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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **15/12/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF:

(1) EDWARD ROONEY
(2) JR181(3)
(3) BELFAST CITY COUNCIL

FOR JUDICIAL REVIEW

and

THE DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS "DEFRA"

and

DERRY CITY AND STRABANE DISTRICT COUNCIL

Notice Parties

AND IN THE MATTER OF THE DECISION MADE BY THE MINISTER FOR THE DEPARTMENT FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS ON 2 FEBRUARY 2022

AND IN THE MATTER OF THE NORTHERN IRELAND PROTOCOL

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Ms Karen Quinlivan KC with Mr Conan Fegan BL (instructed by Paul Campbell, Solicitors) for the Applicant (Edward Rooney)
Mr Ronan Lavery KC with Mr Colm Fegan BL (instructed by McIvor Farrell, Solicitors) for the Applicant (JR181(3))
Mr Stewart Beattie KC with Professor Gordon Anthony BL (instructed by Belfast City Council Legal Services) for the Applicant (Belfast City Council)
Mr John Larkin KC with Mr Aidan Sands BL (instructed by the Departmental Solicitor's Office) for the Respondent

Mr Gregory Jones KC with Mr Kevin Morgan BL (instructed by Philip Kingston, Solicitor) for the Notice Party (Derry & Strabane District Council)
Dr Tony McGleenan KC with Mr Philip McAteer BL (instructed by the Crown Solicitor's Office) for the Notice Party (DEFRA)

COLTON J

Introduction

[1] In the case of *Re Napier's Application* [2021] NIQB 86 and [2021] NIQB 120 Mr Justice Scoffield concluded his judgment with the following passages:

> "[79] In *Re McNern's Application* [2020] NIQB 57, McAlinden J warned (at paragraph [29]) that adherence to the principles embodied by the rule of law was fundamental in a society such as ours, emphasising the need for those in positions of leadership 'to promote, support and demonstrate assiduous adherence to the principles of the rule of law.' I drew attention to the same or similar obligations, grounded in the terms of the Ministerial Pledge of Office and Ministerial Code, in paragraph [41] of my earlier judgment.
>
> [80] Each of the respondents in these proceedings affirmed the Ministerial Pledge of Office committing themselves, inter alia, to discharge in good faith all the duties of their ministerial office; to participate fully in the North-South Ministerial Council, as well as in the Executive Committee and the British-Irish Council; to uphold the rule of law, including by way of support for the courts; and to support the rule of law 'unequivocally in word and deed and to support all efforts to uphold it.' By their actions which are the subject of these proceedings the respondents, and principally the first respondent by his actions following the grant of the court's declaration in October, are in abject breach of their solemn pledge.
>
> [81] It is no answer that the respondents wish to protest what they perceive as a political injustice. For present purposes, the court is entirely unconcerned with the merits of the respondents' criticisms of the Northern Ireland Protocol. The *de Brun* case established that, no matter how worthy one's political goal, and even assuming it relates to the full implementation of other

> aspects of the Belfast Agreement, a Minister cannot act in clear violation of the ministerial obligations which they have assumed.
> …
>
> [83] … From the court's perspective, it is both profoundly concerning and depressing that the respondents hope to secure political advantage by openly flouting their legal obligations."

[2] In that case Mr Justice Scoffield was considering the actions of a group of DUP Ministers, including the respondent Minister in this case, who refused to attend meetings of the North-South Ministerial Council pursuant to their duties under sections 52A and 52B of the Northern Ireland Act 1998 as part of their protest against the Protocol on Ireland/Northern Ireland to the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland for the European Union and the European Atomic Energy Committee ("the Protocol").

[3] His words have a resonance for the issues that arise in this case.

[4] Yet again the courts in this jurisdiction are compelled to grapple with the provisions of the Protocol.

The decision under challenge – a written instruction issued on 2 February 2022

[5] The decision challenged in these proceedings is a written instruction issued by the Minister of Agriculture, Environment and Rural Affairs for Northern Ireland ("the Minister") on 2 February 2022 to his Department ("DAERA") "to cease all checks that were not in force on 31 December 2020 ("the OCR checks") to halt from 00:01 Thursday 3 February 2022."

[6] The checks in question related to animals and various agri-food goods moving from Great Britain ("GB") into Northern Ireland ("NI"). For convenience these will be referred to as the OCR checks throughout this judgment. These checks had been performed by DAERA since 1 January 2021 in order to comply with the UK's legal obligations arising from its withdrawal from the European Union.

[7] Before considering the applications it is necessary to set out in some detail the background and chronology leading to the instruction of 2 February 2022.

Background and chronology – December 2021-February 2022

[8] The background and chronology can be gleaned from the affidavits of Mr Anthony Harbinson, Mr Robert Huey and Mr Richard Bullick, filed on behalf of the respondents.

[9] In February 2022 Mr Harbinson was the Permanent Secretary and Accounting Officer within DAERA; Mr Huey was the Chief Veterinary Officer within DAERA and Mr Bullick was a Special Advisor to the First Minister in the Executive Office from 6 July 2021 until 4 February 2022. Mr Bullick's responsibilities included advising on issues related to Brexit and the Protocol and liaising between the First Minister, other DUP Ministers and the DUP party leader.

Chronology

[10] On 21 December 2021 the Minister received a pre-action protocol letter from Unionist Voice Policy Studies challenging:

> "The respondent's failure to act in accordance with section 28A(5) of the Northern Ireland Act 1998 and associated paragraph 2.4 of the Ministerial Code by failing to bring to the Executive Committee the implementation (in so far as it relates to the discharge of the respondent's functions) of the Northern Ireland Protocol."

[11] This correspondence was referred to Mr Robert Huey for consideration and a draft response.

[12] On 23 December 2021, the Minister in response to a submission dealing with the "EU audit report on official controls at Northern Ireland points of entry", issued an instruction via his Private Office in the following terms:

> "I am instructing officials to increase checks on goods entering the Republic of Ireland from Great Britain via Northern Ireland to 100% documentary and physical checks with immediate effect. To facilitate this, goods coming to NI from GB should be taken forward solely on a risk based approach. This should be implemented for both documentary and physical checks."

[13] Brian Dooher, Director of Public Health, Imports and Portal Controls within DAERA responded within the hour to say that "David Kyle and I will lead on this and will take forward implementation of Minister's instruction below."

[14] In relation to the pre-action protocol letter received from Unionist Voice Policy Studies, on 31 December 2021 Catherine Fisher, Acting Director, Sanitary and Phytosanitary Policy and Logistics Division, DAERA, provided a submission to the Minister. The submission indicated that:

> "The letter was shared with the Departmental Solicitors Office (DSO), who will draft a response on the

> Department's behalf. The applicant has requested a response by 4 January 2022. The standard time for responding to such letters is 21 days, unless the matter is urgent. When taking into account the holiday period this would bring the deadline to 18 January 2022. DSO are therefore seeking an extension to the 4 January response deadline set by the applicant."

[15] Annex B to the submission, supplied on 31 December 2021 outlined the departmental lines that had previously been used in relation to this issue based, as Mr Harbinson understood it, on legal advice received in 2021. The court has not seen this legal advice in respect of which privilege is not waived.

[16] Most unusually the Minister replied directly to Unionist Voice Policy Studies on 31 December 2021 saying:

> "I can confirm that it is my intention to bring a paper to the Executive in the coming weeks (not later than the end of January) in relation to the continued and future implementation of the Protocol."

[17] This response was sent without any prior indication to DAERA or the DSO.

[18] Unionist Voice Policy Studies wrote to the DSO on 4 January 2022 indicating that in light of the Minster's reply there was no necessity for any further response to the pre-action protocol correspondence.

[19] At a meeting on 13 January 2022 the Minister requested officials to provide him with a suitable draft paper that he could share with his Executive colleagues in line with the commitment he had made in his response to Unionist Voice Policy Studies.

[20] On 20 January 2022 the Minister was provided with a draft paper as requested. The paper provided to the Minister asked his Executive colleagues "to note that my Department will continue to fulfil its current legal requirements in relation to SPS checks as set out by the UK Government, Domestic and EU law." The SPS checks are part of the OCR checks referred to in para [6].

[21] A paper, amended by the Minister, was circulated to Executive Members on 25 January 2022. Rather than asking the Executive to note as above it sought an Executive decision to:

> "(a) Agree, pursuant to paragraph 2.15 of the Ministerial Code to grant retrospective approval of the checks which had taken place between 1 January 2021 and 27 January 2022;

(b) Agree that the present level of checks continue until a subsequent decision of the Executive; or

(c) Agree to delegate decisions around the implementation of the Protocol to the DAERA Minister for the remainder of this Assembly term."

[22] The paper was not agreed by the Office of First Minister and Deputy First Minister (OFM and DFM) for inclusion on the agenda for the next Executive meeting and accordingly was not formally discussed by the Executive.

[23] On 27 January 2022 Mr Harbinson received an urgent request to meet with the Minister. At the meeting the Minister suggested that the Department should consider stopping all checks brought in by the Protocol and instead revert to the checks that were carried out prior to it becoming operational whilst the Department and the Minister engaged with the Secretary of State for Northern Ireland on the legality of the checks when considered in light of the requirements of the Belfast Agreement.

[24] There was also some discussion about the EU audit of points of entry.

[25] Following the meeting Mr Harbinson spoke with Mr Huey and Catherine Fisher and requested them to commission the legal advice he had discussed with the Minister. He also requested DSO advice in relation to whether it would be lawful or appropriate to cease NI Protocol checks at points of entry or revert to the checks carried out prior to the NI Protocol becoming operational, whilst seeking to engage the Secretary of State for NI in discussions regarding the checks. He was informed that the Minister wished him to join him in a meeting with senior counsel the following day, 28 January 2022 to which Mr Harbinson also invited Mr Hugh Widdis in his role as Departmental Solicitor.

[26] That meeting took place at 3.00pm on 28 January 2022 at which an unidentified senior counsel attended. The Minister asked senior counsel to provide written advice which was received on Wednesday 2 February 2022. The court has not seen this advice in respect of which privilege is not waived. The Minister met with Mr Harbinson and Mr Huey at 4.00pm on the same date in the course of which he gave Mr Harbinson an instruction to stop checks by midnight that night. Mr Harbinson requested 24 hours to confirm the legality of the instruction.

[27] Mr Harbinson also advised the Minister that he should put a paper to the Executive Committee before taking this step due to it being, in his view, controversial and cross-cutting. Mr Huey asked that the instruction be put in writing to establish the detail of what checks were to be stopped. The Minister agreed that a written instruction would follow. Mr Harbinson indicated that he would respond to the Minister's written instruction and noted that it would always be his intention to follow all ministerial instructions but again asked the Minister for

more time. The meeting ended with the Minister agreeing to confirm the instruction in writing and with Mr Harbinson stating that if he could follow the instruction within 24 hours he would do so.

[28] On returning to his office Mr Harbinson felt that he needed advice around both the operational and legal implications of implementing the Minister's instruction. He therefore arranged a meeting with Mr Huey and Mr Widdis.

[29] Mr Widdis recommended seeking advice from senior crown counsel in relation to the instruction.

[30] Mr Harbinson concluded that:

> "On the face of it, it could not in the time available be concluded that the Minister's verbal instruction, supported as it was by legal advice, was unlawful. Despite my own misgivings as to the rushed nature of the decision and the potential fallout from the implementation of the instruction, … I should follow the instruction (once received in writing) and seek legal advice in the subsequent days."

[31] He also agreed to inform officials in the Department for Environment, Food and Rural Affairs (DEFRA) in London of the Minister's instruction so that they would hear directly from him rather than through media channels.

[32] Shortly after 5:00pm media inquiries were received by the Department to the effect that the Minister was going to spell out his plan to halt border checks at some point that evening. Mr Harbinson understood that the Minister also held a press conference around 5:30pm at which he informed the press of the instruction he had issued. The Minister's Office issued the formal written instruction to Mr Harbinson at 5:24pm but for technical reasons he did not see the actual instruction until 6:37pm.

[33] The instruction was in the following terms:

> "Dear Anthony
>
> I have taken the opportunity to read and consider the detailed legal advice from [redacted] QC dated 2 February 2022 (attached).
>
> [Redacted]
>
> In light of the advice that I have been provided with I have decided to instruct the Department to cease all checks that were not in force on 31 December 2020 ('the

> OCR checks') to halt from 00.01 Thursday 3 February 2022. This instruction will stand until the Executive makes the decision in relation to this issue. I will be bringing forward a further Executive paper on these matters in the coming days.
>
> I do so consistent with my legal advice to hold the balance of legality in a context of some complexity pending a discussion and decision by the Executive Committee."

[34] It is this instruction which is the subject matter of these proceedings.

[35] On receipt of the instruction Mr Harbinson avers that:

> "Having assured myself that on the face of it, it could not in the time available be concluded that the Minister's verbal instruction, supported as it was by legal advice, was unlawful, I then sought to confirm that I also have fulfilled my Accounting Officer duties under Managing Public Money NI."

[36] Mr Harbinson then sets out in detail his understandable concerns arising from his obligations as an Accounting Officer.

[37] At around 9.30pm the Minister asked for a "Zoom" meeting to be arranged with Mr Harbinson at 9.45pm. At that meeting the Minister asked Mr Harbinson to give him an update on whether he intended to comply with his instruction or not. He outlined his concerns and agreed to provide a written update to the Minister advising if he required a formal direction given the range of financial implications that the instruction may have for DAERA. Mr Richard Bullick also attended the meeting. He (Mr Bullick) agreed that the timescales were challenging but that the status quo of continuing checks was "no less risky than stopping the checks." His essential point was that the Minister had given an instruction in terms of timing and the nature and of the questions that would be asked the following day would include whether his instructions had been followed.

[38] Mr Harbinson again requested time to get legal advice and it was agreed that a "landing zone" for the morning was that the officials are not defying the Minister but they have some items of clarity to resolve and are working through the issues.

[39] At 10:36pm Mr Harbinson issued a submission to the Minister outlining his decision. His submission concluded that the Minister's instruction was significant and controversial and possibly cross-cutting and therefore one that he should take to the Executive Committee for their approval. In terms of his responsibility as Accounting Officer he had reached the preliminary view that he would most likely

require a direction to confirm the Minister's instruction to stop the checks. Given the limited time available he believed it would be prudent to seek legal, policy and financial advice about the costs and other implications of the instruction and information as to how others such as the UK Government and European Union would react to it. He indicated that it might take a few days to gather this advice and that he would revert to the Minister as soon as he was in a position to move forward. As a result, he did not instruct staff to halt the checks.

[40] On 3 February 2022 the First Minister Paul Givan MLA, announced his resignation, effective from midnight on 3 February 2022. This had the effect of automatically removing Michelle O'Neill MLA from her post as Deputy First Minister. On 4 February 2022 the resignation and removal of FM and DFM meant that the Northern Ireland Executive Committee collapsed. On the same date, the two judicial reviews from the applicants Rooney and JR181(3) were lodged.

Background prior to December 2021

[41] Some further background is required to set the scene prior to December 2021.

[42] The European Union ("EU") traces its origins to the European Coal and Steel Community ("ECSC") and the European Economic Community ("EEC") established, respectively, by the 1951 Treaty of Paris and the 1957 Treaty of Rome. It was set up with the aim of ending the frequent and bloody wars between neighbours which culminated in the Second World War. It sought to unite European countries economically and politically in order to secure lasting peace. On 1 January 1973 the United Kingdom ("UK") became a member of the EEC pursuant to the European Communities Act 1972. The Republic of Ireland joined at the same time. In the decades that followed, the EEC expanded and developed, eventually becoming the European Union, a political and economic union of 28 countries. One of the important consequences of the Union was tariff free trade between Member States.

[43] On 23 June 2016 in a UK wide referendum a majority of those who voted did so in favour of leaving the EU, by a margin of 52% to 48%, although in Northern Ireland the majority voted in favour of remaining by a margin of 55.8% to 44.2%.

[44] On 29 March 2017 the UK Prime Minister (Theresa May MP) gave notification under Article 50 of the Treaty of the European Union ("TEU") of the UK's intention to withdraw from the Union after Parliament passed the European Union (Notification Withdrawal) Act 2017.

[45] The European Union (Withdrawal) Act 2018 ("the 2018 Act") came into force on 26 June 2018. Section 1 expressly repealed the European Communities Act 1972. Section 13 established the regime for parliamentary approval of the outcome of negotiations with the EU.

[46] The UK Government and the EU concluded a Withdrawal Agreement on 25 November 2018. That agreement included a Northern Ireland Protocol which envisaged the UK remaining in the Customs Union thereby preventing the need for customs checks on the border between Northern Ireland and the Republic of Ireland, which would become a land border between the UK and the European Union after withdrawal. This proposal became known as the "backstop" and was opposed by the DUP with whom the Prime Minister had entered into a "confidence and supply" agreement.

[47] This agreement was rejected three times by the House of Commons and Prime Minister May resigned as leader of the Conservative Party on 7 June 2019. She stood down as Prime Minister on 24 July and was replaced by Mr Boris Johnson MP.

[48] On 17 October 2019 the UK and EU reached agreement on a new Withdrawal Agreement and political declaration setting out the framework for their future relationship. The Protocol which is at the heart of these proceedings forms part of that Withdrawal Agreement.

[49] On 14 December 2019 the EU Official Control Regulations (EU 2017/625) ("the OCR") became part of Northern Ireland domestic law. At this time the UK was still an EU Member State.

[50] In the absence of a Northern Ireland Executive, on 13 and 14 December 2019 DAERA laid regulations namely, the Official Controls (Animals, Feed and Food) Regulations (Northern Ireland) 2019 and the Plant Health (Official Controls and Miscellaneous Provisions) Regulations (Northern Ireland) 2019. (The 2019 Plant Health Regulations have now been replaced by 2020 Regulations of the same name).

[51] On 11 January 2020 the Northern Ireland Executive was reformed pursuant to the New Decade New Approach ("NDNA") Agreement.

[52] Returning to Westminster, the Withdrawal Agreement, including the Protocol, was debated in Parliament on 19 October 2019. The European Union (Withdrawal Agreement) Bill received its second reading stage on 21 October 2019 and was finally approved on 6 November 2019. That Bill became the last Act of that Parliament. Parliament was dissolved and after a general election in December 2019 the governing Conservative Party won a majority of 80 seats.

[53] The first Bill of the new Parliament was the European Union Withdrawal Act 2020 ("the 2020 Act") which received Royal Assent on 23 January 2020 having been passed by a significant majority in the House of Commons. The 2020 Act made significant amendments to the 2018 Act in accordance with the Withdrawal Agreement.

[54] Pursuant to the 2020 Act the UK left the European Union at 11:00pm on 31 January 2020 but entered a transition period until 31 December 2020 during which

time preparations could be made to implement the terms of the Withdrawal Agreement including those checks required by the Protocol.

[55] Mr Huey in his affidavit sets out how the Protocol has been implemented by the Department since 1 January 2021.

[56] It is clear from Mr Huey's comprehensive affidavit that the full implementation of the obligations under the Protocol is challenging.

[57] In terms of background it is important to note that on 20 May 2020 the UK Government published a Command Paper setting out its proposed approach to implementing the Northern Ireland Protocol "in a flexible and proportionate way – protecting the interests of both the whole United Kingdom and the EU."

[58] In relation to trade going from GB to NI the Command Paper stated:

> "Although there will be some limited additional process on goods arriving in Northern Ireland, this will be conducted taking account of all flexibilities and discretion, and we will make full use of the concept of de-dramatisation. There will be no new physical customs infrastructure and we see no need to build any. We will however expand some existing entry points for agri-food goods to provide for proportionate additional controls."

[59] Whether this is a true reflection of the actual obligations implicit in the Protocol is very much a moot point.

[60] The implementation of the Protocol was discussed the following day by the Northern Ireland Executive. The minutes of the meeting on 21 May 2020 record that the First Minister advised that "the UK Government had published its policy approach to the implementation of the Protocol, and that this confirmed the need for arrangements to control the entry of agri-food products into Northern Ireland, but also to simplify and minimise such checks" and that "she and the deputy First Minister would continue to engage with the Westminster Government on this matter."

[61] Importantly at this meeting it was agreed that the Minister would take the lead on this issue with the support of a cross-departmental group; and that officials would confirm to Whitehall that the necessary work would be taken forward with DEFRA, the Cabinet Office and the Northern Ireland Office.

[62] Following this agreement, on 26 May 2020, the Minister appointed the former DAERA Permanent Secretary, Dr Dennis McMahon, as Senior Responsible Owner ("SRO") for the SPS Operational Delivery Programme.

[63] Subsequently, the UK Government took certain unilateral steps to minimise the amount of checks to be carried out by DAERA. As a result, simplified procedures for checks were put in place. This became known as the "Scheme for Temporary Agri-Food Movements in Northern Ireland" ("STAMNI"). In addition, the UK Government also introduced the "P and R" scheme in relation to the checking of certain chilled meats such as sausages. These are referred to as "grace periods" and were extended on 3 March 2021.

[64] In response the EU initiated legal proceedings against the UK requesting that the UK rectify and refrain from putting into practice the announced extension of the grace period for points of entry checks.

[65] These legal proceedings have not moved to the next stage because of ongoing technical discussions between the UK and the EU.

[66] On 1 January 2021 the transition period ended. Since that date DAERA has been carrying out the OCR checks on goods entering NI from GB at ports in NI, in accordance with the Protocol and the decision of the Executive Committee of 21 May 2020. Mr Huey explains that DAERA has been implementing the checks in accordance with its understanding of its obligations under the OCR.

[67] He refers to the Official Controls (Animals, Feed and Food) Regulations (Northern Ireland) 2019 and the Plant Health (Official Controls and Miscellaneous Provision) Regulations (Northern Ireland) 2019, as amended by the Plant Health (Official Controls and Miscellaneous Provision) Regulations (Northern Ireland) 2020 which designate DAERA as the competent authority to carry out these official controls. (See para [50] above.)

[68] He explains that these regulations were made in the absence of Ministers, not to give effect to the OCR, but to make technical updates to comply with DAERA's obligation to ensure, firstly, that the relevant EU law could operate effectively and, secondly, DAERA avoided the threat of infraction proceedings by the European Commission and the associated financial penalties. Had it not made the regulations DAERA would have had no legal basis to carry out actions as the competent authority under the relevant EU law or to take enforcement action.

[69] Under the heading "Organisation of Official Controls on Animals and Goods entering Northern Ireland", in relation to competent authorities Mr Huey explains at paragraph 54 as follows:

> "54. The Competent Authorities responsible for the organisation and performance of official controls on animals and SPS goods subject to mandatory checks on Northern Ireland Border Control Posts have been designated in line with Article 4(1) of the OCR. DAERA and the Foods Standards Agency in Northern Ireland are

> the Central Competent Authorities ("CCAs") for the regulation of imports that are subject to SPS and marketing standards checks in Northern Ireland under the relevant EU legislation, and as such fulfil a legislative and policy making role. Both CCAs are responsible for designating Competent Authorities to perform official controls which verify that animals and SPS goods entering Northern Ireland from third countries comply with EU legislative requirements."

In this context it will be noted that GB is treated as a third country for these purposes.

[70] Mr Huey goes on to explain:

> "55. In Northern Ireland, DAERA acts as the CCA for legislation, policy and control of animals and goods subject to SPS and marketing standard checks. DAERA's Veterinary Service Animal Health Group ("VSAHG"), has responsibility for delivery of controls on animals and products of animal origin, excluding fishery products entering Northern Ireland from third countries. DAERA's Plant Health Division have responsibility for controls on plants, plant products and other objects including wood packaging material, and DAERA's Food and Farming Group have responsibility for EU marketing requirements and standards.
>
> 56. The Foods Standards Agency in Northern Ireland is the CCA for feed and food safety in Northern Ireland. FSANI has designated the District Councils (Belfast City Council, Mid and East Antrim and Newry, Mourne and Down District Council) as Competent Authorities at the border control posts for the delivery of official controls on high risk food not of animal origin, fishery products and plastic kitchenware originating in or consigned from China and Hong Kong. …"

[71] On 14 May 2021, the respondent Minister was elected leader of the DUP.

[72] On 8 June 2021 the respondent, as DUP Party Leader, nominated Mr Paul Givan MLA to become First Minister of Northern Ireland.

[73] On 17 June 2021 Mr Givan was elected as First Minister of Northern Ireland. On the same date the respondent resigned as DUP Party Leader and was replaced by Sir Jeffrey Donaldson MP on 30 June 2021.

[74] Mr Bullick became Special Advisor to the First Minister, Paul Givan on 6 July 2021.

Bullick Affidavit

[75] Mr Bullick's affidavit provides relevant and important context in respect of the decision under challenge.

[76] On 21 December 2021 he was made aware of the pre-action protocol letter ("PAPL") received from Unionist Voice Policy Studies and he was asked to offer advice.

[77] His views on the letter and subsequent advice are revealing. He sets this out in paragraph 3 of his affidavit in the following way:

> "3. From reading the PAPL several issues were initially apparent. First, it was not, in my view politically sustainable to seek to defend this application as it was broadly in line with the approach that had been taken by the party since I became a SPAD in July 2021 (see below), second the PAPL raised substantive issues which, in my assessment, would at the very least have obtained leave to seek a Judicial Review, third, a defence based on procedural issues such as delay would not have been politically credible, fourth, a response drafted in the normal way would likely have been based on arguments which would not have been politically sustainable for the DUP and, fifth, accepting the premise of the PAPL came at no political or administrative cost and that it merely required referral to the Northern Ireland Executive Committee." (My underlining)

[78] It is abundantly clear from this averment that it was political rather than legal considerations which underpinned his advice. Notably this advice resulted in the reply dated 31 December 2021, when the Minister directly replied to the author of the PAPL, notwithstanding that legal advice was being sought from the DSO.

[79] Mr Bullick explains that in July/August 2021 he prepared a draft note for the Minister to send to officials in DAERA. In essence the draft note indicated that the Minister had concluded that:

> "any intensification of checks which I consider involves the exercise of my discretion will require Executive approval and any intensification should not take place without such agreement having been secured."
> (My underlining)

[80] This note was not sent because of the likelihood of "grace periods" being extended at that time.

[81] He then refers to a speech from the DUP party leader Sir Jeffrey Donaldson on 9 September 2021.

[82] That speech included the following:

> "I do not pretend that there are easy answers when the law requires one thing and politics demands something else. Though some Unionists would like to, we cannot wish away the fact that the Northern Ireland Protocol is part of domestic UK law. However, I believe that we can use our position in ministerial office to the benefit of the people of Northern Ireland. No one can be in any doubt that the ending of the grace period would have a devastating impact on Northern Ireland. That is not something that I am prepared to countenance or to be a party to. Nor should any elected politician in Northern Ireland who cares for our people. Therefore, regardless of what the position of the UK Government or of the EU is, in the future, DUP Ministers would seek to block additional checks at the ports. And I believe they would have a solid legal basis to do so. Any decision to intensify checks would have the most profound and significant impact on Northern Ireland. Under the Northern Ireland Act, such a decision to intensify checks could only be implemented following a decision of the Northern Ireland Executive. In such circumstances, neither the Agriculture, Environment and Rural Affairs Minister nor his officials have any power to intensify checks in the absence of Executive agreement. On behalf of the DUP, I want to make it clear that DUP Ministers would use their votes at the Executive to frustrate any such additional checks, now or in the future. Thirdly, I would also examine the legality of the current checks and whether they should have required Executive approval as well. We are also exploring whether there is any scope to limit or eradicate the existing checks at the ports which were in force at the end of 2020. Legal advice has offered Ministers very little room for manoeuvre in this regard and flexibilities have been explored to the maximum. However, we are seeking to revisit this issue to examine every available option. If in the final analysis those who are democratically elected by the people of Northern Ireland lack the power to prevent such checks,

> and the Protocol issues remain, then the position in office of DUP Ministers would become untenable. Let me be clear; if the choice is ultimately between remaining in office or implementing the Protocol in its present form, then the only option for any unionist Minister would be to cease to hold such office."

[83] Mr Bullick then refers to developments post the speech including legal decisions in *Re NIHRC* and *Re Napier.*

[84] He goes on to repeat his conclusion that it was not "politically desirable" to resist the PAPL. He suggested that an executive paper should be produced consistent with the reply that had been sent on 31 December 2021. On receipt of the draft Executive paper produced by officials in DAERA Mr Bullick indicated that it was clear it did not fully reflect the Minister's position on the issues. Rather than suggesting officials redraft the paper, it appears he suggested amendments to it which were reflected in the final paper that was issued to Executive Ministers.

Responses to the Minister's paper

[85] The responses to the Minister's paper are illuminating.

[86] The Minister for Communities, Deirdre Hargey, a Sinn Fein MLA, replied on 26 January 2022 as follows:

> "The Executive has a clear position. The Attorney General's advice to Andrew McCormick of 17 December 2020 underlined that position and made clear, both that the Department for Agriculture, Environment and Rural Affairs (DAERA) is the designated authority to act on behalf of the Executive, and that it has a legal obligation to do so. The correspondence from George Eustice, Secretary of State for Environment, Food and Rural Affairs of 1 April 2021, further highlighted that delivering the requirements of an internationally binding treaty were the responsibility of DAERA and the DAERA Minister."

[87] This view was also reflected in the response from Conor Murphy MLA, Minister of Finance, a Sinn Fein MLA, dated 27 January 2022.

[88] It was the position of Sinn Fein that "any action by the Minister which seeks to undermine this position would be unlawful and a breach of statutory duty, running contrary to the ministerial code and the pledge of office he has taken to uphold the rule of law, and to support, and act in accordance, with all decisions of the Executive Committee and Assembly."

[89] The Minister replied to both Sinn Fein Ministers in the following terms:

> "I note your response to my Executive Paper in relation to the implementation of SPS checks at Northern Ireland Points of Entry under the Northern Ireland Protocol.
>
> It would appear not to be a response to the Executive paper that I provided, rather to some ill-informed media speculation about the paper.
>
> You suggest the Executive has already agreed its policy in relation to 'our legal obligations' under the Protocol. I would be grateful if you could direct me to where this decision has been recorded in the Executive minutes.
>
> To suggest that the Executive has a clear position is equally not one which can be easily reconciled with the available facts and in the absence of any actual evidence of what this position actually is.
>
> As should be obvious from my Executive paper the AG's legal advice to Andrew McCormick that DAERA is the 'designated authority' and that the Department has certain legal obligations is not in dispute. That, however, is the beginning and not the end of the legal analysis that must be carried out. This, of course, should also be clear from reading my Executive paper.
>
> I am somewhat surprised by the reliance that you place on the letter of the UK Secretary of State for DEFRA who, as part of our devolved settlement, does not, in fact, have responsibility for Executive decisions in Northern Ireland.
>
> You make reference to commitments in the Ministerial Code. Might I suggest you (re)-read my Executive paper to see that it is the requirements of the Ministerial Code that have compelled me to bring this paper to the Executive? …"

[90] On 27 January 2022, Gordon Lyons, a DUP MLA and Minister for the Economy, thanked the Minister for his paper and wrote "I look forward to discussing same at the Executive meeting."

[91] On 2 February 2022, Robin Swann MLA of the Ulster Unionist Party, Minister of Health, recommended "that the advice of the Attorney General is sought on

behalf of the entire Executive to obtain an updated legal view that may be accepted by all Executive Ministers."

[92] On 2 February 2022 Naomi Long the Alliance MLA and Minister for Justice replied as follows:

> "I believe that this paper is unnecessary as the Executive agreed its policy on fulfilling our legal obligations in relation to the Protocol on 21 May 2020.
>
> While I have seen your response to Minister Hargey's letter to you on this subject, it remains my view that the correspondence from George Eustice, Secretary of State for Environment, Food and Rural Affairs of 1 April 2021 supports the opinion that delivering the requirements of an internationally binding treaty are the responsibility of DAERA and the DAERA Minister.
>
> Indeed, I note that paragraph 3 of your paper refers to the fact that 'under the withdrawal agreement and the NI Protocol and domestic law, DAERA is legally required to carry out SPS and other regulatory checks on live animals and agri-food products that enter NI from Great Britain ("GB")' and I am, therefore, satisfied that matters around Protocol implementation are settled."

[93] The Attorney General provided a note to Executive Ministers on 31 January 2022 expressing disappointment that reference had been made in the public domain to her advice which was given in September 2020 before the end of the EU exit implementation period. She pointed out that the matters to which the advice referred were different to those raised in the DAERA Minister's draft paper. She also pointed out that the DAERA Minister had not sought advice on the issues raised in this paper, though he may of course have sought advice on the issues from the Departmental Solicitor's Office.

The Proceedings

[94] On 3 February 2022, upon which the instruction entered the public domain and when the First Minister announced his resignation, the court received applications from Edward Rooney and JR181(3) seeking leave to challenge the Minister's instruction and, importantly, seeking interim relief suspending the instruction pending the determination of the applications. The applicant, Rooney, also sought leave against the Secretary of State for Northern Ireland but this aspect of the application has been stayed until the determination of the applicant's case against the Minister/first respondent.

[95] The matter came before the court on an emergency basis on the same date, 3 February 2022.

[96] At that stage the solicitor acting for the Minister had not yet instructed counsel or been served with the papers. She took instructions from her clients and provided an undertaking that the instruction from the Minister would not be acted upon before noon on Monday 7 February 2022.

[97] The matter was listed again the following morning on 4 February 2022 at which hearing the Minister was represented by counsel. Counsel formally indicated to the court that the Department's position was that "the instruction given to officials is entirely lawful." Counsel referred to Article 4(1) of the Departments (Northern Ireland) Order 1999 which provides that:

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

[98] The court considered that the test for leave had been met on the papers and granted interim relief to the applicants suspending the effect of the Minister's instruction on the basis of the principles set out in the well-known authority of *American Cyanamid Company* [1975] AC 396. The court considered that the balance of convenience pointed to maintaining the status quo which had been in place for 13 months in circumstances where there was clearly an arguable case that the instruction was unlawful.

[99] An application for leave to challenge the Minister's instruction was subsequently made by Belfast City Council which was granted on 21 March 2022.

[100] On 29 March 2022 Derry City and Strabane District Council were granted permission to participate as a Notice Party. The applications were all managed and heard together.

Grounds of Challenge

[101] The applicants' grounds of challenge can be summarised as follows:

(a) Illegality – it is argued that the impugned decision was unlawful due to breaches of the following statutory duties/requirements:

   (i) The Official Control Regulations (Regulation 2017/625 ("the OCR")) read with Article 5(4) and Annex 2 of the Protocol on Ireland/Northern Ireland ("the Protocol") and section 7A of the European Union (Withdrawal) Act 2018.

(ii) Section 28A of the Northern Ireland Act 1998 as read with parts 1.4(cd)-(ce) of the Ministerial Code.

(iii) Belfast City Council also argue that the decision challenged is a misuse of the Minister's power of "direction and control" under Article 4(1) of the Departments (Northern Ireland) Order 1999, as read with Regulation 2017/625.

(b) Material considerations – Belfast City Council contends that the impugned decision is vitiated by the Minister having failed to take into account the following material facts/considerations:

(i) The logistical challenges that the Minister's decision has had, and will have, for Belfast City Council which is one of the number of authorities that has statutory duties under Regulation 2017/625 and is the local council in Northern Ireland with responsibility for effecting checks at Belfast port.

(ii) The Minister's decision now potentially means that Belfast City Council will act in breach of the Protocol by default and be subject to "*Francovich*" damages claims under, inter alia, Article 13(2) of the Protocol as read with Articles 2(a)(ii) and (iv) of the Withdrawal Agreement and section 7A of the European Union (Withdrawal) Act 2018.

The Minister's Response

[102] Before analysing the grounds of the applicant's claim it is helpful to summarise the Minister's answer to the challenge. In broad terms he raises four issues as follows:

(a) Is there a public law decision open to challenge?

(b) Do the applicants have standing?

(c) Is there a legal obligation on the Minister?

(d) Was Executive Committee agreement required for the implementation/continuation of checks under OCR?

[103] The court will consider each of the issues raised by the Minister in conjunction with the grounds relied upon by the applicants.

Is there a public law decision open to challenge?

[104] Mr Larkin contends on behalf of the Minister that the instruction in question did not actually take effect either inside or outside DAERA. He points to the affidavit sworn by Mr Harbinson in which he avers that he envisaged taking a further procedural step before the instruction could be implemented.

[105] It is therefore suggested that the instruction under challenge was in effect an "intra-departmental activity that did not take effect even within the Department."

[106] I consider there is no merit in this argument. It is clear from Mr Harbinson's affidavit, that notwithstanding his reservations, he considered himself obliged to comply with the Minister's instruction. What in effect prevented the instruction from being implemented was the actions of the applicants in bringing these proceedings and the interim relief that was granted as a consequence.

[107] The nature of the instruction could not be clearer. It was to have immediate effect.

[108] Prior to interim relief being granted on 4 February 2022, counsel for the Minister confirmed that the Department regarded the instruction as a lawful order which would be complied with (subject to the original undertaking given on 3 February 2022).

[109] Properly, there were no submissions made in opposition to the granting of leave at that time.

[110] In the court's view, clearly a public law decision had been made which justified the injunction see Case *C-213/89, Factortame* [1990] 3 CMRR 1. That case dealt with the interpretation of EC Law with regard to the extent of the power of national courts to grant interim relief where rights claimed under EC law were at issue. The ECJ confirmed the court's power to grant such an injunction in such circumstances – see para [23]. The interim order was not appealed.

Do the applicants have standing?

[111] The applicants, Rooney and JR181(3), are citizens of Northern Ireland.

[112] In his affidavit in support of the application Mr Rooney avers:

> "I am a victim of the Troubles having been kidnapped by the provisional IRA in the early 1980s and I was later shot by paramilitaries for assisting police. I am a strong supporter of the Peace Process and the Good Friday Agreement."

[113] In similar vein, JR181(3) indicates he is a strong supporter of the Good Friday Agreement, the subsequent peace process and the rule of law. He also has been involved in a challenge to a decision by a predecessor of the Minister in terms of actions at the port in Larne, in respect of which, to my knowledge, no issue about standing has been taken.

[114] In a leading text on judicial review in this jurisdiction, Judicial Review in Northern Ireland: A Practitioner's Guide – J F Larkin QC and David A Scoffield, at 7.07 the authors refer to "this increasingly liberal approach to standing on the part of the courts." (What Ms Quinlivan described as the "rich tradition" in this jurisdiction.) In his text – Judicial Review in Northern Ireland – Professor Gordon Anthony referring to this liberal approach says that it is:

> "… in turn, often justified with reference to the need to vindicate the rule of law and to ensure that government illegality does not escape appropriate scrutiny in the courts. The point here is simply that judicial scrutiny of exercise of public power is a constitutional fundamental and that the courts' ability to exercise such control should not be frustrated by the absence of an applicant with a directly affected interest. Whilst applications for judicial review will thus ordinarily be made by individuals whose interests are directly affected by a decision, the wider public interest in the rule of law means that it is not always necessary to have such an applicant." – 3.67 – 2nd Edition.

[115] Perhaps the leading authority in this jurisdiction is *Re D's Application* [2003] NICA 14 where Kerr LCJ provided a helpful summary of the approach to standing at para [15] where he said:

> "[15] There has been much discussion of the topic of standing in textbooks and legal periodicals and examples abound in the reported cases, yet it is difficult to pin down any authoritative statement of the principles to be applied by a court in determining the question. It appears to be incontestable that the courts have tended in recent years to take a more liberal attitude to matters of standing. We would tentatively suggest that the following propositions may now be generally valid:
>
> (a) Standing is a relative concept, to be deployed according to the potency of the public interest content of the case.

(b) Accordingly, the greater the amount of public importance that is involved in the issue brought before the court, the more ready it may be to hold that the applicant has the necessary standing.

(c) The modern cases show that the focus of the courts is more upon the existence of a default or abuse on the part of a public authority than the involvement of a personal right or interest on the part of the applicant.

(d) The absence of another responsible challenger is frequently a significant factor, so that a matter of public interest or concern is not left unexamined."

[116] In 2005 Nicholson LJ said in the case of *Family Planning Association of Northern Ireland v The Minister of Health, Social Services and Public Safety* [2005] NI 188 CA at para [45]:

> "In summary it can be said that today the court ought not to decline jurisdiction to hear an application for judicial review on the grounds of lack of standing to any responsible person or group seeking, on reasonable grounds, to challenge the validity of government action."

[117] Mr Larkin argues that these authorities on the approach to standing should now be considered in light of the recent decision of the Divisional Court in England & Wales in *R(Good Law Project) and another v The Prime Minister and another* [2022] ECHR 298 (Admin). From that authority three propositions emerge:

(i) The test for standing is discretionary and not hard edged;

(ii) Satisfaction of the standing requirement is jurisdictional, and

(iii) One consideration on the evaluation of standing is whether there are 'obviously better placed challengers.'

[118] Paragraph [28] of the judgment also notes that:

> "We also note that not everyone who has a strong and sincere interest in an issue will necessarily have standing …"

[119] Appling these principles I am satisfied that the applicants Rooney and JR181(3) have sufficient standing to bring these applications.

[120] At issue here is a matter of significant public importance. The allegation in this case, in respect of which the applicants have been granted leave, relates to a Minister's alleged unlawful refusal to carry out his statutory obligations. The focus for the court in this application is on an alleged default or abuse on the part of a Minister in respect of a matter of obvious public importance. The potency of the public interest content in this case is high.

[121] In relation to Belfast City Council, it is clear that it has a particular, and individual, interest in the issue under challenge. In my view, its standing cannot seriously be challenged. The Minister's instruction, if implemented, could have a clear and obvious impact on the Council's role as one of the designated authorities for checks coming into Belfast port. In his measured submissions, Mr Beattie, was clear in distinguishing the approach of his clients to that of the other applicants, in particular, pointing to the concern the impact the instruction might have on members of staff employed by the Council. Much of his submissions focused on seeking clarification from the court. Similarly, it cannot seriously be contended that Derry and Strabane District Council did not have standing as an appropriate Notice Party.

[122] In conclusion, I am satisfied that the applicants have sufficient standing to bring these proceedings.

Is the Minister under a legal obligation under EU and/or domestic law?

[123] In the course of written submissions submitted for the substantive hearing listed in May 2022, Mr Larkin, on behalf of the Minister, raised a new point. He submitted that "the traditional understanding" that under the Protocol checks were required of animals and plants on goods coming from GB into NI was, in fact, incorrect. He argued in response to the first applicant's reliance on Article 5(1) of the Protocol that the customs responsibilities under that provision are those of the UK Custom Authorities, including HMRC and not those of the Minister or DAERA. He acknowledged that this submission did not reflect the current or past practice of the Department in carrying out checks on goods coming from GB.

[124] In light of this submission the court directed that His Majesty's Government ("HMG") should be put on notice of these proceedings and invited to intervene if it deemed appropriate.

[125] In fact, HMG did intervene in the form of the DEFRA and made submissions on the occasion of the relisted substantive hearing in September 2022.

[126] Before analysing the substance of this argument the court notes that in fact DAERA has been discharging what it perceives as its duties to carry out such checks since 1 January 2021.

[127] The applicants are correct to argue that in those circumstances the checks carried out heretofore by DAERA benefit from the presumption of regularity. Prior to December 2021 there had been no legal challenge to their lawfulness. No court has declared them to be unlawful.

[128] Furthermore, this was clearly the position of the Minister himself as expressly acknowledged in his paper to the Executive Ministers. In the paper he accepts that the Northern Ireland Protocol imposes legal duties on him in domestic law to carry out SPS check to ensure alignment with EU SPS Rules including OCR.

[129] At para 3 of his paper he states:

> "DAERA is legally required to carry out SPS and other regulatory checks on live animals and agrifood products that enter NI from Great Britain (GB)."

[130] The court is faced with the bizarre situation that notwithstanding the practice of 13 months prior to the decision under challenge and the express view of the Minister in respect of DAERA's legal obligations it is now being argued on his behalf that the checks in question are unlawful on the basis of an entirely new submission. This argument is put forward in the absence of any subsequent affidavit from the Minister or on his behalf. There is nothing before the court to explain the change in position.

[131] A number of the parties raised an issue as to whether or not the Minister was entitled to make this submission by way of skeleton argument in the absence of affidavit evidence explaining the factual basis for the authorisation of past conduct as well as the apparent change in position. As both Mr Beattie and Mr Jones pointed out officers in DAERA were carrying out checks under the direction of the Minister. To argue by way of skeleton argument at the substantive hearing that that direction was unlawful is a remarkable departure from the evidence that had hitherto been relied upon.

[132] Notwithstanding these points I take the view that the court should grapple with this issue. Essentially, it is a legal submission that all the parties were able to address. If it is not determined by this court, it will inevitably be raised in front of another court. It is for this reason that the court invited HMG to make submissions, if so inclined.

[133] What then is the basis for the argument that the widespread and traditional understanding is erroneous and that the practice is, in fact, unlawful?

[134] The focus of the argument is on the interpretation of the OCR.

[135] In summary, the OCR apply in Northern Ireland by virtue of section 7A of the 2018 Act.

[136] Section 7A provides:

> "**General implementation of remainder of Withdrawal Agreement**
>
> (1) Subsection (2) applies to:
>
> (a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and
>
> (b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement;
>
> as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom."

[137] The Protocol formed part of the withdrawal agreement referred to in section 7A.

[138] Article 5(4) of the Protocol provides:

> "(4) The provisions of Union law listed in Annex 2 to this Protocol shall also apply, under the conditions set out in that Annex, to and in the United Kingdom in respect of Northern Ireland."

[139] Annex 2 sets out a list of EU legislative instruments and includes:

> "**Provisions of Union Law referred to in Article 5(4)**
>
> …
>
> 43. **Official controls, veterinary checks**
>
> References to national reference laboratories in the acts listed in this action shall not be read as including the reference laboratory in the United Kingdom. This shall not prevent a national reference laboratory located in a Member State from fulfilling the functions of a national reference laboratory in respect of Northern Ireland. Information and material exchanged for that purpose between the competent authorities of Northern Ireland and a national reference laboratory in a Member State shall not be subject to further disclosure by the national

reference laboratory without the prior consent of those competent authorities.

- Regulation EU 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products amending regulations …"

[140] Article 47 of the OCR provides as relevant:

"**Section 11**

Official controls at border control posts on animals and goods

Article 47

Animals and goods subject to official controls at border control posts

1. To ascertain compliance with the rules referred to in Article 1(2), the competent authorities shall perform official controls, at the border control post of first arrival into the Union, on each consignment of the following categories of animals and goods entering the Union; …"

[141] For the purposes of what is meant by "entering the Union" Mr Larkin turns to Article 3(40) of the OCR which provides:

"(40) 'Entering the Union' or 'Entering into the Union' means the action of bringing animals and goods into one of the territories that are listed in Annex 1 to this Regulation from outside these territories, …"

[142] The relevant territory for the purposes of this article is described in Annex 1 (No.28) as "the territory of the United Kingdom of Great Britain and Northern Ireland."

[143] Put simply, animals and goods that enter NI from GB do not enter NI from outside "the territory of the United Kingdom of Great Britain and Northern Ireland." They are not "entering into the union" when they arrive in NI.

[144] Thus, it is argued succinctly that the OCR do not impose any obligations on the Minister or DAERA to carry out any checks on animals and plants entering NI from GB.

[145] How should the court interpret the relevant interlocking provisions? As a starting point, it is important to recognise that the OCR must be interpreted in accordance with EU law.

[146] Article 4(1) of the Withdrawal Agreement 2019 provides that:

> "The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States."

[147] Article 13(2) of the Protocol provides:

> "… the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union."

[148] As has already been explained the Withdrawal Agreement and Protocol have effect in domestic law under section 7A of the 2018 Act. In *Allister and others* [2022] NICA 15 McCloskey LJ explained the implications arising from this enactment in the following way:

> "[308] The critical nexus between EUWA 2018 and the Protocol is forged by section 7A, described by Professor Catherine Barnard in these terms:
>
> > 'The striking feature of section 7A is how far it draws on the controversial language of section 2(1) European Communities Act 1972 (ECA 1972), which had been read to give direct effect and supremacy to EU law, and was viewed in UK law as constituting a 'constitutional statute.'"
>
> (*McCrudden ed, The Law and Practice of the Ireland-Northern Ireland Protocol*, p 109.)

> Section 7A must be juxtaposed particularly with Article 4(1) WA and Articles 12(4) and 13(2) – (4) of the Protocol. Professor Gordon Anthony observes:
>
> > 'While the corpus of EU law that has effect in this way does so by reason of an international Treaty, Article 4 appears as a reformulation of the supremacy doctrine that was developed in case law such as *Costa v Enel and Simmenthal*. This is where the legal hybridity of the Protocol takes form, as, to the extent that Northern Ireland's institutions are bound by norms of EU law under the Protocol, they must follow different rules when engaged in decision-making outside it.'"
>
> (*McCrudden op cit, p 119*.)

[149] The court's duty to interpret national law in accordance with the United Kingdom's treaty obligations is well-recognised and longstanding – see *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116. The proposition is also stated in Bennion, Bailey and Norbury on Statutory Interpretation (8th Edition), which reads:

> "**Section 26.9: Domestic law should conform to international law**
>
> [26.9] It is a principle of legal policy that the domestic law should be interpreted in a way that is compatible with public international law. This principle forms part of the context against which legislation is enacted and, when interpreting legislation, a court should take it into account."

In the comment section text refers to the *Salomon* case quoting Diplock LJ:

> "… there is a prima facie presumption that Parliament does not intend to act in breach of [public] international law, including therein specific treaty obligations; and if one of the meanings that can reasonably be attributed to the legislation is consonant with the Treaty obligations and another or others are not, the meaning which is so consonant is to be preferred."

[150] The cardinal rule of public international law is *pacta sunt servanda*. Treaty obligations must be observed by states parties.

[151] In summary, the architecture by which the OCR (see para [101](a)(i)] are enacted in domestic law requires their interpretation to be in accordance with public international law and EU law.

[152] In *Bayfine UK v Revenue and Customs Commissioners* [2012] 1 WLR 1630 the Court of Appeal was grappling with the interpretation of double taxation treaties. On the issue of interpretation, the court had the following to say:

> "1.1 **Interpretation of double taxation treaties**
>
> 13. The Treaty is an international instrument. By virtue of section 788 of the 1988 Act, as amended, its provisions declared by statutory instrument have effect in substitution for the equivalent provisions of domestic law. Nonetheless, the fact that the Treaty is an international instrument made by the two Contracting States must be borne in mind in interpreting the provisions of the Treaty. In particular, the Treaty must be given a purposive interpretation.
>
> 14. On the principles applicable to the interpretation of a double taxation treaty, we were referred to the well-known principles laid down by the House of Lords in *Fothergill v Monarch Airlines* [1980] 1 AC 251, as summarised by Mummery J in *RC v Commerzbank AG* [1990] STC 285, 297-298 and approved by this court in *Memec plc v IRC* [1998] STC 754. It is the first three principles with which we are particularly concerned:
>
> > '(1) It is necessary to look first for a clear meaning of the words used in the relevant article of the Convention, bearing in mind that 'a consideration for the purpose of an enactment is always a legitimate part of the process of the interpretation' per Lord Wilberforce ([1981] AC 251, 272) and Lord Scarman (at p294).
> >
> > A strictly literal approach to interpretation is not appropriate in construing legislation which gives effect to or incorporates an international treaty; per Lord Fraser (p285) and Lord Scarman (p290). A literal interpretation may be obviously inconsistent with the purposes of the particular article or of the treaty as a whole. If the provisions of a particular article are

ambiguous, it may be possible to resolve that ambiguity by giving a purposive construction to the convention looking at it as a whole by reference to its language as set out in the relevant United Kingdom legislative instruments; per Lord Diplock (p279):

'(2) The process of interpretation should take account of the fact that – 'the language of an international Convention has not been chosen by an English Parliamentary draftsman. It is neither couched in the conventional English legislative idiom or designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an act of Parliament which deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it in *James Buchanan and Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141, 152, 'unconstrained by technical rules of English law or by English legal precedent, but in broad principles of general acceptation'; per Lord Diplock (pp281-282) and Lord Scarman (p293).'

(3) Among those principles is the general principle of international law, now embodied in Article 31(1) of the Vienna Convention on the law of Treaties, that 'a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. A similar principle is expressed in slightly different terms in McNair's The Law of Treaties (1961) p365, where it is stated that the task of applying or construing or interpreting a treaty is 'the duty of giving effect to the express intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances. It also stated in that work, at p366, that reference to the primary necessity giving effect to `the plain terms' of a treaty or construing words according to their `general and ordinary

> meaning' or `their natural signification' are to be a starting point or prima facie guide and "cannot be allowed to obstruct the essential quest on the application of treaties, namely the search for the real intention of the contracting parties in using the language employed by them.'"
> [My underlining]

[153] Article 31 of the Vienna Convention sets out the applicable rules of interpretation when a court is construing an international treaty. It provides:

> "31.-(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose.
>
> (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty;
>
> (3) There shall be taken into account, together with the context:
>
> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) Any relevant rules of international law applicable to the relations between the parties.
>
> (4) A special meaning shall be given to a term if it is established that the parties so intended."

[154] There are a number of other various canons of instruction that can inform the court's approach to interpretation of international treaties. One such canon is *ut res magis valeat quam pereat* ("that the thing may rather have effect/than to fail/to be destroyed"). It is also called the validation principle. This maxim suggests that treaties are to be interpreted with reference to their declared objects and purposes and that particular provisions should be interpreted to give the fullest effect consistent with the normal sense of the words and with other parts of the text. The principle is explained by Gleider Hernandez in International Law, sec 7.4.3.3, in the following manner:

> "First, all provisions of the treaty are presumed to have been intended to have significance, or to be necessary to convey the intended meaning. Second, the treaty as a whole, and each of its provisions, must be taken to have intended to secure some purpose. Third, any interpretation that would make the text ineffective or meaningless would be incorrect."

[155] The UKSC held that such an approach was applicable in interpreting international law in the case of *Al-Wahed v Ministry of Defence* [2017] 2 WLR 327, para 322-326.

[156] This principle has been described in a somewhat different way by Professor Steven Ratner:

> "The principle of effectiveness, or *effet utile*, is particularly worth mentioning. This principle requires that a treaty is to be interpreted to give it, as a whole, and the individual provisions within it meaningful effect. The approach of international courts reveals that the principal of *effet utile* means that treaty clauses must be interpretated to avoid either rendering them superfluous or depriving them of significance for the relationship between the parties." (*McCrudden op cit, p84*)

[157] The harmonious reading canon may also be relevant. It provides that the provisions of a text should be interpreted in a way that renders them compatible rather than contradictory. One part of a treaty text is not to be allowed to defeat another if by any reasonable construction of the two they may stand together.

[158] The intention of the parties in relation to checks at Northern Ireland ports is beyond dispute. In this court's judgment in the case of *Allister and others* [2021] NIQB 64 the general approach to the checking of goods coming from GB into Northern Ireland was described in the following way:

"**The Protocol on Ireland/Northern Ireland**

[11] On 17 October 2019, the UK and EU reached agreement on a new Withdrawal Agreement and political declaration setting out the framework for their future relationship. The Protocol on Ireland/Northern Ireland ("the Protocol") which is at the heart of these proceedings formed part of that Withdrawal Agreement.

[12] Article 1 of the Protocol provides that its objectives are as follows:

> "1. This Protocol is without prejudice to the provisions of the 1998 Agreement in respect of the constitutional status of Northern Ireland and the principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people.
>
> 2. This Protocol respects the essential State functions and territorial integrity of the United Kingdom.
>
> 3. This Protocol sets out arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions."

[13] The 1998 Agreement to which the Article refers is the Good Friday or Belfast Agreement of 10 April 1998 made between the government of the United Kingdom, the government of Ireland and the other participants in the multi-party negotiations. This led to the Northern Ireland Act 1998 and the establishing of devolution arrangements in Northern Ireland including a Northern Ireland Assembly and a power sharing Executive.

[14] In order to address the "*unique circumstances on the island of Ireland*" the UK and the EU agreed a bespoke arrangement which was the product of a political compromise.

> [15] Both parties agreed not to have a "hard border" with customs posts and infrastructure between Northern Ireland and the Republic of Ireland because of their respective commitments to the Good Friday/Belfast Agreement. In order to protect the EU's internal market the EU agreed to the UK policing the checks for goods travelling from Great Britain (GB) into the EU. The border between Northern Ireland and Republic of Ireland was now the external border between the EU and the UK after withdrawal. The checks were to take place on goods arriving in Northern Ireland from the UK.
>
> [16] Northern Ireland has in effect remained in the EU single market for goods. This means that Northern Ireland has unfettered access to both the GB and the EU markets. Northern Ireland will also benefit from trade agreements between the UK and third countries.
>
> [17] A subsequent Trade and Co-operation Agreement ("TCA") reduced the extent of tariffs applicable on goods being traded between the UK and the EU.
>
> [18] As a consequence of this political compromise some EU laws continue to be applied in Northern Ireland and there are new checks and administrative burdens on businesses in GB providing goods to Northern Ireland."

[159] The objective and purpose of the Protocol can be found in the preamble in the following paragraphs:

> "RECALLING the commitment of the United Kingdom to protect North-South co-operation and its guarantee of avoiding a hard border, including any physical infrastructure or related checks and controls,
>
> NOTING that nothing in this Protocol prevents the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to the rest of the United Kingdom's internal market,
>
> UNDERLINING the Unions and the United Kingdom's shared aim of avoiding controls at the ports and airports of Northern Ireland, to the extent possible in accordance with applicable legislation and taking into account their respective regulatory regimes as well as the implementation thereof,

…

RECALLING that the Union and the United Kingdom have carried out a mapping exercise which shows that North-South co-operation relies to a significant extent on a common Union legal and policy framework,

RECALLING that the United Kingdom remains committed to protecting and supporting continued North-South and East-West co-operation across the full range of political, economic, security, societal and agricultural context and frameworks for co-operation, including the continued operation of the North-South Implementation bodies.

…

MINDFUL that the rights and obligations of Ireland under the rules of the Union's internal market and customs union must be fully respected,

HAVE AGREED UPON the following provisions, which shall be annexed to the Withdrawal Agreement: …."

[160] Thus, it will be seen that the stated objectives of the UK and the EU in Article 1 of the Protocol emphasise the necessity to address the unique circumstances on the island of Ireland and the necessary conditions for continued North-South co-operation to avoid a hard border. The recitals expressly acknowledge that there will be checks at the ports and airports of NI. It is also significant that whilst the recitals include an express articulation that nothing in the Protocol prevents unfettered access for goods moving from NI into GB, there is no recital in respect of the converse movement of goods.

[161] The object and purpose in terms of checks at NI ports could not be clearer.

[162] Furthermore, the subsequent practice in the application of the treaty leaves no doubt as to the agreement of the UK government and the EU and the Minister (until legal submissions in this application) regarding its interpretation. Checks at the ports have been in force and implemented in accordance with the Protocol (subject to grace periods which are the subject matter of dispute between the UK and the EU).

[163] Should there be any lingering doubt about this, Dr McGleenan on behalf of DEFRA, confirms that the argument submitted on behalf of the Minister in this

regard does not "reflect the understanding and interpretation of DEFRA, the UKG or the EU of the Protocol, or the application of the OCR pursuant to it."

[164] It is, of course, recognised that, as Mr Larkin points out by reference to various jurisprudence of the CJEU that a Preamble to a community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question, or in a manner clearly contrary to its wording. However, the authorities are clear that it can be deployed as an aid to understanding the aims and meaning of the measure.

[165] With this in mind Dr McGleenan further argues that in any event a proper interpretation of the legislative architecture is entirely consistent with the parties' interpretation of the OCR and consistent with the Withdrawal Agreement's object and purpose.

[166] An analysis of the interlinking legislation and provisions favours a purposive interpretation consistent with that clear objective and purpose.

[167] In this regard Dr McGleenan focuses on the difference between the United Kingdom as a sovereign state and the geographical territory of Northern Ireland which is reflected in the provisions under consideration.

[168] This distinction is apparent from Article 4 of the Protocol, which deals with agreements entered into by the United Kingdom with a third country.

[169] Importantly, Article 5(3) of the Protocol provides that:

> "Legislation as defined in point (2) of Article 5 of Regulation (EU) No 952/2013 shall apply to and in the United Kingdom <u>in respect of Northern Ireland</u> …"

[170] The 2013 Regulations deal with the customs code at European Union or national level.

[171] Article 5 of the Regulations provides a definition of "Customs and Legislation" and Article 4 defines "Customs Territory" which includes "the territory of the United Kingdom of Great Britain and Northern Ireland and of the Channel Islands and the Isle of Man."

[172] Returning to the Protocol, Article 13 is important. Paragraph 1 provides:

> "For the purposes of this Protocol, any reference to the United Kingdom in the applicable provisions of the Withdrawal Agreement shall be read as referring to the United Kingdom or the United Kingdom <u>in respect of Northern Ireland</u> as the case may be."

[173] The next paragraph provides:

> "Notwithstanding any other provision of this Protocol, any reference to the territory defined in Article 4 of Regulation (EU) No. 952/2013 in the applicable provisions of the Withdrawal Agreement and of this Protocol, as well as in the provisions of union law made applicable to and in the United Kingdom in respect of Northern Ireland by this Protocol, shall be read as including the part of the territory of the United Kingdom to which Regulation (EU) No. 952/2013 applies by virtue of article 5(3) of this Protocol."

[174] It will be seen that the approach in Article 4 of the 2013 Regulations is mirrored in the OCR which provides a list of territories to delineate the scope of the regulations.

[175] The term "in respect of Northern Ireland" is used repeatedly in Article 5 of the Protocol. It is a recognised term used elsewhere in the Protocol. For example, Article 7(2) makes provision for the indication by way of marketing or labelling of "United Kingdom in respect of Northern Ireland" as "'UK (NI)' or 'United Kingdom (Northern Ireland).'" Article 8 makes specific provisions for VAT and Excise "in the United Kingdom in respect of Northern Ireland." Article 9 makes provision for Union laws governing the wholesale electricity markets to apply "to and in the United Kingdom in respect of Northern Ireland."

[176] The effect of the first paragraph of Article 13(1) of the Protocol is to provide for the difference in the United Kingdom and the United Kingdom <u>in respect of Northern Ireland</u> for the purposes of the Protocol. It provides:

> "For the purposes of this Protocol, any reference to the United Kingdom in the applicable provisions of the Withdrawal Agreement shall be read as referring to the United Kingdom or to the United Kingdom in respect of Northern Ireland, as the case may be."

Article 13(1) goes on to provide that reference to EU acts to the territory defined in Article 4 of the Union Customs Code Regulations No.952/2013 shall be deemed to include NI. The second paragraph of Article 13(1) provides such provisions "shall be read as including the part of the territory of the United Kingdom to which Regulation (EU) No.952/2013 applies by virtue of Article 5(3) of this Protocol."

[177] This is consistent with the drafting of the Withdrawal Agreement itself. Where EU law obligations are intended to apply throughout the United Kingdom the term used is simply "United Kingdom" (see, for example, Article 74(2) and (3),

Article 96(2) and (3)). There is no additional text added "in respect of Northern Ireland." The additional text is required where there is intended to be a differential approach in respect of NI.
[178] The way in which the European Regulations have been legislated for in NI is such that the OCR should be read so that the checks in dispute should be carried out at ports in NI. It is at that point that Union territory is entered for the purposes of the Withdrawal Agreement.

[179] Thus, the UK is not to be treated as a unitary state for the purposes of OCR checks coming from GB into NI. This textual analysis is entirely consistent with the purpose, intention and objective of the Protocol itself.

[180] This interpretation is reinforced by what has happened in domestic law with respect to the OCR. Thus, the regulations which apply in GB post withdrawal (the Officials Controls (Animals) Feed and Food, Plant, Health etc (Amendment) (EU Exit) Regulations 2020) refer solely to Great Britain – see Article 3(40) as amended which provides that "entering Great Britain or entering into Great Britain means the action of bringing animals and goods into Great Britain from a third country. In similar vein, Article 3(40A) provides that "'first arrival' means the point of first arrival in Great Britain from a third country;" which was provided for by the same regulations.

[181] Therefore, the regulations in relation to official controls are treated differently for GB and NI. GB is subject to domestic norms whereas the regulations in respect of NI are governed by EU norms.

[182] The court therefore concludes that the Minister and DAERA are under a statutory obligation to implement the checks on goods entering NI from GB in accordance with the requirements of the Protocol.

[183] This legal obligation arises from section 7A of the European Union (Withdrawal) Act 2018, the Protocol and the OCR.

[184] This conclusion is based on a proper interpretation of the interlocking provisions in accordance with the principles referred to above. It is entirely consistent with the ordinary meaning to be given to the terms of section 7A of the Withdrawal Act, the Protocol and the OCR in their context and in the light of their object and purpose.

[185] As Mr Jones forcefully submitted on behalf of the notice party the obligation is clear and beyond doubt.

Was Executive Committee agreement required for the implementation/continuation of checks under OCR?

[186] Having determined that the Minister and DAERA were under a legal obligation to carry out checks under the Protocol, the court now turns to what was in truth, the point of substance at the heart of the initial decision and the subsequent judicial review challenges. It was the Minister's contention that he required retrospective Executive Committee agreement for the implementation of checks under OCR and its approval for the continuation of such checks. The absence of such approval was the basis for the instruction which is challenged in these proceedings.

The Legal Framework

[187] The starting point is that it is settled law that the Executive Committee in Northern Ireland does not itself exercise executive power. Rather executive authority is discharged on behalf of the Northern Ireland Assembly by a First Minister and Deputy First Minister and up to 10 ministers with Departmental responsibilities.

[188] As Morgan J said in *Re Solinas* [2009] NIQB 43 at para [30]:

> "[30] It is, however, important to recognise that the Executive Committee has not and never has had executive power or the entitlement to exercise executive power. By virtue of section 23(2) of the 1998 Act it is Ministers or Northern Ireland departments who have the right to exercise executive power although there were certain savings in respect of the Northern Ireland Civil Service and the Commissioner for Public Appointments for Northern Ireland. That position has not been altered by the 2006 Act."

[189] A consideration of the parties' arguments on this issue requires an understanding and analysis of sections 20 and 28A of the 1998 Act and the Ministerial Code applicable to Ministers in Northern Ireland.

[190] This statutory framework has been comprehensively and authoritatively set out in the judgment of Keegan LCJ in *The Minister for Infrastructure and the Department for Infrastructure and Safe Electricity, A&T Limited and Patrick Woods and the Executive Office* [2022] NICA 61.

[191] At the risk of adding to an already lengthy judgment, rather than summarise the relevant passages, I propose to set them out in full:

"[10] The first relevant legal provision is the NIA. Section 20 of the NIA reads in the following terms:

> '(1) There shall be an Executive Committee of each Assembly consisting of the First Minister, the deputy First Minister and the Northern Ireland Ministers.
>
> (2) The First Minister and the deputy First Minister shall be chairmen of the Committee.
>
> (3) The Committee shall have the functions set out in paragraphs 19 and 20 of Strand One of the Belfast Agreement…'

[11] The functions were described in two paragraphs of the Belfast Agreement namely 19 and 20 as follows:

> '19. The Executive Committee will provide a forum for the discussion of, and agreement on, issues which cut across the responsibilities of two or more Ministers, for prioritising executive and legislative proposals and for recommending a common position where necessary (e.g. in dealing with external relationships).
>
> 20. The Executive Committee will seek to agree each year, and review as necessary, a programme incorporating an agreed budget linked to policies and programmes, subject to approval by the Assembly, after scrutiny in Assembly Committees, on a cross-community basis.'

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

[13] Of particular import is the addition by the 2006 Act of section 20(4) into the NIA in the following terms:

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

(a) significant or controversial matters that are clearly outside the scope of the agreed programme referred to in paragraph 20 of Strand One of that agreement;

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

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

'(5) Subsections (3) and (4) are subject to subsection (6).

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

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

[16] Thereafter, the Northern Ireland (Executive Formation on Exercise of Functions) Act 2018 and the Northern Ireland (Executive Formation etc) Act 2019 dealt with decision making issues which arose following the *Buick* decision. These legislative provisions expressly allowed a senior officer of the Department to exercise the functions of the Department in the absence of a Minister if they were satisfied that it was in the public interest to do so.

[17] A second suite of amendments came about as a result of the Executive Functions Act 2020 which was

correctly described by the judge as "a short but important Act." Its sole purpose is to amend section 20 of the NIA, which makes provision for the functions of the Executive Committee.

[18] Section 1(2) of the 2020 Act amended subsection (4) of section 20 of the NIA. Rather than the previous reference at paragraph (a) to "significant or controversial matters that are clearly outside the scope of the agreed programme referred to in paragraph 20 of Strand One of that Agreement", there was substituted the following text:

> '(a) where the agreed programme referred to in paragraph 20 of Strand One of that Agreement has been approved by the Assembly and is in force, any significant or controversial matters that are clearly outside the scope of that programme;
>
> (aa) where no such programme has been approved by the Assembly, any significant or controversial matters.'

[19] The key amendments made by the 2020 Act for the purposes of this litigation are those made by section 1(3) and (4). Section 1(3) simply provides that, in section 20(5) of the NIA, there should be reference to subsections (6)-(9), rather than merely subsection (6). Accordingly, section 20(3) and (4) are now subject to additional provisions. In other words, the carve-outs or exceptions to Executive decision-making have been increased. The material exception relied upon by the Department for Infrastructure Minister in this case is in a new subsection (7), inserted by section 1(4) of the 2020 Act in the following terms:

> '(7) Decisions may be made by the Department for Infrastructure or the Minister in charge of that Department in the exercise of any function under—
>
> (a) the Planning Act (Northern Ireland) 2011 (except a function under section 1 of that Act); or

(b) regulations or orders made under that Act,

without recourse to the Executive Committee.'

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

Section 20 as amended: the current provisions

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

(1) There shall be an Executive Committee of each Assembly consisting of the First Minister, the deputy First Minister and the Northern Ireland Ministers.

(2) The First Minister and the deputy First Minister shall be chairmen of the Committee.

(3) The Committee shall have the functions set out in paragraphs 19 and 20 of Strand One of the Belfast Agreement.

(4) 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 [F4 subsections (6) to (9)].

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

[F5(7) Decisions may be made by the Department for Infrastructure or the Minister in charge of that Department in the exercise of any function under—

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

(b) regulations or orders made under that Act,

without recourse to the Executive Committee.

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

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

Textual Amendments

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

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

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

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

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

The Ministerial Code

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

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

> '2.4 Any matter which:
>
> (i) cuts across the responsibilities of two or more Ministers;
>
> (ii) requires agreement on prioritisation;
>
> (iii) requires the adoption of a common position;

(iv) has implications for the Programme for Government;

(v) is significant or controversial and is clearly outside the scope of the agreed programme referred to in paragraph 20 of Strand One of the Agreement;

(vi) is significant or controversial and which has been determined by the First Minister and deputy First Minister acting jointly to be a matter that should be considered by the Executive Committee; or

(vii) relates to a proposal to make a determination, designation or scheme for the provision of financial assistance under the Financial Assistance Act (Northern Ireland) 2009

shall be brought to the attention of the Executive Committee by the responsible Minister to be considered by the Committee.'

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

'28A(1) Without prejudice to the operation of section 24, a Minister or junior Minister shall act in accordance with the provisions of the Ministerial Code.

(2) In this section the Ministerial Code means:

(a) The Ministerial Code that becomes the Ministerial Code for the purposes of this section by virtue of paragraph 4 of Schedule 1 to the Northern Ireland (St Andrews Agreement) Act 2006 (as from time to time amended in accordance with this section); or

(b) Any replacement Ministerial Code prepared and approved in accordance with this section (as from time to time amended in accordance with this section);

(5) The Ministerial Code must include provision for requiring Ministers or junior Ministers to bring to the attention of the Executive Committee any matter that ought, by virtue of section 20(3) or (4), to be considered by the Committee.

(6) The Ministerial Code must include provision for a procedure to enable any Minister or junior Minister to ask the Executive Committee to determine whether any decision that he is proposing to take or has taken, relates to a matter that ought, by virtue of section 20(3) or (4) to be considered by the Committee.

(10) Without prejudice to the operation of section 24 a Minister or junior Minister has no Ministerial authority to take any decision in contravention of a provision of the Ministerial Code made under subsection (5).'"

[192] Having set out in full the relevant provisions of sections 20 and 28A the Lady Chief Justice went on to consider the implications for the issue to be determined by the court. In that case the court was considering whether or not the Minister was obliged to refer a planning decision to the Executive Committee. The court went on to state:

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

"(2) Where an Act refers to an enactment, the reference, unless the contrary intention appears, is a reference to

that enactment as amended, and includes a reference thereto as extended or applied, by or under any other enactment, including any other provision of that Act.

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

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

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

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

[40] First, the language of the 2020 Act which amends the NIA is set in clear and unambiguous terms. The Act is described as an Act to make provision concerning the decisions which may be made by Ministers without recourse to the Executive Committee. It is a short and succinct Act which specifically amends section 20 of the NIA. In particular, in subsection (5) there is a widening of application from simply subsection (6) of section 20 to include subsection (6) to (9). After subsection (6) the new subsection (7) is included which specifically allows the Department for Infrastructure or the Minister in charge to exercise a planning function without recourse to the Executive Committee.

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

[42] Section 28A(1) of the NIA requires a Minister to act in accordance with the provisions of the Ministerial Code. Section 28A(5) provides that the Ministerial Code must

include provision for requiring Ministers or junior Ministers to bring to the attention of the Executive Committee any matter that ought, by virtue of section 20(3) or (4) to be considered by the Committee.

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

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

[45] It therefore, follows, in our view that the Minister in this case was under no obligation to bring the matter to the Executive Committee. Since such planning decisions are not now matters that require to be considered by the Committee, the Minister is not acting in contravention of the Ministerial Code. There was also no need to amend the Ministerial Code and so the position was not, as thought at first instance, that this was a job "half done." We also find force in Dr McGleenan's analogy that the amendments which came about as a result of the devolution of policing and justice contained in section 20(6) did not result in an amendment to the Ministerial Code.

[46] Accordingly, we consider that the conclusion reached by the judge in relation to application of the Ministerial Code was erroneous. We agree with

> Dr McGleenan's submissions that there was an over complication of this issue before the court and that the judge underestimated the effect of the section 20(5) amendment which brought section 20(7) into play. The judge therefore fell into error in deciding that the Minister was in breach of the Code or that some amendment was required. We must reverse that conclusion. In doing so we stress that the judge did not have the benefit of the Attorney General's argument which has been of considerable assistance to us along with the focused submissions of counsel.
>
> [47] In our view the statutory interpretation we have set out above is a clear answer to this case. Therefore, it is not necessary to consider the alternative arguments regarding Parliamentary sovereignty and implied repeal."

[193] Whilst the focus of the court was on the implications of section 20(7) of the 1998 Act it will be seen that sections 20(3) and (4) are now subject to sub-sections (6)-(9) of that section. Clearly sub-section (8) has relevance in this application.

[194] There are two important implications which arise from the decision in *Safe Electricity*.

[195] Firstly, it will be seen that the threshold for the requirement to refer a matter to the Executive has been raised, or as the Court of Appeal put it, echoing the comments of Scoffield J at first instance, at para [19]:

> "The carve-outs or exceptions to executive decision-making have been increased."

[196] Secondly, there is no conflict between the obligations under the Ministerial Code and the obligations under section 20 of the 1998 Act – see paras [44] and [45]. Whilst the focus of the Court of Appeal was on planning decisions by reference to section 20(7) the court's reasoning equally applies to section 20(8).

[197] In the context of the requirement to carry out OCR checks can it be said that their initiation in January 2021 or their continuation requires approval by the Executive Committee either by reason of such checks being significant or controversial (there being no programme of the type referred to in paragraph 20 of Strand 1 of the Belfast Agreement) or cross-cutting or that recommending a common position was necessary?

[198] In the court's view the answer to this question is "no." The starting and fundamental point is that the requirement to carry out the OCR checks is a statutory obligation imposed on the Minister. This obligation arises from section 7A of the

2018 Act which gives domestic legal effect to the Protocol in accordance with the analysis set out already in this judgment.

[199] The obligation to carry out OCR checks existed prior to the end of the transition period. DAERA is the competent authority designated to carry out the relevant checks. Under domestic law, DAERA has the legal responsibility for complying with the OCR. After the transition period as the competent authority DEARA had responsibility for carrying out the additional checks required by the Protocol.

[200] Not only is the legal position clear, it appears that this has been accepted as the legal position by the Minister since at least May 2020. Thus, in May 2020 the Minister appointed the former DAERA Permanent Secretary, Dr Dennis McMahon, as senior responsible owner for the SPS Operational Delivery Programme in anticipation of the checks that would be required at the end of the transition period.

[201] The Minister's position was confirmed in written answers provided to Mr Patsy McGlone MLA in September and October 2020 regarding the Protocol and its implementation. In a written answer dated 29 September 2020 to the question:

> "To ask the Minister of Agriculture, Environment and Rural Affairs what legal advice he has sought should he fail to make the preparations required by the Withdrawal Agreement as requested by the Secretary of State."

The Minister replied:

> "Legal advice has been sought during various stages of the programme from the Departmental Solicitor's Office and from the Attorney General. DSO has advised that the obligation to implement the NI Protocol is on the UK government, and it has given the Protocol domestic legal effect by section 7A of the European Union (Withdrawal) Act 2018. It has ongoing obligations under the Withdrawal Agreement to create the legal effects set out in it. The Official Controls Regulations (OCR) requirements are part of domestic law as a result of Article 5(4) of the NI Protocol and s.7A of the European Union (Withdrawal) Act 2018. Under the OCR, DAERA is responsible for Sanitary and Phytosanitary SPS checks on certain goods coming into Northern Ireland. DAERA is therefore required by UK domestic law to ensure compliance with its legal duties under the OCR.
>
> The consequence of a failure by the Department to implement its responsibilities may be a judicial review or a claim for damages by affected parties. Furthermore,

> failure to implement the NI Protocol may result in penalties under the WA Agreement, to which the UK government may require the Department to contribute."

[202] On 12 October 2020 the Minister confirmed DEARA's obligations under Articles 5(4) and section 7A of the 2018 Act in another written reply to Mr McGlone MLA.

[203] After the transition period commenced the Minister implemented what he recognised to be his legal obligations and DEARA, in fact, carried out the checks for a period of 13 months prior to his instruction of 2 February 2022.

[204] The paper he provided for consideration by his fellow Executive Ministers on 25 January 2022 again confirms his legal obligations. The legal position is confirmed in paras 2 and 3 of the paper. (See para [129] above.)

[205] Thus, at para [30] when setting out the legal position the paper states:

> "30. However, with the end of the EU Exit transition period – the EU now considers GB to be a third country, whereas NI remains part of the EU's single market and continues to apply EU law listed in Annex 2 of the Protocol – additional checks are required. (The NI Protocol is an integral part of the Withdrawal Agreement between the EU and UK which established the UK's withdrawal from the EU. The Withdrawal Agreement entered into force on 31 January 2020 after having been agreed by the UK and EU at the European Council on 17 October 2019.)"

[206] That the Minister considered he had the authority to make decisions in relation to the implementation of OCR checks is evident not only by the actions of DAERA over the 13 month period between January 2021 and February 2022 but is amply illustrated by the fact that on 23 December 2021 he instructed officials to increase checks on goods entering the Republic of Ireland from GB with immediate effect.

[207] Against all of this background the Minister sought to absolve himself from these legal obligations by relying on the provisions of sections 20 and 28A of the 1998 Act.

[208] Thus, the paper continues:

> "31. These are not the only legal duties I have to observe. In addition to those legal duties arising out of the NI Protocol, I also have legal duties pursuant to the

> Northern Ireland Act 1998 and the Northern Ireland Ministerial Code. Section 28A(1) requires me to act in accordance with the provisions of the Ministerial Code. Section 28A(10) deprives me of authority to take any decision in contravention of a provision of the Ministerial Code made under sub-section (5). Sub-section (5) provides that the Ministerial Code must include provision for requiring Ministers to bring to the attention of the Executive Committee any matter that ought, by virtue of section 20(3) or (4), to be considered by the Committee. Section 20(3) gives the Executive responsibility, inter alia, for 'cross cutting' issues. Section 20(4) gives the Executive responsibility for (in the absence of an agreed programme (for government) for significant or controversial matters.)
>
> 32. It is clear that the decision around the implementation of the Protocol are both significant and controversial. It is also likely that they would be regarded by a court as cutting across the responsibilities of other Ministers. In such circumstances a strong case would be made that I have lacked the Ministerial authority to take decisions as to the nature of the implementation of the Protocol."

[209] Applying the principles set out by the Court of Appeal in the *Safe* decision, I do not consider that the decision to implement the OCR checks under the Protocol required Executive Committee approval. It is undoubtedly the case that the Protocol and the requirement to implement checks at the ports in NI on goods entering from GB is politically controversial. This does not mean that it is controversial as a matter of law. The legal obligation is clear. Just because it is politically unpalatable for the Minister does not mean that he can invoke the provisions of the 1998 Act to absolve himself and DAERA from their legal obligations. The fact that the Minister considers it to be a controversial matter is, of course, a relevant factor but it does not override the clear legal obligations imposed by the Withdrawal Agreement.

[210] It follows from this analysis that the Executive Committee does not itself have the authority to direct that the OCR checks should be stopped. The legal position is settled and clear. In short, the Executive Committee had no approval function in the context under scrutiny.

[211] Importantly, the Minister's paper refers to apparent practical or logistical difficulties in implementing what the Protocol requires. Such difficulties do not, in my view, have the effect of making the matter one which requires Executive discussion and agreement. It could not reasonably be said that the matter "affects the exercise of the statutory responsibilities of one or more or other Ministers more than incidentally."

[212] Undoubtedly, the Minister and DAERA will have decisions to make in terms of how the checks are implemented. This may involve decisions in relation to the allocation of resources within DAERA including decisions in relation to such matters as staffing and logistics. However, Executive Committee approval is not required for such decisions. Neither the Minister nor the Executive Committee can rely on section 20 or section 28A of the 1998 Act to avoid DAERA's legal obligations imposed by statute.
[213] It would appear that the Minister's instruction was motivated by political rather than legal considerations. When the PAP letter challenging the legality of the checks was received, rather than await legal advice from the DSO which was in train, the Minister, in effect, conceded the relief sought in his direct reply.

[214] On any showing the decision to issue the instruction was made with great haste and urgency. The instruction to stop the checks which had been in place for 13 months was to be implemented within hours. It was to take effect immediately prior to the decision by the Minister's DUP colleague, the First Minister, to resign from his position. They strongly suggest a desire to have the instruction implemented prior to the collapse of the Executive and the withdrawal of the Ministers from the Executive Committee which took place on 4 February 2022. The court also notes that there was no consultation with, or consideration of, the potential impact of the instruction on Belfast City Council or the Notice Party, Derry City and Strabane District Council, who would both have been affected by any immediate cessation of the checks pursuant to the Minister's instruction.

[215] The impugned instruction which was issued when the First Minister's resignation was imminent was consistent with the strategy outlined by the DUP leader in September 2021.

[216] The suggestion that the referral of the matter to the Executive Committee was for the purposes to ensure compliance with the law sits uneasily with the assertion in that speech that DUP Ministers would use their votes at the Executive Committee to frustrate any "additional checks" now or in the future or that if the choice was ultimately between remaining in office or implementing the Protocol in its current form the only option for any unionist Minister would be to cease to hold such office. (See para [82] above.)

[217] It is difficult to draw any conclusion other than that the decision under challenge in this application was an overtly political one, taken for political reasons and as part of the political campaign directed in opposition to the Protocol.

[218] The court recognises that the Minister and his party colleagues are politically opposed to the Protocol. It may well be that for politicians, as the DUP Leader said in September 2021:

> "There are no easy answers when the law requires one thing and politics demands something else."

[219] From the court's perspective there is an easy answer and that is that the law must be obeyed. This is dictated inexorably by the rule of law in every case. Any politically motivated decision that is in accordance with the law is unimpeachable. Every such decision which does not satisfy this indelible standard is unsustainable in law and must be set aside as a consequence.

[220] The Minister's instruction, if implemented, would have been in contravention of his and DAERA's legal obligations. The instruction was a clear attempt to frustrate the statutory purpose of section 7A of the European Withdrawal Act 2018. In so doing, the Minister acted unlawfully.

[221] The applicants place considerable reliance on an assertion that by issuing the instruction the Minister was in breach of the Ministerial Code. It is not necessary for the court to make a finding based on such an assertion. The court does, however, note that under the Code Ministers are required to:

> "1.4(a) Discharge in good faith all the duties of office;
>
> …
>
> (cd) To uphold the rule of law …
>
> (ce) To support the rule of law unequivocally in word and deed, and to support all efforts to uphold it."

On that basis the court expects that its ruling will be respected by the Minister.

Has the Executive Committee approved the OCR checks in any event?

[222] If I am wrong in my analysis to the effect that the implementation of the OCR checks does not require Executive Committee approval, I must consider whether, in fact, such approval has been given in any event. Mr Lavery's submissions on behalf of JR181(3) focused particularly on this point. He contended that, in fact, the Executive Committee had approved the OCR checks. He further contended that the checks could only be stopped by a further decision of the Executive Committee.

[223] This turns on the Executive Committee meeting which took place on 21 May 2020.

[224] It will be recalled that at this meeting the Executive Committee discussed the Command Paper which had been published the previous day entitled "The UK's Approach to the Northern Ireland Protocol" which set out its approach to implementing the Protocol.

[225] The minutes of that meeting (see paras [60]-[61] above), insofar as they are available to the court, record as follows:

> "**Brexit**
>
> **Protocol: Agri-food requirements**
>
> 11. The First Minister advised that:
> (i) The UK government has published its policy approach to the implementation of the Protocol, and that this confirmed the need for arrangements to control the entry of agri-food products into Northern Ireland, but also the need to simplify and minimise such checks.
>
> (ii) She and the Deputy First Minister would continue to engage with the Westminster government on this matter, including by means of the JMC (EN) Meeting later that day.
>
> 12. It was agreed that the Minister of Agriculture, Environment and Rural Affairs would take the lead on this issue with the support of a cross-departmental group; and that officials would confirm to Whitehall that the necessary work would be taken forward with DEFRA Cabinet Office and the NIO to move this forward."

[226] Although there is no affidavit filed by or behalf of the Minister setting out his understanding of what was agreed by the Executive Committee on 21 May 2020, his thinking can be gleaned from the paper he submitted to Executive Ministers where he argues at paragraph 7:

> "7. At its height, this decision empowers me, as Minister, to 'take the lead' on 'this issue.' 'This issue' isn't defined though reference is variously made to the UK government's publication of its policy approach (including the need to simplify and minimise checks) and the engagement with the Westminster government by the First Minister and Deputy First Minister.
>
> 8. Demonstrably this decision does not (insofar as it may be needed) authorise a particular implementation of the Protocol, much less any of the particular judgments my Department has taken over the last 13 months.

> 9. Though it is more debatable, neither do I believe that is of sufficient clarity to affect a delegation of the Executive's normal role to myself to take such decisions without recourse to the Executive."

[227] In my view, this position is untenable as a matter of law for the following reasons.

[228] It was clear that the Executive Committee was discussing "the implementation of the Protocol" and "the need for arrangements to control the entry of agri-food products into Northern Ireland, but also the need to simplify and minimise such checks."

[229] This was the issue the Executive Committee was discussing. It was agreed that the Minister would take "the lead on this issue" and "would confirm to Whitehall that the necessary work would be taken forward with DEFRA Cabinet Office and the NIO to move this forward." The necessary work was the implementation of the Protocol and specifically the arrangements to control the entry of agri-food products into Northern Ireland.

[230] As has been set out already, since that time the Minister and DAERA have undertaken this work and acted on the basis that they were responsible for carrying out the OCR checks. In my view, it is clear that the OCR checks were carried out with Executive Committee approval and agreement.

[231] Having come to this conclusion, if the Minister is correct in his submission that Executive Committee approval was required to implement the checks, I agree with Mr Lavery's submission that if the Minister wished to stop the checks, then he would require Executive Committee approval to do so. Based on the Minister's analysis that Executive Committee approval was required to implement the checks in the first place, such a reversal would clearly be a significant and controversial matter under section 20 of the 1998 Act and would require Executive Committee approval in accordance with the Ministerial Code.

Conclusion

[232] In summary the court concludes as follows:

(i) The applicants have standing to bring these applications.

(ii) The impugned decision is a public law one, amenable to judicial review.

(iii) The Minister and DAERA had at all material times a statutory obligation to implement the checks on OCR goods entering NI from GB under section 7A of the European Union (Withdrawal) Act 2018 read with the provisions of the Protocol and the OCR.

(iv) The checks carried out since 1 January 2021 to date are lawful.

(v) By issuing the instruction on 2 February 2022 the Minister was in breach of his legal obligations set out above.

(vi) The decision to implement the checks provided for in the legislation referred to at (iii) above did not require Executive Committee agreement under section 20 of the 1998 Act.

(vii) In the event that Executive Committee agreement was required as a matter of law to implement the OCR checks pursuant to the Protocol, then such agreement was made on 21 May 2020. Those checks could only be stopped as a result of a further agreement of the Executive Committee.

[233] The court therefore makes the following orders:

(a) An order of certiorari to bring up to this honourable court and quash the instruction of the Minister given on 2 February 2022 to DAERA to cease all checks that were not in force on 31 December 2020 (the OCR checks).

(b) A declaration that the said instruction was unlawful and of no effect.