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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR80

FOR JUDICIAL REVIEW

-v-

SECRETARY OF STATE FOR NORTHERN IRELAND
and
THE EXECUTIVE OFFICE

_____

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McCloskey J

Anonymity

[1] I reiterate that the Applicant was granted the protection of anonymity from the outset of these proceedings. There must be no publication of his identity or of anything which could lead to him being identified.

Introduction

[2] This judicial review challenge concerns the report of the Historical Institutional Abuse Enquiry (the "HIA Report") published on 20 January 2017. The substantive phase of the proceedings having been completed, three considerations in particular stand out. First, the devolution arrangements devised for Northern Ireland following the political settlement in 1998 involved the creation of a unique, bespoke model of government and law making inextricably linked with and motivated by the strife torn history of this jurisdiction. Second, neither the United Kingdom nor Northern Ireland, which is constitutionally part of the United Kingdom, has a conventional written constitution.

[3] Third, the indefinite moratorium applicable to the Executive and Assembly of Northern Ireland featuring in the present case arises in other judicial review cases. One of the consequences of this moratorium is that members of the Northern Ireland population are driven to seek redress from the High Court in an attempt to address aspects of the void brought about by the absence of a Government and legislature. This, as in the large cohort of "legacy" cases, in effect involves the High Court in disputes in cases which would not otherwise arise and entails a significant diversion of judicial and administrative resources. While this does not involve Judges encroaching upon the impermissible territory of political and legislative decision making, it skews the constitutional arrangements. While the spotlight on the implementation of the HIA redress proposals should be firmly on the Northern Ireland Executive and Assembly it is, rather, on the courts.

The Applicant

[4] The Applicant avers that in his childhood he was subjected to sexual, physical and psychological abuse at a named institution. In his affidavit he discloses details relating to his family and life circumstances. It is unnecessary to reproduce this. He further avers that he did not participate in the HIA. He asserts that he would qualify for compensation in accordance with the terms of the HIA Report's recommendations. None of the recommendations of the HIA report has been activated.

[5] The Applicant's case developed organically following the grant of leave to apply for judicial review. Its growth has reflected certain political and legislative developments affecting Northern Ireland. These will be examined *infra.*

The Respondents

[6] The Respondents are the Secretary of State for Northern Ireland (the "Secretary of State") and the Executive Office (the "EO"). The thrust of the Applicant's challenge to these two public authorities is evident from the primary remedies pursued:

> "*An order of mandamus directing the Secretary of State for Northern Ireland to take the steps necessary to establish a redress mechanism for survivors of historical institutional abuse…*
>
> *An order of mandamus compelling the Secretary of State to propose an early date for the poll for the election of the next Assembly ….*
>
> *An order of mandamus directing the Executive Office to take the steps necessary to establish a redress scheme.*"

Other forms of discretionary public law relief are pursued. In very brief compass, the Applicant's case is that the Secretary of State and/or the EO are legally empowered and legally obliged to take either or both of the steps identified in the mandatory orders claimed.

The HIA Inquiry

[7] The HIA Report was the culmination of an independent inquiry into physical, emotional and sexual childhood abuse and childhood neglect occurring in residential institutions in Northern Ireland between 1922 and 1995. It was published in January 2017. It was addressed to the Northern Ireland Executive, which had established the enquiry. It contains a series of recommendations on the subject of redress. One such recommendation was that there should be financial redress to victims in accordance with a specified scheme to be established by the Executive. The report proposed minimum and maximum payments of £7,500 and £100,000 respectively. These would be paid in the form of non-taxable lump sums following the processing of claims by the "HIA Redress Board". The report urged that its redress recommendations be speedily implemented. It exhorted that the first payments to victims be made before the end of 2017. These urgings and exhortations remain unfulfilled.

[8] It is necessary to consider the HIA Inquiry and Report in a little further detail. The Inquiry was established by a legislative measure of the Northern Ireland Assembly ("the Assembly"), namely the Inquiry into Historical Institutional Abuse

Act (NI) 2013 (the "2013 Act"), made on 18 January 2013, with the following long title:

> "*An Act to make provision relating to an inquiry into institutional abuse between 1922 and 1995.*"

By section 1(1), the Inquiry was established by the First Minister ("FM") and deputy First Minister ("dFM") of the Northern Ireland Executive. Its terms of reference were contained in a statement to the Assembly made by the FM and dFM jointly on 18 October 2012, per section 1(2). These terms could be amended only by the FM and dFM acting jointly, in accordance with an order approved by resolution of the Assembly: section 1(3).

[9] The remaining provisions of the 2013 Act make provision for the appointment of Inquiry members and the duration of such appointments; the termination of the Inquiry; the Inquiry's report; the payment of expenses to witnesses and others; the remuneration of the Inquiry panel members and any assessor, counsel or solicitor; and the making of procedural rules. In all of these matters the dominant agencies are the FM, the dFM and the Office of the First Minister and deputy First Minister ("OFMDFM"): see sections 2, 3, 5, 11, 13, 14 – 16 and 21. While the 2013 Act also made provision for other matters in which the dominant agencies were the Inquiry's chairperson and its panel of members, these do not fall to be considered in the present litigation context.

[10] While there is a repeated emphasis throughout the 2013 Act on the FM and dFM, the Assembly was not neglected. Section 13 stipulated that the Inquiry's report be laid before the Assembly upon publication or as soon thereafter as reasonably practicable.

[11] OFMDFM was, at the material time, by virtue of the Departments (NI) Order 1999, one of the so-called "Northern Ireland Departments". It is the only such Department mentioned in the 2013 Act. It is no more, having been "*renamed*" the Executive Office ("EO") by a measure of the Assembly namely the Departments Act (NI) 2016. Notably, having regard to all that has, and has not, occurred since the publication of the HIA Report, the Secretary of State does not feature in the 2013 Act.

[12] As an inevitable consequence of the bespoke statutory arrangements noted above, OFMDFM and, latterly, the EO have had a significant role in the HIA Inquiry which has become increasingly prominent since publication of the HIA Report. This is exhaustively documented in the EO bundle of evidence consisting of almost 1300 pages. Mr Philip McAteer (of counsel) on behalf of the EO, has escorted the court through this bundle in both written and oral submissions and by reference to two further aids of indispensable value, namely a bespoke index to the aforementioned bundle and a substantially augmented version of the parties'

agreed chronology. Having considered these materials in full, I shall highlight selected components only.

[13] The HIA Inquiry public hearings occupied a total of 223 sitting days, from 13 January 2014 to 08 July 2016. Both the origins of the Inquiry and the 2013 Act can be traced to a public statement by the Northern Ireland Executive ("the Executive") on 29 September 2011 that an inquiry into historical institutional abuse would be established. It was envisaged from the outset that the report of the Inquiry would be delivered to the Executive. From the earliest stages it was established that one of the functions of the Inquiry would be to make recommendations on redress for victims of abuse.

[14] On 04 November 2015, when the public hearings of the Inquiry were approximately two thirds completed, the Chairman, Sir Anthony Hart, made a public statement on the topic of redress. This contained *inter alia* the following:

> "*Although our Terms of Reference provide that the Inquiry will make recommendations and findings on a number of matters, the final decision as to whether there should be any form of redress, and what form it may take, are matters for the Northern Ireland Executive to decide, as can be seen from the following extract from our Terms of Reference:*
>
> > *'However, the nature or level of any potential redress (financial or the provision of services) is a matter that the Executive will discuss and agree following receipt of the Inquiry and Investigations report.'*
>
> *…. We will recommend that there should be a scheme to award financial compensation to those children who suffered abuse in children's homes and other institutions in Northern Ireland between 1922 and 1995 …*
>
> *We have now decided to gather additional evidence by way of a consultation ….* [which] *… is not intended to cover every one of the many issues that may arise in any redress scheme that we may recommend. Many of these issues are of a highly technical nature and we still have more work to do on them.*"

The documentary evidence post-dating this statement makes abundantly clear that OFMDFM was particularly alert to the issue of redress and its ramifications thereafter.

[15] In passing, Northern Ireland Assembly elections were held on 05 May 2016 and, as noted in [11] above, on 08 May 2016 OFMDFM ceased to exist, by operation of law, being replaced by the Executive Office ("EO"). I shall address this further *infra*.

[16] The documentary evidence further demonstrates that from mid-2016, coinciding with the appointment of the new FM and dFM, there was a particular focus within the EO on the possible cost of redress measures. This remained a recurring theme subsequently. The issue of redress was also raised from time to time in the Assembly, generating *inter alia* joint FM and dFM responses to formal questions. On 07 July 2016 the EO briefed Ministers in the following terms:

> "*The issue of financial redress is without doubt the primary focus of many involved in this area of work. The issue of affordability is of paramount importance; the need for political consensus and how we engage with the churches and institutions on behalf of Ministers to secure financial contributions to an overall quantum of funds for redress equally so. …*
>
> *The challenge … for Ministers/Executive is the moral imperative to address the harms through the delivery of an affordable redress scheme and managing the growing expectations of a small but active sector.*"

The briefing also identified measures and services other than financial redress which might arise for consideration. The need for co-ordination with other Departments, in particular the Department for Communities, the Department of Health ("DOH") and the Department of Justice ("DOJ") was recognised. The report of the Inquiry being imminent (some 7 months away), the briefing contained the following emphasis:

> "*… it is therefore hugely important that the supporting business case and submission at that juncture* [ie January 2017] *is comprehensive, wide-ranging, fully costed and articulate across the range of areas to be reported on as noted in the terms of reference for the Inquiry.*"

[17] The issue of redress for victims gained further momentum as a result of the activities of the "Panel of experts on redress", a non-statutory entity which had an affiliation with the University of Ulster. Their work generated the publication of a "Briefing Paper" circa November 2016. This was the product of *inter alia* engagement with victims and survivors. The briefing paper was directed to the EO. By this stage the Panel had published two reports. It had a wide ranging membership which included victims and survivors, academics, practising lawyers and certain human rights organisations. At this point the main thrust of the Panel's interaction with OFMDFM and the EO Committee was the Panel's concern about inertia on the part of the EO. On 01 December 2016, following a meeting with the dFM and a Junior Minister, the Panel published a press release which included the following:

> "*A comprehensive redress scheme for victims of historical child abuse must be part of the new Northern Ireland Programme for Government …*
>
> *Child abuse survivors and experts have developed a model compensation scheme which they want the incoming Northern Ireland Executive to adopt …*
>
> *With the …. Inquiry about to deliver its Report to the Executive Office, our Ministers need to plan now for the establishment of an appropriate redress scheme ….*"

The HIA Inquiry Report

[18] In its report published on 20 January 2017 the Inquiry made a series of recommendations relating to the victims of abuse. It highlighted the multiplicity of victims' needs, noting that these could not be effectively addressed by any single agency. Recognising that victims would require an advocate, it recommended the creation of the office of Commissioner for Survivors of Institutional Childhood Abuse, proposing that the Commissioner would have a series of specific responsibilities and would be assisted by an Advisory Panel to be chosen by the FM and dFM. The Commissioner would be created by statute, allocated a separate budget and required to report annually to the Assembly. The Inquiry further recommended that the EO should continue to fund groups of former residents of children's residential homes.

[19] Next, summarising the research which it had undertaken, the Inquiry recommended the payment of a lump sum compensation to victims of abuse, explaining its reasons for proposing that this be a government-funded compensation scheme, to be established by the Executive. Payments of compensation would be graded, ranging from £7,500 to £100,000. The scheme would be administered by a newly created HIA Redress Board, which would determine eligibility. The Inquiry expressed its views on eligibility, including the specific issues of secondary victims and deceased victims. This section of its report contains the following striking passage:

> "*We recommend that priority is given by the HIA Redress Board to those applicants who are over 70 or in poor health …*
>
> *Many have urged that a redress scheme be set up as a matter of urgency, not least because many applicants to the Inquiry were elderly or in poor health and may not live to receive compensation if it takes a long time to set up a redress scheme. Whether the HIA Redress Board is put on a statutory or on an ex gratia basis, we urge the speedy implementation of our Recommendations.*"

The report added:

> "*… we consider that if the implementation of our recommendations is addressed by the Northern Ireland Executive and Assembly in a positive and energetic fashion any legislative or administrative procedures that are required to create the HIA Redress Board can be put in place in time to enable the first payments to be made by the HIA Redress Board by the end of 2017.*"

[20] I draw attention briefly to certain significant events immediately preceding publication of the HIA Report:

(i) On 15 December 2016 the FM and dFM approved the creation of an "Engagement Forum", a measure which was designed to provide victims and survivors of abuse with facilitates for consultation and discussion and to provide a conduit of consultation and communication with the "HIA Implementation Programme Board", an entity which EO officials envisaged would be brought into existence of the wake of the HIA Report.

(ii) On 06 January 2017 the HIA Report was delivered in part to the private offices of the FM and the dFM.

(iii) On 09 January 2017 the dFM resigned from office with the result that, by operation of law, the FM also ceased to hold office.

Post-January 2017

[21] On 02 March 2017 Northern Ireland Assembly elections were held. The HIA Report featured in a "first day brief" dated 22 March 2017, an EO paper, which identified certain of the Report's recommendations and stated *inter alia*:

> "***Key issue**: No action can be taken to implement the Report's recommendations in the absence of an Executive. This is made clear not only in the Terms of Reference of the Inquiry, which states that the nature and level of any potential redress is a matter for the Executive, but also under the Ministerial Code. Any response to the Inquiry Report must, of its nature, be cross-cutting and significant. Therefore, any action to be taken in relation to the implementation of the Report would have to be referred to and agreed by an Executive. Upon a restored Executive, it will be a top priority to put the Report and Findings to the Executive for decision(s) on the implementation of the recommendations including significant financial resources, primary legislation, establishment of two arm's length bodies and the provision of services.*"

[22] Following a period of some five months inertia, on 30 June 2017 Sir Anthony Hart wrote to the Secretary of State, communicating formally that the Inquiry had fulfilled its Terms of Reference and, therefore, had reached its *terminus*. Sir Anthony noted both the enduring political void and the breadth of the positive political response to the HIA Report. He continued:

> "*Because of the wide welcome for, and support of the Report, expressed in the previous Assembly on 23 January and the clear undertaking by the Prime Minister to the House of Commons on 08 February that the findings of the Report will be 'taken into account and acted upon', I feel justified in urging you to put in hand the necessary steps to implement the recommendations of the Inquiry in full as a matter of urgency and without delay ….*
>
> *In the absence of a First Minister and a deputy First Minister, I will copy this letter to the acting Head of the Northern Ireland Civil Service.*"

Sir Anthony also drew attention to what he had said in his related letter of 12 June 2017 to the leaders of the political parties in the Assembly:

> "*The implementation of our recommendations is urgent because so many of those who waited many years for their voices to be heard, and who anxiously await the implementation of our recommendations, are now advancing in years and/or in proof health and for them the prospect of more delay adds to the burden so many have carried for so long.*"

[23] During the period which ensued there was an increasing focus on the Head of the Northern Ireland Civil Service ("HOCS"). On 11 August 2017 members of the Panel of experts (*supra*) met the HOCS and certain EO officials. The minutes record the following:

> "*HOCS pointed out that there would be a number of policy decisions relating to interim compensation payments; it would not be straightforward. He also confirmed that with no Assembly there can be no devolved legislation and therefore there is no devolved power to make interim compensation payments.* ***In the absence of an Executive, any enabling legislation could only be put in place through Westminster ….***
>
> *In response to questions about legislative authority HOCS noted that the SOS could take specific legislation through Westminster without going into a period of Direct Rule which*

> *he did, for example, in order to collect this year's rates payments in Northern Ireland.*"

In the period which followed the EO, in tandem with HOCS, worked on devising "*options for implementation of the HIA Report recommendations on financial redress*". By December 2017 HOCS had decided that the steps necessary to devise draft legislation would be undertaken and that this exercise would enable the envisaged legislation to be introduced in either the Assembly or Westminster.

[24] On 24 January 2018 HOCS, in the forum of the Northern Ireland Affairs Committee, described the contemplated legislation as "*quite complex*" and stated unequivocally that in the absence of restored devolved institutions in Northern Ireland he would be requesting the Secretary of State to take the new legislation through Parliament and, further, that the matter would be accorded priority. The envisaged statutory model, it seems, will give effect to the Report's recommendations relating to the creation of a redress board and a commissioner.

[25] The affidavit evidence on behalf of the EO documents the further pre-legislation steps which have been taken during approximately the past year. In brief compass, two separate measures of draft legislation were completed by October 2018; a formal public consultation exercise because on November 2018; this was followed by *inter alia* various public information meetings; the consultation period, with an extent of four weeks, had a duration of 16 weeks, ending on 10 March 2019; and the exercise generated a "*very encouraging*" 562 responses. According to the EO deponent, as of 26 March 2019:

> "*The consultation analysis is well advanced and remains on track to be completed shortly after the Easter holidays whereupon* [HOCS] *will, in the absence of the devolved institutions, ask the Secretary of state to take the necessary steps to have the legislation enacted through Westminster.*"

[26] Chronologically, it is appropriate to interpose here that the substantive hearing of the judicial review took place from 01 – 03 April 2019. Both at the last pre-hearing case management report and upon completion of the substantive hearing the court identified the possibility of either, or both, Respondents applying subsequently for leave to adduce additional affidavit evidence to reflect further anticipated material developments. HOCS having committed himself unambiguously and unconditionally to formally requesting the Secretary of State to "take" the new legislation through Westminster, the main *incognito* prevailing upon completion of the substantive hearing was the Secretary of State's response to such request. This issue is further addressed in *infra.*

The Secretary of State: Affidavit Evidence

[27] The affidavit evidence on behalf of the Secretary of State has the following main features:

(i) The Secretary of State "*… is of the view (along with her predecessors) that* [she] *does not have the power to make decisions about, or to implement the recommendations of the HIAI, in the absence of primary legislation.*"

(ii) The Secretary of State has been the instigator of certain measures of primary Westminster legislation relating to Northern Ireland subsequent to January 2017. There has been legislation relating to *inter alia* Ministerial appointments, regional Rates and budget (which I shall address further *infra*.)

(iii) The legislation regulating the Northern Ireland budget was introduced reluctantly, given the perceived risk that this could detrimentally affect continuing "*talks*" among the Northern Ireland political authorities and would also prevent any newly formed Executive from legislating on this matter.

(iv) In a statement to the House of Commons the Secretary of State enunciated the policy position that "*… there would be intervention only in relation to measures which were necessary in order to ensure the continuity of public services in Northern Ireland and that they would be limited in nature …* [restricted to] *… those decisions which were necessary for providing good governance and political stability in Northern Ireland, consistent with the restoration of an Executive at the earliest possible opportunity.*"

(v) The Secretary of State's policy stance on the possible exercise of her statutory power to propose a date for a further Assembly election was that this "*would be likely to be divisive and therefore damage to the prospects of achieving political agreement and the restoration of devolved government …* [and] *… there has been nothing to suggest that the outcome would be significantly different than those of the two previous Assembly elections or the recent general Election.*"

(vi) Generally, the Secretary of State "*… remains of the firm view that devolved government is the only sustainable and long term way forward for Northern Ireland and renewed dialogue between the parties is the only means of achieve this.*" This is the Government's "*absolute priority*".

(vii) The Secretary of State has been aware since (at latest) August 2018 of the draft legislation and consultation exercises outlined above. She has "*… expressed her support for the ongoing work and looked forward to receiving details of the outcome of the consultation process when analysis had been completed*".

(viii) The Secretary of State "*… remains of the view that the implementation of the recommendations of the HIAI Report is a devolved matter and that she has neither the legislative nor executive power to take the steps necessary to do so. In any event, it is clear from the correspondence from HOCS that there is no single or obvious mechanism for implementation. It is more likely that a package of measures would be required covering a number of areas which, in the absence of NI Ministers, should be decided by Parliament.*"

Governance of Northern Ireland: pre – NIA 1998

[28] The Government of Ireland Act 1920 (the "1920 Act"), operative from 23 December 1920, was introduced by the Westminster Parliament following several unsuccessful attempts to grant "home rule" to the geographical entity of Ireland. By this statute the separate entities of Northern Ireland and Southern Ireland were established with both constitutionally remaining part of the United Kingdom. Some two years later, following much turbulence, the new Irish Free State, excluding Northern Ireland, was established under the Anglo Irish Treaty.

[29] The model of self-government established for Northern Ireland, with its now familiar trilogy of transferred, reserved and excepted powers, closely resembled colonial constitutional arrangements in other States. The Lord Lieutenant of Northern Ireland was appointed the Monarch's representative, with responsibility for *inter alia* establishing a cabinet which did not require parliamentary support. No provision was made for a Prime Minister. The dominance of the Westminster Parliament was proclaimed forcefully in section 6(1). Positioned within a discrete chapter entitled "Executive Authority", section 8(1) provided:

> "*The Executive power in Southern Ireland and in Northern Ireland shall continue vested in His Majesty the King and nothing in this Act shall affect the exercise of that power, except as respects Irish services as defined for the purposes of this Act.*
>
> *(2)* [Irish Services …..]
>
> *(3) Subject to the provisions of this Act relating to the Council of Ireland, powers so delegated shall be exercised - ….*
>
> *(b) In Northern Ireland, through such departments as may be established by Act of the Parliament of Northern Ireland, or, subject to any alteration by Act of that Parliament, by the Lord Lieutenant; and the Lord Lieutenant may appoint officers to administer those departments, and those officers shall hold office during the pleasure of the Lord Lieutenant.*"

[30] There followed three successive Ministries Acts, in 1921, 1944 and 1946. Pursuant to the Ministries (NI) Order 1972, two new "departments" were established (Environment and Manpower Services) and the terminology of "departments" became more prevalent. Northern Ireland had five Departments, each operating within the realm of devolved (ie "transferred") matters. This remained unchanged until 1976, when the Department of the Civil Service was established (by SI 1976 No 1211). Next, by the Departments (Northern Ireland) Order 1982 (the ("the 1982 Order"), the Department of the Civil Service was dissolved and its functions transferred to the Department of Finance and Personnel (formerly the Department of Finance), while specified functions of the Department of Finance were transferred to the Department of Agriculture, the Department of the Environment and the Department of Health and Social Services.

[31] During the intervening period there had been significant changes in the constitutional arrangements for the governance of Northern Ireland. By the Northern Ireland (Temporary Provisions) Act 1972, another measure of primary Westminster legislation, so-called "*direct rule*" was introduced. The mechanisms which this entailed included the prorogation of the Parliament of Northern Ireland, the assumption by the Secretary of State for Northern Ireland of the functions of Northern Ireland's Governor, Ministers and heads of Government Departments and the transfer of the duties of the Attorney General for Northern Ireland to the Attorney General for England and Wales. Section 1(1), under the rubric of "Exercise of Executive and Legislative Powers in NI", provided:

> "*So long as this section has effect, the Secretary of State shall act as chief executive officer as respects Irish services instead of the Governor of Northern Ireland and no person shall be appointed to hold office under and in accordance with Section 8 of the Government of Ireland Act 1920 as Minister of Northern Ireland or head of a Department of the Government of Northern Ireland; and, subject to the provisions of this Act and any Order there under –*
>
> *(a) All functions which apart from this Act belong to the Governor, or to the Governor in Council, or to the Government or any minister of Northern Ireland or head of a department of the Government of Northern Ireland, shall be discharged by the Secretary of State; and*
>
> *(b) All functions which belong to a Department of the Government of Northern Ireland may be discharged by the Secretary of State or (except insofar as he otherwise directs) may, notwithstanding that there is no head of the department), be discharged by the Department on*

behalf of the Secretary of State and subject to his direction and control …"

[32] Thereafter the Secretary of State headed the Northern Ireland Office, a non-statutory entity which at no time had the status of one of the Northern Ireland Departments. The political aspiration of the Westminster Government, expressed in section 1(5), was that the suspension of the devolved powers of the Northern Ireland institutions would be a temporary measure, having a duration of one year or, at most, two years.

[33] Next, the Northern Ireland Constitution Act 1973 (the "1973 Act") devised new governance arrangements for Northern Ireland, entailing *inter alia* the abolition of the (then suspended) Parliament of Northern Ireland and the post of Governor of Northern Ireland, together with the creation of a Northern Ireland Executive to be chosen by the new Northern Ireland Assembly which had been established by the Northern Ireland Assembly Act 1973, some two months previously. Part II of the 1973 Act made provision for "Legislative Powers and Executive Authorities". Under the rubric of "Executive Authorities in Northern Ireland", section 7 provided in material part:

"*(1) The executive power in Northern Ireland shall continue to be vested in Her Majesty.*

(2) As respects transferred matters the Secretary of State shall, as Her Majesty's principal officer in Northern Ireland, exercise on Her Majesty's behalf such prerogative or other executive powers of Her Majesty in relation to Northern Ireland as may be delegated to him by Her Majesty.

(3) The powers so delegated shall be exercised through the members of the Northern Ireland Executive established by this Act and the Northern Ireland Departments."

[34] In the wake of the political divisions and failure which materialised, the Northern Ireland Act 1974 (the "1974 Act") made provision for the prorogation, followed by dissolution, of the Northern Ireland Assembly and established a further "*interim period*" of direct rule, for one year initially and extendable thereafter. In the event, the "*interim period*" continued for 24 years. Schedule 1 established "Temporary Provision for Government of Northern Ireland". Following the heading "Legislative Functions", paragraph 1(1) provided:

"*During the interim period –*

(a) No Measure shall be passed by the Assembly; and

(b) *Her Majesty may be Order in Council make laws for Northern Ireland and, in particular, provide for any matter for which the Constitution Act authorises or requires provision to be made by Measure.*"

Under the further heading "Executive Functions", paragraph 2 provided:

"*(1) During the period –*

(a) No person shall be appointed or hold office under section 8 of the Constitution Act; and

(b) Any functions of the head of a Northern Ireland Department may be discharged by that Department and any functions of any other person appointed under that section may be discharged by the Secretary of State.

(2) During the interim period any functions of a Northern Ireland Department, including functions discharged by virtue of subparagraph (1)(b) above, shall be discharged by the Department subject to the direction and control of the Secretary of State."

The lifetime of the 1974 Act was eventually terminated by section 100(2) of and Schedule 15 to the Northern Ireland Act 1998 ("NIA 1998").

[35] I draw attention to the immediately preceding 'direction and control' provision, a statutory mechanism which, following its repeal in 1998, clearly for the purpose of giving proper effect to NIA 1998, was reintroduced by statute in 2000 for another finite period, once again in a governance vacuum context, being repealed some seven years later: see [45] *infra.*

Governance of Northern Ireland: The NIA 1998

[36] NIA 1998, another measure of primary legislation of the Parliament of the United Kingdom, which received the Royal Assent on 19 November 1998, had, per its long title, the following self-proclaimed aim:

"*An Act to make new provision for the government of Northern Ireland for the purpose of implementing the agreement reached at multi-party talks on Northern Ireland set out in Command Paper 3883.*"

The statutory context is provided by the Belfast Agreement. The following passages bear on one of the main issues raised in the Applicant's challenge. "Strand 1", entitled "Democratic Institutions in Northern Ireland", begins:

"1. *This agreement provides for a democratically elected Assembly in Northern Ireland which is inclusive in its membership, capable of exercising executive and legislative authority, and subject to safeguards to protect the rights and interests of all sides of the community.*

The Assembly

2. *A 108 member assembly will be elected by PR (STV) from existing Westminster constituencies.*

3. *The Assembly will exercise full legislative and executive authority in respect of those matters currently within the responsibility of the 6 Northern Ireland Government Departments, with the possibility of taking on responsibility for other matters as detailed elsewhere in this agreement.*"

Under the heading "Executive Authority", Strand 1 continues:

"14. *Executive authority to be discharged on behalf of the Assembly by a First Minister and Deputy First Minister and up to 10 Ministers with Departmental responsibilities. ……*

17. *The Ministers will constitute an Executive Committee, which will be convened, and presided over, by the First Minister and Deputy First Minister.*

18. *The duties of the First Minister and Deputy First Minister will include, inter alia, dealing with and co-ordinating the work of the Executive Committee …*

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 …*

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 …*

22. *All Northern Ireland Departments will be headed by a Minister …*

24. Ministers will have full executive authority in their respective areas of responsibility, within any broad programme agreed by the Executive Committee and endorsed by the Assembly as a whole."

[37] Section 5 of NIA 1998 provides:

> *"General Acts of the Northern Ireland Assembly.*
>
> *5. - (1) Subject to sections 6 to 8, the Assembly may make laws, to be known as Acts.*
>
> *(2) A Bill shall become an Act when it has been passed by the Assembly and has received Royal Assent.*
>
> *(3) A Bill receives Royal Assent at the beginning of the day on which Letters Patent under the Great Seal of Northern Ireland signed with Her Majesty's own hand signifying Her Assent are notified to the Presiding Officer.*
>
> *(4) The date of Royal Assent shall be written on the Act by the Presiding Officer, and shall form part of the Act.*
>
> *(5) The validity of any proceedings leading to the enactment of an Act of the Assembly shall not be called into question in any legal proceedings.*
>
> *(6) This section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland, but an Act of the Assembly may modify any provision made by or under an Act of Parliament in so far as it is part of the law of Northern Ireland."*

Continuing one of the main themes of the statutory history outlined above, I draw attention next to Part III of NIA 1998. There are three material provisions within the discrete chapter entitled "Functions". First, **Section 22** ("Statutory Functions"):

> *"22. - (1) An Act of the Assembly or other enactment may confer functions on a Minister (but not a junior Minister) or a Northern Ireland department by name.*
>
> *(2) Functions conferred on a Northern Ireland department by an enactment passed or made before the appointed day shall, except as provided by an Act of the Assembly or other subsequent enactment, continue to be exercisable by that department."*

Next, by **Section 23** ("Prerogative and Executive Powers"):

> *"23. - (1) The executive power in Northern Ireland shall continue to be vested in Her Majesty.*
>
> *(2) As respects transferred matters, the prerogative and other executive powers of Her Majesty in relation to Northern Ireland shall, subject to subsections (2A) and (3), be exercisable on Her Majesty's behalf by any Minister or Northern Ireland department.*
>
> *(2A) So far as the Royal prerogative of mercy is exercisable on Her Majesty's behalf under subsection (2), it is exercisable only by the Minister in charge of the Department of Justice. [added SI 2010/ 976 on 12 April 2010]*
>
> *(3) As respects the Northern Ireland Civil Service and the Commissioner for Public Appointments for Northern Ireland, the prerogative and other executive powers of Her Majesty in relation to Northern Ireland shall be exercisable on Her Majesty's behalf by the First Minister and the deputy First Minister acting jointly.*
>
> *(4) The First Minister and deputy First Minister acting jointly may by prerogative order under subsection (3) direct that such of the powers mentioned in that subsection as are specified in the order shall be exercisable on Her Majesty's behalf by a Northern Ireland Minister or Northern Ireland department so specified."*

[38] Third, **Section 26** ("International Obligations") provides:

> *"26. - (1) If the Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations, with the interests of defence or national security or with the protection of public safety or public order, he may by order direct that the proposed action shall not be taken.*
>
> *(2) If the Secretary of State considers that any action capable of being taken by a Minister or Northern Ireland department is required for the purpose of giving effect to any international obligations, of safeguarding the interests of defence or national security or of protecting public safety or public order, he may by order direct that the action shall be taken.*

(3) In subsections (1) and (2), "action" includes making, confirming or approving subordinate legislation and, in subsection (2), includes introducing a Bill in the Assembly."

The Executive Committee is regulated by **Section 20**:

"20. - (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) [added on 8 May 2007 by 2006 (c.53)] 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.

(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."

[39] Certain provisions of **Section 28A** ("Ministerial Code") are also to be noted:

"(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).

(3) If at any time the Executive Committee-

(a) prepares draft amendments to the Ministerial Code; or

(b) prepares a draft Ministerial Code to replace the Ministerial Code,

the First Minister and deputy First Minister acting jointly shall lay the draft amendments or the draft Code before the Assembly for approval.

(4) A draft Ministerial Code or a draft amendment to the Code-

(a) shall not be approved by the Assembly without cross-community support; and

(b) shall not take effect until so approved.

(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.

(7) The Ministerial Code must also include provision as to the procedures of the Executive Committee with respect to-

(a) the taking of decisions; and

(b) consideration by the Committee of decision papers that are to be considered by the North-South Ministerial Council or the British-Irish Council.

(8) The Ministerial Code must in particular provide-

(a) that it is the duty of the chairmen of the Executive Committee to seek to secure that decisions of the Executive Committee are reached by consensus wherever possible;

(b) that, if consensus cannot be reached, a vote may be taken; and

(c) that, if any three members of the Executive Committee require the vote on a particular matter which is to be voted on by the Executive Committee to require cross-community support, any vote on that matter in the Executive Committee shall require cross-community support in the Executive Committee.

(9) The Ministerial Code may include such other provisions as the Executive Committee thinks fit.

(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)."

[40] The Consolidated Fund of Northern Ireland is governed by sections 57 and 58 of NIA 1998. By section 57(2):

"*Sums forming part of the Fund*

(a) Shall be appropriated to the public service of Northern Ireland by Act of the Assembly; and

(b) Shall not be applied for any purpose for which they are not appropriate."

This discrete provision is, by section 57(3) "*subject to*" section 59. The latter ("Payments into the fund") provides:

"*The Secretary of State shall from time to time make payments into the Consolidated Fund of Northern Ireland out of money provided by Parliament of such amounts as he may determine.*"

[41] Certain provisions of NIA 1998 fell to be considered by the House of Lords in Robinson v Secretary of State for Northern Ireland and Others [2002] NI 390. Lord Bingham of Cornhill said at [10]:

> "*The 1998 Act, as already noted, was passed to implement the Belfast Agreement, which was itself reached, after much travail, in an attempt to end decades of bloodshed and centuries of antagonism. The solution was seen to lie in participation by the unionist and nationalist communities in shared political institutions, without precluding (see section 1 of the Act) a popular decision at some time in the future on the ultimate political status of Northern Ireland. These shared institutions were to deliver the benefits which their progenitors intended, they had to have time to operate and take root.*"

Lord Bingham added at [11]:

> "*The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the 1998 Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue. But the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody …*
>
> *It is in general desirable that the government should be carried on, that there be no governmental vacuum.*"

This was followed by the observation, at [12]:

> "*It would no doubt be possible, in theory at least, to devise a constitution in which all political contingencies would be the subject of pre-determined mechanistic rules to be applied as and when the particular contingency arose. But such an approach would not be consistent with ordinary constitutional practice in Britain. There are of course certain fixed rules, such as those the maximum duration of parliaments or the period for which the House of Lords may delay the passage of legislation. Matters of potentially great importance are left to the judgement either of political leaders (whether and when to seek a dissolution, for instance) or, even if to a diminished extent, of the Crown (whether to grant a dissolution). Where constitutional arrangements retain scope for the exercise of political judgement, they permit a flexible response to differing and unpredictable events in a way which the application of strict rules would preclude.*"

At [14] Lord Bingham described the Secretary of State as the "*non-partisan guardian of this constitutional settlement*".

[42] As already noted, NIA 1998 received the Royal Assent on 19 November 1998 and, per section 101(2), certain of its provisions took immediate effect. In accordance with section 101(3), many of its remaining provisions came into operation later. The Assembly operated in shadow mode only until 02 December 1999 when the requisite subordinate measure was made by the Secretary of State, namely The Northern Ireland Act (Appointed Day) Act 1999 (SI 1999 3208). This brought Parts I and III into operation, thereby enabling the devolved institutions to start functioning.

[43] It is convenient to record at this juncture the periods during which the Assembly has been suspended subsequently:

(i) 11 February – 30 May 2000.

(ii) 10 August 2001 (24 hours).

(iii) 22 September 2001 (*ditto*).

(iv) 14 October 2002 – 07 May 2007.

(v) 09 January 2017 – present.

Only one of the elected Assemblies has operated during the entirety of the four year parliamentary term.

[44] The Departments (NI) Order 1999 (the "1999 Order") was clearly designed to dovetail with NIA 1998, the first Assembly elections and the commencement dates just noted. The 1999 Order came into operation on 01 December 1999 (per SR (NI) 1999/ 480). It repealed *inter alia* the previous Ministries Acts, the 1973 Order and the 1982 Order. By Article 3 it established five Northern Ireland Departments, including (as noted above) OFMDFM. The existence of the extant Departments was extended, while three of them were renamed. Article 3(2) provided:

> "*The Office of the First Minister and deputy First Minister shall be in charge of the First Minister and the deputy First Minister acting jointly.*"

Article 4, under the rubric of "Exercise of Functions of a Department", provides:

> *"4. - (1) The functions of a department shall at all times be exercised subject to the direction and control of the Minister.*
>
> *(2) Without prejudice to the generality of paragraph (1), the Minister may in pursuance of that paragraph-*

(a) distribute the business of a department among the officers of the department in such manner as he thinks fit;

(b) by Minute laid before the Assembly assign any specified functions of the department to such officers of the department as he may determine under such designation as he may determine.

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

(a) the Minister; or

(b) a senior officer of the department.

(4) Subject to paragraph (5), in carrying out its functions a department shall adopt and use the name and seal of the department.

(5) The Minister may authorise the use of a special designation by any officers to whom any functions have been assigned under paragraph (2)(b).

(6) Nothing in this Order affects the operation of any statutory provision or rule of law which authorises or requires any functions of a department to be exercised in a particular manner or by particular persons."

[45] I resume the statutory chronology. Further resort to the statutory mechanism noted in [34] above was had via The Northern Ireland Act 2000 ('the 2000 Act'). This, by section 1(1), formally suspended the Assembly with effect from 11 February 2000, thereby disabling its legislative powers. By Schedule 1, paragraph 1 (1), the familiar 'direct rule' mechanism of Orders In Council to be made by Her Majesty were to replace Acts of the Assembly. 'Executive Functions' were addressed in Schedule 1, paragraph 4:

"4. – (1) While section 1 is in force –

(a) any functions of the First Minister and the deputy First Minister may be discharged by the Secretary of State;

(b) any functions of a Northern Ireland Minister who was in charge of a Northern Ireland department immediately before the coming into force of section 1 may be discharged by that department;

(c) *any functions of a Northern Ireland Minister who was not then in charge of a Northern Ireland department may be discharged by the Secretary of State;*

(d) *section 56 of the 1998 Act (which imposes duties on the First Minister and the deputy First Minister in relation to the Civic Forum) ceases to have effect;*

(e) *the functions to which section 66 of the 1998 Act applies (expenses of Northern Ireland Audit Office) are exercisable by the Department of Finance and Personnel;*

(f) *any functions of a Northern Ireland department (including functions discharged as a result of this sub-paragraph) are to be discharged subject to the direction and control of the Secretary of State."*

The 2000 Act had a lifetime of some seven years, being ultimately repealed by sections 1 and 2 of the Northern Ireland (St Andrews Agreement Act) 2006.

The Decision in Buick

[46] Article 4 of the 1999 Order was considered in Re Buick's Application [2018] NIQB 43. The two main features of this litigation context were the most recent (and enduring) of the Assembly suspensions noted above and a decision by civil servants of the Department for Infrastructure to grant planning permission under the relevant legislation for the development of a major waste disposal incinerator. Article 4(1) of the 1999 Order was the centre piece of these proceedings. The essential question was whether the Department in question was empowered to act as it did in the absence of its Minister. Keegan J held that the grant of planning permission was *ultra vires* the Department's powers having regard to the ordinary and natural meaning of the statutory language and taking into account also the consideration of democratic accountability.

[47] On appeal centre stage was, ultimately, occupied by section 28A of NIA 1998 and the Ministerial Code, paragraph 2.4 (see [39] *supra*). As a result, while the parties' arguments relating to Article 4 were noted at [44] - [46] in the judgment of the Lord Chief Justice, the court did not determine this issue. Rather, the appeal was determined on the basis of the "cross-cutting" provisions noted above, as [52] – [58] make clear. The conclusion of the Court of Appeal is expressed pithily in [54]:

"*We consider, therefore, that this was a significant and controversial matter which again required determination by the Executive Committee. It would be contrary to the letter and spirit of the* [Belfast] *Agreement and the 1998 Act for*

> *such decisions to be made by departments in the absence of a Minister.*"

Having stated unequivocally that this conclusion was "*sufficient to deal with the appeal*" at [56], the court added in what I consider to be an *obiter* passage:

> "*… any decision which as a matter of convention or otherwise would normally go before the Minister for approval lies beyond the competence of a senior civil servant in the absence of a Minister.*"

This, the court stated, "*follows from our analysis of the constitutional position of civil servants …*". This is a reference to the preceding passage in [55]:

> "*We are reinforced in these views by our recognition of the constitutional position of civil servants. That role is to advise Ministers and be accountable. The Appellant's submissions would effectively turn civil servants into Ministers. Such a remarkable constitutional change would require the clearest wording ….*"

The Northern Ireland (Executive Formation and Exercise of Functions Act 2018

[48] In the wake of the Court of Appeal's decision in Buick, judgment wherein was delivered on 06 July 2018, there followed the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 ("the 2018 Act"). This, a measure of primary Westminster legislation, came into operation on 01 November 2018. Its long title states:

> "*An Act to facilitate the formation of an Executive in Northern Ireland by extending the time for making Ministerial appointments following the election of the Northern Ireland Assembly on 02 March 2017; and to make provision about the exercise of governmental functions in, or in relation to , Northern Ireland in the absence of Northern Ireland Ministers.*"

Sections 1 and 2 modify section 16(a)(3) and section 32 of NIA 1998, extending the period for the formation of a Northern Ireland Executive. The effect of these provisions, in tandem with SI 2019 No. 616, is that the latest date for the appointment of an FM and dFM is currently 25 August 2019. The second main change effected is that the Secretary of State now has a discretionary power (formerly a duty) to require fresh Assembly elections prior to the same long stop date.

[49] The subject matter of **Section 3** of this short statute is "Exercise of departmental functions during period for executive formation". It is necessary to consider section 3 in its entirety:

> *"(1) The absence of Northern Ireland Ministers does not prevent a senior officer of a Northern Ireland department from exercising a function of the department during the period for forming an Executive if the officer is satisfied that it is in the public interest to exercise the function during that period.*
>
> *(2) The Secretary of State must publish guidance about the exercise of functions in reliance on subsection (1), including guidance as to the principles to be taken into account in deciding whether or not to exercise a function.*
>
> *(3) Senior officers of Northern Ireland departments must have regard to that guidance.*
>
> *(4) The absence of Northern Ireland Ministers is not to be treated as having prevented any senior officer of a Northern Ireland department from exercising functions of the department during the period beginning with 2 March 2017 and ending when this Act is passed.*
>
> *(5) The fact that a matter connected with the exercise of a function by a Northern Ireland department has not been discussed and agreed by the Executive Committee of the Northern Ireland Assembly is not to be treated as having prevented the exercise of that function as mentioned in subsection (1) or (4).*
>
> *(6) Subsections (4) and (5) do not apply in relation to the exercise of a function before this Act is passed if—*
>
> *(a) proceedings begun, but not finally decided, before this Act is passed involve a challenge to the validity of that exercise of the function, and*
>
> *(b) the application of those subsections would affect the outcome of the proceedings,*
>
> *but nothing in this subsection prevents the re-exercise of the function in the same way in reliance on subsection (1).*
>
> *(7) Subsections (1) to (6) have effect despite anything in the Northern Ireland Act 1998, the Departments (Northern Ireland) Order 1999 (S.I. 1999/283 (N.I. 1)) or any other enactment or rule of law that would prevent a senior officer of*

a Northern Ireland department from exercising departmental functions in the absence of Northern Ireland Ministers.

(8) No inference is to be drawn from subsections (1) to (7) as to whether or not a senior officer of a Northern Ireland department would otherwise have been prevented from exercising departmental functions.

(9) Before publishing guidance under subsection (2) the Secretary of State must have regard to any representations made by members of the Northern Ireland Assembly.

(10) In this section –

"enactment" includes any provision of, or of any instrument made under, Northern Ireland legislation (within the meaning given by section 98 of the Northern Ireland Act 1998);

"Northern Ireland Minister" includes the First Minister and the deputy First Minister;

"the period for forming an Executive" has the meaning given by section 1(5);

"senior officer of a Northern Ireland department" has the same meaning as in the Departments (Northern Ireland) Order 1999 (see Article 2(3) of that Order)."

[50] Section 5 of the 2018 Act is another "governance vacuum" provision, entitled "NI Ministerial Appointment Functions: Specified Offices". It provides:

> "*(1) During the period while there is no Executive, an appointment function of a Northern Ireland Minister in relation to a specified office may be exercised by the relevant Minister of the Crown.*"

There follows a table listing "*Specified Offices*" and the corresponding Minister of the Crown. Section 6 provides that any requirement for any such Minister to consult, or obtain the approval of, a Northern Ireland Minister or the Executive Committee is observed by consulting "*a relevant Northern Ireland Department*". Further provision for "*appointment functions*", as defined, relating to the Secretary of State is made by section 7.

[51] The guidance required by section 3(2) of the 2018 Act was published by the Secretary of State on 05 November 2018. Having referred to the enduring *lacuna* in the governance of Northern Ireland, paragraphs 4, 5 and 6 state:

> "*In the meantime, the UK Government will take the necessary steps to maintain the delivery of public services and protect the interests of the people of Northern Ireland …*
>
> *The UK Government recognises that, in the absence of an Executive, there will be some decisions that it should take, such as setting out departmental budget allocations in legislation. In the absence of a functioning Northern Ireland Assembly, the UK Government will keep under review the need for any additional necessary Northern Ireland legislation that may need to be brought before Parliament.*
>
> *In this context, the UK Government recognises that, while efforts to restore the Executive continue, Northern Ireland Departments will need to take decisions and exercise functions in order to uphold governance and protect the public interest. This guidance is intended to support NI Departments when considering taking and exercising those decisions and functions.*"

The Guidance, faithful to the specific requirements of section 3(2), has a section entitled "Guiding Principles for Decision-Making". These principles are framed in open textured, flexible and inclusive terms. They do not purport to be hard edged, bright line rules. A paradigm example of this is the principle enshrined in paragraph 9 that "*major policy decisions*", a phrase illuminated by certain inexhaustive illustrations, should "*normally*" be made by Ministers rather than NI Departments. Bearing in mind the full context, the principle expressed in paragraph 11(c) is noteworthy:

> "*The principle that opportunities should be taken to work towards the 12 outcomes published in the 2018 – 19 Outcomes Delivery Plan, which is based on the draft Programme for Government developed in conjunction with the political parties of the previous Executive …*
>
> *Opportunities should also be taken to continue to deliver previously agreed investment programmes such as those in the Investment Strategy for Northern Ireland 2011 – 2021.*"

Constitutional Conventions

[52] Constitutional conventions are one of the features of the United Kingdom's uncodified constitution. While there is general agreement among leading academics, commentators and judges about their functioning, there is scope for some doubt and disagreement about their precise scope and import in certain areas. This is an unavoidable phenomenon in the absence of a settled constitutional code.

[53] In O. Hood Philips and Jackson, Constitutional and Administrative Law (8th Edition), the following definition of constitutional conventions is offered at paragraph 7-001:

> "*Rules of political practice which are regarded as binding by those to whom they apply, but which are not laws as they are not enforced by the courts or by the Houses of Parliament.*"

The most noteworthy feature of this definition is that it excludes legal rules. This is harmonious with the approach of Dicey and other 19th century writers, who consistently made a distinction between the laws of the constitution and the conventions of the constitution. (See in particular Dicey, Law of the Constitution (10th Edition), chapters 14 and 15). The authors develop the thesis that this distinction explains why the courts do not enforce constitutional conventions. They suggest at paragraph 7-005:

> "*The fact that the courts do not enforce constitutional conventions does not mean that the courts do not incidentally recognise their existence. It may be relied on as an aid to statutory interpretation or to justify non-intervention by the courts in ministerial decisions in areas in which the courts feel that they cannot or should not become involve.*"

[54] The authors illustrate their thesis by reference to a landmark decision of the Supreme Court of Canada, Re Amendment of the Constitution of Canada [1981] 125 DLR (3rd) 1 and the following passage in particular, at page 22:

> "*No instance of an explicit recognition of a convention as having matured into a rule of law was produced. The very nature of a convention, as political in inception and as depending on a persistent course of political recognition by those for whose benefit and to whose detriment (if any) the convention developed over a period of time, is inconsistent with its legal enforcement ….*
>
> *The attempted assimilation of the growth of a convention to the growth of the common law is misconceived. The latter is the product of judicial effort, based on justiciable issues which attained legal formulation and are subject to modification and even reversal by the courts which gave them their birth …*
>
> *No such parental role is played by the courts with respect to conventions.*"

This analysis is not affected by the consideration that constitutional conventions are, typically, closely related to some law or laws.

[55] The Cabinet system of government is one of the more vivid illustrations of the operation of constitutional conventions. This small body of persons, whose president is the Prime Minister, exercises enormous control over both legislative and executive functions. Legal controls and constraints are conspicuously absent, another incident of the lack of a written constitution or bill of rights. Scrutiny and constraints are largely political in nature. See generally the discussion in Volume 8(2) of Halsbury's Laws of England (4th Edition Reissue) at paragraphs 19 – 22F.

[56] I have considered it appropriate to examine this topic briefly for two main reasons. First, none of the three parties, correctly in my view, invoked any particular constitutional convention either as a source of legal power for taking the action which the Applicant pursues or as a shield for justifying a refusal or reluctance to do so. Second, it seems likely that the developing practice attested by the evidence in this case whereby legislative activity by the UK Parliament in areas falling within the competence of the local devolved institutions – such as Budget or public appointments – is instigated by the Secretary of State for this jurisdiction, on occasions preceded by a formal request from the HOCS, is probably to be viewed as an evolving, constitutional convention peculiar to Northern Ireland in the abnormal governance circumstances prevailing here.

The Battle Lines Drawn

[57] The overarching contention developed on behalf of the Applicant by Mr Barry MacDonald QC (with Mr Malachy McGowan, of counsel) is that the Secretary of State and the EO are, or either of them is, both legally empowered and obliged to establish a redress scheme in accordance with the recommendations of the HIA Report. This contention is reflected in the primary remedy sought against, firstly, the Secretary of State in the final incarnation of the Order 53 pleading:

> "*An order of mandamus directing the Secretary of State … to take the steps necessary to establish a redress mechanism for survivors of historic institutional abuse, including in particular provision for compensation (hereinafter 'a redress scheme'), either by issuing guidance to that effect under section 3(2) of the* [2018 Act] *or otherwise.*"

Two kindred mandatory orders are sought against the EO:

> "*An order of mandamus directing the Executive Office to take the steps necessary to establish a redress scheme …* [and]
>
> *An order of mandamus directing the Executive Office to present a proposal for a redress scheme to the Secretary of State forthwith.*"

[58] The Applicant contends that the Secretary of State's inertia to date is (again per the Order 53 pleading) –

".. based on a mistake of law, namely a misapprehension of the nature and extent of his prerogative and executive powers and duties in arriving at the conclusion that the establishment of a redress scheme was a matter for the developed administration. The power and duty to take steps to establish a redress scheme are vested in the Secretary of State in the present circumstances as:

(i) There has been no Executive since January 2017;

(ii) The Secretary of State has not proposed a date for the poll for the election of the next Assembly ….

(iii) Article 4(1) of the [1999 Order] *provides that the functions of a department shall at all times be exercised subject to the direction and control of the Minister, so that in the absence of Ministers and of any policy previously set by a Minister there is no power for a devolved Department to act to establish a redress scheme;*

(iv) In the absence of ministers and of a Department with power to act, the Secretary of State enjoys the power to do so by virtue of section 23(1) of the Northern Ireland Act 1998.

(v) In the absence of Ministers and of a Department with power to act, the Secretary of State is under an obligation to exercise residual powers in appropriate circumstances, as was done when the Secretary of State issued an 'indicative budget allocation' in April 2017.

(vi) The Secretary of State retains the power under section 26 of [NIA 1998] *to direct that an act be taken where they consider it necessary for compliance with the international obligations of the UK.*

(vii) In the absence of an Executive, decisions taken by Departmental officers would lack democratic accountability."

[59] The central grounds of the Applicant's challenge to the EO are pleaded in the following terms:

> "*Alternatively, the decision of the Executive Office not to establish a redress scheme was based on a misapprehension of law, namely that a senior officer of the Department had no power to establish a redress scheme in the absence of a Minister and/or of legislation.*
>
> [The "Department" evidently being the EO.]
>
> *By virtue of sections 3, 4 and 5 of the 2018 Act, the Executive Office was entitled to exercise the power to establish a redress scheme and ….. ought to have done so.*"

[60] The final amended version of the Applicant's Order 53 pleading includes a frontal challenge to certain aspects of the 2018 Act. This entails a claim for specific declaratory relief. This remedy is sought in the alternative to the primary remedies sought against the Secretary of State and the EO, rehearsed above. It entails the pursuit of –

> "*… a declaration that section 3 of the* [2018 Act] *is unlawful insofar as it permits senior departmental officials to make significant and/or controversial decisions in the absence of Ministerial direction and control.*"

While I do not overlook that, as ultimately pleaded, section 1 of the 2018 Act also features in this discrete aspect of the Applicant's challenge, attracting a claim for the same declaratory relief, the focus of the case as presented was predominantly on section 3.

[61] The corresponding contention enshrined in the Applicant's skeleton argument is conveniently reproduced at this juncture:

> "*The* [2018 Act] *purported to remove the obligation on the Secretary of State to propose a date for a fresh election and simultaneously to permit civil servants to take departmental decisions, including significant and controversial decisions, in the absence of Ministerial control or democratic oversight. This amounts to an unlawful attempt to change the constitution* [of Northern Ireland] *and should not be regarded by the court as a valid enactment ….*
>
> *If* [this] *is correct, then …. either the Secretary of State or the Executive Office must retain executive power to act in the current constitutional circumstances, or in the alternative the Secretary of State is under a duty to propose a date for a fresh Assembly election …*

> *If the court considers itself bound to apply the 2018 Act, then the Executive Office has (and always had) the power to implement a redress scheme and the failure to implement such a scheme is unlawful ….*
>
> *Similarly, following the 2018 Act, the Secretary of State now has an obligation to issue Guidance on the Executive Office's exercise of powers and the power to do so in relation to specific policies such as the implementation of a redress scheme. The failure to issue guidance that the EO should implement a redress scheme is based on a misdirection and is Wednesbury unreasonable …*
>
> *The Secretary of State in any event retains executive power to implement a redress scheme and should do so ….*
>
> *If the court considers (contrary to our submission) that there is no one with the power to act, the Secretary of State should end the prolonged vacuum by proposing a date for a fresh election.*"

Within the above passages, the central tenets of the Applicant's case are identifiable.

[62] The thrust of the resistance to the Applicant's case can be ascertained from those aspects of the Secretary of State's affidavit evidence highlighted in [27] above. The affidavits of both Respondents reflect, and adhere to, the stance adopted on their behalf in the pre-action protocol ("PAP") exchange of correspondence. On behalf of the Secretary of State the following (*inter alia*) was stated in the PAP response letter written by one of the Assistant Crown Solicitors:

> "*The Secretary of State had no formal role in the establishment of the Inquiry ……..*
>
> *that is appropriate for the Secretary of State to take in relation to the implementation of Inquiry recommendations, as these matters are within the responsibility of the devolved administration ….*
>
> *The Secretary of State has been very clear …. that, in the absence of an Executive, he will not interfere in devolved matters in Northern Ireland except to the extent that it is absolutely necessary to do so in order to allow public administration to continue and public services to be maintained.*"

The Northern Ireland (Administerial Appointments and Regional Rates) Act 2017 (the "2017 Act") is instanced as an illustration of this policy:

> "*…. the decision to take forward* [this] *legislation .. was done as a matter of last resort in order to preserve the functioning of essential public services. The implementation of the Inquiry recommendations, while of considerable importance, does not create the same imperative for action.*"

[63] This response on behalf of the Secretary of State prompted the Applicant's solicitors to write to the EO. In this context it is convenient to refer to the court's transcribed *ex tempore* leave ruling, pronounced on 12 April 2018, at [11]:

> "*The position of the EO, in a sentence, is that the HIA report and recommendations are directed exclusively to the Executive and the EO has no legal power or duty to activate same. It is also represented on behalf of the EO that work on what are considered to be the administrative arrangements and draft legislation necessary to implement the HIA redress recommendations has been initiated and is continuing, in a context wherein it is suggested that the requisite legislation could be made in either Westminster or Northern Ireland.*"

The more detailed out-workings of this summary of the EO's case are rehearsed in its affidavits and counsel's submissions.

The Governance Vacuum Issue

[64] The first central pillar of the Applicant's case is formulated thus in the second of counsels' five skeleton arguments:

> "*… as a matter of constitutional law, it can never be the case that no one has executive or prerogative power in relation to significant devolved matters in Northern Ireland ….*"

In the fifth of their skeleton arguments, counsel refer to the "*constitutional principle that there should be no vacuum in governance ….* [in] *…. a constitutional democracy founded on the rule of law. Two "constitutional ideas" are identified, namely the aim of promoting democracy and the "equally important principle" there should be no governmental vacuum*".

[65] The authority invoked in support of this contention is limited to two passages in the speeches in Robinson (*supra*). There the House of Lords decided, by a majority of 3 – 2, that where there was a failure to elect a FM and dFM within the six week period prescribed by section 16 of NIA 1998, the ensuing duty imposed on the Secretary of State to propose a date for the poll for the election of a new Assembly was subject to no temporal limitation. In thus construing the relevant

statutory provisions the majority sought to promote what they considered to be the most fundamental purpose of the Belfast Agreement, namely the creation of the most favourable constitutional environment for stable cross-community government in Northern Ireland.

[66] In the leading speech of the majority, Lord Bingham reasoned, at [11]:

> "*Section 32(1) and (3) expressly contemplate such elections as a means of resolving political impasses. But elections held with undue frequency are not necessarily productive. While elections may produce solutions, they can cause divisions. Nor is the democratic ideal the only constitutional ideal which this constitution is understood to embody.* ***It is in general desirable that the government should be carried on, that there should be no governmental vacuum***"

I have highlighted the sentence on which the Applicant's argument places particular reliance. It is linked to Lord Bingham's later statement, at [15], in the context of his examination and construction of section 32(3):

> "*There was to be no protracted stalemate, no persisting vacuum in the conduct of the devolved government. But Parliament imposed no temporal limitation either on the making of the proposal or on the date proposed. If there appeared to be no prospect of an imminent and effective election under section 18(8), or if the Assembly resolved under section 32(1) that it be dissolved forthwith, the Secretary of State would no doubt be expected to propose a very early date for a poll. If, on the other hand, the Assembly resolved on dissolution at a future date earlier than its normal terminal date, the Secretary of State might no doubt be expected to propose a date further in the future. And if an effective election under section 16(8) appeared to be imminent, one would expect the Secretary of State to pause in order that the political process might take effect and, if it did, to propose a date in the future which would take account of that effective election.*"

[67] The Applicant's argument on this issue also prays in aid a passage in the speech of the third member of the majority, Lord Millett, at [90]:

> "*But the failure to elect a First Minister and Deputy First Minister within the time limited does not result in the immediate and automatic dissolution of the assembly. It continues in existence for the time being until a date fixed by Order in Council on the recommendation of the Secretary of State. It is his duty to propose the date for the election of the*

> *new Assembly.* ***No doubt he must act promptly, but he must be allowed a little time for consultations to take place,*** *not only as to the appropriate dates for the dissolution of the existing ….. and the holding of the election of a new one, but also as to the carrying on of government in the meantime.*"

I have highlighted the words on which the Applicant places particular emphasis. While the submissions of Mr MacDonald QC did not invoke any part of the speech of the third member of the majority, Lord Hoffmann, I consider the following passage, at [29], to be pertinent:

> "*So, in choosing between the two constructions of section ….. have been put forward, I think it is reasonable to ask which result is more consistent with a desire to implement the Belfast Agreement: a situation in which an immediate election becomes mandatory as soon as the six week period has expired* ***or one in which the Secretary of State retains a discretion, for the exercise of which he is politically answerable*** *to take advantage of developments in the Assembly which enable a First and Deputy First Minister to be elected to carry on the government of Northern Ireland.*"
>
> [My emphasis.]

Lord Hoffmann continued at [30]:

> "*In my opinion the rigidity of the first alternative is contrary to the agreement's most fundamental purpose, namely to create the most favourable constitutional environment for cross-community government. This must have been foreseen as requiring the flexibility which could allow scope for* ***political judgement in dealing with the deadlocks and crises which were bound to occur.***"
>
> [My emphasis.]

[68] My conclusions on this aspect of the Applicant's challenge are the following:

(i) I consider that the *dicta* in the speeches of Lord Bingham and Lord Millett in Robinson fall markedly short of purporting to formulate a principle of constitutional law, whether in the context of the NIA 1998 constitutional arrangements or more widely, that any vacuum in governance should be of short duration. The language which their lordships used is not the language of legal or constitutional principle. In particular, a statement that something is "*in general desirable*" is

most unlikely to have been intended to operate as a pronouncement of legal or constitutional principle.

(ii) Similarly, the language of "*a very early date*", "*a date further in the future*" [Lord Bingham], "*promptly*" and "*a little time*" [Lord Millett] is not, in my view, the language one would expect to encounter in the judicial formulation of legal or constitutional principle.

(iii) The context of everything said by the majority in Robinson was that of construing specific statutory provisions. Furthermore, this exercise was carried out by the majority without reference to either existing or novel principles of constitutional law.

(iv) The constitutional principle for which the Applicant contends is further undermined by its intrinsic imprecision and uncertain boundaries. In particular, at what point in time would a governance vacuum become unlawful?

(v) Properly analysed, the relevant passages in the speeches of Lord Bingham and Lord Millett, in tandem with that of Lord Hoffmann highlighted above, are resonant with the factor of ministerial political judgement. This stands in marked contrast to constraint on ministerial choices or action imposed by the superior medium of constitutional principle.

(vi) Furthermore, the Applicant's contention is not harmonious with those provisions of NIA 1998 which expressly contemplate vacuums in Ministerial authority, namely section 16A (Ministerial appointments) and section 32 (extraordinary elections), while at the same time conferring no powers, duties or functions on the Secretary of State exercisable during either of the envisaged voids.

[69] To summarise, where a vacuum in the governance of Northern Ireland occurs, even a protracted one and no matter how regrettable, I consider that this is to be viewed through interrelated prisms of political reality and consequential prejudice and disadvantage to the population, rather than infringement of any constitutional principle or contravention of NIA 1998. Of course, the plight of the victims and survivors of historical institutional abuse in Northern Ireland illustrates graphically just how damaging a lengthy lapse in the governance of this country can be for certain members and sections of society. However, for the reasons given I must reject this element of the Applicant's challenge.

The section 3, 2018 Act Challenge

[70] It follows, necessarily and logically, that any other aspect of the Applicant's challenge contingent or consequential upon the first main element succeeding must

fail. This applies, firstly, to the Applicant's quest for a declaration that section 1 of the 2018 Act is unlawful as it infringes the constitutional principle advocated on behalf of the Applicant and rejected by the court. It is convenient to add at this juncture that, in the notional absence of section 1 of the 2018 Act, I consider that the Applicant's challenge to the Secretary of State's pre-existing failure to propose a date for new Assembly elections under the unamended provisions of section 32(3) of NIA 1998 would have failed: first, based on the court's analysis of specific aspects of the Robinson decision above; second, because the key conclusions in Robinson were made in the context of a factual matrix differing markedly from that which has evolved in Northern Ireland during the past two years; and third, because Robinson does not attempt any exhaustive prescription of dates, delays or periods pertaining to the Secretary of State's former duty (now a discretionary power) under section 32(3), whether as a matter of statutory construction or constitutional principle or otherwise.

[71] Furthermore, if and insofar as there is any freestanding challenge in the alternative to the Secretary of State's continuing failure to date to propose a date for new Assembly elections to be held sooner than 25 August 2019, the critical feature of the amended incarnation of section 32(3) is that it now invests the Secretary of State with a discretionary power, whereas previously it imposed a duty. The Secretary of State has determined not to exercise this power to date. The Applicant contends that this is Wednesbury irrational. This contention, in common with any Wednesbury challenge, confronts a high hurdle, particularly in a context imbued with matters of political judgement and political parties' manoeuvring in a governance vacuum which elected politicians have repeatedly failed and refused to rectify. The extensive exposition of the Secretary of State's consideration, reasoning, aims and aspirations in the affidavits filed on her behalf makes abundantly clear that rationality has prevailed throughout the period under scrutiny. Controversy is not to be equated with irrationality. This analysis is unaffected by resort to arguments based upon democracy in a context where there is not a scintilla of evidence before the court that new Assembly elections in Northern Ireland would make the slightest difference to the long-standing vacuum in governance.

The Other 2018 Act Issues

[72] I turn to examine the Applicant's quest for a declaration that section 3 of the 2018 Act is not law "*… insofar as it permits senior departmental officials to make significant and/or controversial decisions in the absence of Ministerial direction and control*". The Applicant's challenge to section 3 is formulated in counsels' third skeleton argument in these terms:

> "*The contention that this particular Act of Parliament can be properly challenged is underpinned by the essential proposition that its provisions are incompatible with the rule of law and the core principles of democracy on which the constitution is founded. In summary, by this Act Parliament*

> *purports to permit the continuance of a governmental vacuum during a prolonged period when the constitutional arrangements created by Parliament itself in accordance with the Belfast Agreement have ceased to operate and, instead of either requiring a fresh election or restoring direct rule, to confer on unelected civil servants the power to exercise governmental functions without Ministerial supervision or, therefore, democratic accountability.*"

[73] The underpinnings of this element of the Applicant's challenge are certain *dicta* in the judgments of two members of the Supreme Court in two reported cases. The first is R (Jackson) v Attorney General [2006] 1 AC 262, which entailed a challenge to the Hunting Act 2004 which outlawed the hunting of wild animals with dogs. This Act had been made pursuant to the Parliament Act 1911, as amended by the Parliament Act 1949 (the "1949 Act"). The claimant's case was that the 2004 Act had no legal validity as the 1949 Act was not an Act of Parliament. Their case was dismissed. The decision of the Supreme Court consists of eight separate judgments of substance and one very short concurring judgment. There were no dissenting judgments.

[74] Lord Steyn, at [101], noted the submission of the Attorney General that the 1949 Act could in principle be invoked to bring about constitutional changes such as altering the composition of the House of Lords. Lord Steyn observed:

> "*The logic of this proposition is that the procedure of the 1949 Act could be used by the Government to abolish the House of Lords. Strict legalism suggests that the Attorney General may be right. But I am deeply troubled about assenting to the validity of such an exorbitant assertion of government power in our bi-cameral system. It may be that such an issue would test the relative merits of strict legalism and constitutional legal principle in the courts at the most fundamental level.*"

He continued at [102]:

> "*But the implications are much wider. If the Attorney General is right the 1949 Act could also be used to introduce oppressive and wholly undemocratic legislation. For example, it could theoretically be used to abolish judicial review of flagrant abuse of power by a government or even the role of the ordinary courts in standing between the executive and citizens. This is where we may have to come back to the point about the supremacy of Parliament. We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts. In the European context the second Factortame decision [1991] 1 AC 603 made that clear. The settlement contained in the Scotland Act 1998*

> *also point to a divided sovereignty. Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act 1998 created a new legal order. One must not assimilate the European Convention on Human Rights with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the* general *principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish. It is not necessary to explore the ramifications of this question in this opinion. No such issues arise on the present appeal."*

[75] Lord Hope began, at [104]:

> *"My Lords, I start where my learned friend, Lord Steyn, has just ended. Our constitution is dominated by the sovereignty of Parliament. But parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in* McCawley v The King *[1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified."*

Next, at [105], he noted that such qualifications had, for the most part, been the product of legislation, instancing Part 1 of the European Communities Act 1972 as "*perhaps the prime example*", while noting also section 3(1) of the Human Rights Act 1998. Lord Hope then reflected on the concept of "*unalterable laws*", ie provisions of primary legislation, such as the Acts of Union of 1707, which are so fundamental that Parliament is not at liberty to alter them. Lord Hope's deliberations continued through [107] – [108]. He continued at [109]:

> "*It is as well that I should stress, however, before I go further, that this case is not about a contest between the courts and the executive ….*
>
> *What this case is about ….. is the place which the court occupies in our constitution with regard to the legislative sovereignty of parliament.*"

[76] The second reported case underpinning this aspect of the Applicant's challenge is AXA General Insurance v HM Advocate and Others [2012] 1 AC 868. There the claimants were insurance companies who contended that an Act of the Scottish Parliament purporting to extend the liability of employers for a particular species of industrial injury was outside the competence of the legislature by virtue of section 29(2)(d) of the Scotland Act 1998, which provides that any right protected by the ECHR – in this instance, the insurer's rights under Article 1 of The First Protocol – is outside the legislative competence of the Scottish Parliament. The challenge failed. The Supreme Court held *inter alia* that in general the Scottish Parliament was accountable for the exercise of its powers, within the limits set by section 29(2) to the electorate rather than the courts. It was in this context that certain observations were made about an exceptional power of the courts to intervene on grounds other than those specified in section 29(2). The decision of the Supreme Court is composed of 4 judgments. The Applicants rely particularly on the following passages in that of Lord Hope, at [50] – [51]:

> "**50** *The question whether the principle of the sovereignty of the United Kingdom Parliament is absolute or may be subject to limitation in exceptional circumstances is still under discussion. For Lord Bingham, writing extrajudicially, the principle is fundamental and in his opinion, as the judges did not by themselves establish the principle, it was not open to them to change it: The Rule of Law (2010), p 167. Lord Neuberger of Abbotsbury, in his Lord Alexander of Weedon lecture, "Who are the masters Now?" (6 April 2011), said at para 73 that, although the judges had a vital role to play in protecting individuals against the abuses and excess of an increasingly powerful executive, the judges could not go against the will of Parliament as expressed through a statute. Lord Steyn on the other hand recalled at the outset of his speech in Jackson*, para 71*, the warning that Lord Hailsham of St Marylebone gave in The Dilemma of Democracy* (1978), p 126 *about the dominance of a government elected with a large majority over Parliament. This process, he said, had continued and strengthened inexorably since Lord Hailsham warned of its dangers. This was the context in which he said in para 102 that the Supreme Court might have to consider whether judicial review or the ordinary role of the courts was a constitutional fundamental which even a sovereign*

Parliament acting at the behest of a complaisant House of Commons could not abolish.

51 We do not need, in this case, to resolve the question how these conflicting views about the relationship between the rule of law and the sovereignty of the United Kingdom Parliament may be reconciled. The fact that we are dealing here with a legislature that is not sovereign relieves us of that responsibility. It also makes our task that much easier. In our case the rule of law does not have to compete with the principle of sovereignty. As I said in Jackson, para 107, the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based. I would take that to be, for the purposes of this case, the guiding principle. Can it be said, then, that Lord Steyn's endorsement of Lord Hailsham's warning about the dominance over Parliament of a government elected with a large majority has no bearing because such a thing could never happen in the devolved legislatures? I am not prepared to make that assumption. We now have in Scotland a government which enjoys a large majority in the Scottish Parliament. Its party dominates the only chamber in that Parliament and the committees by which bills that are in progress are scrutinised. It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise."

[77] Counsel have also brought to the attention of the court certain academic commentaries on this subject. I have been referred particularly to Knight, Bi-polar Sovereignty Restated [2009] 68 CLJ 361; Allan, Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Enquiry (2002) CLJ 87; Elliott and Forsythe, Legitimacy of Judicial Review (2003) PL 286; and Barber, The After Life of Parliamentary Sovereignty, International Journal of Constitutional Law (2011) 9(1) 144.

[78] The academic writings noted above confirm the fact of the continuing debate about the limits of Parliamentary sovereignty, or its legislative supremacy, and some of the contours thereof. In the first of these the theory of dual, or bi-polar sovereignty, shared by Parliament and the courts is espoused. As the author recognises, this theory has received limited attention only in the realm of public law scholarship. Furthermore it does not command widespread acceptance as it is perceived to be incompatible with orthodox constitutional theory and the conventional view of Parliamentary sovereignty in particular. The author further acknowledges that his thesis entails a reconfiguration of the "*traditional*" concept of

bi-polar sovereignty. Notably he expresses doubts as to whether there is any real progression of the courts "*towards recognising their power*" (page 386). What emerges with particular clarity from this commentary is the continuing nature of the debate in this sphere. Stated succinctly, this subject is far from settled.

[79] Similar observations may be made of the second of the academic commentaries noted above, in particular the section entitled "The Rule of Law and Parliamentary Sovereignty" (from p 101). Having acknowledged the ongoing nature of the debate – which, I would add, has been played out mainly in the academic and not judicial sphere – the author, TRS Allan, argues (page 102):

> "*What is missing here is an appropriately nuanced account of the nature and limits of legislative power. For while we adhere to an entirely formal or literal conception of sovereignty, apparently permitting a legislative majority to attain any object it chooses by employing suitably explicit language, our constitutional theory can never reflect our knowledge of the legal and political landscape it is supposed to explain …*
>
> *Parliamentary supremacy should be accepted in the sense that the legislature alone enjoys the sovereign power to alter the law by enactment of general rules; but we should also recognise, as equally fundamental, that Parliament's power to determine the outcome of particular cases is confined by the judge's duty to make sense of the law as a whole.*"

The *obiter dicta* of Lord Steyn and Lord Hope in Jackson and AXA Insurance resonate in this context.

[80] In the third of the academic commentaries, Messrs Forsythe and Elliott suggest that the treatise of TRS Allan broke "*new ground*" (page 289). The authors continue (page 291):

> "*Although the modified ultra vires doctrine has been articulated on the understanding that parliamentary sovereignty is a key feature of the constitutional landscape within which judicial review must be justified, we do not accept the notion of parliamentary sovereignty uncritically. Indeed we argue that, in order to sustain the argument that the ultra vires doctrine is constitutionally imperative, one does not have to embrace the principle of parliamentary sovereignty in its orthodox form.*"

The stand out sentence in this commentary is probably the following (page 294):

> "*If the principles of judicial review are constitutional fundamentals, then it follows that the rule of law must operate to deny legal recognition to legislation which is inconsistent with those fundamentals.*"

Followed by:

> "*Although, in most situations, any tension between legislative provisions and the rule of law may be resolved through judicial interpretation, this analysis nevertheless ultimately permits judicial disobedience to statute.*"

The authors recognise that this judicial task of determining how constitutional values should be balanced against policies adopted by the legislature "*raises a number of difficulties*". Ultimately, espousing the adoption of what they describe as their "*modified ultra vires doctrine*", the authors, favouring the Laws LJ doctrinal approach to that of Sedley LJ, state (page 297):

> "*The limitations which the common law currently recognises and applies relate only to the form of legislation. Parliament is thus substantively sovereign: there is nothing upon which Parliament is prevented – by virtue of the common law conditions upon which it holds legislative authority – from making law. Those limits which the common law recognises are directed only towards the* ***form*** *in which legislation is enacted.*"
>
> [My emphasis.]

Thus, for these authors, the judicial role should be one of interpreting parliamentary legislation, driven and directed by common law constitutional rights and principles.

[81] At this juncture, it is essential to consider the aims and rationale of the 2018 Act and section 3 in particular. I agree with Mr Tony McGleenan QC (with Mr Paul McLaughlin, of counsel), representing the Secretary of State, that the 2018 Act is inseparable from the immediately preceding judicial context. There are two key features of the decision of the Court of Appeal in this respect. First, decisions belonging to the "cross – cutting" domain can only be made within the forum of the Executive Committee. Thus such decisions cannot be lawfully made by Departments. Second, the question of whether Article 4(1) of the 1999 Order provides legislative authority for certain types of Departmental action and decision making in the absence of Ministers was left undecided by Buick.

[82] The 2018 Act was made against the foregoing background. I have already drawn attention to its long title and have considered section 1. Section 3 is linked to the second part of the long title namely "*to make provision about the exercise of governmental functions in, or in relation to, Northern Ireland in the absence of Northern Ireland ministers*". It invites the following analysis:

(i) Departmental senior officers, applying a public interest test, are lawfully empowered to exercise departmental functions in the absence of Ministers.

(ii) In deciding whether to thus act, senior departmental officers must have regard to the Secretary of State's statutory guidance.

(iii) Retrospective validity is conferred on the exercise of departmental functions by senior officers dating from 02 March 2017 to 01 November 2018, irrespective of whether preceded by Executive Committee and agreement.

(iv) Nothing in NIA 1998 or the 1999 Order or any other enactment or rule of law undermines any of the foregoing.

[83] The 2018 Act must be considered in its full context, its origins dating from 02 March 2017. It was made just over 1 ½ years later. It was both backwards and forwards looking. Looking backwards, it devised mechanisms designed to resolve the multiple doubts and uncertainties surrounding the acts and decisions of departmental officials subsequent to March 2017. Looking forwards, it devised an arrangement designed to facilitate the day to day functioning of this country. The latter is no freewheeling palm tree. Rather, it confers governmental (not legislative) powers which are subject to the two important constraints of, first, promoting the public interest and, second, compulsorily having regard to the Secretary of State's statutory guidance (already considered in [51] *supra*) I have already commented on the measure of flexibility enshrined in the "*Guiding Principles For Decision Making*" instrument. However, simultaneously, the first of the principles cautions that specified decisions "*should not be taken*" by departmental officials. Similarly the second of the guiding principles draws attention to the discrete public interest that certain types of decision should be made by Ministers rather than civil servants.

[84] Objectively, the 2018 Act is properly to be viewed as a reactive legislative fix, a necessary Parliamentary intervention in response to an extraordinary state of affairs. This measure was adopted in preference to any other option, including in particular that of setting a date for fresh Assembly elections. I have already examined the rationale and rationality of the quintessentially political judgement underpinning the rejection of this option, a continuing one. Furthermore, the whole scheme of the 2018 Act is that it is envisaged to be a device of short duration, a temporary solution. This flows from the twofold sources of (a) the time limited

arrangements enacted by sections 1 and 2, with their long stop date of 26 August 2019 (some 10 months postdating the making of the Act) and (b) the now time limited Westminster government policy of attempting to restore functioning institutions and systems of government in Northern Ireland without resort to a further Assembly election.

[85] I consider the foregoing analysis to be in no way undermined by resort to the aims and objectives of the Belfast Agreement. The regrettable, but limited and time limited, statutory mechanism designed to address some of the negative and unsatisfactory day to day consequences of the reality of persisting deep political divisions in Northern Ireland, simply fills a gap while other efforts to sustain and fulfil the Belfast Agreement have been fully explored and exhausted.

[86] The Applicant's argument is based on a lack of democratic accountability. The strength of this complaint must be calibrated by reference to the entirety of the context with its multi-faceted ingredients identified above. The same approach must be applied to the isolated comments to like effect in two of the four judgments delivered at first instance and on appeal in Buick which the Applicant invokes. It has fallen to this court, in an evidentially plentiful and different litigation context, to conduct the elaborate analysis above, nowhere to be found in the two Buick judgments which the Applicant prays in aid. Taking everything into account, and on the assumption that this court is competent to grant the declaratory remedy pursued by the Applicant, I consider that this element of the Applicant's challenge falls measurably short of establishing that sections 1 – 3 of the 2018 Act are of the extreme, offensive or repugnant nature contemplated by Lords Steyn and Hope.

[87] I consider it far from clear that this court is competent to declare that any of the provisions of the 2018 Act are not law in any event. Confirmation of a judicial power to this effect would, in my judgment, require a clearly worded constitutional provision in a typical constitution or Bill of Rights or kindred legal instrument, an unambiguous provision of primary legislation or a supporting decision of the highest court, the Supreme Court (which, for such a momentous purpose, would presumably convene as a panel of nine Justices).

[88] This assessment is reinforced by and appreciation of the limited, minority and obiter nature of the dicta which the Applicant invokes, in tandem with a clear understanding of the central issue in the Jackson case, which was one of statutory construction and not the justiciability of primary legislation. In Pickin v British Railways Board [1974] AC 765 the House of Lords held that the courts of the United Kingdom are not competent to declare primary legislation unlawful. In Jackson, Lord Bingham emphasised that the authority of Pickin was "*unquestioned*", at [27]. See also per Lord Nicholls at [49] – [50]. I further consider that the academic writings and the observations of the two distinguished senior judges (Lords Steyn and Hope) correctly understood point firmly to the conclusion that at this stage of the evolution of the United Kingdom and Northern Ireland constitutional

arrangements, the power of the High Court to declare that provisions of primary legislation are not law has not been established.

The Challenge to the EO and the 2018 Act Guidance Ground

[89] Having rejected the Applicant's primary, frontal challenge to the 2018 Act, I must examine the alternative ground, which serves also to place the spotlight on the freestanding challenge to the EO. This ground is to the twofold effect that (a) the Secretary of State is legally empowered to issue guidance *on the establishment of a redress scheme* and (b) has acted unlawfully in the Wednesbury irrational sense, by failing to do so vis – a - vis the EO. The central particulars of the asserted irrationality are the dysfunctional Northern Ireland Assembly and Executive, the terms of the HIA Inquiry Report, the lack of any available alternative redress mechanism, the age and ill health of many victims and the impact upon the members of this cohort generally.

[90] As the replying submission of Mr McGleenan made clear, it is essential, in resolving this discrete issue, to focus carefully on the statutory language of "*a function of the Department*" in section 3(1) of the 2018 Act. This phraseology is replicated throughout section 3 in the statutory shorthand of "*the function*", "*a function*", "*functions*" and "*departmental functions*". My first conclusion is that all of these terms and phrases attract the same meaning. Second, while no definition is provided in the 2018 Act, I consider that NIA 1998 belongs unmistakably to the context in which the 2018 Act was enacted and is to be applied and construed. Within NIA 1998, Part III ("Executive Authorities"), there are specific provisions relating to "Northern Ireland Departments", beginning with section 21. Part III, having addressed first the subject of "Authorities", then turns to that of "Functions", in sections 22 – 28. Section 22 is a bespoke provision concerned with "Statutory functions". It makes provision for Northern Ireland Departments having functions either pursuant to an Act of the Assembly or other enactment or by an enactment passed or made before the appointed day.

[91] There is nothing novel in the proposition that in the United Kingdom legal system all Departments and Ministries of Government are creatures of statute. Their main functions are normally to be found in a single, major statutory measure, while other functions may be scattered throughout other instruments of legislation. In some instances there may be a single provision of primary legislation applicable to all government departments, section 6 of the Human Rights Act 1998 being a prime illustration. Debates about whether departmental action, or inertia, is *ultra vires* usually revolve around the applicable statutory provisions.

[92] The EO is, as already noted, a Northern Ireland Department. It has no express, specific function with regard to implementing any of the HIA Inquiry Report recommendations. While the 2013 Act could, in principle, have created a function of this kind, it did not do so. Although this statute contains certain provisions relating to the EO's predecessor, OFMDFM, these are confined to

matters pertaining to the conduct of the Inquiry, in particular (per sections 14 and 15), the payment of expenses to witnesses and the remuneration of members of the Inquiry panel and others. The Act provided, by section 11, that the report of the Inquiry was to be delivered by its chairperson to the FM and dFM (section 11), published by the chairperson (section 12) and laid before the Assembly by the FM and dFM (section 13). The Act is silent on the issue of implementing the Report.

[93] In my view, the search for the overarching statutory function of the EO leads to Article 3(2) of the 1999 Order. There is nothing else to be found in the panoply of statutory provisions featuring in these proceedings. Article 3(2) provides:

> "*The* [EO] *shall be in the charge of the First Minister and the deputy First Minister acting jointly.*"

There is no detailed prescription of the EO's functions. The statement in Article 4(1) of the 1999 Order that the functions of a department shall at all times be "exercised subject to the direction and control of the Minister" would, in the specific case of the EO, appear to refer to the FM and dFM. Article 3(2) must, self-evidently, be considered, construed and applied in juxtaposition with all of the provisions of NIA 1998 relating to the FM and dFM. It further co-exists with Schedule 1 to the Northern Ireland Budget Act 2017, which authorised EO expenditure for the purpose of *inter alia "actions associated with the preparation and implementation of the [HIA] Report and Findings"*. By virtue of the associated policy "Managing Public Money Northern Ireland" non – administrative expenditure was limited to £1.5 M incurred during a two year period.

[94] The primary submission of Mr McAteer on behalf of the EO is that his client has no legal power to implement the HIA Inquiry report recommendations relating to redress. I accept this submission. As the analysis above demonstrates, the EO has no function in the matter of implementing any aspect of the Report beyond the legislation preparatory work it has undertaken. Nor has it any statutory power or responsibility to do so. The EO is not a legislator and, thus, cannot introduce legislation. Nor can it exercise any of the powers of the moribund Executive. Furthermore, it is invested with no executive powers.

[95] I further accept Mr McAteer's submission that that Re Williamson's Application [1998] NI 19 does not avail the Applicant. This decision clearly recognised the need for legislative authority either to establish a compensation scheme or to permit the payment of *ex gratia* redress from public funds. Furthermore, the terms of reference of the HIA Inquiry which the 2013 Act incorporated authorised only the Executive to make decisions about redress for victims. It is also to be noted that under the scheme of NIA 1998 the welfare of children and the investigation of their alleged abuse in State institutions being neither an "excepted" matter nor a "reserved" matter, had the legal status of "transferred" matter and this, in turn, provided the *vires* for the 2013 Act itself.

[96] By virtue of the 2013 Act and the Inquiry's formal terms of reference, the relevant axis has at all times been that of the Inquiry/the FM, the dFM and the Executive. I consider the correct analysis to be that via the three statutory channels identified above the legal powers of the EO have been confined to the legislation preparation exercise just completed. I reiterate: this has at all times been a "transferred" matter and, as such, one falling within the executive and legislative competence of the Executive and the Assembly, with the EO playing the supporting role conferred by Article 3 (1) of the 1999 Order and performing the specific functions conferred on it by the 2013 Act.

[97] I consider that the *vires* for all that the EO has done in the wake of the HIA Inquiry Report, properly analysed, reposes in Article 3(2) of the 1999 Order and Schedule 1 to the Budget Act and its successors. No competing analysis was laid before the court by any party. While the terms of Article 3(2) are admittedly bare, I consider that this provision must, by necessary implication, mean that the functions of the EO are inextricably linked to the powers, responsibilities, duties and functions of the FM and dFM and the Executive. The EO is the statutory entity which serves and services the Executive. It is under the direction and control of the FM and dFM, no-one else.

[98] The need to identify a specific Departmental function in a legal challenge of this kind is indispensable. This is illustrated in Re Hughes Application [2018] NIQB 30. There the Departmental function in play was the specific statutory obligation of the Department of Justice, under section 68A of the Judicature (NI) Act 1978, as amended, to ensure the provision of an efficient and effective system to support the carrying out of the business of *inter alia* coroners' courts.

[99] When one applies the above analysis to the evidential matrix, it becomes apparent that the EO is on the brink of reaching the limits of what it is legally competent to do vis-à-vis the HIA Inquiry Report. According to the evidence, the culmination of the EO's activities and endeavours, anticipated this month, will be the formal presentation by its head, the HOCS, of draft legislation to the Secretary of State accompanied by a request that the Secretary of State activate the matter via the Westminster legislative channel. The court has been given no reason to doubt the imminence of this step.

[100] One further consequence of the foregoing assessment is that neither the issue of guidance by the Secretary of State to the EO, nor the grant of a discretionary public law remedy by the court, if either were legally appropriate, could conceivably achieve for the Applicant any practical benefit as regards this Respondent. The primary relief sought by the Applicant against the EO is an order of mandamus "*to take the steps necessary to establish a redress scheme*", the secondary remedy pursued being an order of mandamus directing the EO "*to present a proposal for a redress scheme to the Secretary of State forthwith*". I conclude that the EO, within the boundaries of its legal competence, has just about completed everything that it can do. For the reasons given neither of these remedies would be appropriate.

[101] The further riposte to this discrete aspect of the Applicant's challenge is the following. The key statutory word in section 3(2) and (3) of the 2018 Act is "*guidance*". This word is an unpretentious member of the English language with a readily recognisable and uncontroversial meaning, encountered in a range of statutory contexts usually with a public law flavour. Fundamentally, guidance contrasts sharply with decisions. Furthermore, it does not equate with directions or instructions. The ultimate decision entails the exercise of such discretion or choices as are available to the recipient of the guidance, the decision maker in the particular context, acting within the confines of its legal powers. Such decision is informed by the relevant guidance. But there is no obligation to follow the guidance. These are well established principles of public law.

[102] I further consider that the language of section 3(3) – "*have regard to*" – makes clear beyond peradventure that there was no legislative intent to modify these principles. Properly exposed, the Applicant contends that the Secretary of State should direct or instruct the EO to in some unspecified way establish a redress scheme. This is simply not possible under section 3. The Applicant's contention is further defeated by the clearly ascertainable intention underlying section 3(2) namely that the requisite guidance should be general in nature, rather than focussing on any discrete Departmental function. If reinforcement of this analysis is required it is readily found by recalling that whereas the Secretary of State formerly, during a time limited period, was empowered by statute to direct and control Northern Ireland Departments, this power was extinguished by statute: see [34] – [35] and [45] above.

[103] Furthermore, I accept Mr McAteer's submission that the EO has in any event been acting in a manner compliant with the Guidance, specifically paragraph 12(c). Finally, it is highly improbable that the court would have acceded to the Applicant's quest for mandatory relief in the vague and imprecise terms of the Order 53 pleading. Every order of mandamus requires the precision and detail necessary to convey unambiguously to its recipient the action required. The orders of mandamus sought by the Applicant would not have had this effect.

[104] The above analysis and conclusions dispose of the Applicant's challenge to the EO, with the exception of what is addressed in [114] – [124] *infra*.

The section 23 NIA 1998 Ground

[105] One of the Applicant's alternative grounds of challenge (as understood by the court) is that the Secretary of State has a duty, or power, conferred by section 23(1) of NIA 1998, to establish, by executive act, a redress scheme for victims in accordance with the recommendations of the HIA Inquiry report. While this contention is not clearly reflected in any of the forms of relief pursued, it is identifiable in the accompanying grounds of challenge. Section 23 is reproduced in [37] above.

[106] It is appropriate to begin with section 5 of NIA 1998. This is the first of the provisions in Part II of the statute, entitled "Legislative Powers". While the cross-heading of section 5 is "Acts of the Northern Ireland Assembly", it contains one discrete provision relating to the Westminster Parliament:

> "*(6) This section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland, but an Act of the Assembly may modify any provision made by or under an Act of Parliament insofar as it is part of the law of Northern Ireland.*"

The legislative competence of the Northern Ireland Assembly is, of course, restricted to "*transferred*" (ie devolved) matters, a paradigm illustration given the present litigation context being the 2013 Act.

[107] It is a fact that in the post-02 March 2017 governance vacuum in Northern Ireland the United Kingdom Parliament has enacted the following measures of primary legislation relating to Northern Ireland:

- Northern Ireland (Ministerial Appointments and Regional Rates) Act 2017.
- Northern Ireland Budget Act 2017.
- Northern Ireland Budget Act 2018.
- Northern Ireland (Regional Rates and Energy) Act 2018.
- Northern Ireland Assembly Members (Pay) Act 2018.
- Northern Ireland Budget (Anticipation and Adjustments) Act 2018.

By this succession of statutes the Westminster Parliament has, in very brief compass, legislated in order to extend the period of time for making Ministerial appointments; to make provision about the regional Rate in Northern Ireland for the years ending 31 March 2018 and 31 March 2019; to authorise the payment of certain sums from the Consolidated Fund of Northern Ireland for budgetary purposes in respect of the years ending 31 March 2018 and 31 March 2019; to revise the amounts payable in respect of accredited installations under the statutory Renewable Heat Incentive Scheme; and to empower the Secretary of State to determine the salaries and other benefits payable to Members of the Northern Ireland Assembly in respect of periods when there is no Executive.

[108] It is common case that all of the subjects to which the aforementioned statutes relate belong to the realm of powers devolved under NIA 1998 (or "transferred" matters). The several public interests giving rise to the need for legislative intervention of this kind, while not justiciable in these proceedings, being tangential to the central issues, are largely self-evident. If and to the extent that statutory authorisation for these interventions of Westminster Parliament is required, I consider that this is readily found in section 5(6) of NIA 1998.

[109] As regards the exercise of executive power in the current governance impasse, it is convenient to refer once more to In Re Hughes. Sir Paul Girvan concluded, in unambiguous terms, at [69], that –

> "… *executive power in respect of devolved matters and in respect of the control of Northern Ireland departments is not exercisable as such by the Secretary of State.*"

The solution to this lacuna, he reasoned, lay in legislation, there being two identifiable options, namely legislation introducing direct rule and legislation reconfiguring the extant constitutional arrangements for the government of Northern Ireland. I consider that the "*power and duty*" passage in [69], considered in the full context of his Lordship's judgment, is to be construed in this way and, hence, is not suggestive of some residual prerogative or executive power in constitutional law. This in my view is harmonious with the preceding paragraph, [67]:

> "*The 1998 Act thus did not envisage a lengthy vacuum of power in Northern Ireland. While it would have made political and legal sense for provision to have been made for a resumption of power by the Secretary of State in the situation such as that which currently prevails it would in my view require clear wording to provide the Secretary of State with power to exercise the powers of as yet unappointed ministers of the devolved administration in the intervening period. In the past the problem was dealt with by the imposition of direct rule under express statutory provision. That express statutory power was abrogated and fresh primary legislation to introduce direct rule would be required. In the current situation there is in effect a form of political vacuum in which a department continues to function but without ministerial direction.*"

I consider that Hughes is correctly decided on this issue. The overarching principle, as formulated by Mr McGleenan in argument, is that the executive branch of Government in Northern Ireland is subject to the law, as determined by Parliament.

[110] In **Buick**, the Court of Appeal made the following contribution to this topic, at [34]:

> *"Section 23(1) provides that executive power in Northern Ireland shall continue to be vested in Her Majesty. That, of course, is a variation on the terms of the Agreement. Section 23(2) provides that in respect of transferred matters the prerogative and other executive powers shall be exercised on Her Majesty's behalf by any Minister or Northern Ireland Department. Although there is no express exclusion of the executive and prerogative powers of a Minister of the Crown as in the Scotland Act, the Agreement did not contemplate such a Minister having prerogative or executive power in respect of transferred matters and the better view is probably that such Ministers are excluded from exercising prerogative or executive power in respect of such matters."*

It did not fall to the Court of Appeal to undertake a comprehensive examination of section 23 and its outworkings. This, doubtless, explains the parties' common position on [34] – [35] of Buick, namely that it consists of *obiter dicta*. This, in my view, must be correct as section 23 does not feature anywhere either in the key conclusions of the court or the underlying reasoning, to be found at [52] – [56] and [58].

[111] In [28] – [35] above I have endeavoured to trace, at a little length, the statutory antecedents of section 23. Having done so, I consider it impossible to overlook the different and specific historical contexts to which this series of statutory provisions belongs. The Belfast Agreement is, in effect, the shadow which overhangs all of the provisions of NIA 1998. The "*generous and purposive*" interpretation of NIA 1998 was advocated by the House of Lords in Robinson for the specific purpose of giving effect to the Agreement. Approached in this way, I consider that section 23 of NIA 1998 is to be construed thus:

(i) Her Majesty is invested with residual executive power in a context – a statutory one, through the NIA 1998 - of limited devolution of legislative powers to the Northern Ireland institutions of governance.

(ii) The Monarch's prerogative and other executive powers are to be exercised on her behalf by any Minister or Northern Ireland Department.

(iii) Neither the Secretary of State nor any Minister of the Crown is empowered by section 23 to exercise any of the Monarch's prerogative or other executive powers.

(iv) Section 23(2) is designed to delimit the breadth of section 23(1) in recognition of the limited devolution of prerogative and other executive powers effected by NIA 1998 and subsequent measures

such as the two subordinate instruments devolving policing and justice functions (SI 977/2010 and SI /2010).

[112] Elaborating on the foregoing, I accept the submission of Mr McGleenan QC that the protracted governance vacuum in Northern Ireland has given rise to the exercise of powers by Departments (including the EO) and not the Secretary of State. This conclusion is yielded by a series of provisions of NIA 1998, in particular sections 17 (1) and (3), 18, 20, 23(2) and 30(2). It is reinforced by the contrasting provisions of the equivalent Scotland and Wales devolution statutes, which establish arrangements whereby devolved statutory functions are exercised collectively by the appointed Ministers. In contrast, as Mr McGleenan emphasised, executive authority in Northern Ireland is exercised by Ministers or Departments individually. This is a feature and consequence of the peculiar model of government, constructed around cross – community and power sharing objectives and arrangements, rooted in the 1998 Agreement and subsequently established by NIA 1998, as highlighted in [1] of this judgment. I would add that the constraint imposed by section 28(10) applies to Ministers and not Departments. The one further solid feature of the current attenuated governance arrangements in Northern Ireland is the legislative power under section 5(6) conferred on – and exercised by – the Westminster Parliament.

[113] The HIA Report and its recommendations belong to the domain of a "transferred" matter wherein the Secretary of State is not legally equipped with any executive, legislative or prerogative authority. This is the inescapable analysis of the collection of statutory provisions and associated legal principles under scrutiny. I consider that, giving effect to the foregoing, recourse to section 23 of NIA 1998 does not provide the Applicant with a route to any of the remedies sought against the Secretary of State.

The section 26 NIA 1998 Ground

[114] This ground, as pleaded, is formulated as a contention, in the following terms:

> "*The Secretary of State retains the power under Section 26 [NIA 1998] to direct that an act be taken where they consider it necessary for the compliance with the International obligations of the UK.*"

Section 26 is reproduced in [38] above. "*International obligations"* is defined, by section 98(1), as "*any international obligations of the United Kingdom other than obligations to observe and implement EU law or the Convention rights*".

[115] The "*international obligations*" invoked in support of this ground are three "General Comments" of the UN Committee Against Torture and the UN Human

Rights Committee, together with certain provisions of two international treaties, namely the Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment ("the Torture Convention"), a measure of the United Nations adopted on 10 December 1984 and the International Covenant on Civil and Political Rights ("ICCPR"), another UN measure adopted on 16 December 1966.

[116] Article 2 of the Torture Convention provides:

> "1. *Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.*"

By Article 12:

> "*Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.*"

By Article 13:

> "*Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.*"

Article 16(1) states:

> "*1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.*"

The definition of "torture" is, per Article 1:

> "*… any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for*

> *such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."*

[117] Article 7 of ICCPR provides:

> *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."*

This must be considered in tandem with Article 14, which provides:

> *"1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.*
>
> *2. Nothing in this Article shall affect any right of the victim or other persons to compensation which may exist under national law."*

[118] The subject matter of General Comment No:2 of the UN Committee Against Torture (dated 24 January 2008) is "implementation of Article 2 by states parties". General Comment No:3 (dated 19 November 2012) is entitled "Implementation of Article 14 by States Parties". The Committee opines that "redress" under Article 14 encompasses the concepts of effective remedy and reparation and includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

[119] On 24 June 2013 the Committee published its "Concluding Observations" on the 5th periodic report of the UK government relating to the Torture Convention. In its comments the Committee made specific reference to the HIA Inquiry (at para 24), stating:

> *"The Committee recommends that the State Party conduct prompt, independent and thorough investigations into all cases of institutional abuse that took place in Northern Ireland*

> *between 1922 and 1995, including of women over 18 who were detained in Magdalene Laundries and equivalent institutions in Northern Ireland, and ensure that, where possible and appropriate, the perpetrators are prosecuted and punished and that all victims of abuse obtain redress and compensation, including the means for as full as possible rehabilitation, in accordance with the Committee's General Comment No:3 on the implementation of Article 14 by States Parties."*

[120] The Applicant also invokes Articles 2 and 7 ICCPR in tandem. While Article 7 (replicating Article 3 ECHR) provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, Article 2(3)(a) states:

> *"3. Each State Party to the present Covenant undertakes:*
>
> *(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."*

The UN Report of 26 May 2004 (CCPR/C/21) states the following at paragraph 8:

> *"There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States Parties permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the inter-relationship between the positive obligations imposed under Article 2 and the need to provide effective remedies in the event of breach under Article 2, paragraph 3."*

[121] This aspect of the Applicant's case occupied a subsidiary place in Mr MacDonald's submissions. Furthermore, many of the materials outlined above emerged only following observations by the court about what had, and had not been, furnished. In addition, certain of these sources feature nowhere in any of the several versions of the Order 53 pleading. While there is a mention in the final amended pleading of both section 26 of NIA 1998 and "the international obligations of the UK", there is no elaboration and no particulars are provided. While this ground is developed, briefly, in counsels' skeleton arguments, I observe:

(a) Of the various international treaty provisions rehearsed above, only Article 2 ICCPR is mentioned.

(b) There is an undeveloped reference to Article 39 of the UN Convention on the Rights of the Child, which seems inapposite (the Applicant, now aged 77, not being "a child victim") and in any event adds nothing of substance to the pertinent Treaty provisions considered above.

(c) The third measure belonging to the domain of international law is a (mere) UN General Assembly Resolution, adopted on 16 December 2005 (A/RES/60/147) relating to basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law.

[122] There is in my view clear scope for more elaborate argument in relation to section 26. Indeed, an opportunity might arise in the event of one further, and final, chapter augmenting this judgment: see [123] *infra*. While counsel availed of the opportunity of providing further submissions on this ground, there was a continuing, and striking, failure to identify the Northern Ireland Minister to whom, or Northern Ireland Department to which, the Secretary the Secretary of State should issue directions in the exercise of the discretionary statutory power to do so. Nor were the directions thereby pursued formulated in specific terms. Subject to the qualifications expressed, my evaluation of this ground is as follows:

(a) The "international obligations" to which section 26 is directed must be those of the United Kingdom as no treaty making powers have been devolved to the Northern Ireland Institutions.

(b) Section 26(1) is plainly inapplicable: no Northern Ireland Minister or Northern Ireland Department is proposing to take any action incompatible with any of the UK's international obligations.

(c) The Applicant's argument does not identify any "Minister" to whom Section 26(2) could conceivably apply in the present circumstances of a moribund Northern Ireland Assembly and a non-functioning Executive.

(d) In contrast, the Northern Ireland Departments continue to function and the EO is one such Department.

(e) The only <u>action</u> of any kind which the EO is legally competent to undertake must be something falling with the ambit of its legal powers. In this context I refer to the courts analysis in [92] – [99] above.

(f) The EO, acting *intra vires* its powers, has virtually completed the process necessary to render possible the implementation, by legislation, of the HIA Inquiry Report redress recommendations.

(g) This conduct on the part of the EO can be related to the specific international obligations imposed on the UK by Articles 2 and 7 ICCPR and Article 14(1) of the Torture Convention. Each of these provisions plainly enshrines an "international obligation" imposed on the UK.

(h) I consider that the brutality and sexual abuse described by the Applicant and exposed in multiple cases by the HIA Report is embraced by the definition of "*torture*" in Article 1 of the Torture Convention and constitutes, as a minimum, inhuman or degrading treatment or punishment within the embrace of Article 7 ICCPR.

[123] I would add that while it was obviously open to the legislature to provide a restricted definition of the term "*international obligations*" or other limitation, for example by excluding acts of torture *et al* preceding the date of adoption of the International Treaties in question, it has not done so. If this discrete, or any related, issue is capable of being illuminated by more comprehensive argument, including a full examination of any material principles of international law or any material decisions of any of the competent UN Committees, I will of course revisit this analysis when appropriate.

[124] Reverting to the language of section 26(2) the action "*capable of being taken by*" the EO is virtually complete. The consideration that the EO may have been sub-consciously or inadvertently taking steps to comply with certain international obligations of the UK is in my view irrelevant. The role of the EO will be complete when the promised interaction between the HOCS and the Secretary of State, which is imminent, unfolds: see paragraph [99] above. No coercive – or, indeed, other - public law remedy against the EO is either necessary or appropriate.

Summary of Conclusions

[125] I summarise the conclusions of the court thus:

(a) The governance vacuum in Northern Ireland does not infringe any principle of constitutional law or any provision of NIA 1998.

(b) This court is not competent to adjudicate on whether the Northern Ireland Executive Formation and Exercise of Functions Act 2018 is law.

(c) In the alternative to (b), the court considers that the 2018 Act is law.

(d) There has been no unlawful failure by the Secretary of State to issue guidance to the EO under the 2018 Act.

(e) There has been no unlawful failure by the Secretary of State to exercise the power vested in her by section 32(3) of the Northern Ireland Act 1998, as amended, to propose a date for the poll for the election of a new Northern Ireland Assembly.

(f) The EO is not legally competent to give effect to the redress recommendations of the HIA Inquiry report by executive or legislative or other act whatsoever.

(g) The measures of primary legislation relating to Northern Ireland enacted by the UK Parliament since 02 March 2017 have been made acting under section 5(6) of NIA 1998.

(h) In the absence of any revocation or suspension of the powers devolved to the Northern Ireland administration, the Secretary of State is not competent to exercise prerogative or executive power under section 23 of NIA 1998.

(i) Section 26(2) of NIA 1998 applies as the UK Government is subject to international treaty obligations to provide redress to the applicant and other victims of the torture or inhuman or degrading treatment or punishment identified in the HIA Inquiry Report.

(j) The EO is, within the embrace of section 26(2), the "Northern Ireland Department" involved in the post – HIA Report scenario.

(k) The EO has accomplished all that can be legally expected or required of it in the post – Report scenario.

The Completion of these Proceedings

[126] The intervention of the court in this case has occurred at a particular point in time. Certain imminent events of unmistakable significance, involving the Secretary of State in particular, are awaited. I have already openly expressed the provisional view that it would be preferable that any further or expanded challenge which may thereby materialise should be absorbed within these proceedings, via

appropriate extension and amendment as required. The parties will have an opportunity to address the court on this issue and, if appropriate, to provide a draft case management order. Equally important, the parties' proposals on the order consequential upon this judgment, relating particularly to the issue of remedies, will be provided. To defer such order awaiting the ultimate conclusion of the proceedings may be the preferable course.

Postscript [27/06/19]

[127] Further to [126] above, in light of what the court considered to be inadequate engagement and response on the part of the Applicant's legal representatives two further listings of the case had to be convened and it became necessary for the court to issue a specific case management direction. This resulted in the rejection by the Applicant's legal representatives of the course tentatively mooted above. It is a matter of both surprise and disappointment to the court that any member of this group of victims would refuse the offer of swift judicial adjudication in respect of the further events and decisions which were imminent when judgment was handed down initially (on 12 April 2019) and then duly materialised during the ensuing weeks. No adequate explanation for this refusal has been provided.

[128] The court mooted the aforementioned possibilities at three successive stages: at case management review hearings prior to the substantive listing of this challenge, during the substantive listing and upon handing down its judgment, in the form of a specially devised summary, on 12 April 2019. No objection was canvassed on behalf of the Applicant at any of these stages. It transpires that, on a date unknown to this court, a Notice of Appeal was filed. The date of this event is unknown to this court because the Applicant's legal representatives, far from engaging and responding in the manner required and contemplated by [126] above, failed to observe the courtesy of informing the court of this development. This was merely symptomatic of the phase triggered by delivery of the accelerated judgment on 12 April 2019. I would add that on the latter date the court stated explicitly that promulgation of its decision had been accelerated (a) with a view to ensuring that the two Respondents had the benefit of the court's determination of the extant legal issues in advance of the anticipated further events and decision making activities and (b) in an attempt to mitigate the delays and uncertainties the victim had been forced to endure following publication of the HIAI Report.

[129] It has been confirmed by both the Applicant's solicitors and the Judicial Review Office that the sole written communication from the Applicant's legal representatives to the court prior to the most recent case management direction, dated 07 June 2019, is a perfunctory 45-word email from junior counsel dated 10 May 2019, one month after the court had promulgated its decision. At the most recent listing, on 07 June 2019, the court in its *ex tempore* ruling drew attention to the foregoing in its assessment of a signal failure of proper engagement and co-operation on the part of the Applicant's legal representatives subsequent to 10 April 2019. This elicited an accusation by senior counsel that the court had "totally

misrepresented" the facts bearing on this matter. This accusation was repeated twice. It now transpires that it can only have been based on the aforementioned email sent by junior counsel. The latter communication does not begin to represent proper engagement and co-operation with the court as required and envisaged by [126] of its judgment: and see further [135] below in this respect. It is to be expected that this accusation will be unreservedly and immediately withdrawn.

[130] The refusal of the Applicant's legal representatives to respond positively to the proposal of the court in [126] above is based on the professed reason (per counsels' recent submission) that–

> *"…The conclusions the court has already reached means [SIC] in practice that neither Respondent is under any legal obligation to implement a redress scheme for survivors of historic abuse".*

Given the implacable stance which has been adopted on the Applicant's side, I confine myself to the limited observation that this fails to recognise, much less analyse and consider, the new factual framework and the altered legal framework materializing in the immediate aftermath of the promulgation of the court's decision and in the context of a formally pleaded challenge to an alleged "*continuing failure" (*see [131] *infra)*, together with its inextricable nexus with all that has gone before. Beyond this I consider it inappropriate to venture.

[131] Each of the Respondents has reacted positively to the court's proposal. Each of them recognises the issue of timing. While the option of awaiting the final phase of events which materialised between late April and early June 2019 was available to the court, none of the parties suggested this course and, as explained at the listing on 10 April 2019, the timing of promulgation of the court's decision was driven by the two factors identified at [12] above. Mr McAteer's further submission highlights, tellingly, that the Applicant's case, as formally pleaded, challenges the Respondents' "*continuing failure to introduce a redress scheme".* That of Mr McGleenan and Mr McLaughlin draws attention to the overriding objective, the stayed status of part of the Applicant's challenge and (my paraphrase) the public interest in achieving the maximum coherence and unity, together with finality, in any form of litigation.

[132] I entertain not the slightest doubt that the court is empowered, on its own initiative and of its own volition, to undertake the further adjudication proposed in [126] above. These are judicial review proceedings. One aspect of the judicial review ethos is that from the moment proceedings are initiated they are driven by the court, not the parties. The judicial review applicant, of course, takes the first step. However, thereafter it is the court which via the mechanisms of initial and subsequent rulings coupled with case management and procedural orders identifies, defines and delimits the issues to be determined. The public interest, as assessed by the court, dominates the interests of the parties. The court is in charge until the end. The discharge of the constitutional function of the court, of course,

requires the active participation of the parties and their legal representatives. This has long been a principle of the common law and has been reinforced by the specific terms of the overriding objective. Furthermore, it may be said that the inherent jurisdiction of the High Court is at its most virile in its judicial review jurisdiction.

[133] The most recent phase of these proceedings has confirmed beyond per adventure that the Applicant's legal representatives will not engage and co-operate with the court in the course mooted in [126] above. This cannot be countered by the court with any available powers of coercion or enforcement, other than the exercise of the court's discretion regarding costs, of which I am aware. The logical conclusion of their stance clearly is that the Applicants' legal representatives will not participate in any further phase of this public law litigation.

[134] I consider that to terminate these proceedings at this juncture would be manifestly antithetical to the overriding objective. It raises the spectre of new litigation and/or the possible remittal to this court by the Court of Appeal in the present litigation framework, both pre - eminently avoidable, in a context of public funding for all parties. It exposes the Applicants and their legal representatives to possible costs sanctions. It requires the Respondents to expend potentially unnecessary public funds. It also raises the prospect of a Respondents' cross – appeal. Further delays, suffering and uncertainty for all concerned loom. I further consider that the termination of these proceedings at this juncture will promote no identifiable public or, for that matter, private interest. However, the prosaic reality is that the court has been rendered relatively impotent by the position, implacable and unswerving, adopted by the Applicant's legal representatives. The cooperation and engagement with the court required by the common law and the overriding objective **will not** be forthcoming. They have made this abundantly clear. Given this regrettable, but unmistakeable, reality I conclude, reluctantly, that a final order should now be made.

[135] As appears from [126] above, the court invited the parties' proposals regarding a final order when promulgating it's decision on 12 April 2019. Since then, the Respondents have espoused the stance noted above and have engaged with the court impeccably. The further assistance which the court was seeking related particularly to the issues of how the stayed aspects of the Applicant's challenge should be accommodated and managed; whether any aspects of the court's adjudication should be expressed in declaratory terms; linked to the foregoing, whether a blunt order of dismiss would be appropriate in the circumstances; the 'final phase' issue; and costs. The Applicants' legal representatives have adopted the insistent stance that a final order **must** be made at this stage. However, No assistance whatsoever in this exercise has been forthcoming from them.

[136] The Applicant's legal representatives will have one final opportunity to rectify their foregoing default. They shall provide their proposed draft final order by 05

July 2019 at latest. The Respondents will reply by 26 July 2019 (making due allowance for the holiday season). Should the Applicant's legal representatives maintain their position of non – engagement with the court, so be it: this will neither preclude nor obstruct the promulgation of a final order at a time convenient to the court.