Neutral Citation No: [2023] NIKB 10	*Ref:* SCO12041
	ICOS No: 22/011035/01
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* 20/01/2023

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY EILEEN WILSON FOR JUDICIAL REVIEW

Applicant

AND IN THE MATTER OF DECISIONS OF THE EXECUTIVE OFFICE

Respondent

Ronan Lavery KC and Colm Fegan (instructed by McIvor Farrell, Solicitors) for the applicant
Tony McGleenan KC and Philip McAteer (instructed by the Departmental Solicitor's Office) for the respondent

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SCOFFIELD J

Introduction

[1] This is an application in which the applicant seeks to challenge the failure to establish (or re-establish), and obtain the views on certain matters of, the Civic Forum ("the Forum") provided for in para 34 of the Belfast Agreement.

[2] Mr Lavery KC appeared for the applicant, with Mr Fegan; and Mr McGleenan KC appeared for the respondent, the Executive Office ("TEO"), with Mr McAteer. I am grateful to all counsel for their helpful written and oral submissions.

Factual background

[3] Para 34 within Strand One of the Belfast Agreement is in the following terms:

> "A consultative Civic Forum will be established. It will comprise representatives of the business, trade union and voluntary sectors, and such other sectors as agreed by the First Minister and the Deputy First Minister. It will act as a consultative mechanism on social, economic and cultural issues. The First Minister and Deputy First Minister will by agreement provide administrative support for the Civic Forum and establish guidelines for the selection of representatives to the Civic Forum."

[4] In due course, legislative provision was made in relation to the Forum in section 56 of the Northern Ireland Act 1998 ("NIA"). I return to this below. However, this particular provision came into effect on 2 December 1999 (by virtue of the Northern Ireland Act 1998 (Commencement No 5) Order 1999 (SI 1999/3209)).

[5] When devolved government in Northern Ireland was suspended on 12 February 2000, under section 1 of the Northern Ireland Act 2000 ("the 2000 Act"), the duties imposed on the First Minister and deputy First Minister under section 56 of the NIA were suspended pursuant to section 1(8) of the 2000 Act, when read together with para 4(1)(d) of Schedule 1 to that Act. However, on 12 August 2001, section 1 of the 2000 Act ceased to have effect by virtue of Article 2 of the 2000 Act(Restoration of Devolved Government) Order 2001 (SI 2001/2895). The applicant submits that this revived the section 56 obligation which has remained in force from 12 August 2001 to the present.

[6] The Forum no longer exists. The last time it sat (if 'sitting' is the apposite term) was in October 2002, now over 20 years ago. The evidence filed by the respondent in these proceedings states that the Forum was unable to operate during the suspension of the devolved institutions between October 2002 and May 2007. However, it has never reconvened or been re-established since its last meeting in 2002.

[7] When in existence, the Forum held 12 plenary sessions, in the period between 9 October 2000, when it was established, until the suspension of the devolved institutions in October 2002. It consisted of a Chairman and 60 members representing ten sectors (voluntary and community; business; trade union; churches; arts and sports; culture; agriculture and fisheries; community relations; education; and victims). The First Minister and deputy First Minister could also each make three personal nominations for membership. The mission statement adopted by the Forum set out the following lofty aims: "The Civic Forum will exercise effective community leadership and directly influence the building of a peaceful, prosperous, just, cohesive, healthy and plural society."

[8] On 6 February 2001 the Northern Ireland Assembly agreed that the Forum should offer its views on such social, economic and cultural matters as were from time to time agreed by the Chairperson of the Forum and the First Minister and

deputy First Minister. In addition, the Forum was to be invited to offer its views on specific social, economic and cultural matters where the Assembly had by motion so requested.

[9] The Forum held its inaugural meeting on 9 October 2000. In addition to holding its 12 plenary sessions, it established three sub-committees and produced three reports, as well as responding to a number of government consultation exercises. As noted above, it was unable to operate during the suspension of the devolved institutions between October 2002 and May 2007.

[10] A full review of the working of the Forum was commissioned in 2008, after devolution was restored. This was to examine the effectiveness and appropriateness of the current structure, operation, composition and membership of the Forum, with a view to also drawing on experiences elsewhere in determining the most appropriate mechanism for engaging with civic society. Following completion of the review, a report was prepared but not published. Somewhat surprisingly, the respondent's evidence is that it has not been possible to obtain a copy of the review report. Also, no formal decision on the future of the Forum was recorded. However, answers in response to Assembly questions about the re-establishment of the Forum provide an insight into the responses received during the consultation phase. The respondent's evidence, set out in an affidavit from Neil Jackson, a senior official in the Executive and Central Advisory Division of TEO, is that "responses received during the consultation phase of the review did not suggest a widespread desire for a return to the structure of the size and expense of the Forum, as it had previously operated". Mr Jackson's affidavit says that the Forum was not abolished – on the basis that there was no legislative basis for its existence (a matter discussed further below) – but also that it has neither been reconstituted.

[11] The issue of some kind of formal engagement between the Executive and the Assembly on the one hand and civic society on the other has, nonetheless, been considered further since 2008. The Stormont House Agreement and 'A Fresh Start' implementation plan agreed that the issue of civic society engagement would be better met through the establishment of a Compact Civic Advisory Panel ("CCAP"), which was then established in 2016. It was acknowledged that it was important that civic voices were heard and civic views considered in relation to key social, cultural and economic issues; but the Stormont House Agreement proposed a new engagement model, with every effort being made to minimise the administrative costs of the proposed CCAP. In the Fresh Start implementation plan in relation to the Stormont House Agreement it was proposed that a panel of six people would be established by the Executive, who would be tasked to consider specific strategic issues relevant to the Programme for Government and to report to the Executive. This Panel would seek the views of a wide range of representatives and stakeholders from civic society and terms of reference for it were proposed.

[12] The CCAP was in fact established in 2016, with the First Minister and deputy First Minister each appointing three members to it. It met on a small number of

occasions during 2016 but its work was then suspended in the absence of a functioning Assembly and Executive during the 2017 to 2020 period. Although conceived for broadly the same purpose, the applicant rightly observed that the CCAP was not, and was a different model to, the originally proposed Forum.

[13] The 'New Decade New Approach' agreement in January 2020 further developed the issue of civic engagement by way of proposed reform of the CCAP. The parties again recognised the value of structured and flexible engagement with civic society to assist the administration in solving complex policy issues. They also agreed that the existing CCAP should be reformed to include a renewed membership appointed by way of public appointments process. One or two issues per year were to be commissioned for civic engagement and the Panel was to be invited to propose the most appropriate model of engagement for specific issues, including one Citizens' Assembly per year. Thus, Mr Jackson has averred that, by the time the Executive ceased functioning again in early 2022:

> "Ministers remained committed to the reformation of the Compact Civic Advisory Panel, although this was delayed by the impact of the Covid-19 pandemic and the constraints this placed on direct civic engagement with stakeholder groups and others."

[14] As to the present position, the TEO's evidence is that, following the resignation of the First Minister in February 2022 and the deputy First Minister also therefore ceasing to hold office, "in the continuing absence of direction and control by a First Minister and deputy First Minister it has not been possible to progress the re-establishment of the Compact Civic Advisory Panel". The matter of civic engagement and the CCAP will, it is said, be referred to a new First Minister and deputy First Minister following their reappointment for their consideration and decision.

[15] The applicant has relied upon a statement made in the Assembly by the then First Minister, David Trimble MLA, on 25 September 2000, around the time of the Forum being established and convened, when he said that:

> "The agreement provides that the Civic Forum will act as a consultative mechanism on social, economic and cultural matters. We anticipate that the Assembly will, over time, develop a constructive relationship with the Civic Forum in order to avail of its experience on social, economic and social matters."

[16] I did not find this comment of particular relevance or significance in the task of statutory interpretation which the court was called upon to undertake in the course of these proceedings; but it is nonetheless of note, as part of the evidential context, that the First Minister anticipated the Forum as being a body which

operated on an ongoing basis over time. That has plainly not happened as matters have developed.

[17] This application was commenced on 9 February 2022. It was preceded by pre-action correspondence of 9 November 2021, which was responded to by the Departmental Solicitor's Office on behalf of TEO and the then First Minister and deputy First Minister on 10 December 2021. Leave was granted on the papers on 15 March 2022, in light of the fact that the grounds appeared strongly arguable.

Summary of the parties' positions

[18] The applicant relies on a range of grounds of challenge, which are primarily different species of illegality, including (i) breach of statutory duty (section 56 of the NIA); (ii) breach of the *Padfield* principle by virtue of the respondent acting in frustration of section 56 of the NIA; (iii) error of law as to the effect of section 56 of the NIA (including the erroneous view that it operates only if and when a Civic Forum is in existence); (iv) unlawful delay in making arrangements for obtaining the Forum's views pursuant to section 56(1); and (v) taking legally irrelevant considerations into account (a purported lack of support for re-establishing the Forum; and a purported view that the CCAP which operated between 2016-2017 satisfied or satisfies the requirements of section 56 of the NIA). However, the skeleton argument filed on the applicant's behalf contains the following helpful summary:

> "Ultimately, the applicant's challenge can be distilled down to the following proposition/propositions: the legislation entails a duty on the First Minister and Deputy First Minister (FM & DFM) to consult with the Civic Forum. However, a prerequisite to that, is that there is a legal duty to establish, or as the case may be, re-establish the CF. FM & DFM are in breach of that duty, and have to date misdirected themselves in law in relation to that duty."

[19] The applicant's case is essentially that the Belfast Agreement made provision for the Forum; that it was endorsed by the referendum approving the new constitutional arrangements proposed in that agreement; and that Parliament then legislated for this. It is an essential part of the new constitutional arrangements that there should be such a forum to act as "a consultative mechanism on social, economic and cultural issues". The absence of the Forum has resulted in the Northern Ireland Assembly and its Executive Committee not having obtained, nor having had the benefit of, such a forum's views on matters in respect of which it was designed to be consulted. This is not a matter of choice to be determined by the will of the Executive at any given point. Rather, it is part of the ongoing constitutional arrangements mandated by the NIA and cannot simply be ignored.

[20] The only remaining respondent in the absence of a First Minister and deputy First Minister – the Executive Office – has raised a number of issues about the proper interpretation of the relevant statutory provisions. Before coming to those, however, it also raises a number of preliminary challenges to the applicant's right to litigate the matter which is before the court at this time. In particular, the respondent claims that the applicant lacks standing to pursue this claim and/or sufficient interest to be granted any remedy.

[21] The respondent also asks the court to dismiss the claim on the basis that the proper respondents to the application are the First Minister and deputy First Minister (having regard to the terms of the obligations, such as they are, contained within section 56(1) of the NIA). No relevant duty is imposed upon TEO as a department. Since the relevant ministerial positions are presently unoccupied, the respondent submits, it would be wrong for the court to substantively determine the present dispute. That is as a matter of basic principle; but also partly because, even if the applicant were to be successful, there are no ministers in place to seek to remedy the situation in response to any judgment of the court; partly because there are no ministers in place to benefit from any views of a Forum in any event; and, more fundamentally, because the Executive Office is not itself in a position to explain *why* the First Minister and deputy First Minister have let the Forum fall into desuetude or to defend their position on this issue on the merits. Put shortly, it contends that TEO is not the proper respondent, as it is a department which is *not* the relevant Ministers, and nor are the relevant Ministers part of TEO. It cannot be used as a surrogate or proxy for those Ministers or the Executive as a whole. Indeed, the respondent also contends that the application is premature because, once a First Minister and deputy First Minister are reappointed, it will be for them to consider the question of civic engagement, including whether to re-establish the Forum or (perhaps more likely) whether there should be some more radical reform, which could include the repeal or amendment of section 56 of the NIA.

Relevant statutory provisions

[22] Section 56 of the NIA provides as follows:

> "(1) The First Minister and the deputy First Minister acting jointly shall make arrangements for obtaining from the Forum its views on social, economic and cultural matters.
>
> (2) The arrangements so made shall not take effect until after they have been approved by the Assembly.
>
> (3) The expenses of the Forum shall be defrayed as expenses of the Department of Finance and Personnel.

> (4) In this section "the Forum" means the consultative Civic Forum established in pursuance of paragraph 34 of Strand One of the Belfast Agreement by the First Minister and the deputy First Minister acting jointly."

[23] It is uncontentious that the provisions of the NIA should be read against the context of the provisions of the Belfast Agreement, to which they were designed to give legislative effect: see, for example, Morgan LCJ in *Re Buick's Application* [2018] NICA 26, at para [19]; and *Re Napier's Application* [2021] NIQB 120, at para [40]. Para 34 of Strand One of the Belfast Agreement, set out in para [3] above, is within that section of the Agreement dealing with democratic institutions in Northern Ireland and, in particular, the Assembly's relationships with other bodies. Section 56 of the NIA is within Part V of that Act, which makes provision for the North-South Ministerial Council, the British-Irish Council, the British-Irish Intergovernmental Conference and North-South Implementation Bodies, as well as the Forum.

[24] I have little difficulty in concluding that section 56 entails an obligation to establish a Civic Forum. It would be impossible for the First Minister and deputy First Minister to obtain the views of the Forum if no such forum existed. The making of "arrangements" for obtaining those views must include securing the establishment of the Forum in order that as these might be obtained. That it is the First Minister and deputy First Minister who have the responsibility for establishing the Forum is also clear from section 56(4). Indeed, that is not in dispute. Read together, sub-sections (1) and (4) make clear that the First Minister and deputy First Minister should establish the Forum and make arrangements for obtaining its views on certain matters.

[25] The one factor potentially undermining the suggestion that there is an obligation upon the First Minister and deputy First Minister to establish the Forum is the fact that section 56(4) defines the Forum as meaning the Civil Forum "established" (in the past tense) "in pursuance of paragraph 34 of Strand One of the Belfast Agreement…" That could be argued to refer back to a forum which had *already* been established at the time when the legislation was introduced. In part of the respondent's argument, it is emphasised that the Forum is not a statutory body but one the establishment of which is 'presumed' by the legislation. At the same time, the respondent accepts that there was a duty on the First Minister and deputy First Minister to establish the Forum (including by reference to Hansard excerpts relied upon by the applicant and referred to below). It is also clear that, at the point of enactment of the NIA, the Forum had, as a matter of fact, *not* been established. I consider it plain that the intention and meaning of the relevant provision is that the First Minister and deputy First Minister should establish a Civic Forum consistent with the requirements of para 34 of the Belfast Agreement and make arrangements for obtaining its views. Indeed, part of the making of such arrangements was to be the establishment of the Forum.

[26] In light of my conclusions on the meaning and effect of these provisions, recourse to Parliamentary materials upon which the applicant also relied is unnecessary. Had I considered that the effect of section 56 was ambiguous, however, I would have been inclined to have recourse to some of these materials in order to assist me in interpreting the provision. This would have been permissible in this case, in my view, pursuant to the admittedly strict conditions set out in *Pepper v Hart* [1993] AC 593 (as more recently explained by the Supreme Court in *R v Adams* [2020] UKSC 19, at para [33]). In particular, in the House of Lords on 21 October 1998, Lord Cope withdrew a proposed amendment which was designed to make clear that the Act would impose a duty on the First Minister and deputy First Minister to establish the Forum on the basis of statements made by Lord Dubs, then Parliamentary Under-Secretary for the Northern Ireland Office. Lord Dubs said that it was clear on the basis of the clause as it then stood that the First Minister and deputy First Minister had the duty to make arrangements to obtain the Forum's views which would "give them also the duty to establish it in the first place." He did, however, indicate that he would consider the matter further. On 10 November 1998, Lord Dubs introduced further amendments on behalf of the Government. Amendment 82, in his words, "makes clear that it is the responsibility of the First Minister and Deputy First Minister to establish the forum." He said that this clarified a point which many people, including some noble Lords, had found obscure in the original drafting. This amendment added the words "by the First Minister and deputy First Minister acting jointly" in what became section 56(4).

[27] Some days later, in the House of Commons, the Lords had introduced a further amendment (amendment 109) which contained the exact wording which was ultimately passed as section 56(1)-(4). The Minister of State for the Northern Ireland Office, Paul Murphy MP, invited the House of Commons to accept this amendment. He said that, "The main differences with the new provisions are that the First Minister and the Deputy First Minister will now have a clear duty to establish the forum." In light of these comments, made by Government Ministers in respect of the precise provisions at issue to the effect that there would be a clear duty on the First Minister and deputy First Minister to establish the Forum, had I considered those provisions ambiguous on this issue, these statements could have been used as an interpretative aid to lead the court to the conclusion which I have in any event reached.

[28] The key issue in this case is whether there is a duty to maintain a Forum or, as necessary, to re-establish one, in light of the initial Forum having effectively been dissolved. The core of the respondent's submissions on this issue is as follows:

> "If there is a duty to re-establish it (there is no express statutory duty to that effect and no implied duty has been established), that duty is on FMdFM. There is no obligation under the Belfast Agreement or constitutionally

> to retain the Civic Forum in perpetuity particularly where there is cross party agreement to the contrary."

[29] The applicant's written and oral submissions on the effect of the statutory scheme relied upon a variety of arguments as to how or why section 56 requires the Forum to be maintained or re-established as the case may be: either as a result of the plain reading of the provisions, on the basis of a purposive interpretation, or by means of an implied duty inherent within the relevant provisions.

[30] I cannot accept the respondent's arguments as to the nature and effect of the statutory scheme, which amounts to a submission that the First Minister and deputy First Minister are only required to consult the Forum so long as they choose to retain the Forum (having been bound to establish it) and continue to elect to make use of it. The language of the relevant provisions is mandatory in nature. The First Minister and deputy First Minister "shall" make arrangements to obtain the Forum's views; and its expenses "shall" be defrayed by the relevant department. The wording of para 34 of the Belfast Agreement, which is an interpretative aid to section 56, is perhaps more clear again. A Civic Forum "will" be established and "will" comprise various sectoral representatives who "will" act as a consultative mechanism. There is nothing to suggest that the consultation so envisaged would come from a one-off body of limited duration which would fall away after the Assembly reaches maturity. The relevant Ministers, if in post, remain under an obligation to make arrangements for obtaining the Forum's views on certain matters. Just as that involved an obligation to establish the Forum in line with how it was envisaged to operate in para 34 of the Belfast Agreement, so too does it involve an obligation to retain a forum such as was envisaged in the Belfast Agreement, unless and until the statutory scheme is changed.

[31] There is considerable flexibility within para 34 of the Belfast Agreement as to how the Forum may be established (or re-established), and as to the arrangements which are put in place; but to allow the Forum to fall out of existence entirely is plainly not consistent with the obligation under section 56(1). A slimmed down forum, much closer to the CCAP model, may be permissible; but this would need to be established pursuant to para 34 of the Belfast Agreement and be approved for that purpose by the Assembly under section 56(2).

[32] I have reached this conclusion on the basis of a straightforward construction of section 56(1) and (4). I do not consider that reliance upon a purposive construction is required, although that would plainly lead to the same result. So too, in my view, would an interpretation taking account of section 12 of the Interpretation Act 1978 (which applies to the NIA as an Act of the Westminster Parliament). It provides that, where an Act confers imposes a duty it is implied, unless the contrary intention appears, that the duty is to be performed from time to time as occasion requires; and that, where an Act imposes a duty on the holder of an office as such, it is implied, unless the contrary intention appears, that the duty is to be performed by the holder for the time being of the office. No contrary intention

appears in the NIA, such that successive First Ministers and deputy First Ministers remain under an obligation to make the arrangements required by section 56(1).

[33] It is also important to recall that the Belfast Agreement makes express provision for reviewing the Strand One arrangements: see para 36 of the Belfast Agreement. It was always envisaged that the Assembly's procedures would be kept under review "with a view to agreeing any adjustments necessary in the interests of efficiency and fairness". If – as appears to be the case – there is broad agreement that the Forum as initially envisaged was not efficient or cost-effective, the appropriate response is to either review this aspect of the Belfast Agreement or, at least, to amend the law accordingly. The applicant has drawn an appropriate analogy, in my view, with the situation described by Singh J in *Child Poverty Action Group v Secretary of State for Work and Pensions* [2012] EWHC 2579 (Admin), at paras [30]-[31], which related to the illegality of ministers wrongly failing to establish a commission to whose advice they were obliged to have regard. Although Singh J considered that the government may have had good reason to adopt a different policy from that of the previous government, they were not entitled as a matter of law to simply ignore, or to fail to comply with, primary legislation as laid down by Parliament.

Absence of the appropriate respondents

[34] Section 56(3) of the NIA provides that the Forum's expenses will be defrayed as expenses of the Department of Finance and Personnel. By virtue of Article 3 of the Departments (Transfer of Functions) Order (Northern Ireland) 2001 (SR 2001/229), this function was transferred to the Office of the First Minister and deputy First Minister ("OFMdFM"). In turn, pursuant to section 1(1) of the Departments Act (Northern Ireland) 2016, OFMdFM was renamed as the Executive Office ("TEO"). The obligation to meet the Forum's expenses therefore now falls to TEO, which is also the Department presided over by, and which supports, the First Minister and deputy First Minister (when they are in post). TEO therefore has some responsibility in this field.

[35] It is nonetheless right to point out that the key obligations examined above fall upon ministers, namely the First Minister and the deputy First Minister. What effect upon the present proceedings does the absence of those Ministers being in post have? This issue was not addressed at the leave stage in light of the fact that, when pre-action correspondence was both sent and responded to, the First Minister and deputy First Minister were in post. When the proceedings were lodged – shortly after the relevant Ministers left post – no further submission was provided by TEO as to the effect of that recent development.

[36] I have considered this issue essentially as one of fairness and have taken the following view. At the heart of these proceedings was an issue of statutory construction. No unfairness to the previous incumbents of the First Minister and deputy First Minister posts has arisen by hearing and determining that issue. Their position on it was expressed in formal pre-action correspondence on their part

whilst they were in position. Counsel instructed by TEO were well able to – and did, with customary skill – advance that position by way of legal submissions. TEO was able to appear as an appropriate legitimus contradictor in respect of that aspect of the case. Nothing was to be gained by failing to determine the issue, which would also not appear to me to have been consistent with the overriding objective in RCJ Order 1, rule 1A. One also has to be cautious to ensure – although there is no suggestion that this concern arose in the present case – that those occupying ministerial post cannot simply evade the supervisory jurisdiction of the court by leaving office, either briefly or for a more sustained period, or by a change in the identity of the relevant office-holder. Some flexibility may be required to ensure that respondents cannot render their actions immune from challenge by such means.

[37] But different considerations arise in relation to the grant of relief in this case, where the First Minister and deputy First Minister might have had additional evidence to offer as to their reasoning for allowing the Forum to wither or as to their proposals or intentions in this area going forward. Such evidence, or additional submissions made on instruction in relation to these or other matters, might properly affect the exercise of the court's discretion in relation to remedy. I do not consider that it would be fair to grant any intrusive relief against respondents, or putative respondents, who are not here to make appropriate representations on those issues.

Standing

[38] As to standing, the respondent relies upon section 18(4) of the Judicature (Northern Ireland) Act 1978, which provides as follows:

> "The court shall not grant any relief on an application for judicial review unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

[39] It also relies heavily upon the relatively recent decision of a Divisional Court (Singh LJ and Swift J) in England and Wales in *R (Good Law Project and others) v The Prime Minister and others* [2022] EWHC 298 (Admin), at paras [21]-[28]. The respondent submits that this case "represents the most up to date detailed treatment of the issue of standing against current trends". I recently examined some key themes emerging from that judgment's treatment of the standing issue in *Re JR216 and Others' Applications (Leave Stage)* [2022] NIKB 28, at para [75], summarising the relevant principles as follows:

> "(a) Standing and the merits of the case – including the nature of the relevant power or duty, the nature of the alleged breach, and the subject-matter of the claim – can often not be separated.

(b) There are likely to be differences between cases brought by individuals and those brought as a group challenge. Within the category of group challenges, there are also different types: those where the group sues on behalf of its members, where it does so representing (or purporting to represent) the interests of others, and where it does so claiming to represent the public interest.

(c) There has been a liberalisation of the approach to standing in judicial review over the last four decades but, where a challenge has been permitted to proceed even though the applicant is not themselves directly affected, this is usually (although not exclusively) a case brought by a specialist interest group in its own field of interest and in some form of representative capacity.

(d) The approach to standing is based upon the concept of interests, which will be context specific, including by reference to the purpose of judicial review in the particular context of the case and the issues raised by the application.

(e) The test for standing is discretionary and not hard-edged. A relevant consideration in that regard may be whether there are obviously better-placed challengers."

[40] The respondent here relies upon the facts that the applicant is not, nor is she representing, any special interest group; that the context of this case (including the fact that the Forum has been non-existent for so long) does not support the conferral of standing; that the applicant herself has no particular interest in the operation of the Forum and is not herself directly affected by the issues she has raised.

[41] It is correct that, as Lord Reed observed at para [94] of his judgment in *Walton v Scottish Ministers* [2012] UKSC 44, not every member of the public can complain of every potential breach of duty by a public body. In many contexts it *will* be necessary for a person to demonstrate some particular interest in order to demonstrate that he or she is not a mere busybody. On the other hand, in the same paragraph of his judgment, he went on to explain that:

> "… there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater

> impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no one was able to bring proceedings to challenge it."

[42] Determining where on this spectrum a particular case falls calls for an exercise of judgment. Some cases will be clear cut; others will not. Authority is clear that a personal interest will not always be required; but neither do litigants enjoy a pure right of actio popularis.

[43] The applicant is a recent litigant before this court in relation to concerns about health care and waiting lists (see *Re Wilson's Application* [2023] NIKB 2); but she has been careful to assert that she does *not* believe the existence of the Forum would allow those issues to be brought to the Executive and the Assembly's attention. In light of this, the respondent argues as follows:

> "In short she has no particular interest in the subject matter sufficient to confer the necessary locus standi, particularly when one considers the long history of the matter, the absence of any evidence of public concern or complaint about the matter and the clear evidence of cross-party political support for reform contrary to what the Applicant presses upon this Court."

[44] In her grounding affidavit, the applicant made reference to her judicial review proceedings in relation to medical waiting lists. She said that she was interested in setting up a forum or support group for those in a similar situation. She also averred that she was, and is, interested in "setting up some form of direct line between people and politicians", giving the example of the Citizens' Assembly which operates in the Republic of Ireland. She expressed her disappointment at the lack of Civic Forum in Northern Ireland. She noted that, although hospital waiting lists were her primary personal concern and what had prompted her interest in this area, she did not consider that the Forum would advance those matters. Her interest in the Forum was separate, related to her desire that ordinary people from different sections and parts of society should have an opportunity to voice their views on these issues in a way which would directly engage the politicians responsible for governing in this jurisdiction.

[45] The issue of standing was raised in a relatively muted form only in the response to pre-action correspondence. It was suggested that the applicant could and should have raised this issue in her separate judicial review proceedings dealing with waiting lists: a point which I did not find persuasive. It was also suggested that the Forum did not exist for the purposes of lobbying the Assembly or Executive on issues of concern to individuals (for example, the applicant's concern about waiting lists), nor to replace other mechanisms which were designed for, or appropriate to, that purpose. Therefore, it was said, the applicant's interest in the matter and her

proposed standing "appears to be based on a misunderstanding of the role of the Forum".

[46] The applicant relies on the fact that leave was granted in this case and that – pursuant to RCJ Order 53, rule 3(5) – the court must not grant leave unless it considers that the applicant *has* a sufficient interest in the matter to which the application relates. She is justified in making this point. In granting leave in this case, I took the view that the applicant did have sufficient interest, particularly in light of the relatively liberal approach to standing which has traditionally been adopted in this jurisdiction in public interest cases. However, the mere fact that leave has been granted cannot completely preclude further consideration of the issue of standing at the substantive hearing, particularly where (as here) there has not been a full ventilation of the issue at the leave stage. Indeed, even where that has occurred, there may be some change in circumstance, or some additional evidence, which requires the matter to be reconsidered. Since authority suggests that the issue of standing is jurisdictional, it cannot simply be ignored where a respondent squarely raises the issue as a basis for dismissing the application or refusing to grant relief. As Lord Reed also pointed out in para [95] of his judgment in *Walton*:

> "At the same time, the interest of the particular applicant is not merely a threshold issue, which ceases to be material once the requirement of standing has been satisfied: it may also bear upon the court's exercise of its discretion as to the remedy, if any, which it should grant in the event that the challenge is well-founded."

[47] I consider, therefore, that I must look at the issue of standing again, in the round, in light of the evidence as it now stands and the further submissions which have been made in relation to it. Although no application has been made to set aside the grant of leave, the issue is plainly relevant to the question of remedy.

[48] There is a long line of authority, both in this jurisdiction and that of England and Wales, suggesting that a broad approach to the grant of standing in public law cases is appropriate where there is a potent public interest in the claim: see, for instance, Lord Denning in *Blackburn* [1976] 1 WLR 550, at 559; and Sedley J in *R v Somerset County Council, ex parte Dixon* [1997] COD 323. Authorities such as these emphasise that public law is not at base about rights, but about wrongs, that is to say misuses of public power. More importantly, these themes also found expression in two cases of the highest authority dealing with the issue of standing, namely the decisions of the Supreme Court in *AXA General Insurance Ltd v HM Advocates* [2011] UKSC 46 and *Walton v Scottish Ministers* (*supra*). In para [90] of his judgment in the *Walton* case, Lord Reed observed that the court's clarification of the approach to standing in the *AXA* case was "intended to put an end to an unduly restrictive approach which had too often obstructed the proper administration of justice: an approach which presupposed that the only function of the court's supervisory

jurisdiction was to redress individual grievances, and ignored its constitutional function of maintaining the rule of law."

[49] One of the leading cases on standing in this jurisdiction remains the Court of Appeal's decision in *Re D's Application* [2003] NICA 14. At para [15] of that judgment, the following general principles were set out:

> "(a) Standing is a relative concept, to be deployed according to the potency of the public interest content of the case.
>
> (b) Accordingly, the greater the amount of public importance that is involved in the issue brought before the court, the more readily it may be to hold that the applicant has the necessary standing.
>
> (c) The modern cases show that the focus of the courts is more upon the existence of a default or abuse on the part of a public authority than the involvement of a personal right or interest on the part of the applicant.
>
> (d) The absence of another responsible challenger is frequently a significant factor, so that a matter of public interest or concern is not left unexamined."

[50] The respondent does not take strong issue with any of these propositions, although submits that *Re D* "spoke to a different time and context" and should now be read in light of further case law developments, including the two Supreme Court decisions mentioned above which post-date it, and in light of the "more exactly analysis" contained in cases such as the *Good Law Project* case mentioned above. *Re D* was cited with approval by Colton J in recent times in *Re Moon's Application* [2021] NIQB 26, at paras [19] and [21]. It remains good law in this jurisdiction and, in any event, as the respondent accepts, is not inconsistent with the guidance set out in later cases. It is uncontentious that it should also be read alongside more recent Supreme Court authority, on which both sides relied in relation to the standing issue in this case.

[51] Resolution of the respondent's objection based on the absence of standing in the present case has not been easy. On the one hand, the applicant makes a valid point that if the administration is simply ignoring statutory obligations, there is an obvious public interest in that being examined by the courts in order to vindicate the rule of law. But it is in the nature of the standing requirement that not every legal wrong requires to be corrected. A further powerful point in the applicant's favour is that the subject matter of this challenge itself relates to civic engagement, that is to say providing citizens with a route by which their views may be brought to bear on

issues under consideration by elected politicians. On one view, surely this is the very type of issue which an ordinary citizen should be entitled to bring before the court, even in the absence of a direct personal interest.

[52] On the other hand, the Forum has not been active since 2002 and there has been no discernible public outcry about this. The fact that it has not been operational has not been hidden; and the evidence suggests that consultation responses on the issue considered the Forum to be costly and inefficient. The Northern Ireland political parties and British and Irish governments have kept the issue in mind when discussing the development of the constitutional structures in Northern Ireland. While civic engagement remains important, there is no appetite (it seems) for restoration of the Forum in its original form. This applicant was not a member of the Forum; she has expressed no desire to be a member of the Forum should it be re-established, much less a persuasive basis for suggesting that she would be so appointed; and she accepts that the political issue of most concern to her is unlikely to be addressed through re-establishment of the Forum.

[53] Albeit not without some hesitation, on the basis of the fuller argument which was had on this issue at (and following) the substantive hearing in this case, I consider that the better view is that the applicant does not have sufficient interest to obtain any relief in these proceedings. The concept of standing in judicial review is elastic but there must be some limits. In light of the significant evidence provided by TEO as to the process by which the issue of civic engagement has been kept under review and the results of that process, I do not consider that the potency of the public interest in this issue is such that an individual with no otherwise obvious links to it should be afforded standing. Put another way, on the basis set out at paras [40] and [52] above, I do not consider that the applicant can be said to genuinely have a reasonable concern in the matter to which the application relates or to be representing a section of the public directly affected by the issue.

[54] Some commentators have suggested that a stricter approach to the issue of standing is emerging in the jurisprudence of the courts of England and Wales, typified by the decision in the *Good Law Project* case on which the respondent here relied: see, for instance, Marsons, '*Crossing the t's and dotting the i's: The turn to procedural rigour in judicial review*' [2023] (January) Public Law 29-38. I should add that the present judgment is not intended to herald a new approach to the issue of standing in judicial review proceedings in Northern Ireland. Nor could it, since the relevant principles have been established by the Court of Appeal in this jurisdiction, and indeed in Supreme Court authorities such as *Walton.* As those cases emphasise, each case will have to be addressed on its own merits, bearing in mind the flexibility inherent in the governing principles. As ever, in law context is everything.

[55] In that vein, I also consider this case to be distinct from some of the recent cases where a more liberal approach to the question standing might arguably be said to have been displayed. For instance, in the *Napier* litigation the issue was the ongoing, but recently adopted, policy of thwarting North-South cooperation in

circumstances where that was impeding (and was designed to impede) executive and operational decisions and actions. In the recent case of *Re Rooney and Others' Applications* [2022] NIKB 34, Colton J considered the standing of the individual applicants at paras [111]-[122]. Crucially, he considered that the issue in that case was one of significant public interest; where the potency of the public interest was high (see para [120]). The impugned decision on the part of the Minister had immediate, real-world effects and was impacting a range of third parties. By contrast, in the present case, the issue relates to the historic mothballing of a consultative body in circumstances where there is broad agreement that it should be, and it has been, replaced by other structures for similar purposes. These variety of outcomes in these cases in my view demonstrates the flexibility already inherent within the guiding principles set out by the higher courts.

Conclusion

[56] I have determined the key issue of statutory interpretation which lies at the heart of these proceedings, since I heard full argument upon it and am not persuaded that TEO, appearing as the respondent to these proceedings, was in any way inhibited from making properly arguable legal objections to the applicant's case, through counsel, on the correct interpretation and effect of section 56 of the NIA.

[57] Notwithstanding that I consider that, as a matter of statutory construction, the applicant's point is well made, I decline to grant any relief on the bases (1) that, in the absence of a First Minister and deputy First Minister, the appropriate respondents have not been able to make full submissions to the court which might be relevant to that issue; and (2) that, in any event, the applicant lacks standing to be granted any relief.

[58] I will hear the parties on the issue of costs.