Neutral Citation No: [2022] NICA 61 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **KEE11959** *ICOS No:* **2020/076062/01** *Delivered:* **28/10/2022**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND KING'S BENCH DIVISION (JUDICIAL REVIEW)

BETWEEN:

THE MINISTER FOR INFRASTRUCTURE AND THE DEPARTMENT FOR INFRASTRUCTURE

Respondent/Appellants

and

SAFE ELECTRICITY A&T LIMITED AND PATRICK WOODS

Applicants/First and Second Respondents

and

THE EXECUTIVE OFFICE

Respondent/Third Respondent

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Dr Tony McGleenan KC with Mr Philip McAteer (instructed by the Departmental Solicitor's Office) for the Appellants
Ronan Lavery KC, Conan Fegan and Colm Fegan (instructed by McIvor Farrell Solicitors) for the Respondents
Mr William Orbinson KC, Scott Lyness KC and Emily Neill (instructed by Carson McDowell LLP Solicitors) for the Notice Party
Interventions were also received in writing from Arc 21 and Indaver (NI) Ltd and the Attorney General for Northern Ireland

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Before: Keegan LCJ, Treacy LJ and Horner LJ

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KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This is an appeal against the judgment of Mr Justice Scoffield ("the judge") delivered on 19 October 2021 and his order of 11 March 2022 whereby he

substantively dismissed an application by Safe Electricity A&T Limited and Patrick Woods ("the first and second respondents") for judicial review in relation to planning approval for the North-South electricity interconnector but granted a declaration in the following terms:

> "The Department for Infrastructure 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."

[2] In making this declaration the judge was clear that an order of certiorari was not merited as the planning decision was lawfully made and intra vires the legislation. The judge rejected all other grounds of challenge in a comprehensive judgment reported at [2021] NIQB 93.

[3] The one point remaining involves an exercise in statutory interpretation to determine if the relevant Minister breached the Ministerial Code by approving planning permission without referral to the Executive Committee of the Northern Ireland Assembly.

Factual Background

[4] The relevant planning decisions involved in this case are the decisions to grant planning permission in applications O/2009/0792/F and O/2013/0214/F to facilitate development of what is known as the North-South Interconnector ("the Interconnector"). The proposals involve constructing and running a 400kV overhead transmission line from Woodland in County Meath to Turleenan in County Tyrone over a distance of 138 km in total, with 34 km of line in this jurisdiction. The project will also involve constructing a new substation at Trewmount Road, Moy, Dungannon and some 102 pylons in Northern Ireland.

[5] The then Minister for Infrastructure, Nichola Mallon, granted both applications in respect of the Interconnector on 8 September 2020. Final planning approval issued on 14 September 2020. This was following amendments made to section 20 of the Northern Ireland Act 1998 ("NIA") by the Executive Committee (Functions) Act (Northern Ireland) 2020 ("the Executive Functions Act 2020") which permitted the Department for Infrastructure ("DfI") Minister to make operational planning decisions without recourse to the Executive.

[6] The first respondent, Safe Electricity A&T Limited ("SEAT"), is a private company limited by guarantee. It is a company established to act as a representative organ in respect of the environmental concerns of a large number of persons to include landowners, businesses and interested parties affected along the route of the proposed development of the Interconnector in particular those from the counties of

Armagh and Tyrone (A&T in the company title). Mr Patrick Woods, the second respondent, is also one of those concerned persons.

[7] The remaining background is set out at paras [5]-[10] of the judge's ruling. We will not repeat it here save to say that the context of this case is important. Firstly, it concerns a planning decision of high public interest. Secondly, it comes after a period of legislative consideration of the issue following a significant case heard by this court in the matter of *Re Buick's Application* [2018] NICA 26.

[8] That case arose during a previous period when the Assembly was suspended between 2017 and 2020. The decision of the court at first instance was to quash a planning decision in relation to a large incinerator project on the basis that there was no authority vested in a civil servant to make such a decision. That aspect of the ruling was subsequently corrected by virtue of the Executive Functions Act 2020 which gave power to officials in the absence of Ministers to grant the necessary planning permission in certain circumstances.

[9] The second aspect of the *Buick* case which formed the basis of the decision of the Court of Appeal relates to the Ministerial Code. The Court of Appeal decided that the Minister in the *Buick* 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. That outcome prompted a period of discussion within government and resulted in the legislative change which we will discuss below. With this context in mind, we turn to the relevant legislative provisions as follows.

Legal Framework

[10] The first relevant legal provision is the NIA. Section 20 of the NIA reads 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…"

[11] The functions were described in two paragraphs of the Belfast Agreement namely 19 and 20 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."

[12] Section 20 of the NIA was amended in 2007 by the Northern Ireland (St Andrews Agreement) Act 2006 ("the 2006 Act"). The 2006 Act was given legislative force following a breakdown in the power sharing arrangements by way of revitalisation and to ensure the ongoing stability of the Northern Ireland institutions.

[13] Of particular import is the addition by the 2006 Act of section 20(4) into the NIA 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."

[14] Section 20 was further amended in 2010 by Article 23 of the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010. In particular, two subsections were added to section 20 which are of importance:

> "(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."

[15] These amendments came about as a result of the devolution of policing and justice. Some transitional arrangements were made, but no amendment of the Ministerial Code was made to encompass the decision making powers contained in section 20(6) of the NIA.

[16] Thereafter, the Northern Ireland (Executive Formation on Exercise of Functions) Act 2018 and the Northern Ireland (Executive Formation etc) Act 2019 dealt with decision making issues which arose following the *Buick* decision. These legislative provisions expressly allowed a senior officer of the 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.

[17] A second suite of amendments came about as a result of the Executive Functions Act 2020 which was correctly described by the judge as "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.

[18] 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."

[19] 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 Department for Infrastructure 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."

[20] The new 2020 Act came into effect one day after it was given Royal Assent on 25 August 2020. It was therefore an unconditional piece of legislation to have immediate effect. The full effect of this is reflected in the terms of section 20 of the NIA as amended which we set out as follows with the textual amendments indicated:

Section 20 as amended: the current provisions

[21] **"20 The Executive Committee**

(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.

(4) [F1 The Committee shall also have the function of discussing and agreeing upon—

(a) [[F2 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;]]

(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.]

[F3(5) Subsections (3) and (4) are subject to [F4 subsections (6) to (9)].

(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.]

[F5(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.

(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.]

Textual Amendments

F1 S. 20(4) inserted (8.5.2007) by Northern Ireland (St Andrews Agreement) Act 2006 (c. 53), ss. 2(2), 5(1), 27(4)(5) (as amended by Northern Ireland (St Andrews Agreement) Act 2007 (c. 4), s. 1(1)) (with s. 1(3)); S.I. 2007/1397, art. 2

F2 S. 20(4)(a)(aa) substituted for s. 20(4)(a) (N.I.) (26.8.2020) by Executive Committee (Functions) Act (Northern Ireland) 2020 (c. 4), ss. 1 (2), 2,

F3 S. 20(5)(6) inserted (12.4.2010) by The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (S.I. 2010/976), arts. 1(2), 23 (with arts. 28-31)

F4 Words in s20(5) substituted (N.I.) (26.8.2020) by Executive Committee (Functions) Act (Northern Ireland) 2020 (c. 4), ss. 1(3), 2

F5 S. 20(7)-(9) inserted (N.I.) (26.8.2020) by Executive Committee (Functions) Act (Northern Ireland) 2020 (c. 4), ss. 1(4), 2."

The Ministerial Code

[22] The Ministerial Code came about also after the St Andrews Agreement which resulted in the need for an introduction of a statutory Ministerial Code. Therefore, the 2006 Act inserted a new section 28A into the NIA providing for the Ministerial Code. A particular power was provided for in section 28A(10) whereby breach of the Ministerial Code could in fact invalidate decision making.

[23] The operative section for present purposes is section 2.4 of the Code entitled "Duty to bring matters to the attention of the Executive Committee" which is in the following terms:

> "2.4 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."

[24] By virtue of section 28A of the NIA the implications for breach of the Code are set out. The relevant provisions being section 28A(1), (2), (5), (6) and (10) as follows:

> "28A(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)."

The decision of the judge at first instance

[25] We summarise the core elements of the decision of Scoffield J relevant to the issue between the parties in relation to this appeal as follows. The judge determined that:

(i) Section 28A(1) imposes upon Ministers a legal duty to act in accordance with all of the provisions of the Ministerial Code;

(ii) 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;

(iii) Section 28A(10) 'super-charges' the provisions of the Ministerial Code made under section 28A(5);

(iv) 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) of the NIA.

(v) The DfI Minister's decision in respect of the planning applications was both "significant" and "controversial" within the meaning of that term in section 20(4) of the NIA;

(vi) 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 to be pre-approved by the Executive through that means did not arise;

(vii) The Ministerial Code can only be amended (or its meaning materially changed) through the specific mechanism for its amendment under section 28A NIA;

(viii) The current Ministerial Code imposes obligations of referral to the Executive Committee which go beyond those contained in the governing statutory regime which does not give rise to any illegality but gives rise to a particular problem in this case however, given that the requirements of section 2.4 of the Ministerial Code are backed by the sanction set out in section 28A(10);

(ix) The Minister acted in breach of her obligations under the current version of the Ministerial Code;

(x) Not every breach of the Ministerial Code will result in the Ministerial decision involving that breach being quashed, and a distinction therefore has 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."

(xi) The Minister's failure to comply with the strict terms of section 2.4 was deemed to be a technical failure on the particular facts, rather than a wilful or reckless disregard of the Code;

(xii) 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);

(xiii) 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);

(xiv) The failure to act in accordance with the Ministerial Code in this case represents a breach of section 28A(1), but does not engage section 28A(5) and (10).

[26] It will be apparent from the above that the judge thought that the Ministerial Code should be amended to reflect the legislative changes. In the absence of an amended Code the Minister had breached the Code but not to the extent that the decision itself could be quashed pursuant to section 28(10). A number of factors were also taken into account when deciding upon the question of remedy to include the fact that there was a willingness on behalf of the Minister to refer the relevant matter to the Executive for discussion and agreement (see paragraph [119] of the judgment), no other Minister appeared to have raised any concern about the substance of the Minister's decision, there had already been a significant delay to the overall Interconnector project due to delays in obtaining planning consent in Northern Ireland, that there is in the PAC's view, and that of the relevant Minister, significant public interest in the project proceeding and no challenge had been made by the applicants on any planning-related grounds.

Summary of the argument on appeal

[27] The core proposition advanced by Dr McGleenan was that notwithstanding the lack of express amendment to the Ministerial Code, by reason of the express provisions set out in section 20(7) of the NIA, the Minister was under no legal obligation to refer the planning decision to the Executive Committee before deciding to authorise the Department to grant planning permission in this case.

[28] In support of this Dr McGleenan said that as a matter of statutory construction the court should give effect to the intention of the legislature as evident from the plain meaning of the language used; legislation should be interpreted so as to give effect to its provisions rather than to defeat its clear purpose

[29] Dr McGleenan advanced some subsidiary arguments namely the principle of implied repeal/modification, where a later statutory provision takes precedence over an earlier inconsistent provision. He also maintained the executive branch is subordinate to the express will of the legislative branch as expressed through legislation. The executive branch cannot by its own action or inaction undermine or frustrate the effect of primary legislation; and subordinate instruments of policy promulgated by the executive branch must be consistent with and follow the contents of parent legislation.

[30] In response to the appeal Mr Lavery submitted that the judge's decision was correct. He argued that section 28A was introduced into the NIA by Parliament via the 2006 Act in order to implement the 2006 St Andrews Agreement. Section 28A is therefore primary legislation and subsection (1) imposes a legal (and unqualified) duty on Ministers to "act in accordance with the provisions of the Ministerial Code."

[31] Mr Lavery provided the following legal analysis. Paragraphs 2.4(i) and (v) of the Ministerial Code require Ministers to bring a cross-cutting and/or significant or controversial matters (which are clearly outside the scope of the agreed programme of government) to the Executive Committee for discussion and agreement. They have not been amended to reflect the newly introduced section 20(7) NIA which purports to grant a "carve out" to the Minister for planning decisions. The Minister's planning decision in this case was both cross cutting and significant or controversial and it was not brought to the Executive Committee for discussion and agreement. This amounts to a breach of the Code and of his legal duty under section 28A (1) rendering the decision unlawful.

[32] The respondents also argued that the doctrine of implied repeal or amendment is not applicable in this case in light of the precise statutory amendment procedure prescribed by Parliament at section 28A(2)-(4) and also due to the Code's status as a constitutional instrument when viewed in its proper context.

[33] The respondents' primary submission was that section 28A prescribes a singular process by which amendments to the Code can occur, which is by way of the procedure that starts with the Executive Committee. However, if the court does not agree with the respondents' submissions on this point and holds that the Assembly also has the power to introduce amendments to the Code it is submitted that this does not assist the appellants appeal as section 28A would still apply to the process of the Assembly introducing and passing amendments.

Consideration

[34] We pay tribute to all counsel for the high quality legal arguments made and also to the trial judge for his careful and comprehensive consideration of them. However, whilst many different legal arguments have been made, we think that this case is solved by a simple examination of the relevant statutory provisions to decide whether the Minister did in fact act in breach the Code. The amended NIA must be examined first to determine whether or not the Minister failed in her statutory duty to act in accordance with the Ministerial Code.

[35] The parameters of statutory construction were recently reiterated by the Supreme Court in *R(O) v Secretary of State for the Home Department* [2022] 2 WLR 343 at paras [29]-[31] as follows:

> "29. The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated:
>
> > 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.'
>
> (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme* Ltd [2001] AC 349, 396.) Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, p 397: "Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."
>
> 30. External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the

authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below. Sir James Eadie QC for the Secretary of State submitted that the statutory scheme contained in the 1981 Act and the 2014 Act should be read as a whole.

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme* [2001] 2 AC 349, 396, in an important passage stated:

> 'The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either

> House … Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.'"

[36] Any exercise in statutory interpretation must consider the context of a particular case. In this case the context 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.

[37] We have considered the plain and ordinary meaning of the words used in the relevant legislative provisions. In this court we have had the benefit of a written argument from the Attorney General for Northern Ireland who points to an interpretation in favour of the Department's appeal. The Attorney General refers, in the first instance, to the Interpretation Act 1978 which is important. Section 20(2) of the Interpretation Act applies to statutes and reads as follows:

> "(2) Where an Act refers to an enactment, the reference, unless the contrary intention appears, is a reference to that enactment as amended, and includes a reference thereto as extended or applied, by or under any other enactment, including any other provision of that Act.

[38] Therefore, the Attorney General argues that it is open to the court to:

(a) Adopt an interpretation of section 28A(1) which reads the references in the Ministerial Code as amended by the Executive Functions Act (Northern Ireland) 2020; and

(b) To read the obligations in paragraph 2.4 of the Ministerial Code as applying to the altered statutory position.

[39] The Attorney's argument coincides with the argument raised by the appellant in this appeal. In our view this argument is correct, and the appeal should be allowed for the following reasons.

[40] First, the language of the 2020 Act which amends the NIA is set in clear and unambiguous terms. The Act is described as an Act to make provision concerning the decisions which may be made by Ministers without recourse to the Executive Committee. It is a short and succinct Act which specifically amends section 20 of the NIA. In particular, in subsection (5) there is a widening of application from simply subsection (6) of section 20 to include subsection (6) to (9). After subsection (6) the

new subsection (7) is included which specifically allows the Department for Infrastructure or the Minister in charge to exercise a planning function without recourse to the Executive Committee.

[41] This means that section 20 NIA as amended inserted a new section 20(7). Crucially, it also amended section 20(5) providing that 20(3) and (4) are now subject and subordinated to the new provisions including section 20(7), the latter providing that planning decisions may be made by the Department or the Minister "without recourse to the Executive Committee."

[42] 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.

[43] However, the reference in section 28A(5) to section 20(3) and (4) of the NIA is to the provisions as amended. Subsection (5) now refers to the amended functions set out in section 20(3) and (4) and is subject to subsection (6)-(9) of that section. Again, the statute is clear by use of the phrase "is subject to." Therefore, it follows that subsections (3) and (4) are now subject to section 20(7) which is that the Minister for Infrastructure without recourse to the Executive Committee may make a planning decision. The mandatory matters which must be referred to the Executive Committee are not applicable to planning decisions when analysed in this way.

[44] The statutory basis for the Ministerial Code is section 28A NIA. Most notably, 28A(5) provides that the Code must include provision for requiring Ministers to bring to the attention of the Executive Committee "any matter that ought, by virtue of section 20(3) or (4) be considered by the Committee." Since section 20(3) and (4) are now, by virtue of section 20(5), expressly subject to section 20(7), such planning decisions were not, in light of the statutory changes, matters which "ought, by virtue of section 20(3) or (4), to be considered by the Committee."

[45] It therefore, follows, in our view 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. There was also no need to amend the Ministerial Code and so the position was not, as thought at first instance, that this was a job "half done." We also find force in Dr McGleenan's analogy that the amendments which came about as a result of the devolution of policing and justice contained in section 20(6) did not result in an amendment to the Ministerial Code.

[46] Accordingly, we consider that the conclusion reached by the judge in relation to application of the Ministerial Code was erroneous. We agree with Dr McGleenan's submissions that there was an over complication of this issue before

the court and that the judge underestimated the effect of the section 20(5) amendment which brought section 20(7) into play. The judge therefore 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.

[47] 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

[48] Accordingly, we will allow the appeal and set aside the declaration which was made at the lower court. This means that the judicial review is simply dismissed. We note that the parties have already agreed a course of action to finalise matters including a protective costs order, but we will hear the parties as to any other issue that arises.

[49] Finally, we trust that this decision will provide the necessary clarity in this area going forward given the public interest in planning decisions being made in an efficient and effective way.