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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

IN THE MATTER OF AN APPLICATION BY NO GAS CAVERNS LTD AND FRIENDS OF THE EARTH LTD FOR JUDICIAL REVIEW

Mr Conor Fegan (instructed by Tughans Solicitors) for the Appellants
Mr Tony McGleenan KC with Mr Philip McAteer and Ms Laura Curran (instructed by the Departmental Solicitor's Office) for the Respondent
Mr David Elvin KC and Mr Yaaser Vanderman (instructed by Carson McDowell, Solicitors) for the Notice Party

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Before: Keegan LCJ, Treacy LJ and Colton J

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

Introduction

[1] This is an appeal from a decision of Mr Justice Humphreys ("the trial judge") of 31 August 2023, in which he dismissed the appellants' judicial review which challenged the grant of a marine licence, a discharge consent, and an abstraction licence to Islandmagee Energy Ltd ("the notice party"). challenged the grant of a marine licence to Islandmagee Energy Ltd ("the notice party"). These consents were granted to progress with a project involving the installation of a five hundred million cubic metre underground gas cavern storage facility in Larne Lough. The Department of Agriculture, Environment and Rural Affairs ("DAERA") granted the licence in November 2021 at which time Mr Edwin Poots MLA was the Minister with responsibility who ultimately took the decisions.

[2] The judicial review proceeded at first instance on a myriad of grounds including grounds directly related to environmental matters and alleged breach of the Habitats Directive. In this court the challenge has distilled and been presented with sharper focus. We are simply asked to consider two grounds of appeal. They are as follows:

(i) That the learned judge erred in concluding that the impugned decisions were not decisions which had to be referred to the Executive Committee, pursuant to sections 20 and 28A of the Northern Ireland Act 1998.

(ii) That the learned judge erred in concluding that the community fund was not taken into account by the Minister.

[3] The appellants have not pursued any grounds of challenge to the planning merits or planning policy. Rather, the first ground of appeal raises a constitutional issue which is simply whether under the present constitutional arrangements in this jurisdiction the DAERA Minister was the wrong decision maker and deprived of the ministerial authority he might otherwise enjoy in favour of the Executive Committee.

[4] The second ground of appeal raises a question whether the decision is lawful due to consideration of a community fund of £1million which was voluntarily offered by the developers for the benefit of the local community in the locality of this development. This issue arises following the Supreme Court case of *R (Wright) v Resilient Energy Severndale Ltd* [2019] UKSC 53, where a planning application was quashed because the decision maker took into account a community fund when making a decision.

[5] The respondent defends this appeal on the basis of its case that the matters under consideration were not significant, controversial or cross-cutting and so there was no obligation on the Minister to refer the decision to the Executive Committee. In addition, the respondent maintains the position that whilst the community fund was referred to in the environmental impact statement, it was not treated as a material consideration. Therefore, the respondent maintains the case which succeeded at first instance that both limbs of challenge must fail.

Background

[6] The background has been comprehensively set out in the first instance judgment and so we will not repeat it all here. Suffice to say that there is a lengthy preamble to approval of this gas storage project.

[7] We can see that the proposal for gas storage under Larne Lough began in 2008 with planning permission granted for the terrestrial part of the project on 17 October 2012. The grant of the marine licence was thereafter approved by the Minister on 27 September 2021. This decision alongside the grant of a revised discharge consent and the grant of a revised abstraction licence resulted in the issue of draft licences on 12 October 2021, with the final versions of the discharge consent and abstraction licences being issued on 5 November 2021. Collectively, these decisions authorised the marine aspects of a proposed development of seven caverns under Larne Lough for the purposes of storage of natural gas.

[8] For the benefit of this court the parties have provided a schedule of facts which we have found useful and which we replicate here. The following summary of relevant events sets the context of the case and its progression since 2008 as follows:

18 November 2008	RPS Consulting Engineers, planning agents acting on behalf of the applicant for planning permission, wrote to the then Department of the Environment seeking a scoping opinion for the project.
January 2009	Department of the Environment issues scoping opinion setting out the matters to be covered in an environmental statement.
24 March 2010	Application for planning permission for the terrestrial parts of the project submitted under the Planning (Northern Ireland) Order 1991 to the Department of the Environment, the planning authority at the time. The application was accompanied by an environmental statement which, amongst other things, referred to the community fund.
26 August 2011	Department of the Environment requests further environmental information under regulation 15 of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1995.
24 November 2011	Further environmental information provided in an addendum environmental statement.
17 October 2012	Planning permission granted by the Department of the Environment.
22 October 2012	Applications for marine licence, discharge consent, and water abstraction licence submitted to the Department of the Environment. It was accompanied by the same environmental statement and addendum as was submitted as part of the application for planning permission.
10 July 2014	Draft water abstraction licence, discharge consent, and marine construction licence issued by the Department of the Environment for comment.
14 November 2014	Water abstraction licence and discharge consent issued in final form. The marine construction licence was never issued in final form.

20 June 2018	Following reports in the media about the status of the project, DAERA wrote to the notice party asking for a meeting to discuss the status of the project.
30 July 2018	Meeting held between departmental officials and the notice party to discuss the status of the project.
20 August 2018	Following the meeting held on 30 July 2018, DAERA wrote to the notice party indicating that if the marine construction licence application was going to be progressed, environmental information needed to be updated. The Department also indicated that the water abstraction licence and discharge consent would need to be reviewed.
31 October 2019	A package of further environmental information is submitted by RPS Consulting Engineers on behalf of the notice party to DAERA. This included an updated environmental conditions report and a shadow habitats regulations assessment.
9 December 2019	Further revisions of the updated information were provided by RPS Consulting Engineers to DAERA.
16 December 2019	Revised application form for a marine construction licence submitted to DAERA.
20 December 2019	Public consultation on the application commenced.
23 December 2019	DAERA wrote to bodies with a statutory remit inviting comments. This included the Council for Nature Conservation and the Countryside.
6 February 2020	Council for Nature Conservation and the Countryside returned its objection to the project to DAERA.
7 February 2020	Alliance Party wrote to DAERA setting out a party position in objection to the application.
10 February 2020	Sinn Féin announced party opposition to the proposal after having written to DAERA.
19 February 2020	DAERA again wrote to bodies with a statutory remit inviting comments.
3 March 2020	Minister for Agriculture, Environment, and Rural Affairs issued a response to an Assembly Written Question which referred to the community fund.

6 March 2020	RPS Consulting Engineers submit to DAERA revised application forms for discharge consent and an abstraction licence. These were accompanied with relevant application documents.
26 March 2020	The Green Party wrote to DAERA setting out a party position in objection to the application for a marine construction licence, supporting submissions made by the Northern Ireland Marine Taskforce.
27 March 2020	Public consultation on the marine construction licence application closed. Over 410 responses with nearly 600 queries were raised. Objections were received from a range of bodies including Friends of the Earth, Ulster Wildlife, the Royal Society for the Protection of Birds, the National Trust, the Northern Ireland Marine Taskforce, Divers Action Group Northern Ireland, Northern Ireland Fish Producer Organisation, and the Northern Ireland Scallop Fisherman Association. John Stewart MLA, UUP, also wrote in objection to the proposal.
7 July 2020	RPS Consulting Engineers provided DAERA with a spreadsheet breaking down and responding to each of the consultation responses received.
21 October 2020	Chief Executive Officer of Infrastrata Limited wrote to the First Minister and the Minister for Agriculture, Environment, and Rural Affairs about the proposal, enclosing a report from Oxford Analytica which, amongst other things, referred to the community fund.
16 December 2020	Public consultation on the applications for discharge consent and abstraction licence commenced.
20 January 2021	Public consultation on the applications for discharge consent and abstraction licence ended.
31 March 2021	Ministerial submission sent to the Minister for Agriculture, Environment, and Rural Affairs for a decision on the three related applications.
27 September 2021	Email from ministerial private office confirming that the Minister for Agriculture, Environment, and Rural Affairs agreed with Option 1 in the submission.
12 October 2021	Draft consents issued to the notice party for comment.

4 November 2021	Discharge consent and water abstraction licence issued in final form.
5 November 2021	Marine construction licence issued in final form.

[9] Furthermore, a backdrop to this case is provided by measures taken within our jurisdiction to tackle climate change. An agreed metric in this case is the path to net zero targets by 2050 which followed the signing of the Paris Agreement in 2016 and ensuing instruments. As a result, Northern Ireland has alongside the rest of the United Kingdom committed to net zero targets by 2050. This involves the phasing out of fossil fuels and the promotion of renewable energy. This policy drive found expression in the Northern Ireland Energy Strategy issued in December 2021 and more recently received legislative imprimatur in the Climate Change Act (Northern Ireland) 2022 ("the 2022 Act") which the Northern Ireland Assembly passed on 6 June 2022.

[10] The 2022 Act background and objectives as set out in the explanatory notes provides a useful synopsis of the current position and the history:

> "**Background and Policy Objectives**
>
> 4. Climate change is a defining crisis of our time on a global and national scale. In June 2019, the UK amended the Climate Change Act 2008 to set a 'net zero target' which commits the UK to reduce net greenhouse gas emissions by "at least" 100 per cent below 1990 levels by 2050. While the Climate Change Act 2008 extends to Northern Ireland, specific greenhouse gas emission reduction targets for Northern Ireland are not included in it, or any other legislation.
>
> 5. In order to address this legislative gap, the Northern Ireland Executive, through the *New Decade, New Approach* agreement, made a commitment that it will 'introduce legislation and targets for reducing carbon emissions in line with the Paris Climate Change Accord.' Under the Climate Change section at Appendix 2 of that agreement it further states that 'The Executive should bring forward a Climate Change Act to give environmental targets a strong legal underpinning.'
>
> 6. Northern Ireland is not immune to the severity of the impacts of a changing climate, and it is important that it plays its part in the global and UK effort to tackle climate change. The Act aims to achieve this by creating a

> framework that will establish a pathway to achieving emission reduction targets which will ensure that Northern Ireland makes a contribution to the achievement of the UK 2050 Net Zero target. In doing so this will help to ensure that Northern Ireland develops a greener, low carbon circular economy in which the environment can prosper and be protected."

It is within this factual and policy context that we consider the two issues raised on appeal.

Ground 1 – Referral to the Executive Committee?

[11] This first ground of appeal requires consideration of section 20 of the Northern Ireland Act 1998 ("the 1998 Act") as amended by the Northern Ireland (St Andrews Agreement) Act 2006 ("the 2006 Act") and the Executive Committee (Functions) Act (Northern Ireland) 2020 ("the 2020 Act").

[12] In particular, the 2020 Act provided for amendment of section 20 which now reads as follows:

> "**20 The Executive Committee**.
>
> (1) There shall be an Executive Committee of each Assembly consisting of the First Minister, the deputy First Minister and the Northern Ireland Ministers.
>
> (2) The First Minister and the deputy First Minister shall be chairmen of the Committee.
>
> (3) The Committee shall have the functions set out in paragraphs 19 and 20 of Strand One of the Belfast Agreement.
>
> (4) The Committee shall also have the function of discussing and agreeing upon—
>
> (a) where the agreed programme referred to in paragraph 20 of Strand One of that Agreement has been approved by the Assembly and is in force, any significant or controversial matters that are clearly outside the scope of that programme;
>
> (aa) where no such programme has been approved by the Assembly, any significant or controversial matters;

(b) significant or controversial matters that the First Minister and deputy First Minister acting jointly have determined to be matters that should be considered by the Executive Committee.

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

(6) Quasi-judicial decisions may be made by the Department of Justice or the Minister in charge of that Department without recourse to the Executive Committee.

(7) Decisions may be made by the Department for Infrastructure or the Minister in charge of that Department in the exercise of any function under—

(a) the Planning Act (Northern Ireland) 2011 (except a function under section 1 of that Act); or

(b) regulations or orders made under that Act, without recourse to the Executive Committee.

(8) Nothing in subsection (3) requires a Minister to have recourse to the Executive Committee in relation to any matter unless that matter affects the exercise of the statutory responsibilities of one or more other Ministers more than incidentally.

(9) A matter does not affect the exercise of the statutory responsibilities of a Minister more than incidentally only because there is a statutory requirement to consult that Minister."

[13] Further, section 28A of the 1998 Act ties decision making to the Ministerial Code. It provides as follows:

"(1) Without prejudice to the operation of section 24, a Minister or junior Minister shall act in accordance with the provisions of the Ministerial Code.
…
(5) The Ministerial Code must include provision for requiring Ministers or junior Ministers to bring to the attention of the Executive Committee any matter that

> ought, by virtue of section 20(3) or (4), to be considered by the Committee.
>
> …
>
> (10) Without prejudice to the operation of section 24, a Minister or junior Minister has no Ministerial authority to take any decision in contravention of a provision of the Ministerial Code made under subsection (5)."

[14] For present purposes paragraph 2.4 of the Ministerial Code is highly relevant. It provides as follows:

> "Any matter which:-
>
> (i) cuts across the responsibilities of two or more Ministers;
>
> …
>
> shall be brought to the attention of the Executive Committee by the responsible Minister to be considered by the Committee.
>
> Regarding (i), Ministers should, in particular, note that:-
>
> - the responsibilities of the First Minister and deputy First Minister include standards in public life, machinery of government (including the Ministerial Code), public appointments policy, EU issues, economic policy, human rights, and equality. Matters under consideration by Northern Ireland Ministers may often cut across these responsibilities.
>
> - under Government Accounting Northern Ireland, no expenditure can be properly incurred without the approval of the Department of Finance and Personnel."

[15] Finally, we reference paragraph 19 of Strand One of the Belfast Agreement which states:

> "The Executive Committee will provide a forum for the discussion of, and agreement on, issues which cut across the responsibilities of two or more Ministers, for prioritising Executive and Legislative proposals and for recommending a common position where necessary, (eg in dealing with external relationships)."

[16] Self-evidently the 2006 Act made significant changes to the constitutional arrangements in Northern Ireland following an agreement reached by the UK and Irish governments after multi-party talks in St Andrews in 2006. A central feature of the agreement as it related to Strand 1 issues (ie the functioning of the Executive) was the requirement that certain important decisions would have to be taken at Executive level rather than by being taken by any individual minister. The purpose of this was to avoid a minister making a unilateral decision or undertaking a solo run on an issue of general importance. This meant that the Executive Committee was to be the forum for the discussion of, and agreement on, issues which cut across the responsibilities of two or more ministers.

[17] The 2020 Act altered the landscape further following a decision of the Court of Appeal in *Re Buick's Application* [2018] NICA 26 in relation to a planning application for an incinerator at Mallusk. The decision of the Court of Appeal was that a planning application should be referred to the Executive Committee when significant or controversial. Specifically, the Court of Appeal found as follows at paras [52]-[54]:

> "52. When, however, looking at the extent of the power given to departments the context of the Agreement and the surrounding features of the 1998 Act impose significant limitations. We are satisfied that the decision in this case is a cross-cutting decision involving the interests of DAERA because of its waste management function and FMDFM because of the impact on compliance with EU Directives. Paragraph 19 of the Agreement provides that 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. Section 20(3) expressly attributed that function to the Executive Committee and Section 28A of the 1998 Act provides a mechanism to ensure that the authority of ministers is limited accordingly. There is no support in the Agreement for the suggestion that cross-cutting matters can be dealt with by departments in the absence of ministers and the allocation of responsibility for such matters within the 1998 Act to the Executive Committee can only be properly interpreted as excluding the departments from the determination of such matters.
>
> 53. We also consider that the issue of incineration as a means of waste disposal is controversial having regard to the political views expressed within the papers and that the issue is significant having regard to the importance of this issue for waste management policy in Northern Ireland and compliance with EU Directives. Section 20(4)

> provides that the Executive Committee shall have the function of discussing and agreeing upon significant or controversial matters that are clearly outside the scope of the agreed programme referred to in paragraph 20 of Strand One. There is no agreed programme. In certain obiter remarks of mine in *Central Craigavon Ltd's Application* I suggested that not all significant and controversial matters in those circumstances might need to be referred to the Executive Committee. With the benefit of further argument I am satisfied that the purpose of this provision is to ensure that significant and controversial matters are brought before the Executive Committee unless they had previously been agreed within the context of the programme referred to in paragraph 20 of Strand One.
>
> 54. We consider, therefore, that this was a significant and controversial matter which again required determination by the Executive Committee. It would be contrary to the letter and spirit of the Agreement and the 1998 Act for such decisions to be made by departments in the absence of a Minister."

[18] To address this decision and its potential impact on planning decision making, the provisions of the 2020 Act imported a requirement that a referral must affect the exercise of statutory responsibilities "more than incidentally."

Arguments on appeal

[19] Applying this analysis to the above legal framework Mr Fegan argued that the Minister erred in approving the gas storage project because it was significant, controversial and cross-cutting and so should have been referred to the Executive Committee.

[20] Furthermore, Mr Fegan made the case that consideration of whether the project was significant, controversial, and cross cutting were matters of law rather than matters of fact. In the alternative Mr Fegan maintained that even if this is predominantly an area of ministerial judgment, given the constitutional points at issue, any review should be a high intensity rationality review rather than a lower intensity *Wednesbury* review. Mr Fegan also emphasised the point that approving the project had the effect of potentially locking in fossil fuel dependency for 40 years which conflicted with a climate policy directed at net zero by 2050.

[21] In reply, Mr McGleenan argued that the consideration of these issues required rationality rather than legality review. He maintained that the Minister's position could not be described as irrational in any sense. In this regard he relied upon the

affidavit evidence of Ms Claire Vincent, Principal Scientific Officer in DAERA. She swore the principal affidavit on behalf of the respondent, to justify the Minister's actions.

[22] Without rehearsing the details of this lengthy and comprehensive piece of evidence we can see having considered the contents of the affidavit that Ms Vincent offers support for the Ministerial decision making in this case in each and every respect. It is sufficient to refer to following points which derive from Ms Vincent's affidavit and which Mr McGleenan reiterated in argument before us as follows:

(i) There was no discussion at Executive level on any of the consents granted for the project;

(ii) No previous applications for marine licences had been the subject of consideration by the Executive;

(iii) Although the issue was the subject of questions and answers at Assembly level, no MLA sought to have the matter escalated to the Executive Committee;

(iv) The planning application for the terrestrial aspect of the project was treated as a regular application, not as one of regional significance, and was not referred to the Executive;

(v) The Minister was aware of the level of local opposition but did not regard that as meeting the threshold to be treated as 'controversial';

(vi) In February and March 2021, other Ministers, including Robin Swann in Health, Deirdre Hargey in Communities and Conor Murphy in Finance, all received correspondence from representatives of the first appellant asserting that the matter ought to be referred to the Executive for determination but none of them sought to do so.

[23] To complete the evidential picture we record the fact that Mr Elvin supported the Minster's decision on behalf of the notice party and urged us to uphold it. He stressed that the impugned decision is supplementary to the grant of the terrestrial planning permission in 2012 and that the development would provide substantial benefits to the community by way of jobs, investment, energy security and the designated £1m community fund.

Consideration

[24] In order to properly analyse the questions which arise for adjudication in this case, we begin with an examination of what the Ministerial advice was and what ensued in terms of decision making. We do so cognisant that the new section 28A(10) of the 1998 Act makes unequivocally clear "… that a minister or junior minister has no ministerial authority to take any decision in contravention of a provision of the Ministerial Code." This is the standard by which the lawfulness of the ministerial decision must be assessed.

Trajectory of ministerial advice and decision

[25] The core advice document penned by Ms Vincent is dated 31 March 2021 and is addressed to Edwin Poots MLA. We highlight the core elements of this as follows. First, the issue highlighted in the advice document is a decision on DAERA statutory consents (Application for a Marine Construction Licence and review of extant Discharge Consent and Abstraction Licence in respect of the Islandmagee Gas Storage Project).

[26] The recommendation from Ms Vincent is expressed in the following terms:

> "Recommendation: that you:
>
> (i) Note submission; and
>
> (ii) Approve the issue of the environmental consent decision, draft marine licence, reviewed abstraction licence and discharge consent and the response to the consultation (question and answer document, which is the recommended (Option 1): or
>
> (iii) Agree to refer the environmental consent decision and draft marine licence to the Executive; or
>
> (iv) Agree to hold a public inquiry on the application for the marine licence, or explore options for a wider joined up public inquiry with the utility regulator; or
>
> (v) Agree to delay your decision until further information is available from the outcome of the DFE 2021 Energy Strategy, which may be more definitive on the role of gas or storage caverns on the Northern Ireland glide path to net zero."

[27] The advice submission goes on to consider the background to the application. In doing so, it specifically refers to the fact that "the project has attracted significant opposition from local residents, ENGOs and politicians." It also refers to the

previous actions of the Minister by reminding him that "you have answered a number of Assembly questions on the matter and are due to answer an oral question on 12 April 2021."

[28] Specific reference is then made to the appellants in this judicial review in this way:

> "(vi) A community group called No Gas Caverns has been actively opposing the project. The group has written to a number of political representatives highlighting environmental and socio-economic concerns and calling for the decision to be delayed until a decommissioner of last resort, a UK public body who will accept residual liability for the project, is identified. The environmental matters have been considered in the determination process and can largely be addressed through conditions in the DAERA consent.
>
> (vi) The letters also call for the project to be referred to the Executive and seeking your/Executive support for a public inquiry. These matters are addressed as options you wish to consider.
>
> (vii) Although the environmental consent to marine licence are significant milestones in this project, there are still substantial issues to be resolved outside the DAERA consents. The utility regulator and the landowner – the Crown estate – have indicated that the marine licence is required before they will fully engage on their respective issues (further construction licence, and financial arrangements around residual liabilities in the case of abandonment). In addition, the HSENI has advised that there are substantial requirements outstanding under the COMA legislation."

[29] In the advice the consultation issues as well as the consultation responses are also set out. The consultation responses refer to environmental issues at para [17] which reads, *inter alia:*

> "Climate change considerations were considered, and it appears that while the UK plans to reduce its reliance on fossil fuels, transition will take a significant time. Gas will continue to play an important part in the UK fuel mix for some years to come."

[30] We also note para [19] which reads:

> "19. To summarise, officials are confident that the authorisations have appropriate controls in place to mitigate any impacts and these will be sufficient to ensure protection of the habitat from which water is abstracted and into which the discharge is being made. The project is also consistent with current energy policy and can potentially contribute to the move to net zero, particularly where the caverns can be repurposed for other gases."

[31] Reference is then made to consideration of various options including approval of Option 1 which the Minister ultimately followed. Option 2 was referral to the Executive (the narrative of this is redacted). Option 3 was a public inquiry (the narrative in relation to this is partially redacted). Option 4 was to await further information particularly around the outcome of the Department for the Economy Energy Strategy which "may be more definitive on the role of gas storage caverns on the Northern Ireland glide path to net zero."

[32] From paras [23]-[28] of the advice there is a substantial part of the submission which is redacted. We have not seen the unredacted documents but were told that the redaction was based on legal professional privilege. At this point we note that a previous application to strike out aspects of the case relating to the community fund on the basis of redacted advice was rejected. It follows that the respondent was obviously content to rely on the documentation that we have seen by way of evidential support for its case, and we proceed on that basis.

[33] We also note that the attachments to the submission were:

Annex A	Environmental consent,
Annex B	Draft Marine Licence,
Annex C	Q&A document,
Annex D	Draft Water Discharge Consent,
Annex E	Draft Water Abstraction licence,
Annex F & Annex G	Legal Advice in relation to referral to the Executive Committee and a public inquiry.

We pause to observe that we have obviously not seen the legal advice referred to at Annex F and G but can take judicial notice of the fact that advice was necessary on

the issues of whether there should be referral to the Executive Committee and/or the necessity of a public inquiry.

[34] At this point we turn to the environmental impact consent decision of March 2021 which was annexed to the Ministerial submission as shown above. This is an important decision because of the contents of paragraph 7.20 which refers to the community fund. It reads as follows:

> "**7.20 Social and Economic**
>
> 7.21 As Islandmagee lacks the infrastructural requirements to supply natural gas to each household, the local community will receive few direct benefits from the proposed project. Job opportunities post-construction are also relatively small. As a compensatory measure, the company proposed to set up a community benefit scheme as part of the overall proposal. A community fund of £1m has been created by Islandmagee Energy Ltd, with the aim of supporting local projects and initiatives over the life of the project. The Committee is responsible for the allocation of the Trust fund and will act as a selection panel to fairly and appropriately allocate investment."

[35] Some ensuing actions and ministerial pronouncements are also germane to our consideration as follows. First, as indicated above, questions were asked about this project in the Assembly. In answer to these questions, it is of particular note that on 13 April 2021, the Minister stated in the Assembly as follows:

> "I recognise that the proposed development is unpopular with some local residents. That in itself does not mean that it is controversial under the legislation on Executive referral. While it may be controversial locally, that does not necessarily mean, in terms of the measures for a Minister to have to take it to the Executive, that it is controversial."

[36] Further, we note that in all of the correspondence with other ministers which is referenced, none of them raised the issue of Executive referral. In summary, we can see that Minister Dodds, Mr Stewart Dickson MLA and the First Minister all wrote in relation to issues around this project but did not raise any concern that the Minister should be referring the matter to the Executive for its consideration and approval. Ministers Hargey and Swann also received correspondence in relation to the project and simply provided it to the DAERA Director of Marine and Fisheries Division for answer. Neither of these ministers specifically raised the issue of Executive referral with the Minister.

[37] Next in the chain is a further submission from Ms Vincent to the Minister in August 2021. This submission refers to the DAERA consents for Islandmagee Gas Storage Project. It is clear from this submission that the Minister at this stage was being alerted to the fact that there was a risk in delaying the decision on the DAERA consents until the 2021 Energy Strategy was published (possibly November 2021) as that might have resulted in a legal challenge from the applicant.

[38] There is also relevant correspondence from the Minister to Gordon Lyons the Minister for the Economy in August 2021, which reads as follows:

> "I am currently considering an application for a marine licence for a proposed gas storage project at Islandmagee, for which a secure, sustainable and affordable supply of energy is a consideration. There are a number of synergies between the work of our respective departments around climate change correspondence and green growth, and I am aware that work has been progressing on the development of 2021 Energy Strategy to decarbonise the Northern Ireland Energy Sector by 2050. I would welcome an opportunity to meet with you to discuss these matters."

[39] Interestingly, the lines to take which the Minister was given at this point refer to the strategic context as follows:

> "I am conscious that the Islandmagee Gas Storage Project is a major infrastructure project … the strategic context for energy development in Northern Ireland is being set via a new energy strategy … I am aware that the Islandmagee Gas Storage Project is unpopular with local residents."

[40] In the event, by an email of 27 September 2021 the Ministerial decision was issued in the following simple terms:

> "The Minister has seen and read your submission of 23 March 2021, and has agreed the recommendations with the following comment:
>
> Option 1 – on the basis that appropriate controls are in place to mitigate environmental impacts."

[41] This is not the end of the chain. Rather, there followed a memo of 27 September 2021 from the Minister to Gordon Lyons referring to an opportunity to meet to discuss these matters. By virtue of this we can see that the Minister was clearly cognisant of the policy backdrop and the emerging Energy Strategy.

[42] The reply from Mr Lyons is dated 20 October 2021 and reads as follows:

> "Thank you for your request for a meeting to discuss the proposed gas storage project at Islandmagee. I note that your department has progressed Islandmagee Energy Ltd's application for a marine licence and associated consents for the project and issued a draft of the licence. I will continue to watch the project's progress with interest but feel that a meeting to discuss the marine licence in light of the emerging Energy Strategy for Northern Ireland is not necessary at this stage. My officials will, of course, continue to liaise closely with DAERA officials on any developments, and the Energy Strategy proposals will involve correspondence with Executive Ministers."

[43] It is within the above decision-making framework that we must consider whether the appellants' arguments that this project was significant, or controversial or cross-cutting can be made good.

Significant or controversial/cross cutting

[44] It was common case that the first statutory provision in issue in this case is section 20(4)(aa) of the 1998 Act. Thus, we must apply the language of this section to the facts of this case.

[45] The relevant section clearly refers to any significant <u>or</u> controversial matter. Thus, applying ordinary and natural meaning to the provision it seems clear to us that a matter does not have to be both significant and controversial to require referral to the Executive Committee. It can be significant or controversial or both.

[46] In addition, paragraph 2.4 of the Ministerial Code (alongside section 28A of the 1998 Act) is clear that a matter <u>must</u> be referred if it is cross-cutting in the sense of affecting the exercise of the statutory responsibilities of more than one minister more than incidentally.

[47] In practice, we can see that it is likely that many of the projects which the Executive Committee will be required to determine rather than an individual minister, may well involve all of the above elements of being significant, controversial and cross-cutting but that is not necessarily so on the basis of statutory construction which derives from the ordinary and natural meaning of the statute.

[48] At this point we return to the question whether determination of these issues involve questions of fact or law. Mr Fegan has urged us to categorise ministerial decision making in the field of whether a project is significant and controversial as matters of law. Mr McGleenan and the notice party take issue with this analysis and

maintain that only rationality review is available. Hence in the alternative, Mr Fegan accepts that if determination on these issues are matters of judgment, then the *Wednesbury* irrationality standard should be a higher intensity of review.

[49] The outcome we reach on this question, as far as significant and controversial goes, is informed by the context in which the issue arises. That context is the exercise of ministerial power in relation to a permission for a marine licence, discharge consent and abstraction licence. Notwithstanding Mr Fegan's erudite submissions we do not think that the review of this ministerial power should be categorised a question of law or correctness review. In our view, that is a step too far and detracts from the freedom that should be afforded within the usual good faith parameters for ministers to exercise their decision-making function. Ministers should have the ability acting in good faith to determine whether matters are significant, or controversial matters within their portfolio. This is the approach taken by all courts dealing with this issue in our jurisdiction to date and was the approach of the trial judge. We agree with the trial judge's analysis found at para [63] of his judgment and proceed on the basis that this is a rationality review.

[50] That said, we agree with the submissions Mr Fegan which were not seriously challenged that a higher intensity of review is required given the constitutional context. The following well known passage from *Kennedy v Charity Commission* [2015] AC 455 at para [51] facilitates this approach:

> "The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principles. … The nature of judicial review in every case depends upon the context."

We proceed on this basis.

[51] Having established the form of this review we turn to consider whether the facts of this case can establish that the issue was significant and controversial as Mr Fegan contends. There is a danger of over analysis which should be avoided as we consider that this exercise should be open ended.

[52] An obvious starting point is the Oxford Dictionary definition of significant and controversial:

> "Significant means sufficiently great or important to be worthy of attention; noteworthy."
>
> "Controversial means giving or likely to give rise to controversy or public disagreement; subject to (heated) discussion or debate; contentious."

[53] How these words relate to a particular project is a matter of fact and degree, involving some element of judgment by the decision maker within the context of what arises in a particular ministerial portfolio. This is broadly the approach that Scoffield J applied to this interpretative exercise in *Safe Electricity* [2021] NIQB 93 (which the trial judge followed) and which we adopt.

[54] That case concerned the approval of a cross border electricity interconnector. In this context Scoffield J considered the issue of whether the project was significant and controversial. In relation to significance the judge said this at para [73] of his judgment:

> "[73] … In my judgment, the term "significant" is not merely used as the antonym of "insignificant." Rather, it relates to a matter of some importance and noteworthiness, judging that against the gamut of other responsibilities the Minister has. Significant might arise because of the financial implications of the matter (either in terms of cost or benefit) or because of the effects it will have on citizens in Northern Ireland. It is also conceivable that an otherwise run-of-the-mill decision might be significant because of its symbolic or precedent value. The category of 'significant' decisions is likely to be open-ended.
>
> [74] Whether a decision or matter is 'significant' within the meaning of that term in section 20(4) is a matter of fact and degree, involving some element of judgement. In the first instance, that will be a question of judgement for the minister or department making the decision. That minister – with responsibility for the decision or policy in issue – should be best placed to determine whether the matter is one which is significant or not. However, the minister or department who is making the decision cannot have the final say on the matter. In particular, a minister cannot escape the plain purpose and intention of the statutory scheme by disclaiming the obvious significance of a matter with which they wish to deal. The primary forum for establishing whether a matter is significant where there is legitimate contention about this ought to be the Executive Committee itself."

[55] Interestingly, in the *Safe Electricity* case at para [78] the judge indicates how the Minister in that case was quoted as saying that the interconnector project "remains of strategic importance for our island economy." She had also referred to the Planning Appeals Commission's ("PAC") consideration of the applications which, again, refer to strategic importance. She went on to describe a number of benefits to the project.

The advice to the Minister from her officials on presentational issues was that the question of planning permission for the interconnector had been a matter of high public and political interest. Hence, whilst the facts are different, the interpretative principles have application to the instant case.

[56] Staying with *Safe Electricity* we note that Scoffield J found the question whether controversy was established somewhat more difficult. However, he said this at para [82]:

> "[82] Again, I consider that this is primarily a matter for the responsible Minister to consider in the first instance, making a dispassionate and good-faith assessment of whether the issue they are considering is controversial in the sense intended by the statute."

[57] Therefore, Scoffield J found that on balance the Minister's decision should be considered to involve a controversial matter notwithstanding the absence of any significant objection to it within the Executive Committee. In light of the sustained and widespread public campaign against the grant of permission on grounds which were rational given the conclusions of the PAC he considered that any conclusion that the grant of planning permission for the interconnector was not controversial would be *Wednesbury* unreasonable if a good faith assessment of that issue was being made for the purpose of determining whether the issue should be referred to the Executive Committee for consideration. We agree with that approach.

[58] Of course, this case is not on all fours with the interconnector case. However, there also are factors in the instant case which cause us concern as to the correctness of the Minister's ultimate decision on whether the gas caverns project was significant or controversial which we will explain as follows.

[59] First is the striking yet simple fact that there is no explanation from the Minister himself as to why this project was not considered significant or controversial. To our mind this creates a significant gap in this particular case given the issues we have to decide. The paucity of explanation for ministerial decision making on an issue which clearly required extensive advice and consideration over a period of time limits us in the exercise of our supervisory function.

[60] That is not the end of the matter as we must look at the evidence on this issue. To that end we have carefully considered whether the affidavit evidence is enough to fill the gap we have identified. The issue is dealt with in paras [402]-[405] of Ms Vincent's affidavit. From reading this it is also striking, in our view, that at para [403] when dealing with whether the proposal is significant and controversial, Ms Vincent deposes that the considerations were around the publicity and level of public debate which was primarily in the local area of Islandmagee. On any read this evidence does not deal with the significance of the project at all and is limited to

the question of controversy. That begs the question whether the significance of this project was overlooked, implicitly accepted, or implicitly rejected.

[61] In raising these gaps we have been conscious of the respondent's arguments which guard against excessive legalism in determining such issues, see for example *Mansell v Tonbridge & Malling Borough Council & Others* [2017] EWCA Civ 1314. However, this is not a case where we are analysing a decision-making letter from local councillors or inspectors on appeal. This is a case involving ministerial decision making at a high level where we as a supervisory court expect to be able to glean the rationalisation for the decision on the core elements.

[62] There is more to go on as to the question of controversy in the affidavit evidence. At para [404] Ms Vincent rightly points out that none of the other Executive Ministers required the issue of Executive Committee referral to be taken up by the Minister. The assertion that is made on this issue is found at para [405] which says, "the minister was advised on the issue of Executive referral and in making the decision, he determined that the matter did not require Executive approval and that it was not significant, controversial or cross-cutting."

[63] We have difficulty with this justification applying the approach that significance is an open-ended concept which must be judged by reference to the facts of this case. In the context of this case there was evidence that the impugned decisions were, on the face of it significant for two main reasons skilfully advanced by Mr Fegan. One is the strategic and economic significance of the project. Plainly, there is force in the submission that the strategic significance of the project for energy security and supply in Northern Ireland. This argument was specifically advanced by the notice party who is the successful developer, as part of the justification for the project.

[64] The use of the phrase "strategic significance" is also found throughout the paperwork that we have seen by both those who wished to proceed with the project and the officials who promoted it during the application process. The Ministerial advice refers to "a strategic infrastructure project of this scale" when advising that it triggered the Marine Works (Environmental Impact Assessment) Regulations 2007 as amended in terms of public participation requirements. A number of other examples illustrate the point that this was viewed as a large-scale important project as follows:

From the environmental impact statement:

> "There are currently no underground gas storage facilities in Northern Ireland. Islandmagee Storage Limited believe the proposed facility at Ballylumford will be an important asset locally, regionally and nationally to ensure the efficient functioning of the gas market and security of supplies."

> "A gas storage facility at Islandmagee would be important to security of supply, safety and health in Northern Ireland."
>
> "The gas storage facility will benefit almost every resident in Northern Ireland by ensuring stability in supply of both natural gas and of electricity which is largely generated from combustion of natural gas within the province."

From Islandmagee Energy, 21 October 2020:

> "As we move away from fossil fuels to create a new cleaner environment, gas storage will play a critical role in this transition and Northern Ireland has an opportunity to be at the forefront of this once in a generation transition.
>
> The report (Oxford Analytica) enclosed illustrates the benefits of the project beyond the strategic enhancement to energy security, supply and resilience for Northern Ireland as mentioned above."

From The Oxford Analytica report, October 2020:

> "The location of the proposed Islandmagee facility in Northern Ireland is strategically and operationally significant as neither Northern Ireland nor Ireland have any gas storage capacity."

[65] Furthermore, the project was clearly of economic significance to Northern Ireland. Again, this issue was raised by the notice party in a letter to the First Minister, it was covered in the environment statement, and it was set out very clearly in a report from Oxford Analytica contained within the papers.

[66] The second factor which, in our view, brings this project within the ambit of significance was the impact on current and emerging climate policy. Mr Fegan is undoubtedly correct that officials acknowledged that the role which gas storage would have on the "glide path to net zero" was a critical issue in the run up to the decision. This as we have said was an agreed metric in the case.

[67] In fairness to the Minister this issue is specifically referenced by him when he corresponded with Minister Lyons and referred to the emerging Energy Strategy. In any event, concerns about the effect of approving a large fossil fuel project for current and emerging climate change policy was raised by many objectors. These

were not just local residents and included a statutory consultee, The Council for Nature Conservation and the Countryside. The issue was also covered extensively in the decision-making documents with reference to the relevant policy documents dealing with the glide to net zero. Therefore, there was sufficiently clear information available that approving the project had the effect of potentially locking in fossil fuel dependency for 40 years to come which was of obvious significance to a climate policy directed at net zero by 2050.

[68] Without any further explanation by the Minister, his decision that a strategic project of significance for all citizens in Northern Ireland in terms of security of energy was not significant is problematic. Without explanation from the Minister and a sparse explanation *ex post facto* by Ms Vincent, we consider that the decision not to refer to the Executive Committee is open to challenge.

[69] It is clear to us that the trial judge did not have the level of argument on this issue that we have had probably because of the myriad grounds that were pursued. That, we think, explains his analysis of this issue at paras [66]-[67] at first instance. The trial judge also observed that what we are dealing with is a matter of evaluative judgment with which a court will be slow to interfere. That is correct up to a point as a supervisory court must be able to understand the basis for any decision in order to assesses its lawfulness and rationality. We have been able to analyse this issue in more detail and have reached a different conclusion from the trial judge.

[70] Whether or not a marine licence has been referred to the Executive Committee before cannot be the touchstone for proper decision making. Further, it matters little that the terrestrial planning was granted in 2012 given that matters have moved considerably since then not least in terms of commitments to reducing fossil fuels which now find expression in the Energy Strategy and the 2022 Act, we discuss above. To our mind that may explain why there was no discussion at Executive level on any of the consents granted for the project in the past.

[71] What is of primary concern to us is the lack of rationalisation for this decision by the Minister. In the context of this case, it is necessary to scrutinize even more closely the rationale for a decision which on the face of it conflicts with international and domestic standards on climate change without explanation. That is particularly so given the clear expressions of intent found in Northern Ireland in strategy documents following the *New Decade New Approach* agreement. In this context, we consider that the decision not to classify this project as significant crosses the threshold of irrationality where it simply does not add up or, in other words, there is an error of reasoning which robs the decision of logic: see *R v Parliamentary Commissioner for Administration, ex parte Balchin* [1996] EWHC Admin 152.

[72] Next, we turn to the other elements which were debated namely whether this was a controversial project and whether it was cross cutting.

[73] As to whether the project was controversial, we agree with Scoffield J's formulation in *Safe Electricity* that 'controversial' is not just satisfied if there have been objections to a project. Otherwise, on their own, objections from lobby groups or others could stymie perfectly valid projects. That could paralyse decision making in this area and is not something which we endorse.

[74] Rather, a judgement call is required when projects get to the point of widespread concern and meet the threshold for controversy. One indicator of controversy is public campaigning or analyses from bodies such as the PAC as to concerns about a project. In this case there is no PAC report although we note some legal advice was obtained regarding whether a public inquiry was necessary.

[75] The objections are well set out by a range of objectors who are not just local objectors but respected independent bodies including Friends of the Earth, Ulster Wildlife, the Royal Society for the Protection of Birds, the Northern Ireland Marine Task Force, the Divers Action Group, the Northern Ireland Fish Producer Organisation, the Northern Ireland Scallop Fisherman Association, and the National Trust.

[76] However, the factor which troubles us most which was advanced by Mr McGleenan is that the Minister's Executive colleagues, once engaged with this matter, did not insist on Executive referral. As to this issue Mr Fegan says the Executive colleagues simply and reasonably sent their correspondence back to the Minister to make the call as that is his responsibility. On the other hand, as Mr McGleenan stressed if there was sufficient concern, it is difficult to understand why the Minister's Executive colleagues would not have made a play for Executive referral themselves. We have considered these competing submissions.

[77] As one can see from the agreed facts that we have set out at para [8] herein, three political parties (Alliance, Sinn Féin, Green Party), as well as John Stewart MLA (UUP) clearly and publicly objected to the proposal. Further, as one can see from the entry for 27 March 2020, numerous objections were made by a very wide range of respected and independent bodies. We ask the question: can this rationally be said to be anything other than 'controversial?'

[78] There is an apparent disconnect between the objections of the parties and the fact that none of them triggered a referral. However ultimately it is the Minister's duty to properly determine the issue in the first instance. Put simply, we question the rationality as to why this project was not deemed controversial within the meaning of the statute given the objections raised by the public and politicians. Hence, we also find for the appellants on this aspect of the appeal for the same reason as stated at para [71].

[79] Finally, we turn to the third core aspect of this ground of appeal which is in relation to "cross-cutting." The legal scope of what is "cross-cutting" is self-evident from section 20(8) of the 1998 Act. The trial judge dismissed this ground on the basis

that there was no defined statutory responsibility which would bring a second department, namely the Department for Economy, within the ambit of this provision. We have considered this argument carefully and find as follows.

[80] First our simple observation is that on the face of it, it does seem odd that the Department for Economy is engaged with energy policy and energy security and yet is not a department which has statutory responsibility within the meaning of the section 28 provision relative to a project which deals with gas supply and energy security.

[81] Furthermore, we are satisfied that the Department for Economy has statutory and policy responsibility for gas supply and energy security. This seems to us to be amply evidenced by the strategic framework for Northern Ireland policy documents and is self-evident from broad statutory duties which arise from the Energy (Northern Ireland) Order 2003.

[82] However, we do not think that Mr Fegan needs to utilise Article 14 of the Energy Order to make his claim good. To our mind it is sufficient that we settle this argument on the basis of the Energy Strategy which was part and parcel of the Department for Economy's brief. The wider canvas is climate policy across government. The path to net zero is an agreed metric in this case. In our view, this is a valid argument which now finds further support in the 2022 Act which was enacted by the Northern Ireland Assembly. We are also informed by the correspondence chain between the DAERA and DFE ministers which we have referred to above and the implication that discussion would be required in future on this issue.

[83] Therefore, we are not convinced that trial judge was correct to dismiss this case as one that did not involve the statutory responsibility of other departments.

[84] If statutory responsibility is engaged on a cross cutting basis as we find it is, it cannot be said that that this was simply 'incidental' given the overall policy framework we have discussed above. Energy strategy is clearly a fundamental part of the decision-making matrix. Thus, the statutory requirements in section 20(8) and (9) are satisfied. Therefore, the appellants, also succeed on this argument.

[85] Accordingly, for the reasons we have given, and on the particular facts of this case, the appellants succeed on ground 1 of the appeal on the basis of the constitutional argument.

Ground 2: Consideration of the community fund?

[86] We can deal with this ground in shorter compass as follows. The developer who recognised the effects on the local community of this project was willing to put together a £1m fund for the local community. However, following the Supreme Court decision in *R (Wright) v Resilient Energy Severndale Limited [2019] UKSC 53* it is

quite clear that a community fund cannot be a relevant or material consideration when considering planning applications.

[87] This issue also features in the decision-making history we have referred to. Specifically, on 3 March 2020, the Minister in response to an Assembly Question refers to 'the community fund.' This establishes the fact that it was in his consciousness. In addition, we note that the Oxford Analytica report refers specifically to the 'the community fund.' The reference is as follows:

> "Islandmagee Energy Limited pledged £1million community fund (to be independently administered) and it will benefit the community of Islandmagee over the 40 year lifetime of the project."

[88] The point is dealt with not by the Minister himself but by Ms Vincent in her affidavit from paras [349]-[351]. In particular, [351] reads:

> "The community fund was not, however, given weight in the EIA decision or the decision to grant the marine licence. This is reflected in the fact that its existence does not constitute a condition of the marine licence. It is accepted that the section entitled social and economic is a sub-section of other mitigation measures and this was an inappropriate place to insert the text in the EIA decision which simply forms a narrative of the company's intentions."

[89] We are bound to say that this reasoning is sparse and not particularly convincing. The rationale raised by the respondent in defence of this aspect of the appeal is that the Minister did not place a condition on the marine licence in relation to the community fund and so he must not have taken it into account. We find that logic hard to follow. Ms Vincent has candidly accepted that the issue of the community fund should not have been part of the environmental impact assessment. Yet it was part of the environmental impact assessment which was before the Minister.

[90] Hence we return to the fact that we have no rationalisation by the Minister as to how he reached his decision and whether the community fund was something that he took into account. The Ministerial decision is comprised in one line set out at para [34] above where he opted for Option 1 "on the basis that appropriate controls are in place to mitigate environmental impacts." He has not filed an affidavit which may have clarified his approach and assisted us in exercising our supervisory function.

[91] Therefore, questions remain about whether the community fund was considered or not within the decision-making process. To our mind it is a bridge too far to suggest that whenever this community fund was impermissibly part of the

material that went before the Minister, that it can just simply be inferred that he did not take it into account. Thus, we cannot agree with the trial judge who was prepared to accept that the community fund although referenced was not treated as a material consideration. We are not so reassured on the basis of the evidence which we find to be insufficient in dealing with this issue.

[92] It follows that based on the Supreme Court decision in *Wright*, it is unlawful to take into account such a fund in a planning application. Hence, we are compelled to say that the evidential justification for this aspect of the decision making also fails to convince us. Although we understand that this was a sideline argument at first instance the appellants also succeed on ground 2 for the reasons we have given.

Overall conclusion

[93] We are conscious that there are different interests engaged with the subject matter of this case which span from those who have invested in this large-scale project to provide energy for householders and who stress the economic and other benefits to those concerned about the climatic effects of the ongoing use of fossil fuels in light of climate policy here. An obvious tension arises. In addition, a highly important issue of energy security requires decisions such as this to be made.

[94] We stress that we are not deciding on the merits of this issue as that is for policy makers within the political arena. This is a supervisory court in which the court is only concerned with the legality of the decision-making process and not the merits of the decision. See *Re Heffron's Application* [2017] NIQB 25, *Re Bow Street Mall's & Ors Application* [2006] NIQB 26. We have decided this case solely on that basis within the current structures which apply to ministerial decision making without determining the merits of the permission for a marine licence, discharge consent and abstraction licence in issue. This case is also highly fact specific, and it is on the particular facts that we have reached our outcome.

[95] We observe that the trial judge dealt comprehensively with a wide range of issues including environmental claims none of which have been challenged on appeal. We have undoubtedly had the benefit of a more concentrated focus on the two issues that have been argued before us.

[96] In reaching our decision we have also considered the discretion afforded to the responsible minister in decision making. However, the minister must act lawfully and rationally when determining whether a decision should in fact be referred to the Executive Committee. This consideration will not arise in every case but is an important reassurance for the public when significant or controversial and/or cross cutting projects are proposed which affect all of the citizens of Northern Ireland.

[97] An abundance of the material that we have examined refers to the strategic importance of this project for energy security across Northern Ireland. This is to be

expected in relation to a project which engages with the issue of energy security for this jurisdiction and climate change targets, standards, and commitments in Northern Ireland. Approving the project had the effect of locking in fossil fuel dependency for 40 years to come which potentially conflicts with a climate policy directed at net zero by 2050.

[98] However, the Ministerial decision as it stands, effectively means that this gas storage proposal is not deemed a significant and controversial project. This is a decision which, on the face of it, we find to be irrational for the reasons we have given which include the interface with climate commitments in Northern Ireland. Our conclusion engages the obligation to refer to the Executive Committee who can reach a decision with all interests in mind. Referral to the Executive Committee is also mandated due to the cross-cutting nature of this project.

[99] Our analysis leads us to the conclusion that there is an error in the Ministerial decision making in relation to referral to the Executive Committee. Furthermore, in the absence of sufficient explanation from the Minister, we are satisfied that he cannot be said to have left out of account the community fund. Obviously, for any future decision making to be lawful a decision maker must clearly leave the existence of a community fund out of account.

[100] Given the trajectory of decision making we do not consider that what we are dealing with is an inadvertent or unconscious breach of the Ministerial Code. Hence, the application of comments contained in *Re Central Craigavon Councils Application* [2011] NICA 17 does not arise. The question as to whether that decision holds as good law should be determined in another case where the specific issue arises.

[101] Lest any uncertainty arises or lest there is any suggestion that by virtue of this ruling we are effectively creating a bright line rule in judicial review that ministers must depose to their decisions, we are not. The point clearly arises and is acute in this case for the reasons we have given. Specifically, it seems logical to us that given the climate commitments now enshrined in our law that decision makers on large scale projects such as this will have to consider and rationalise any convergence or divergence with those standards set in law.

[102] Accordingly, the appeal succeeds on both grounds. We will hear from the parties as to remedy any other matters that arise and on the issue of costs.