

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

Delivered: 30/4/09

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IN THE MATTER OF AN APPLICATION BY GERALD DORINO  
SOLINAS FOR JUDICIAL REVIEW  
AND IN THE MATTER OF A DECISION OF THE MINISTER WITH  
RESPONSIBILITY FOR THE DEPARTMENT FOR SOCIAL  
DEVELOPMENT MADE ON 16 OCTOBER 2007

MORGAN J

**The application**

[1] This is an application for judicial review of a decision of the Minister with responsibility for the Department of Social Development (DSD Minister) made on 16 October 2007 whereby she decided to withdraw funding from the Community Transformation Initiative (CTI). The funding was provided to Farset Youth and Community Development Ltd and the applicant is a regional assistant development officer employed by Farset. The grounds of the application are set out in the amended Order 53 statement.

(a) The Minister failed to consult, adequately or at all, with the employees of Farset who were involved in delivering the CTI, as required by the duty to act in a procedurally fair manner, before making a decision which had the inevitable effect of terminating their employment.

(b) The Minister's decision was pre-determined and any consultation embarked upon by the Minister's officials was therefore nugatory.

(c) In reaching her decision, the Minister took into account irrelevant considerations, namely the failure of the Ulster Defence Association (UDA) to make a "start to decommissioning" or to conduct (in the Minister's view) "meaningful engagement" with the Independent International Commission on Decommissioning (IICD). Such considerations were legally irrelevant as they formed no part of

the contractual arrangements between the Minister's Department and Farset.

(d) In reaching her decision without the agreement of the Executive, the Minister acted in breach of paragraphs 1.4, 2.4 and 2.5 of the Ministerial Code and thus unlawfully by virtue of sections 20(4), 28A(1) and (10) of the Northern Ireland Act 1998 (as amended).

(e) In reaching her decision the Minister took into account further irrelevant considerations, namely:

(i) The activities of what the Minister knew, or ought to have known, was a breakaway or splinter group of the UDA; and/or

(j) The activities of the UDA in areas which were not targeted by the CTI funding which the Minister terminated.

## **Background**

[2] At the beginning of 2006 the Direct Rule Ministers were giving consideration to how they might tackle disadvantage in Protestant/Unionist/Loyalist working class communities, how they might free such communities from paramilitaries/criminal influence and how they might build confidence in such communities. Ministers considered that it should be part of the role of government to seek not just to encourage loyalist paramilitaries away from violence and criminality but to assist them, where possible, to do so. The UPRG is an organisation which describes itself as a provider of political advice and analysis to the UDA. Ministers considered at the beginning of 2006 that it could clearly be seen to be encouraging the UDA to turn its back on violence with some prospect of success.

[3] In January 2006 the UPRG tabled a proposal for a pilot project on conflict transformation. The UPRG held five meetings with officials between February and April 2006 to discuss the project and put forward a Conflict Transformation Initiative (CTI) proposal involving expenditure of £1 million over three years for the appointment of 9 workers plus ancillary costs. There were concerns within government about the accountability and robustness of the proposal in relation to outcomes including in particular reductions in criminality and freeing communities from paramilitary influence.

[4] Farset is a voluntary organisation with an excellent track record in managing projects funded from the public purse. On 24 July 2006 Farset agreed to provide the administrative and governance framework for the project. On 12 September 2006 Mr Hain, Secretary of State for Northern Ireland, authorised a pilot project for a six-month period at a cost of £135,000

on condition that any act of violence attributed to the UDA would result in a review of the scheme. On 17 October 2006 DSD wrote to Farset advising that the grant application towards the project had been successful but that the Department reserved the right to immediately suspend or terminate payments on grounds of security, community disputes or if there was any increase in the scale or significance of crime or any incident giving rise to major public disquiet within the specified areas of programme. The power to provide the assistance arose from article 3 of the Social Need (Northern Ireland) Order 1986.

3. - (1) The Department may provide financial assistance for any body or person doing or intending to do in a district where there exist one or more areas of social need anything falling within paragraph (2).

(2) Financial assistance under paragraph (1) may be provided for-

- (a) the promotion, development or regeneration of commercial, industrial or other economic activity;
- (b) the improvement of the environment;
- (c) the provision of housing;
- (d) the provision of social or community facilities;
- (e) the refurbishment or restructuring of buildings;

or for anything not falling within sub-paragraphs (a) to (e) which the Department considers will benefit the district.

Article 4 of the 1986 Order enabled the Department to impose such conditions as it thought fit and to require the recipient of any grant to provide information or produce documents.

[5] On 22 March 2007 Mr Hanson, the relevant minister, approved an award of grant under article 3 of the 1986 Order to Farset for a CTI from 1 April 2007 until 31 March 2010 at an amount of £1,288,671.16. The funding conditions included the following.

4. The project will work with the range of stakeholders to promote an end to paramilitary activity in Protestant working class areas and also specifically aim to achieve such a reduction in the target areas. The Department will use information from the project and from other sources including PSNI and the IMC to confirm progress.

5. The project will work to achieve measurable reduction in the levels of crime and antisocial behaviour within the target areas.

Failure to comply with any of the conditions above may be considered a breach of contract and may lead to the withdrawal of funding. In

addition any evidence that there is not a sustained reduction in the level of paramilitary activity or levels of crime and antisocial behaviour associated with paramilitary (sic) in the target areas may be considered as indicative that the project is not pursuing its identified outcomes and could lead to a cessation of funding.

In a press statement entitled "Government Expects End To Paramilitism" issued on 22 March 2007 Mr Hanson identified the work as a further development of a programme announced the previous year focussed on freeing communities from the influence of criminality and paramilitarism. He expected that this additional support would deliver a quickening in pace of the work of the UPRG in the conflict transformation work that the latest IMC report identified was required. The press release noted that the funding would be closely monitored by officials from DSD and that continued funding over the three years would be dependent on evidence that there is a reduction in criminal activity and paramilitarism.

[6] On 8 May 2007 devolution returned to Northern Ireland and Ms Ritchie took up her position as DSD Minister. On 16 May 2007 she met with representatives of Farset. They indicated that they were convinced that they were heading in the right direction. The UPRG had recently shown itself keen to work with the PSNI on issues relating to drugs, violence and extortion. They felt there had been substantial buy in from the UDA to the project. The Minister asked that a message be conveyed to the UPRG that now was the right time for decommissioning and that this was an expectation of government and not an aspiration. Farset indicated that they would take a strong message back to the UPRG.

[7] On 4 July 2007 the Minister wrote to her Executive Committee colleagues in relation to CTI. She stated that the contract for the project was agreed by a direct rule minister and made it clear that if she had been Minister at the time she would not have entered into the contract and approved the funding. She identified 4 principal outcomes.

- Engaging hard to reach Loyalist communities in the peace building process
- Ending all paramilitary activity in their communities
- Achieving a measurable reduction in levels of crime and antisocial behaviour within target communities
- Moving towards conflict resolution, a shared peaceful and prosperous future.

Each of those outcomes, which were identified within the project documentation, was also related to the four objectives which were set for the project. The Minister indicated her firm belief that decommissioning must also form part of the process since the contract is focussed on ending

paramilitary and criminal activity. She recognised that the contract gave rise to private law rights in relation to Farset. She sought endorsement to leave funding in place on the clear understanding that

- this is a collective responsibility;
- there will be rigorous monitoring and oversight of the contract and all its condition;
- we will continue to press for faster progress, including a commitment to - and the delivery of - decommissioning and an end to all paramilitary and associated criminal activity as part of the contract;
- funding will be provided so that the money involved is not seen to be at the expense of the DSD budget for other community groups;
- regular reports on progress will be provided to the Executive.

Executive colleagues took the view that as the contract was to remain in place the Minister's paper did not contain a decision for the Executive to take and the matter was not brought before it.

### **The announcement of 10 August 2007**

[8] On the weekend of 21 July 2007 on the Castlemara Estate a policeman was shot as a result of UDA violence. On 1 August 2007 serious rioting occurred on the Kilcooley Estate. On 2 August 2007 the Chief Constable said publicly that the UDA were responsible for the violence. On 6 August 2007 the Minister met with Assistant Chief Constable Peter Sheridan who confirmed that shots had been fired during the Kilcooley riot. The PSNI confirmed that local UDA personnel were involved in the rioting at Kilcooley and involved in the Castlemara Estate incident. On 10 August 2007 the Minister met the UPRG to advise them that she intended to issue a statement indicating that funding would be withdrawn after 60 days unless certain conditions were met. She indicated to them that she required some credible evidence that the UDA intended to move away from violence and criminality. She encouraged them to engage in dialogue with the organisation. Farset was contacted by her officials to advise them of the statement and the Executive Committee were provided with a copy of it. The operative portion said

The actions of recent days are a clear breach of the basis on which funding was awarded and I have seriously considered withdrawing the funding immediately. I have based my decision on what will offer the best future for these communities.

I have decided therefore that the funding for the CTI project will cease unless there is clear evidence that the UDA means what it says. The funding will end 60 days from now unless there is clear and demonstrable

evidence that the UDA has engaged meaningfully with the IICD and has started to decommission its weapons.

I also want to see evidence that the UDA has moved irreversibly away from criminality and violence to positive and lawful community transformation.

This decision was broadly in line with one of the options provided to the Minister by her officials, the other option being the immediate withdrawal of funding. Although her official had suggested an intent to decommission as a condition of continued funding the Minister chose to impose a condition of a commencement of decommissioning.

[9] On 17 August 2007 the Minister wrote to Farset indicating that the recent UDA linked violence in Carrickfergus and Kilcooley had breached the conditions in the contract linked to the sustained reduction of paramilitary violence and criminality. Farset maintained that the 60 day deadline was too short a time limit within which to make a judgment about a sustainable reduction in violence. At a meeting on 19 September 2007 with the Minister members of staff at Farset maintained that it had complied with the terms of CTI. The Minister has made it clear that she has no criticism to make of Farset. She also met Mr Goggins of the NIO on 28 August 2007, Mr Ahern of the Irish Department of Foreign Affairs on 30 August 2007 and the IICD on 18 September 2007. On 27 September 2007 she met with the UPRG and they indicated that they hoped that the decommissioning body would be able to record meaningful engagement had taken place before 9 October 2007 (the date on which the 60 day deadline ended) and emphasised that something significant was likely to occur in November.

[10] On 18 September 2007 the Minister for Finance and Personnel wrote to the First and deputy First Minister in relation to the announcement of 10 August 2007. The burden of this correspondence is found in the following passages.

You will recall that in July a draft Executive paper from the Minister for Social Development was circulated in relation to the CTI. However, at that time it was felt that it was unnecessary for the matter to come before the Executive as there was a contract in place and there was no new decision to be taken. While in those circumstances that was the correct approach to take, I believe the subsequent decision announced by the Social Development Minister on this matter should be brought to the Executive to

allow a collective decision to be taken on the best way forward....

I am also concerned as to whether the requirements announced by the Social Development Minister amount to laying down a new condition which is not found in the original contract offer. In addition, as far as I am aware, there appears to have been no study or detailed assessment made as to the extent to which the actual terms of the contract had been adhered to or the progress which has already been made in this area. CTI were not asked to provide any information in this respect.

### **The Executive Committee meeting of 8 October 2007**

[11] The matter was placed on the agenda of the Executive Committee as "Conflict Transformation Initiative; Update from the Minister for Social Development" to be considered at its meeting on 8 October 2007. The Minister was able to attend the first part of this meeting where the item was discussed but had to leave for Brussels before the meeting ended. The minute of this meeting, which was approved at the next meeting of the Executive on 18 October 2007, records that the Minister said that she had reached no conclusion yet but would decide her next move over the following few days. The minute records that it was agreed that the Minister for Social Development would;

- (a) ask the Departmental Solicitor's Office for early and immediate advice in respect of the contractual, financial etc issues arising from any proposed decision to withdraw funding from this initiative;
- (b) forward that legal advice as soon as possible to the Minister of Finance and Personnel, copied to the First Minister and deputy First Minister;
- (c) defer any decisions on this matter until she had opportunity to reflect on what action, if any, had been taken by the deadline set, and also until she and the Minister of Finance and Personnel had opportunity to consider the legal advice from the Departmental Solicitor's Office; and
- (d) copy to the First Minister and deputy First Minister the assessment she had made before making her original statement that she would withdraw funding if certain conditions were not met.

[12] On 9 October 2007 the Head of the Civil Service sent a memo to the Minister's Permanent Secretary and the head of the Departmental Solicitor's Office setting out the terms of the agreed decision. On 12 October 2007 after her return from Brussels the Minister sent a memo to the Head of the Civil Service as follows.

- i. Your characterisation of what the Executive "agreed" in relation to my handling of the CTI issue is not consistent with my own recollection of the discussion.
- ii. The fact that you sent this note to my legal adviser (and ended up in the brief prepared for the Senior Crown Counsel) has not been helpful. I intend to seek an external independent legal opinion.
- iii. I also found the tone of the note somewhat disrespectful.

Despite this it appears that some action was taken on foot of the memorandum of 9 October 2007. Steps were taken on that date to obtain an opinion from Senior Crown Counsel. By a memorandum on 10 October 2007 he sought additional information. An opinion dated 12 October 2007 was received in the Minister's office from Senior Crown Counsel at 1709 hrs that day. A further memorandum from Senior Crown Counsel was received on 15 October and two further memoranda dated 16 October 2007 were received at 1249 hrs and 1400 hrs respectively on that date. A further opinion from another senior counsel retained on behalf of the Minister was received by the Minister on 15 October 2007.

[13] On 15 October 2007 DSD's Permanent Secretary prepared a submission which considered options including continuing funding, termination or suspension of funding. He recommended that funding should continue subject to certain additional safeguards and pointed out that there was an opportunity to involve Executive colleagues in the decision.

#### **The decision on 16 October 2007**

[14] The events of 16 October 2007 leading up to the Minister's announcement have been set out by an official from the Minister's Department.

- (i) At 10.55 hrs the Minister notified her fellow Ministers that she was going to make a statement to the Assembly that afternoon concerning CTI.
- (ii) At 12.12 hrs the Minister provided a copy of the text of her proposed Statement to officials.
- (iii) At 13.25 hrs the Minister received a letter about the proposed Statement from the Minister of Finance. The Minister of Finance



noted that the Executive agreed that a copy of the legal advice should be shared with OFMDFM and DFP before any decision on the issue is made. On that basis the Minister of Finance presumed that Mrs Ritchie was using the statement as an opportunity to update assembly members on progress rather than announcing final decisions.

- (iv) At 13.42 hrs the Minister's office sent by e-mail a copy of the legal Opinion of Brett Lockhart QC and Senior Crown Counsel's memoranda of 10th October and one of his memoranda dated 16th October to the offices of First Minister and deputy First Minister and the Minister of Finance.
- (v) At 14.15 hrs the Minister had a brief conversation with Nigel Hamilton, the Head of the Northern Ireland Civil Service and Secretary to the Executive Committee. Mr Hamilton advised the Minister that in his opinion the Minister's planned announcement would if made be in contravention of a decision of the Executive and would be in breach of the Ministerial Code. The Minister did not share Mr Hamilton's view.
- (vi) At 14.25 hrs the Minister's office provided by e-mail copies of Senior Crown Counsel's Opinion of 12th October to the offices of First Minister, deputy First Minister and to the Minister of Finance.
- (vii) The Minister's statement was copied by e-mail at 14.29 hrs to the offices of the other Ministers in the Executive.
- (viii) At 14.45 hrs the Minister made her statement to the Assembly announcing the end of funding for CTI.

[15] In her statement the Minister pointed out that any initiative which targets socially and economically deprived hard to reach communities will have worthwhile aspects. She drew a distinction between those who were being targeted and Farset as the provider of the programme. She said it was misleading to suggest that CTI was simply about targeting social need and not connected to a reduction in criminality, paramilitary activity and violence by the UDA. She noted the paper that she had forwarded to her Executive colleagues in early July and referred to the various meetings in which she had engaged. She referred to the continued problem of extending outreach to hard to reach communities and devising the most appropriate vehicle to get there but concluded that the UDA seemed intent on the continued use of violence and the organisation was simply not at this time able to meet the objectives of CTI. She concluded that the CTI project could not be justified any longer and decided to end it immediately.

## **The submissions of the parties**

[16] For the applicant Mr Larkin QC contended first that the Minister had failed to consult properly before making her decision. He accepted that the Minister and her officials took steps to engage with Farset and CTI staff in the period following the announcement on 10 August 2007. The criticism related to the failure to consult in advance of that announcement. The applicant contends that after the announcement the Minister was set on a fixed course and that any consultation did not offer a fair opportunity to influence the decision. This in a sense fed into his second point that the Minister's decision was predetermined by the announcement on 10 August 2007. Mr Larkin pointed to the fact that the Minister had indicated that she would not have granted the funding. The options which she considered in August 2007 were withdrawal or an ultimatum which he contended the UDA was very likely not to achieve. Predetermination was also supported by her acceptance in her statement to the Assembly that she had taken into consideration the expectations which had been raised by her statement of 10 August 2007. She described herself as staying true to the position she announced over 60 days ago.

[17] It was further contended that the Minister had erred by taking into account irrelevant considerations, namely the failure of the UDA to make a start to decommissioning or to conduct meaningful engagement with the Independent International Commission on Decommissioning. CTI could play a positive role in supporting identified communities to develop the necessary skills capacity and abilities in order to move away from paramilitary activity but unlike the pilot project the funding for the three year project was not linked to an end to paramilitary activity.

[18] Finally Mr Larkin contended that the Minister's decision was unlawful because firstly she had failed to comply with the requirements set out in the minutes of the Executive meeting of 8 October 2007 and in any event because she was required to bring to the Executive Committee any matters such as this which were significant or controversial. In the first of these submissions Mr Larkin was supported by Mr Shaw QC on behalf of the Executive Committee.

[19] For the respondent Mr Maguire QC contended that the essence of the case made on behalf of the applicant was that the Department broke the private law contract which it had entered into with Farset at the time of the award in March 2007. Such private law agreements are not susceptible to judicial review and in any event Farset was not a party to these proceedings. Secondly he submitted that the evidence demonstrated that the Minister had entered into a bona fide consultation process with a wide range of interests

after her announcement of 10 August 2007 and the evidence refuted the suggestion that her mind was made up despite her expressed reservations about the project. He submitted that the underlying objective of the project was to free the community from the disadvantages associated with paramilitary activity.

[20] He did not accept in the absence of an agreed Programme for Government that there was any obligation to bring significant or controversial matters to the attention of the Executive Committee. The Minister had sought to obtain approval for collective responsibility in her minute to the Executive of 4 July 2007 and accordingly had complied with this requirement even if it applied. He submitted that the Minister understood that her obligation was to obtain early and immediate legal advice and share it with the Minister for Finance and the First Minister and deputy First Minister. He submitted that she did so. Even if she was in breach by virtue of the minute approved by the Executive on 18 October 2007 this is a political matter and does not give rise to any illegality or rob her decision of legal validity.

### **The target areas**

[21] In the amended Order 53 statement an issue is raised about the extent to which the disorder and violence of July and August 2007 took place within the target areas of the project. This is specifically addressed in an affidavit by the Permanent Secretary of DSD sworn on 12 May 2008 and I am satisfied that the target areas included South East Antrim which included Castlemara and East Belfast which within the UDA structures included Bangor. No contrary argument was addressed in the course of the hearing although the point was not abandoned.

### **Public/Private Law**

[22] It is common case that any private law issues that may arise between DSD and Farset are not to be determined by these proceedings. The award of grant in this case was made to Farset under article 3 (1) of the Social Need (Northern Ireland) Order 1986 for purposes set out in article 3 (2) of the 1986 Order. In particular those included matters relating to training, youth and child development and environmental decline. The project implicitly recognised the connection between deprivation and the conduct of paramilitary activity. The decision of the Minister under challenge is her judgment that the funding should cease. The manner in which scarce resources should be distributed is eminently a consideration involving the assessment of competing public interests. Whether one examines this issue by reference to the legal source of power exercised by the decision maker as suggested by *De Smith* or by reference to the public interest test developed in *Re Phillips' Application* [1995] NI 322 and *Re McBride's Application* [1999] NI

299 it is clear in my view that the decision at issue is one of a public law nature.

### **Predetermination, Consultation and Irrationality**

[23] The applicant contends that the decision of 16 October 2007 was predetermined by the Minister's announcement on 10 August 2007. That issue is closely connected to the applicant's complaint about consultation and irrationality. From the time of her appointment the Minister made it clear that her interest was in securing real change on the ground. She specifically raised this with members of Farset at their first meeting in 16 May 2007. At that meeting one of the representatives of Farset noted that there had not been any mention of decommissioning but he felt that the sooner this came onto the agenda the better. It was in that context that the Minister asked for a message to be conveyed to the UPRG that now is the right time for decommissioning. It is clear, however, that the Minister was content at that stage that the project should proceed in the absence of an act of decommissioning and she so advised the Executive in her memo of 4 July 2007 despite the fact that if she had been Minister at the time she would not have entered into the contract or approved the funding. That displays a proper public interest consideration of balancing on the one hand the desirability of the initiation of the project and on the other the adverse consequences of termination.

[24] I am satisfied on the basis of the materials before me that the underlying purpose of the award of grant was to improve the social, economic and environmental circumstances of those living in communities adversely affected by the continuation of UDA paramilitary activity by way of drugs, extortion and violence. At the time of the award of grant it was recognised that within the UDA there were those who wanted to improve the social, economic and environmental lot of the community by moving away from paramilitary activity but that there were others who were resistant to that idea. The events of July and August 2007 demonstrated the strength of the latter group.

[25] The statement made by the Minister on 10 August 2007 indicated a firm intention to cease the funding if the conditions which she required were not achieved. That clearly supports the applicant's contention that the statement made on 10 August 2007 had the character of a final decision. It is clear, however, that there was an extensive round of meetings after 10 August 2007 and that those meetings discussed the benefits which had arisen from the CTI project and the disadvantages that might accrue if the project were stopped. At the Executive meeting on 8 October 2007 the Minister referred to her discussions with a variety of interested bodies and individuals and stated that she had reached no conclusion. In his memo of 15 October 2007 the Permanent Secretary noted that the Secretary Of State had referred to the fact

that there had been meaningful engagement with the decommissioning body. He prepared an advice on 15 October 2007 which recommended a course which would have involved the Minister departing materially from her statement of 10 August 2007. These factors all point in the direction that the outcome remained uncertain. In light of the Minister's recorded comment at the Executive meeting of 8 October 2007 that she had reached no conclusion on the issue it would require cogent evidence to establish that her position had remained fixed (see Re D [2008] UKHL 33). The fact that the Minister failed to bring the matter back to the Executive does not assist the applicant on this point because it merely reflects the fact that the Minister was of the view that the decision was hers to make. I do not consider that the applicant has satisfied the burden of establishing that the decision was predetermined by the announcement of 10 August 2007 and I consider that the complaints in relation to consultation fall for broadly the same reasons.

[26] The next question to be determined is whether in deciding upon her response the Minister was confined to the rights which had been reserved under the contract for funding or whether she was entitled to make a broader public interest determination. I have no doubt that the latter is the true position. In Amphitrite v The King [1921] 3KB 500 the plaintiff obtained an undertaking from the British government that if it sent a particular ship with a particular cargo it would not be detained. The ship was sent but the government detained it. The court declined to hold that there was a contract and the reason for so thinking was that it was not competent for the government to fetter its future executive action. William Cory & Son Ltd v London Corporation [1951] 2 KB 476 was a case in which the Corporation as sanitary authority made a contract with the plaintiffs who were barge owners for the removal of refuse from a wharf where it was to be dumped. The Corporation subsequently acting as the port health authority made new bylaws relating to barges which were much more onerous than the existing bylaws as a result of which the contract became commercially unviable for the plaintiff. The plaintiff claimed that the provisions of the contract give rise to either express or implied terms that the Corporation should not impose more onerous burdens on the plaintiff than those contained in the contract. Lord Asquith noted that a party preventing the other from performing the contract is generally guilty of a breach. But in this case he held that the Corporation had a dual character as a sanitary or health authority. As health authority they are charged with making bylaws and any implied term would impose an unwarrantable fetter on the Corporation in the exercise of their statutory duties.

[27] Commissioner of Crown Lands v Page [1960] 2 QB 274 is a case in which the defendant leased premises from the Crown in 1937 under a 25 year lease. In 1939 the Minister of Works requisitioned the premises and did not derequisition them until 1955. Devlin LJ held that in making a lease or other contract with subjects the Crown does not promise to refrain from exercising

its general powers under a statute or under the prerogative. A more recent example of this principle is Yarl's Wood v Bedfordshire Police [2008] EWHC 2207 (Comm) where at paragraph 80 Beatson J stated that it was clear law that a contractual arrangement by a public authority may not fetter the authority in the exercise of its powers and duties. I am satisfied that the Minister was entitled to exercise a public interest judgment outside the terms of the funding award. In doing that she was bound to take into account the terms of the funding award but I am entirely satisfied on the papers that she did so.

[28] The last point which arises in this area is whether in taking into account a failure to begin decommissioning or to reduce paramilitary activity the Minister took into account an irrelevant consideration. It is plain that responsibility for decommissioning lies entirely outside the remit of the Minister as does responsibility for criminal justice. There are, however, many facets of government where the issues arising in one sphere cut across those in another. The background to this grant application was the desire of the government to build confidence within loyalist communities and empower those communities to achieve the skills which would enable them to move on from the deprivation caused by drugs, extortion and violence engineered by paramilitaries within those communities. A simple example suffices. A youth and child development programme is likely to be imperilled in a community in which there is active, organised drugs activity. The judgment about whether projects like these are the appropriate recipient of scarce resources may well need to take into account the extent to which it is likely that those resources will achieve the aim of empowering the community. That judgment may well be influenced by the extent to which there is evidence of the relevant paramilitary group's action or inaction on decommissioning. In exercising that judgment the decision maker is not in my view straying into the forbidden territory of taking on responsibility for the issue of decommissioning but rather considering the impact on the desired community improvement of likely paramilitary interference. This is exactly the type of balancing of the application of resources in the public interest that is properly the territory of democratically accountable ministers. I consider that the challenge on irrationality must fail.

### **Executive Approval**

[29] The Northern Ireland Act 1998 provided a legal framework within which the Executive Committee, Ministers and the Assembly were to operate. That framework was significantly altered by the Northern Ireland (St Andrews Agreement) Act 2006 and it is to the effect of those provisions that I now turn. Section 20 of the 1998 Act as amended deals with the Executive Committee.

“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) 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."

Section 20(4) is the amendment introduced by the 2006 Act. Section 20(4)(a) assumes that the agreed programme referred to in paragraph 20 of Strand One of the Agreement are in place. In fact it is common case that the agreed programme was not in place in October 2007. Section 20 (4) (b) is a provision which has the effect of giving the First Minister and deputy First Minister acting jointly the power to determine that particular significant or controversial matters should be considered by the Executive Committee. In effect, therefore, this gives the First Minister and deputy First Minister acting jointly a significant measure of control over the business of the Executive.

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

[31] It is apparent that under these arrangements that a conflict could arise between the exercise by a Minister of executive power and the function of the Executive Committee to discuss and agree upon significant or controversial matters. It was for the purpose of resolving that conflict that the 2006 Act introduced section 28A dealing with the Ministerial Code. Of particular relevance in this application are the following subsections.

*"28A Ministerial Code*

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

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

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

[32] The Ministerial Code was approved by the Assembly on 20 March 2007. It is divided into three sections. The first section is described as an introduction largely deals with the individual responsibility of ministers. It notes at paragraph 1.4 that under the 1998 Act it is a condition of appointment that Ministers of the Northern Ireland Assembly affirm the terms of the Pledge of Office which include a requirement to support, and to act in accordance with, all decisions of the Executive Committee and Assembly. Section 2 deals with the Executive Committee and provides of paragraph 2.3 for the functions of the Executive Committee which broadly reflect those in section 20 (3) and (4) of the 1998 Act as amended. There are then specific provisions dealing with a duty to bring matters to the attention of the Executive Committee. Section 3 of the Ministerial Code is not relevant for the purposes of this application.

[33] That statutory background casts light on the events which occurred and the consequences in terms of the obligations of those involved. I have found that the announcement of 10 August 2007 was a statement of intent upon which the Minister engaged in a bona fide consultation. In his correspondence of 18 September 2007 the Minister for Finance raised the question of whether any proposed decision ought to be considered by the Executive. In exercise of their powers under section 20 (4) (b) of the 1998 Act as amended the First Minister and deputy First Minister acting jointly determined that the issue should be put on the Executive Committee agenda on 8 October 2007. The Pledge of Office the provisions of which are contained within the Ministerial Code requires a Minister to support and to act in accordance with all decisions of the Executive Committee. The only accurate record of the decision is the minute approved by the Executive Committee at its meeting on



18 October 2007. The relevant terms of that minute are set out in paragraph 11 above.

[34] There is no dispute that the Minister asked the Departmental Solicitors Office for early and immediate advice in respect of the issues. The Minister was obliged to forward the legal advice as soon as possible to the Minister for Finance and Personnel copied to the First Minister and deputy First Minister. In fact not all of the advice was forwarded. At the very least the memorandum which arrived at 2 p.m. on 16 October 2007 was not forwarded. Of more significance, however, is the fact that none of the advice was forwarded until 1:42 p.m. on the afternoon of 16 October 2007 approximately 1 hour before the Minister made her statement to the Assembly. A memorandum was received by the Minister from Senior Crown Counsel on 10 October 2007. An opinion was received on the afternoon of 12 October 2007 and a further memorandum on 15 October 2007. The affidavits do not contain any explanation as to why these materials were not forwarded as soon as they were received. The importance of their receipt lay in the fact that it would, of course, have been open to the First Minister and deputy First Minister acting jointly to have directed that the matter should once again be placed before the Executive Committee and by virtue of 2.4 of the Ministerial Code the Minister would be required to bring the matter for consideration to that Committee. The combined effect of the provisions of section 28A(5) and 28A(10) would mean that in those circumstances the Minister would have no Ministerial authority to take any decision in respect of the issue.

[35] The third requirement in the minutes imposed an obligation on the Minister to defer her decision on the matter until the Minister of Finance and Personnel had an opportunity to consider the legal advice from the Departmental Solicitor's Office. On behalf of the Minister it is submitted that she did not accept that any such obligation had been imposed upon her at the Executive Committee meeting. Although I entirely accept that that was her firm view it remains the case that by 12 October 2007 she had been provided with a memorandum from the Head of the Civil Service setting out his account of the agreement. She was also expressly advised 30 minutes before she made the announcement that in the opinion of the Head of the Civil Service her planned announcement would if made be in contravention of the decision of the Executive and in breach of the Ministerial Code on that account. The Minister chose to proceed with the announcement on 16 October 2007 rather than wait for the Executive Committee meeting on 18 October 2007. Although I recognise the urgency which the Minister attached to clarification of this issue I considered that by proceeding with the announcement on 16 October 2007 she voluntarily accepted the risk that she was not acting in accordance with the Ministerial Code. I am satisfied that by not deferring her decision on the matter until the Minister of Finance and Personnel had an opportunity to consider the legal advice from the Departmental Solicitor's Office the Minister was not acting in accordance with

a decision of the Executive and accordingly was not acting in accordance with the provisions of the Ministerial Code contrary to section 28A(1) of the Northern Ireland Act 1998 as amended.

[36] The respondent contrasted the express terms of section 28A(10) of the 1998 Act which removes the entitlement to exercise executive power if there is a failure to bring the matter to the attention of the Executive with the fact that no such sanction arises where there is a contravention of section 28A(1). In this case I have decided that no breach of section 28A(10) arises because the matter had been before the Executive Committee on 8 October 2007 and the Committee had determined how the decision-making process should proceed. The error in this case is procedural in that the Minister did not act in accordance with that process. Although there can be political sanctions under the 1998 Act in certain circumstances these do not provide a practical and effective remedy for the applicant. This applicant was directly affected by the decision making in this case as he was at risk of losing his job were it not for the interim relief that was granted. Although not every breach of section 28A(1) must lead to the provision of a remedy I consider that where, as here, procedural default is established which directly affects the applicant a practical and effective remedy should normally follow. Accordingly I make an order of certiorari quashing the decision of the Minister to cease the funding of the CTI.