly may then, with cross-community support, approve the draft budget with or without modifications.

[7] Northern Ireland has been without a functioning Executive or Assembly since the resignation of the First Minister on 3 February 2022. It is for this reason that SoSNI issued a Written Ministerial Statement ('WMS') on 27 April 2023, announcing that he would be setting the budget for Northern Ireland for 2023-24. The WMS set out the resource and capital allocations for each Northern Ireland department and formed the basis of the legislation which became the 2023 Act.

[8] This budget has been the subject of criticism from the UN Committee on the Rights of the Child in its Concluding Observations on the combined sixth and seventh periodic reports of the UK, published in June 2023. It recommends withdrawal of the Northern Ireland budget and adoption of a child rights-based approach into budgeting processes.

[9] The applicant's evidence is that this budget involves a series of spending cuts across children's services, and specific examples are given of the impact of such cuts in a series of affidavits filed on the applicant's behalf.

[10] However, it is not the content of the budget that the applicant seeks to impugn. Rather the challenge is to the failure by the state parties to produce a CEIA prior to SoSNI's approval of the budget and the failure by ECNI to proffer accurate and consistent advice to the state parties in this regard.

[11] On 2 May 2023 Ms Kelly, director of the applicant, wrote to SoSNI, expressing profound concern at the decisions outlined in the WMS which were said to have been made without taking account of statutory equality and human rights duties, to the

detriment of children in Northern Ireland. On 4 May 2023 the applicant sought the NIO's equality screening document associated with the WMS and the budget.

[12] In its reply dated 24 May 2023 the NIO stated:

> "Northern Ireland departments completed likely assessments of their proposals as part of their departmental returns and provided these to the Northern Ireland Office via the Department of Finance during the budget setting processes.
>
> Through its functions, the Department of Finance, as a designated public authority, must comply with the statutory equality duties, and apply its equality scheme arrangements. The Northern Ireland departments, rather than the Northern Ireland Office, have functional responsibility not only for contributing to the preparation of budget proposals, but also the allocation of their individual budget settlement. Similarly they must fulfil these functions and make decisions having given the required consideration (i.e. due regard to the need to promote equality of opportunity and regard to the desirability of promoting good relations)."

[13] On the same date, SoSNI wrote to the applicant inviting it to engage directly with the departments with regard to section 75 in the context of spending decisions proposed by them.

[14] Ms Kelly, in her grounding affidavit, refers to a meeting attended by the SoSNI on 3 May 2023 where he stated:

> "Equality duties fall with those who spend the money."

[15] In its response to pre action correspondence dated 31 July 2023, the DoF refers to its dual role in budget preparation. It states that it has a strategic responsibility in preparing information for decision makers across all departments and a role as a department itself. The former role is carried out by the Public Spending Directorate and the latter by the Finance and Corporate Services Division.

[16] The DoF also refers to the ECNI's report on the 2019-20 budget, as a result of which a decision was made to provide all equality information to the ultimate decision maker "in full and without commentary." In the subject budgetary process, information was received from the various departments in January and March 2023, including equality data, and this was passed to the NIO in its entirety. The NIO later confirmed that SoSNI was provided with the equality information himself prior to making final decisions on the budget.

Section 75

[17] Section 75 of the NIA provides:

> "(1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity –
>
> (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
>
> (b) between men and women generally;
>
> (c) between persons with a disability and persons without; and
>
> (d) between persons with dependants and persons without.
>
> (2) Without prejudice to its obligations under subsection (1), a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group."

[18] In this context, 'public authority' is defined as any department, corporation or body listed in Schedule 2 to the Parliamentary Commissioner Act 1967 and designated by SoSNI, which includes the Northern Ireland Office by virtue of the Northern Ireland Act (Designation of Public Authorities) Order 2000, or Schedule 3 to the Public Services Ombudsman Act (Northern Ireland) 2016, which includes all Northern Ireland departments. Neither SoSNI nor ECNI falls within the ambit of section 75(1).

[19] Section 75(4) provides that Schedule 9 to the NIA, relating to the enforcement of duties under that section, shall have effect. Paragraph 1 of Schedule 9 states that the ECNI shall:

> "(a) keep under review the effectiveness of the duties imposed by section 75;
>
> (b) offer advice to public authorities and others in connection with those duties; and

(c) carry out the functions conferred on it by the following provisions of this Schedule."

[20] Schedule 9 goes on to impose duties on public authorities to submit equality schemes to ECNI for approval. These are intended to show how the authority in question intends to fulfil the section 75 duties. Paragraphs 6 and 7 of Schedule 9 provide for a system of approvals of schemes by the ECNI or, in certain cases, by SoSNI. Paragraph 10 concerns complaints and provides:

> "(1) If the Commission receives a complaint made in accordance with this paragraph of failure by a public authority to comply with a scheme approved or made under paragraph 6 or 7, it shall—
>
> (a) investigate the complaint; or
>
> (b) give the complainant reasons for not investigating.
>
> (2) A complaint must be made in writing by a person who claims to have been directly affected by the failure.
>
> (3) A complaint must be sent to the Commission during the period of 12 months starting with the day on which the complainant first knew of the matters alleged.
>
> (4) Before making a complaint the complainant must—
>
> (a) bring the complaint to the notice of the public authority; and
>
> (b) give the public authority a reasonable opportunity to respond."

[21] Paragraph 11 relates to investigations by ECNI:

> "(1) This paragraph applies to—
>
> (a) investigations required by paragraph 10; and
>
> (b) any other investigation carried out by the Commission where it believes that a public authority may have failed to comply with a scheme approved or made under paragraph 6 or 7.

(2) The Commission shall send a report of the investigation to—

(a) the public authority concerned;

(b) the Secretary of State; and

(c) the complainant (if any).

(3) If a report recommends action by the public authority concerned and the Commission considers that the action is not taken within a reasonable time—

(a) the Commission may refer the matter to the Secretary of State; and

(b) the Secretary of State may give directions to the public authority in respect of any matter referred to him.

(4) Where the Commission—

(a) sends a report to the Secretary of State under sub-paragraph (2)(b); or

(b) refers a matter to the Secretary of State under sub-paragraph (3)(a),

it shall notify the Assembly in writing that it has done so and, in a case falling within paragraph (a), send the Assembly a copy of the report.

(5) Where the Secretary of State gives directions to a public authority under sub-paragraph (3)(b), he shall notify the Assembly in writing that he has done so."

[22] Paragraph 12 of Schedule 9 excludes governments departments listed in the Schedule to the Parliamentary Commissioner Act 1967, including the NIO, from the operation of paragraphs 6 and 7. It states:

"(1) Paragraphs 6, 7 and 11(2)(b) and (3) do not apply to a government department which is such a public authority as is mentioned in section 75(3)(a).

(2) On receipt of a scheme submitted by such a government department under paragraph 2 or 3 the Commission shall—

(a) approve it; or

(b) request the department to make a revised scheme.

(3) A request under sub-paragraph (2)(b) shall be treated in the same way as a request under paragraph 3(1)(b).

(4) Where a request is made under sub-paragraph (2)(b), the government department shall, if it does not submit a revised scheme to the Commission before the end of the period of six months beginning with the date of the request, send to the Commission a written statement of the reasons for not doing so.

(5) The Commission may lay before Parliament and the Assembly a report of any investigation such as is mentioned in paragraph 11(1) relating to a government department such as is mentioned in sub-paragraph (1)."

[23] It will be noted that the powers of ECNI, whether on foot of a complaint under paragraph 10 or an investigation instigated by it under paragraph 11, are limited to the question of failure to comply with an approved scheme.

Equality Schemes

[24] ECNI has published "Section 75 of the Northern Ireland Act 1998 : A Guide for Public Authorities." It reiterates the obligation under paragraph 4 of Schedule 9 for the scheme to outline the arrangements:

"(a) for assessing its compliance with the duties under section 75 and for consulting on matters to which a duty under that section is likely to be relevant (including details of the persons to be consulted);

(b) for assessing and consulting on the likely impact of policies adopted or proposed to be adopted by the authority on the promotion of equality of opportunity;

(c) for monitoring any adverse impact of policies adopted by the authority on the promotion of equality of opportunity;

(d) for publishing the results of such assessments as are mentioned in paragraph (b) and such monitoring as is mentioned in paragraph (c);

(e) for training staff;

(f) for ensuring, and assessing, public access to information and to services provided by the authority."

[25] The current version of the NIO equality scheme was published in December 2019. It states that the authority will consult those directly affected by any matter or policy, as well as a range of stakeholders, and will use the tools of screening and equality impact assessment, where necessary, to assess the likely impact of any particular policy. The NIO is also committed to monitoring, training of staff and ensuring access to information.

[26] The current DoF equality scheme is dated February 2023 and closely mirrors the NIO scheme in terms of commitments and arrangements. It states that the DoF's functions include the planning and management of public expenditure in Northern Ireland, including supporting the Minister and Executive in the allocation of funding available from HM Treasury.

[27] Neither equality scheme makes any reference to CEIA.

ECNI, Budgets and Section 75

[28] In June 2015 the ECNI published "Budgets and Section 75 : A Short Guide", the aim of which was to set out how the section 75 duties apply to budget processes. It refers to the "have due regard" duty and states:

> "There should be assessments of overall budget proposals at a strategic level. This should provide evidence of the **cumulative impacts**, i.e. consideration of the overall range of proposals and what impacts they might collectively have on the section 75 categories. It is important that this is presented alongside any draft budget consultations, to inform and enable consultees to fully contribute to the evidence that will be taken into account in decisions on the overall budget settlement."

[29] In the draft Budget 2015-16 brought forward by the Minister of Finance in November 2014, paragraph 6.8 stated:

> "In recognition of the fact that the allocation of resources has always the potential to impact on section 75 groupings, an equality impact screening document will be produced, in accordance with statutory requirements, to consider the equality impacts of the Budget. The aim of the screening document conducted at this strategic level will be to consider the overall impacts which may be associated with the Executive's strategic priorities and the allocation of resources."

[30] The final Budget for 2015-16 recorded that such an equality impact screening document was produced and provided to the Executive Ministers to assist with deliberations on the budget.

[31] In a document entitled "Public Authority Statutory Equality and Good Relations Duties Annual Progress Report 2017-18", the DoF stated that it would ensure that Ministers were briefed prior to making decisions on any potential equality impacts resulting from the cumulative impact of allocations, in line with ECNI guidance.

[32] Pursuant to its powers under paragraph 11 of Schedule 9 to the NIA, the ECNI conducted an investigation into the DoF's preparation of the budget for 2019-20. The matter in issue was whether the DoF had complied with its approved equality scheme relating to equality impact assessment and consultation. This budget setting process occurred during a previous period when there was no functioning Executive or Assembly.

[33] In its findings published in September 2020, the ECNI noted that the DoF published details of the budget on 28 February 2019 by way of tables setting out departmental allocations. It then published a CEIA entitled "NI Budget equality considerations" on 28 March 2019. In a letter from DoF to ECNI dated 11 July 2019 it describes the steps taken:

> "DoF then collated this information in line with its duty to provide decision makers with a Cumulative Equality Impact Assessment in advance of decisions being made."

[34] The ECNI found that there had been failings on the part of DoF both in respect of the presentation of equality assessments to SoSNI and by reason of a lack of consultation on the assessments. As a result, it was determined that DoF had failed to comply with its approved equality scheme.

[35] Following an inquiry made by the applicant, the ECNI wrote on 18 October 2023 explaining that the 2020 investigation did not find that DoF had failed to conduct a CEIA. The Chief Commissioner stated:

> "ECNI was informed and accepted that it is not within DoF's functions to carry out such a cumulative assessment of the equality impact of the budget across Departments. ECNI was advised and accepted that DoF's function was to support the Secretary of State in his decision making on the Budget through the provision of financial and equality information."

[36] This correspondence stated that the 2015 guidance in relation to CEIA remains ECNI's position and it was concerned that cumulative adverse impacts were not being considered or mitigated. It also recorded that on 10 July 2023 ECNI had written to all Permanent Secretaries:

> "…outlining its recommendation that a cumulative equality impact assessment was required."

[37] The applicant responded, by letter dated 25 October 2023, posing the following question:

> "In the view of the ECNI, which public authority (to which section 75 applies) is under a legal obligation (arising from section 75), to carry out the cumulative equality assessment of the draft Northern Ireland Budget that the Commission considers is required by section 75?"

[38] On 7 November 2023 ECNI replied stating that it was "not presently clear" that section 75 requires, as a matter of law, a CEIA to be conducted. Reference was made to first instance case law dating from 2010 in England & Wales. As a result, it concluded:

> "ECNI is not in a position to state which, if any, public authority is under a section 75 duty to conduct a cumulative equality impact assessment of the draft budget."

[39] In December 2023 ECNI wrote to all government departments, pursuant to its powers under paragraph 11 of Schedule 9, seeking information in relation to their compliance with equality schemes.

The Test for Leave

[40] It is well-established that an applicant must, at the leave stage, satisfy the court that it has an arguable case with realistic prospects of success – see *Re Ni Chuinneagain's Application* [2022] NICA 56.

The Grounds for Judicial Review

(i) The NIO and DoF

[41] As against the state parties, the applicant recognises that there is a distinction between the SoSNI and the NIO and DoF. SoSNI is not subject to the section 75 duty, whatever its content, as it is not a designated public authority.

[42] In relation to the NIO and DoF, the applicant's case is that each of them has breached the statutory duty imposed by section 75 to have due regard to the principle of equality of opportunity in the carrying out of their functions.

[43] Section 75 has a statutory equivalent in Great Britain in the form of section 149 of the Equality Act 2010. In *Re Toner's Application* [2017] NIQB Maguire J cited with approval the principles set out by McCombe LJ in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 in respect of the operation of the section 149 duty. In *Bracking* the court recognised that a combination of the 'due regard' duty and the principle in *Secretary of State for Education v Tameside MBC* (1977) AC 1014, gave rise to an obligation on a public authority to be properly informed before taking a relevant decision. If the information required for this purpose was not available, then there would be a duty to acquire it.

[44] In arguing that the section 75 'due regard' duty encompasses an obligation to carry out a CEIA, the applicant relies upon the 2015 guidance proffered by ECNI wherein it states that:

> "There should be assessments of overall budget proposals at a strategic level. This should provide evidence of the cumulative impacts…"

[45] Moreover, the DoF itself appears to have recognised the obligations in its own publications. In its correspondence of 11 July 2019 the duty to carry out a CEIA is expressly referenced, as did the draft budget of 2015-16.

[46] The applicant therefore says that the process adopted in relation to the subject budget, which entailed merely collecting the indicative section 75 assessments from other departments and passing these to the NIO, failed to meet the obligation. Equally, it is contended that the NIO was under a duty, in the absence of such cumulative assessment having been carried out by DoF, to acquire the information

and carry out the assessment itself. In this context, it is notable that section 75 duties are non-delegable (see *Bracking* at para [25] (5) (iv)).

[47] In *Fawcett Society v Chancellor of the Exchequer* [2010] EWHC 3522 (Admin) the applicant sought permission to challenge the government's failure to comply with the duty under section 76A of the Sex Discrimination Act 1975 (a predecessor of section 149 of the Equality Act) in the preparation of the national budget for 2010. In particular, it was argued that there was a failure to carry out a cumulative assessment of the impact of the budget on equality of opportunity.

[48] Permission was refused, and Ouseley J commented:

> "A cumulative impact, if there is one, is perfectly possible to see from the accumulation of separate impacts. The separate adverse consequences, if there are such consequences, can be accumulated as they would have to be from an individual examination of them separately." (Para [8]).

[49] This conclusion seems to flow from an understanding that the gender equality impact assessment can be adequately undertaken on a consideration of the line items in the budget.

[50] I am satisfied that the applicant has established an arguable case that the section 75 duty, imposed on both the NIO and the DoF, does encompass an obligation to carry out a CEIA. *Fawcett* is itself a permission decision which is of limited precedent value and would not bind this court in any event. It is clearly arguable that in order to discharge the section 75 obligation to have regard to the principle of equality of opportunity it is necessary to analyse the overall impact of budgetary allocations.

[51] I will however consider the other specific objections to the grant of leave which have been raised by the proposed respondents in due course.

(ii) SoSNI

[52] The case advanced against SoSNI is not founded on section 75 but on *Wednesbury* unreasonableness and the *Tameside* duty of inquiry.

[53] The evidence available to date paints a picture of the SoSNI regarding equality issues as a matter for individual departments, and not for him in fixing departmental allocations.

[54] The applicant seeks to construct a common law principle of equality from various sources, namely:

(i) Caselaw which establishes it may be a relevant or material consideration;

(ii) Unincorporated treaties should inform the content and development of the common law;

(iii) The recognition of the importance of equality in the Good Friday Agreement;

(iv) The conclusions of the UN Committee on the Rights of the Child; and

(v) The Ministerial Pledge of Office which includes reference to the promotion of equality.

[55] However, in *R (Gallagher Group) v Competition and Markets Authority* [2018] UKSC 25, the Supreme Court held:

> "…the domestic law of this country does not recognise equal treatment as a distinct principle of administrative law." (Per Lord Carnwath at para [24])

[56] This was followed in this jurisdiction in *Re McCord's Application* [2020] NICA 23 in which Stephens LJ explained:

> "…consistency is a component of equal treatment which in turn is not a separate principle, but part of *Wednesbury* rationality." (Para [86])

[57] It must also be recognised that unincorporated treaties form no part of the domestic law of the United Kingdom, a principle described as 'fundamental' by Lord Reed in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26.

[58] Equally, it is trite to observe that SoSNI is not a Minister in the Northern Ireland Executive and is not subject to that pledge of office. This is the case even in circumstances when there is no functioning Executive, and he is carrying out functions which would normally fall to Northern Ireland Ministers.

[59] Whether SoSNI complied with a *Tameside* duty of inquiry to take reasonable steps to acquaint himself with the relevant information depends to a significant extent on whether he was subject to a common law duty of equality. If no such duty exists, then it could not be said that SoSNI fell into error in failing to make sufficient inquiries.

[60] I am also conscious that the statute occupies the field. Parliament has designated certain public authorities, and not others, as those which owe section 75 duties. To impose an identical obligation on another public authority through the creation of a common law duty would undermine the constitutional arrangements prescribed by the NIA.

[61] For these reasons, I am not satisfied that the applicant has made out an arguable case with realistic prospects of success against SoSNI.

(iii) ECNI

[62] The applicant relies on the duty imposed on the ECNI under paragraph 1(b) of Schedule 9 to the NIA to offer advice to public authorities in connection with the section 75 duties. In particular, it says that such a duty must require advice to be given which is legally sound, clear and consistent.

[63] The criticism levelled at ECNI is that its most recent position as articulated in the letter dated 7 November 2023 is inconsistent with the advice given in 2015. It remains a mystery, the applicant says, as to why this volte face has occurred. If it were in reliance on *Fawcett*, this is peculiar since it was decided five years before the advice was published. If it arose out of the 2020 investigation, the basis for that has not been articulated.

[64] It is clearly arguable that ECNI has fallen into error in failing to give advice to public authorities on the extent of the duties imposed by section 75. A duty to give such advice arises under statute. It is arguable that ECNI must give the advice, whilst recognising that it may be found to be wrong in due course by a court or tribunal, and it is not open to it simply to assert that the law in this area is uncertain.

[65] In its submissions to the court, ECNI has repeated its position that a CEIA should be conducted as a matter of good practice, but it remains unclear as to whether this is required as a matter of law. It seems tolerably clear that a determination of this question would be beneficial both to ECNI and to those authorities subject to the section 75 requirements.

Reasons Not to Grant Leave

[66] Having established that an arguable case has been made out against NIO, DoF and ECNI, I turn to the arguments advanced by the proposed respondents against the grant of leave.

(i) Article IX of the Bill of Rights 1689

[67] The state parties contend the court should respect the proper constitutional boundaries as decreed by Article IX of the Bill of Rights:

> "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

[68] In *R (Adiatu) v HM Treasury* [2020] EWHC 1554 (Admin), the High Court in England & Wales considered a challenge to the treatment of workers during the Covid-19 pandemic. The respondent argued that the section 149 duty did not apply to the making of secondary legislation since this involved functions carried out by a

Minister in connection with proceedings in Parliament. This was rejected by the court which held that the duty did apply to the making of the subject Regulations. This conclusion was, of course, in line with public law principles generally.

[69] By contrast, the court held that the position was different when the challenge entailed amendment to primary legislation. The court stated:

> "In our view it would be a breach of Parliamentary privilege and the constitutional separation of powers for a court to hold that the procedure that led to the legislation being enacted was unlawful. The consequence of this would be that the legislation itself would be ultra vires and void…" (Para [230])

[70] The late Professor Osborough has given an account in an article entitled 'The Failure to Enact an Irish Bill of Rights : A Gap in Irish Constitutional History' (Irish Jurist, vol 33 (1998)) of the events which led to the enactment of the Bill of Rights in England following the Glorious Revolution. He also recounts how attempts to pass such a bill though the Irish Parliament failed. There remains a debate amongst lawyers and legal historians as to whether the Bill of Rights has been incorporated into Irish law by the judges.

[71] In *Re W's Application* [1998] NI 19 Girvan J left open the question of whether the Bill of Rights extended to Northern Ireland. The Court of Appeal seem to have assumed that it did apply in *Re Burns and McCready's Application* [2022] NICA 20.

[72] Since this was a leave application, and I did not hear full argument on the issue, I do not intend to resolve this thorny subject of the legal and political history of the island. The applicant's answer to the point raised is that this is not, properly analysed, a challenge to proceedings in Parliament at all. Whilst the end product of the process was the 2023 Act, this is not what the applicant seeks to impeach. The process of fulfilling the section 75 duty is not a proceeding in Parliament but an administrative information gathering and assessment step which ultimately informs decision making.

[73] I accept that this analysis is arguable and reject the invocation of the Bill of Rights and/or the principle of Parliamentary sovereignty as a basis to refuse leave.

(ii) The decision is non-justiciable

[74] The state parties argue that the subject matter of this challenge is 'polycentric' or 'macro-economic' and therefore non-justiciable. Reliance is placed on the Court of Appeal decision in *Department of Justice v Bell* [2017] NICA 69 in which Gillen LJ held:

> "(a) Normally, the question whether the Government allocates sufficient resources to any particular area of state activity is not justiciable.
>
> (b) A decision as to what resources are to be made available often involves questions of policy, and certainly involves questions of discretion. It is almost invariably a complex area of specialized budgetary arrangements taking place in the context of a challenging economic environment and major cutbacks on public spending. There should be little scope or necessity for the court to engage in microscopic examination of the respective merits of competing macroeconomic evaluations of a decision involving the allocation of (diminishing) resources. These are matters for policy makers rather than judges: for the executive rather than the judiciary." (Para [19])

[75] The applicant says that this challenge does not relate to the allocation of resources. Whilst it may have profound disagreements with the budgetary figures, the challenge is not to these allocations or the Act of Parliament, but to the process engaged upon by the state parties. As a result, this is not a case where the court will be invited to engage in the type of microscopic examination cautioned against by Gillen LJ. I am therefore not persuaded that the court should decline to hear and determine the merits of the application on this basis.

(iii) Adequate alternative remedy

[76] Central to the position adopted by the state parties is that there is an adequate and effective alternative remedy in the form of the statutory scheme prescribed by Schedule 9 to the NIA. They say that it is open to the applicant to make a complaint under paragraph 10 or to the ECNI to instigate an investigation of its own motion.

[77] In *Re Neill's Application* [2006] NI 278, a challenge was brought by way of judicial review to legislation on the basis that it had not been equality assessed in respect of its impact on young people. Kerr LCJ found that the intention of Parliament was that breach of the section 75 requirement would be the subject of enforcement via the Schedule 9 mechanisms. However, this was not to be treated as an ouster clause and judicial review may lie in certain undefined circumstances.

[78] As McCloskey LJ observed in *Stach v Department for Communities* [2020] NICA 4, the decision in *Neill* "promulgates a strong general rule", based on the principles that judicial review is a remedy of last resort and the need to exhaust alternative remedies.

[79] One example of section 75 successfully being invoked in a judicial review application is *Re Toner's Application* [2017] NIQB 49. In that case, a public realm scheme created by the local council led to new kerb heights being put in place which posed risks to blind people, including the applicant. The complaint was that the council had wholly failed in its section 75 duty and had not complied at all with its own approved equality scheme. Whilst recognising the import of the Court of Appeal's decision in *Neill*, Maguire J held that there were exceptional circumstances which meant that judicial review remedies lay for the section 75 breach.

[80] In *Re McMinnis' Application* [2023] NIKB 72 Scoffield J postulated the following principles:

> "1. A court will rarely permit a section 75 claim to proceed by way of judicial review. The strong general rule is that such claims should be pursued by way of complaint to the Equality Commission under Schedule 9 to the NIA for failure to comply with the authority's equality scheme, which is the primary means by which provision is made for the discharge and enforcement of the section 75 duty.
>
> 2. Nonetheless, the court retains a discretion – reflecting its discretion to hear and determine a case even where an effective alternative remedy exists – to allow a section 75 claim to proceed by way of judicial review. The governing principle expressed by the Court of Appeal in *Neill* is whether the alleged breach is procedural or substantive; but, in light of additional authority post-dating *Neill*, it is clear that something exceptional is required.
>
> 3. The result is that a court will very rarely permit a section 75 claim to proceed by way of judicial review where the complaint is about the conduct of a full EQIA. Where a full EQIA has been carried out, it is likely that any complaint about the content of that exercise will be a matter of detail better addressed by the Equality Commission.
>
> 4. Different considerations may apply where the complaint is essentially that, by means of the approach taken to an equality screening exercise, or by not conducting a screening exercise at all, the public authority concerned has simply side-stepped any proper equality assessment of the policy or decision under consideration.

5. Even then, this will often be a matter to be pursued with the Equality Commission. It may, however, be appropriate for the court to intervene in such a case where:

(a) the approach adopted, by which the impugned decision has been 'screened out' of equality assessment, is arguably irrational on its face or amounting to bad faith; *and*

(b) the impact on a protected group is likely to be particularly serious (for instance, giving rise to objectively very significant detriment to them, such as physical danger in the *Toner* case or other significant adverse impact, rather than something such as mere offence or inconvenience)." (Para [175])

[81] I am aware that the decision in *McMinnis* is the subject of an appeal. However, from the perspective of judicial comity, and bearing in mind that this is a leave application, I am prepared to accept that Scoffield J's principles reflect the legal position in relation to the enforcement of section 75.

[82] The state parties submitted that the instant dispute falls foursquare within the general rule laid down in *Neill* and that there was nothing in the decision making process which could be classified as being irrational or made in bad faith, nor was there any identified very significant detriment as may have been the case in *Toner*.

[83] However, there appear to be two significant features of this case which bring it outside the general rule:

(i) The body charged with enforcement of section 75 under Schedule 9, the ECNI, has already stated that the law in this area is uncertain and has declined to offer advice to the relevant public authorities as to whether a legal obligation to carry out a CEIA exists; and

(ii) In any event, the enforcement powers of ECNI, whether under a paragraph 10 complaint or a paragraph 11 investigation, are limited to an examination of whether the public authority in question has complied with its equality scheme. It is evident from a consideration of the schemes approved on behalf of the NIO and DoF that no reference is made to CEIA. It is therefore arguable that ECNI would not have any jurisdiction to address the alleged failing in question, which relates to the content of the section 75 duty rather than the compliance with an approved scheme.

[84] For these reasons, I am not persuaded that Schedule 9 represents an alternative remedy which could be properly described as adequate or effective. I therefore decline to exercise my discretion to refuse leave on this ground.

(iii) The matter is academic

[85] Given that the 2023 Act has passed into law, the proposed respondents say that the issue raised in this litigation has become academic and the proceedings have no ongoing utility.

[86] In *R v SSHD ex p. Salem* [1999] 1 AC 450, the House of Lords held, in relation to appeals, that those which had become academic should not be heard unless there was a good reason in the public interest for doing so. Lord Slynn cited examples of cases where a discrete point of statutory construction arose or where there were a large number of similar cases awaiting the outcome of the dispute as ones where the discretion to hear an academic point may be exercised.

[87] The same principles have frequently been applied to applications for leave to apply for judicial review. In this case, the following matters of public interest arise:

(i) The statutory body charged with the giving of advice to public authorities in this area has declared that the law is uncertain and would welcome a decision of the court;

(ii) The setting of budgets and the allocation of resources to public services is a matter of the highest public interest since it affects all aspects of society;

(iii) The principle of equality of opportunity is central to the Good Friday Agreement and the NIA and should be promoted and upheld by all public authorities;

(iv) Issues around the proper process for the setting of budgets are likely to recur, and the court should take this opportunity to provide clarity and certainty in the law for the benefit of good public administration.

[88] For these reasons, I have concluded that the court should proceed to hear and determine the substantive application for judicial review.

Conclusion

[89] The applicant has established an arguable case with realistic prospects of success against the NIO, DoF and ECNI and there is no discretionary reason to refuse leave. Leave is therefore granted to pursue the application for judicial review against those three respondents. The case against SoSNI is dismissed.

[90] I will hear the parties as to the proposed timetable for the litigation.