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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY COLIN BUICK FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT FOR INFRASTRUCTURE MADE ON 13 SEPTEMBER 2017 UNDER SECTION 26 OF THE PLANNING ACT (NORTHERN IRELAND) 2011

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KEEGAN J

Introduction

[1] This application for judicial review is brought against a decision of 13 September 2017 to grant planning permission for a major waste disposal incinerator in the Hightown and Mallusk area. The applicant is Colin Buick who is the Chairperson of "No Arc21", an unincorporated association which was established to campaign against the incinerator on environmental grounds. The respondent is the Department for Infrastructure ("the Department"). The interested parties are "Arc21" which is an umbrella waste management group of six councils who between them service 60% of the population of Northern Ireland and Indaver (Northern Ireland) Limited who is the final remaining bidder in the procurement process to implement the planning permission.

[2] It is common case that the impugned decision was taken in the absence of a Minister with responsibility for the Department there having been no Executive in Northern Ireland since January 2017.

[3] Leave to apply for judicial review was granted on 11 November 2017 on two core grounds. The first of these grounds may be summarised as "the vires ground" i.e. that the Department had no legal power to make the decision. The second ground of challenge may be described as "the cross-cutting ground" whereby it is

argued that even if the Department could exercise the powers in the absence of the Minister it was unable to do so in this case given that the decision cut across two departments namely the Department and the Department for Agriculture and the Environment ("DEARA") and as such in the absence of an Executive Committee the decision could not be lawfully taken in accordance with the provisions of the Northern Ireland Act 1998 Section 28A and paragraph 2.4 of the Ministerial Code.

[4] Mr Orbinson QC appeared with Mr Anthony BL on behalf of the applicant. Mr McGleenan QC appeared with Mr McLaughlin BL on behalf of the respondent. Mr Beattie QC appeared on behalf of the interested party.

The case made in the Order 53 Statement

[5] The relief sought is:

(a) An Order of Certiorari to quash a decision of the Department made under section 26 of the Planning Act (Northern Ireland) 2011 on 13 September 2017 whereby it granted planning permission in respect of application reference T/2014/0114/F viz for "proposed development of a residual waste treatment facility incorporating a mechanical and biological (MBT) facility, an energy from waste (EFW) thermal treatment facility, an incinerator bottom ash (IBA) treatment facility, a refuse derived fuel (RDF) bale storage building, an administration/visitor centre and related infrastructure including widening of the Boghill Road from its junction with Hydebank Road to the west of the existing access road into Hightown Quarry sites and other ancillary works.

(b) An Order of Certiorari to quash the planning permission so granted.

(c) A declaration that the said decision and permission and each of them is unlawful, ultra vires and have no force and effect.

(d) Such further and other relief as the court shall deem appropriate.

(e) All necessary and consequential directions.

[6] The grounds upon which the relief is sought are set out under two headings:

(a) The Department failed to understand correctly the law that regulates its decision making power and to give effect to it, and thereby acted unlawfully in making the impugned decision. In particular, the Department failed to understand and give effect to the following:

    (i) Article 2 of the Departments (Northern Ireland) Order 1999 ("the 1999 Order") and section 17(3) of the Northern Ireland Act 1998 ("the 1998 Act"), whereby Ministers are "in charge of all departments".

(ii) Article 4(1) of the 1999 Order whereby "the functions of a department shall at all times be exercised subject to the direction and control of the Minister".

(iii) Article 4(3) of the 1999 Order whereby any functions of a department may be exercised by -

(a) the Minister; or

(b) a senior officer of the department, but "subject to the provisions of this Order", including the Article 4(1) requirement that the functions of the department be at all times exercised subject to the direction and control of the department's Minister.

(iv) Section 22(1) of the 1998 Act, whereby "an act of the Assembly or other enactment may confer functions on … a Northern Ireland department by name" but where any such conferral of functions is to be read with section 17(3) of the 1998 Act, which provides that Ministers are in charge of departments.

(v) Section 22(1) of the 1998 Act whereby "an Act of the Assembly or other enactment may confer functions on … a Northern Ireland department by name" but where any such conferral of functions is to be read with Articles 2 and 4 of the Departments (Northern Ireland) Order 1999, as aforesaid, which, per section 98 of the 1998 Act are "Northern Ireland law" and therefore the constitutional equivalent of any provisions in an Act of the Assembly (here, section 26 of the Planning Act (Northern Ireland) 2011 ("the 2011 Act")).

(vi) The common law requirement that all decisions must have a lawful basis and that, there being at the time of the impugned decisions no Minister in charge of the Department and exercising direction and control over the functions of the Department, there was no lawful basis for the Department to take the impugned decision.

(vii) The common law requirement that public decision makers do not misdirect themselves in law, such misdirection having here occurred given the words that were attributed to the Department in the Belfast Newsletter of 15 September 2017, namely that:

> "While Departments normally exercise their powers subject to the direction and control of Ministers, the power to grant planning permission for regionally significant development proposals is vested in the Department."

(viii) The common law requirement that public decision makers do not act beyond their statutory powers when performing functions, which requirement has been breached insofar as the Department's statement that departments normally exercise their powers subject to the direction and control of Ministers is inconsistent with the statutory provisions referred to above and in particular Article 4(1) of the 1999 Order ("the functions of a department shall at all times be exercised subject to the direction and control of the Minister") and thereby ultra vires.

(b) The second ground is that the Department, when making the impugned decision of 13 September 2017, acted inconsistently with and/or manifestly without due regard to sections 20 and 28A of the 1998 Act, as read with paragraph 19 of the Belfast Agreement and paragraph 2.4 of the Ministerial Code. In particular, the Department failed to recognise and acted inconsistently with:

(i) Section 20(3) of the 1998 Act, whereby "the Executive Committee shall have the functions set out in paragraphs 19 and 20 of Strand 1 of the Belfast Agreement" and paragraph 19 of the Belfast Agreement, whereby 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.

(ii) Section 28A(i) of the 1998 Act whereby "… a Minister or Junior Minister shall act in accordance with the provisions of the Ministerial Code"; section 28A(10) of the Northern Ireland Act 1998 whereby "a Minister or Junior Minister has no ministerial authority to take any decision in contravention of a provision of the Ministerial Code"; and paragraph 2.4 of the Ministerial Code, whereby Ministers are under a duty to bring to the attention of the Executive Committee for discussion and agreement, inter alia, "any matters which cut across the responsibilities of two or more Ministers.

(iii) Its legal obligation to note that the decision of 13 September 2017 was cross-cutting and therefore of a kind which could lawfully be taken only by the Executive Committee.

(iv) Its legal obligation not to subvert the foregoing provisions which were subverted by the impugned decision.

Background

[7] The context of the case is a planning application of some considerable public importance to permit an incinerator in the area of Hightown, Mallusk. The development is a major waste treatment facility, with regional importance for

Northern Ireland as a whole in the context of EU waste targets for recycling and landfill use. The developer is an incorporated committee of several local councils with statutory waste functions.

[8] The application process is of some vintage and as a result it crosses over between the current and previous statutory planning regimes. It was received by the Department of the Environment in March 2014 and progressed initially under Article 31 of the Planning (Northern Ireland) Order 1991 as a major planning application. In April 2015 the relevant provisions of the 2011 Act came into force and the planning functions of the Department of the Environment were transferred to the Department for Infrastructure. The application was determined to be regionally significant for the purposes of section 26 of the 2011 Act and was ultimately determined by the Department in September 2017.

[9] The following chronology explains the progress of the application from its inception in 2010 as follows:

May-November 2010	A scoping process to inform the Environmental Statement was undertaken and subsequently a scoping document was submitted to DOE Strategic Projects Team in May 2010.
27 March 2014	Arc21 submitted planning application T-2014-0114-F to the then Department of the Environment.
3 April 2014	The planning application was validated.
April 2014	The Department considered the application and determined that it was "a major planning application" for the purposes of Article 31 of the 2011 Act.
2 July 2014	A request for further environmental information in the form of an addendum to the Environmental Statement was requested by the Department of the Environment.
30 September 2014	"The Waste Prevention Programme for Northern Ireland – The Road to Zero Waste" was published by the Department of the Environment, Environmental Policy Division. The document stated that its intention was to assist Northern Ireland in moving along the "Road to Zero Waste".
2014-2015	No Arc21 submitted numerous objections to the application and engaged with local representatives.

June 2015	The Final Development Management Report recommending approval of the planning application was drafted by the Department of the Environment.
23 September 2015	The application was subject to a notice of opinion to refuse by the then Minister for the Environment, Mark Durkan MLA, for reasons of health risks and lack of justifiable need.
16 October 2015	Arc21 requested a hearing before the Planning Appeals Commission (PAC) under section 26 of the 2011 Act.
January 2016	Correspondence from the DOE Environmental Policy Division to the Director of the Strategic Planning Division was received anticipating that there would be a regional requirement for thermal capacity between 668,000-759,000 tonnes to meet 2030 EU landfill/recycling targets.
9 March 2016	A pre-inquiry meeting was held by the PAC. At the meeting Arc21 indicated that they wished to submit further environmental information.
5 May 2016	The Northern Ireland Assembly elections were held. A new Executive Committee was formed. Northern Ireland departments were reorganised under the Departments Act (Northern Ireland) 2016 as read with the Departments (Transfer of Functions) Order (Northern Ireland) 2016 (SR 2017/76). Chris Hazzard of Sinn Fein became the Minister for Infrastructure, which had assumed the relevant planning functions of the Department of the Environment, that Department having been dissolved.
29 July 2016	Mr Hazzard was requested to provide directions on the position that the Department should adopt at any upcoming PAC hearing. The Department had recommended a position of neutrality. It is noted that the Infrastructure Minister agreed with the recommendation and instructed the Department to adopt a neutral position at the hearing in relation to the recommendations which the PAC might make.
August 2016	Further environmental information including updated ecology, air quality and transport assessments were submitted by Arc21 as part of its Statement of Case lodged in respect of the Public Inquiry.

11/12 October 2016	The hearing takes place. No Arc21 participated through a Statement of Case and rebuttals. On the first day of the hearing a representative for the Department indicated that circumstances had moved on since the Notice of Opinion had been issued and that the Department was no longer seeking to defend the stated reasons for refusal. The Inquiry was advised that the then Minister for Infrastructure, Chris Hazzard, was adopting a neutral stance and that the advice of the PAC would be taken into account in reaching a decision.
January 2017	Political difficulties in Northern Ireland lead to the collapse of power-sharing.
2 March 2017	Assembly elections were held but they did not result in the formation of a power-sharing government. The Assembly remained in place but did not convene.
8 March 2017	The PAC report was issued and recommended approval of the proposal with conditions.
March 2017	Officials in the Department liaised with officials in DEARA about the PAC report and recommendation. DEARA "welcomes the Commissioners' recommendations" by memo dated 24 March 2017
March-June 2017	Various deadlines for formation of an Executive passed. The Department awaited political developments on the appointment of a Minister.
29 June 2017	The Department began making preparations for the possibility of determining the application by exercising its powers in the absence of a Minister. It received legal advice on how this could be achieved.
July-August 2017	The Department liaised further with DEARA regarding the application.
24 August 2017	The application is referred to Peter May, the Permanent Secretary of the Department. Mr May considered that, in the light of the legal advice that he had received, he has "authority to exercise or to direct other senior officials to exercise the powers of the Department to determine this planning application". In doing so Mr May acknowledged, *inter alia*, that "a planning decision of this nature would

	ordinarily have been taken by a Minister on behalf of the Department."
29 August 2017	Mr May decided that planning permission should be granted. He sent a memo to that effect to the Chief Planning Officer.
13 September 2017	The planning permission was granted.
14 September 2017	The Belfast Telegraph carried a story that included statements from former Minister Hazzard about the reason for his neutrality in relation to the PAC hearing.
20 October 2017	The Applicant sent pre-action protocol correspondence.
27 October 2017	Papers for application for leave were lodged with the Court Office.
11 November 2017	Leave was granted on the two grounds now before the court.
6 December 2017	The Respondents' pre-action protocol letter was issued.
15 December 2017	The BBC News website carried a story regarding proposed compensation payments to victims of abuse stemming from the Historical Institutional Abuse Inquiry. That report stated that "the Head of the Northern Ireland Civil Service has written to victims explaining payments would be open to legal challenge without ministerial approval".

[10] The application is supported by two affidavits of the Applicant, Mr Buick, which are dated 27 October 2017 and 30 January 2018. There are also three affidavits filed by Mr Ryan, the solicitor acting on behalf of the Applicant, which are dated 27 October 2017, 30 January 2018, and 13 February 2018.

[11] In broad summary the Applicant's affidavit refers to his status as Chairperson for No Arc21. He also sets out the basis of his challenge that the decision was not taken with legal authority. Various other matters were raised including the issue of whether or not a highly dangerous mineral known as eronite was present on the site of the proposed development. However, Mr Orbinson did not pursue that point and he confirmed at the outset that the challenge was simply as to the legality of the decision being taken in the absence of a Minister.

[12] The Respondent's case is contained in the affirmation of Mr Peter May which is dated 11 January 2018. In addition, an affidavit has been filed by Nola Jamieson, Strategic Planning Division which is dated 10 January 2018. A further affidavit has

been filed by Clyde Shanks Ltd, a Planning Consultancy firm which is dated 22 January 2018.

[13] The latter affidavit refers to the fact that Arc21 is responsible for developing, formulating and implementing an effective approach to waste management for the area within its constituent councils and has identified the need for a public infrastructure to deal with residual waste as part of its statutory Waste Management Plan ("the WMP"). The affidavit avers to the fact that at present a high proportion of waste in Northern Ireland is directed to landfill and that Northern Ireland has no operational structure currently in place to receive directly and thermally treat biodegradable waste. Reference is made to an EU Landfill Directive 1999/31/EC which limits the amount of household waste permitted to landfill. The deponent avers that it is in this context that Arc21 made the application for planning permission for the proposed development of a residual waste treatment facility and ancillary works. The affidavit also sets out details of the economic and environmental benefit put forward by Arc21. Finally, the affidavit refers to the consequences of delay.

The affirmation of Mr May

[14] This affirmation of 11 January 2018 explains how this decision making process was conducted. Mr May confirms that he is the Permanent Secretary of the Department . He states that:

> "I am the most senior Civil Servant within the Department and I decided that it should exercise its power under the Planning NI Act to grant planning permission for this development notwithstanding the absence of a Minister for Infrastructure."

[15] He states that:

> "The purpose of this affirmation is to explain why I considered it to be in the public interest that the Department should exercise its statutory powers to determine this planning application, notwithstanding the absence of a Minister."

[16] Mr May then refers to having received legal advice as to this issue over which he claims privilege. However, he states that the relevant legal principles are set out in the pre-action response under the heading 4 which is entitled "Response to matters under challenge (a) Power of Department to grant planning permission." In this correspondence Mr May refers to the 1999 Order and the sets out his position regarding Article 4(1) that the functions of a department … shall at all times be exercised subject to the direction and control of the Minister. I set out the operative part of this correspondence where the following explanation is found:

"This provision does not have the effect of depriving senior officials from exercising powers of a department. Rather, it recognises that a department must act in accordance with the direction of a Minister, where they have been made. This may take the form of a specific instruction to officials or alternatively an expression of a preferred policy approach.

The legal effect of Article 4(1) is therefore to ensure that departmental powers are exercised in a manner consistent with the will of Ministers. The legal effect of Article 4(3) is to provide the legal authority by which Ministers (individual members of the Assembly) may themselves exercise these powers. Such a provision is necessary, since the relevant powers have been conferred upon a different body, namely a department. It is not accepted that either of these provisions require the appointment of a Minister as a pre-condition to the exercise by a department of its own powers.

The purpose of these provisions is also clear. They provide a mechanism for public accountability of departmental decisions through the Assembly. In addition, since a minister will also be a member of the Executive Committee, the provisions will facilitate decision making by a department in a manner which accords with the views, policies or (as the case may be) decisions of the Executive, thereby contributing coordinated decision making across government. While the 1999 Order and the 1998 Act anticipate that Ministers and an Executive will be in place, they do not require it. The constitutional position is illustrated by section 23(2) Northern Ireland Act 1998 which provides that the executive authority and prerogative powers of Her Majesty may be exercised by either a Northern Ireland minister or a department.

The distinctions between the legal status and powers of Ministers and departments are reflected in a number of other provisions within Part III Northern Ireland Act 1998, including in particular ss 17, 18, 21 and 23.

The references within s 17(3) Northern Ireland Act 1998 and Art 2(2) of the Departments (NI) Order 1999 to a Minister being "in charge" of a department do not reflect

> a statutory merger of ministerial and departmental identities or powers. Rather they are a reflection of the fact that members of the Assembly who are appointed Ministers are assigned to Northern Ireland departments, which in turn must act in accordance with the direction and control of that Minister, when expressed."

[17] Paragraph 4 of the affirmation refers to the position of the Minister at the PAC hearing. Reference is made to the fact that the Minister was neutral as to the outcome in that:

> "He clearly considered that the Department should no longer consider itself to be bound by the views and directions of the former Minister, but that it should maintain an open mind as to the planning merits of the application and the prospect of an independent recommendation from the PAC."

[18] Mr May then sets out how he took the decision on the basis of information presented to him and planning policy considerations and he states that:

> "I also carried out an assessment of whether it was in the public interest for the Department to do so (make the decision) at that time."

[19] He states at paragraph 9 that:

> "Prior to reaching a decision, I also took account of the fact that a planning decision of this nature would ordinarily be taken by a Minister on behalf of the Department."

[20] Mr May also refers to the Ministerial Code which he says did not apply to him but he states that the custom was that no previous Environment Minister or Infrastructure Minister has ever referred an individual planning application to the Executive Committee prior to its determination. He states that in the light of the clear and independent recommendation of the PAC on the planning merits, supported by DEARA and officials within the Department, he decided that planning permission should be granted.

[21] Mr May also explains the reference to a policy which is contained in a memorandum of 29 August 2017. A request was made for production of the policy by the Applicant's solicitors. However, in his affirmation Mr May states that no such policy exists and that use of the expression simply referred to "an internal departmental procedural protocol for planning decision making in the absence of a Minister".

Legislative context

[22] The governing legislation is the 1998 Act which reflects Strand 1 of the Belfast Agreement 1998 ("the 1998 Agreement") by virtue of which devolution was established in Northern Ireland. The 1998 Act has been described as a constitutional statute. Section 17 of the 1998 Act provides that the First Minister and the Deputy First Minister shall determine the number of ministerial offices and the functions to be exercised by the holders of such offices. Section 17(4) provides that the number of Ministers shall not exceed 10. Section 17(3) provides that in making a determination … the First Minister and Deputy First Minister shall ensure that the functions exercisable by those in charge of the different Northern Ireland Departments existing at the date of the determination are exercisable by the holders of the ministerial offices. Section 18 refers to the fact that Ministers must be elected representatives, under the d'Hondt system.

[23] The 1998 Act also provides for departments within the devolved framework of government. Section 23 provides that the executive power in Northern Ireland shall continue to be vested in Her Majesty. Section 23(2) provides that as regards transferred matters, the prerogative and other executive powers of Her Majesty in respect of Her Majesty in Northern Ireland shall be exercisable on Her Majesty's behalf by any Minister or Northern Ireland department (subject only to defined exceptions)

[24] Section 22 states that:

> "An Act of the Assembly or other enactment may confer functions on a Minister (but not a Junior Minister) or a Northern Ireland department by name."

Section 21(2) provides for functions in place before the enactment of the 1998 Act to continue to be exercisable by the department. So the 1998 Act made no change to existing departmental arrangements.

[25] Strand 1 of the 1998 Agreement refers to the fact that "all the Northern Ireland departments will be headed by a Minister". This is reflected in the framework laid down by the 1998 Act. The Departments (Northern Ireland) Order 1999 ("the 1999 Order") also refers to the fact that the Minister is "in charge" of a Department by virtue of Article 2(2). A department may act at as a body corporate by virtue of Article 5(2) of the 1999 Order. A department can defend legal proceedings (section 17(3) of the Crown Proceedings Act 1947 read with the Crown Proceedings (Northern Ireland) Order 1981).

[26] Article 4 of the 1999 Order provides as follows:

"4(1) The functions of a department shall at all times be exercised subject to the direction and control of the Minister.

4(3) Subject to the provisions of this Order, any functions of a department may be exercised by -

(a) the Minister

(b) a Senior Officer of the Department."

[27] Section 26 of the 2011 Act confers the decision making functions upon the Department. Section 35 of the 2011 Act permits decisions of this nature to be taken by the Department. Under Article 4(3) of the 1999 Order the Minister may also exercise the decision-making function. Article 4(1) is expressed in mandatory terms by inclusion of the word *shall.* The provision also requires that *at all times* departmental decision making *shall* be subject to the *direction and control* of a Minister.

Arguments made by the parties

[28] Mr Orbinson supplemented his written submissions by making the following points which I set out in summary:

(i) Mr Orbinson submitted that the Department's status as a statutory body corporate does not change the fact that it is not legally distinct from its Minister. Its status does nothing more than give it a legal personality so that it may for instance have the capacity to acquire and hold land for the purposes of its functions and defend legal proceedings.

(ii) He also contended that as a matter of constitutional law the fundamental premise of Strand 1 of the 1998 Agreement which informs Part 3 of the 1998 Act and the 1999 Order is that Executive authority is to be discharged on behalf of the Assembly by a First Minister and Deputy First Minister and up to 10 Ministers with departmental responsibilities. It was submitted that all Northern Ireland departments will be headed by a Minister and that Ministers will have full Executive Authority for their respective areas of responsibility. It was submitted that this wording makes it clear that Executive decision making cannot legally occur in the absence of Ministers.

(iii) Mr Orbinson argued that the statutory references to a Minister being in charge of a department reflect both the democratic imperatives within Strand 1 and historical experience with devolution in Northern Ireland.

(iv) In grounding his argument Mr Orbinson placed heavy reliance upon the wording of Article 4(1) of the Departments (Northern Ireland) Order 1999

which he stated is clear in that it provides that at all times the functions of a department must be exercised subject to the direction and control of a Minister. The applicant submitted that this is a requirement for all pervasive direction and control. The argument was made that if there is no Minister, it is impossible for such direction and control to be expressed.

(v) In relation to the cross-cutting point Mr Orbinson submitted that the evidence of the respondent is clear that two Ministers should be involved in this decision. As such the decision making process offends the provisions of the Northern Ireland Act 1998 applying *Re Minister for ETI's Application* [2016] NIQB 26.

[29] The Respondent's arguments were presented by Mr McGleenan in written format augmented by oral submissions during which he referred to the following:

(i) Northern Ireland departments are entirely different entities, they are recognised separately in section 21 of the 1998 Act and they have separate identities and functions.

(ii) The constitutional tradition in Northern Ireland has been for statutory powers to be conferred upon Northern Ireland departments. In particular Mr McGleenan stressed that the power to grant planning permission is one such power.

(iii) Mr McGleenan also made the argument that the Northern Ireland Act 1998 made no change to these existing arrangements in that powers previously conferred upon departments remained with those departments.

(iv) He further contended that the Minister may exercise the powers of the department or may direct officials as to how those powers may be exercised, however the powers of the department may also be exercised by its senior officers.

(v) Mr McGleenan placed emphasis upon the fact that the arrangements in Northern Ireland stand in contrast to the structure of central government in the United Kingdom. In summary he submitted as follows. Executive and prerogative authority is vested in Her Majesty, which is exercised on her behalf by Ministers who in turn act on the authority of an appointment by Her Majesty. Statutory powers and functions are conferred upon the Secretary of State and may be exercised by the Secretary of State. Departments of central government do not have a separate legal identity and powers are not conferred upon them. Departments are created by prerogative order, normally exercised by the Prime Minister. Departments of central government are un-incorporated bodies of civil servants who support the relevant minister in the exercise of his or her functions. As such Mr McGleenan drew a distinction between the constitutional provisions in

Northern Ireland and the Whitehall model which he said were entirely different. He also drew an analogy with Scotland where the powers and prerogative authority formally exercised by the Secretary of State were transferred to Scottish Ministers not departments. He stated that a similar structure is followed in Wales. However, Mr McGleenan stressed that in Northern Ireland there is specific power given to departments.

(vi) Reliance was placed on the case of *Robinson v Secretary of State* [2002] NI 390 in which the House of Lords held that the 1998 Act should be interpreted generously and purposefully in a manner which enabled the devolved institutions both to form and to function. In that sense the argument was made that the provisions should be generously interpreted in relation in particular to the 1999 Order.

[30] The interested party represented by Mr Beattie reiterated and supported the representations made by Mr McGleenan.

Discussion

[31] This is a discrete challenge to the lawfulness of decision making. In that regard I intend to examine the legislative context and then the factual context before explaining my conclusion. The question is whether the decision could lawfully be taken by a Senior Civil Servant given the political impasse. In his skeleton argument Mr Mc Gleenan frames it thus:

> "The key question for the Court is whether the Department may exercise its statutory power to grant planning permission in the absence of a Minister."

[32] In answering this question I keep in mind some core facts. I begin by borrowing the words of the Department that "the issue has been a matter of high public importance and political interest". This application was designated a "major planning application" and subsequently a "development of regional significance" pursuant to the relevant legislation. I note that there was a Public Inquiry and a PAC recommendation in favour of planning permission. I bear in mind that this was a policy decision which the Minister was expected to take and with which he was engaged prior to the collapse of the devolved institutions. Also, I have not been greatly assisted by the comparison with the situation pertaining to historical abuse compensation as the context is different. I am deciding this case upon its own particular facts.

[33] Mr McGleenan provided an impressive historical overview of the constitutional arrangements in Northern Ireland. In doing so he highlighted the particular structure in Northern Ireland which provides for executive decision making by both Ministers and departments. There can be no real dispute about the existence of these powers. However, this case is actually about the lawful exercise of

the departments' function and how the 1999 Order should be interpreted. This Order in Council makes provision for how departmental powers must be exercised. Mr McGleenan explains in his written argument that there is a clear interplay with the 1998 Act in that "the two pieces of legislation therefore form part of the same overall package of measures by which devolution was brought into effect in Northern Ireland and should be interpreted in light of one another". I agree with this analysis and I proceed on that basis.

[34] I have considered all of the evidence filed and the arguments made. Having done so, I am of the view that the case really distils into a consideration of Mr May's affirmation as in that he sets out the basis for the decision making process adopted in this case. I extract three core themes from this evidence. Firstly, Mr May argues that as a senior member of the Civil Service he could lawfully take the decision pursuant to Article 4(1) of the 1999 Order without a Minister in place. Secondly, he points out that the legal effect of Article 4(3) of the 1999 Order is to provide the legal authority by which Ministers may themselves exercise the powers conferred on a department. Thirdly, he contends that in effect there was some direction and control from the Minister in this case. I will deal with these points in turn.

[35] In support of the first point Mr May states that "while the 1999 Order and the 1998 Act anticipate that Ministers and an Executive will be in place, they do not require it". Mr May places reliance upon section 23(2) of the 1998 Act to support this argument. That provision states that executive functions may be exercised by a department or a Minister. However, it cannot be read without reference to the 1999 Order which provides how the department must exercise its functions. These are the "package of measures" which the Department accepts should be interpreted in the light of one another.

[36] I bear in mind that in *Robinson* Lord Bingham considered that the 1998 Act need not be interpreted narrowly bearing in mind the "values that the constitutional provisions are intended to embody". However, this was a case involving whether the election of a First and Deputy First Minister outside of the prescribed time limits in the 1998 Act was valid. In my view it represents a very different factual situation to the case at hand. The aim in the *Robinson* case was to save the devolved institutions notwithstanding the defined time frame for the appointments. However, in this case the Court is being asked to validate a decision making process which offends one of the core values of the constitutional structure namely democratic accountability.

[37] By contrast the now repealed Northern Ireland Act 2000 is a useful analytical aid. This Act previously provided for direct rule in Northern Ireland. It did not confer absolute power upon departments in the absence of a Minister but rather paragraph 4(1)(f) of the Schedule to the Act provided that:

> "Any functions of a Northern Ireland department (including functions discharged as a result of this

> sub-paragraph) are to be discharged subject to the direction and control of the Secretary of State."

This to my mind supports the argument made by the Applicant that departmental exercise of power must always be subject to direction and control whether by a Minister in the case of devolved institutions or the Secretary of State in the case of direct rule.

[38] During oral submissions Mr McGleenan raised an argument based on the extension of time provision in the Northern Ireland (Ministerial Appointments and Regional Rates) Act 2017. This extends the time for filling ministerial offices in that "the Northern Ireland Act 1998 has effect as if in section 16A(3) for 14 days there were substituted 108 days". However, this provision cannot validate the decision making in this case. In fact reference to this provision highlights the problem. In the absence of any other legislative provision there is no framework in place to regulate the ongoing exercise of power during the current impasse.

[39] In my view the role of a department in decision making in relation to this type of planning decision is clear. The Department has decision making functions conferred upon it. However, the Department cannot be entirely detached from the Minister who heads it up. The level and extent of direction and control may vary depending on the circumstances however the Minister remains in overall charge. This is clear from the governing legislation, the 1998 Act, which reflects the premise behind the devolved institutions contained in Strand 1 of the Belfast Agreement. The principle is also given expression in Article 4 of the 1999 Order. In my view the status a department may have in terms of acting as a corporate body or defending proceedings does not diminish this position. If the Department's argument were correct there would have been no need to include the provisions of Article 4(1) in the 1999 Order. However, the requirement that the functions of the Department shall at all times be exercised subject to the direction and control of the Minister is clearly part of the statutory regime.

[40] The interpretation contended for by the Department also faces the formidable hurdle of democratic accountability. This was raised by Sir Paul Girvan in *An Application by Brigid Hughes* [2018] NIQB 30 at paragraphs 67-68:

> "[67] The 1998 Act thus did not envisage a lengthy vacuum of power in Northern Ireland. While it would have made political and legal sense for provision to have been made for a resumption of power by the Secretary of State in the situation such as that which currently prevails it would in my view require clear wording to provide the Secretary of State with power to exercise the powers of as yet un-appointed ministers of the devolved administration in the intervening period. In the past the problem was dealt with by the imposition of direct rule

> under express statutory provision. That express statutory power was abrogated and fresh primary legislation to introduce direct rule would be required. In the current situation there is in effect a form of political vacuum in which a department continues to function but without ministerial direction."
>
> [68] Undoubtedly a vacuum in which there are rudderless departments without ministers, the lack of a functioning Executive Committee and the absence of a sitting Assembly produces an essentially undemocratic system of unaccountable government provided effectively by senior civil servants who, as the respondent's counsel conceded, find themselves in an uncomfortable situation. The extent of their powers to take pressing policy decisions is unclear. The departments cannot arrive at a programme for government and the departmental cross cutting provisions do not work in the way envisaged under the Act. I have been informed there are likely to be a number of judicial review challenges in respect of determinations in other judicial review cases arising out of decisions made and decisions not made in the absence of ministers. The normal Westminster Convention is that civil servants do not make policy this being a matter for ministers who are accountable to Parliament. In Northern Ireland ministers are accountable to the Assembly but in the absence of an Assembly there is no democratic accountability in respect of civil servants exercising departmental powers."

[41] In response to this issue Mr May relies upon the pre-action response which I have set out at paragraph [16] herein. In particular Mr May relies upon the assertion that the provisions provide a mechanism for accountability of departmental decisions through the Assembly. That assertion is divorced from the facts of this case. In short, I fail to see how it is possible to have democratic accountability without a Minister in place and a functioning Executive and in particular a working Assembly.

[42] In my view the provisions of the 1999 Order are clear. The language is expressed in mandatory terms by inclusion of the word *shall*. The other words are also clear. However, the issue is really whether they should be qualified to take into account current circumstances. The Respondent is effectively asking the Court to read Article 4(1) of the 1999 Order to mean that *direction and control* only applies when a Minister is in place and *at all times* is also subject to that qualification. I am not attracted to this argument for the following reasons. Firstly, it offends the

ordinary and natural meaning of the provision. Secondly, it is not in keeping with the legislative context namely the 1998 Act which forms the basis for government in Northern Ireland and which provides for ministerial oversight. Thirdly, I do not consider that Parliament can have intended that such decision making would continue in Northern Ireland in the absence of Ministers without the protection of democratic accountability. Fourthly, in terms of effect, the rubric suggested by the Department would mean that civil servants in Northern Ireland could effectively take major policy decisions such as this one for an indefinite period. This is not a purdah situation where there is a short gap. Rather there is a protracted vacuum in existence pending the restoration of executive and legislative institutions or direct rule.

[43] Mr May also refers to the fact that the clear intention was that the Minister would take the decision. That fits with the public profile and political importance of this decision. This factual matrix is significant. Mr May explains that Article 4(3) of the 1999 Order provides legal authority to the Minister. This was clearly utilised in this case in that the Minister embarked upon the decision making process. The rationale given for a switch to departmental decision making seems to be the "public interest" in having a timely decision. I have sympathy with the point and I understand the frustration within the Civil Service that important decisions need to be made. That is a sentiment which I am sure is echoed by the public at large.

[44] I have also noted the argument made in the papers that the delay in concluding a determination of the Arc21 planning application is impacting upon the implementation of public waste and environmental development at national, European and international level. However, the entire programme for government is on hold whilst the current impasse continues. This is extremely unfortunate. However, I do not consider that the exigencies of the current situation are an adequate justification for the course that has been taken. The commendable motivation and aims I refer to cannot override the proper construction of the statutory regime which this case requires.

[45] The final point of substance made by Mr May is that he was in effect acting under the direction and control of the Minister. I have considered the evidence carefully in relation to this submission. Having done so, and adopting a generous approach, I cannot accept the argument made by Mr May that because the former Minister adopted a neutral position prior to the PAC hearing that that can in any way satisfy the direction and control requirement. Also Mr May cannot on the evidence come close to satisfying his own position that specific instructions were given or a policy was in place. This is too much of a stretch. The evidence falls well short of persuading me that this decision was made under the aegis of a Minister. Also, although not strongly pressed by either side, I cannot see that the decision making is validated on the basis of the *Carltona* principle given that the Minister was not *in situ* at the relevant time. Finally, this line of argument overlooks the considerable lapse of time since the Minister was engaged.

[46] On an overall view of the evidence, I cannot accept any of the arguments in defence of the vires challenge. I have no reason to doubt that Mr May has acted in good faith. However, as he recognises himself, decisions have to be taken in a lawful manner otherwise the whole structure of government is undermined. The Respondent's case fails on the particular facts as this was clearly a decision which the Minister intended to take and should take pursuant to Article 4(3) of the 1999 Order. I also decline to interpret the 1999 Order in a wide and open ended manner for the reasons I have given.

[47] Finally, I turn to the cross cutting point which I can deal with in relatively short compass. A Minister must act in accordance with the Ministerial Code. In particular where a decision is cross cutting it should be referred to the Executive Committee by virtue of paragraph 2.4 of the Ministerial Code. This obligation does not apply to departments by virtue of Section 28(1) and (10) of the Northern Ireland Act. As the Ministerial Code does not apply to civil servants this obligation does not even arise. The argument highlights the different obligations imposed upon Ministers and as such may be utilised in support of the vires challenge. However, in my view this ground of challenge does not survive in its own right on the particular facts of the case.

Overall Conclusion

[48] In the light of the above I have decided that the decision is unlawful on the vires ground. I will hear the parties as the appropriate remedy, costs and any other issues that arise.