

Judicial Communications Office

6 July 2018

COURT OF APPEAL CONCLUDES THAT DEPARTMENT DID NOT HAVE POWER TO ACT IN ABSENCE OF MINISTER

Summary of Judgment

The Court of Appeal today dismissed an appeal by the Department of Infrastructure against a decision that it did not have the power to grant planning permission in the absence of a Minister.

On 14 May 2018, Mrs Justice Keegan ruled that a senior civil servant did not have the power to grant planning permission for a major waste treatment centre and incinerator at Hightown Quarry in Mallusk. The decision had been made by the Permanent Secretary of the Department of Infrastructure (“the Department”) in the absence of a Minister because of the current political impasse in Northern Ireland. The Department appealed the trial judge’s decision.

The judgment sets out in detail the arrangements for the exercise of statutory, prerogative and executive power in England, Scotland and Wales. The Court of Appeal said this review evidenced a number of established constitutional principles:

- Statutory, prerogative and executive powers are exercised by politically accountable Ministers;
- In order to ensure continuity, Ministers continue in office after the dissolution of Parliament. If a Minister resigns the functions for which that Minister exercised responsibility can be exercised by any other Minister. That is connected to the principle of collective responsibility;
- Departments do not have statutory, prerogative or executive powers. The establishment of Departments and their functions are essentially matters for politically accountable Ministers;
- Civil servants do not exercise statutory, prerogative or executive powers. They are accountable to Ministers but it is Ministers who are accountable to Parliament;
- Constitutionally the decision of a civil servant exercising the powers given to Ministers is a decision of the Minister.

The constitutional position in Northern Ireland is set out in the Northern Ireland Act 1998 (“the 1998 Act”) which implemented the Belfast/Good Friday Agreement (“the Agreement”). Strand One of the Agreement made provision for an Assembly which would exercise the legislative and executive authority in respect of matters that had been within the responsibility of the then six Northern Ireland Government

Judicial Communications Office

Departments and for an Executive Authority which would be discharged on behalf of the Assembly by a First Minister and Deputy First Minister (“FM and DFM”) and up to ten Ministers with Departmental responsibilities. The FM, DFM and the Ministers would constitute the Executive Committee which would provide a forum for agreeing cross-cutting, significant or controversial matters. Unlike the position in England, Scotland and Wales, the Agreement intended that Ministers should 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. The Agreement therefore did not intend that there should be any collective responsibility in respect of the areas allocated to individual Ministers.

The workings of the 1998 Act resulted in the NI Ministers ceasing to hold office on 2 March 2017, the date on which an election was held following the failure to fill the posts of FM and DFM following the resignation of the DFM on 9 January 2017. The 1998 Act required the Assembly to fill the offices of FM, DFM and the Ministerial offices within 14 days of its first meeting. That did not happen and as a result no Ministers have been in place since 2 March 2017 and there has been no meeting of the Executive Committee since 9 January 2017. Section 32(3)(a) of the 1998 Act provides that, in such circumstances, the Secretary of State must propose a date for the poll for the election of the next Assembly but the Act does not specify a timeframe within which this must be done.

The 1998 Act does not contain any provision in relation to the role of civil servants. The Court of Appeal considered that it clearly reflects the intention of the Agreement that Ministers should head Departments and be politically accountable for what happened within those Departments. The 1998 Act originally contemplated a period of up to six weeks when there were no Ministers in place but amendments effected under the Northern Ireland (St Andrews Agreement) Act 2006 removed this flexibility and any time limit can only be altered by primary legislation.

Article 4 of the Departments (Northern Ireland) Order 1999 (“the 1999 Order”) deals with the exercise of the functions of a Department. Article 4(1) provides that the functions of a Department “shall at all times be exercised subject to the direction and control of the Minister”. Article 4(3) provides that any functions of the Department may be exercised by the Minister or a senior officer of the Department.

In her decision, the trial judge noted the general frustration among civil servants and others about the need to take important decisions. She also recognised that delay had an effect on the implementation of public waste and environmental development at national, European and international level. She rejected a submission that because an outgoing Minister had indicated that a neutral stance should be taken, the Permanent Secretary could be said to have been acting in accordance with the direction and control of the previous Minister and concluded that in the absence of a Minister the Department did not have the power to grant the impugned planning permission.

Judicial Communications Office

Consideration

The Lord Chief Justice and Lord Justice Stephens considered that Article 4(1) of the 1999 Order is ambiguous but can be read as merely empowering Ministers to exercise direction and control over Departments when in place. They felt that Article 4(3) of the 1999 Order also supports that interpretation. Lord Justice Treacy disagreed that the 1999 Order is ambiguous. He said it was clear from the terms of the Agreement that the Department's argument that executive authority may be exercised by Departments in the absence of a Minister was incompatible with the Agreement. He considered the default position contended for by the Department is "profoundly undemocratic" and if correct "Departments in NI would be empowered, in breach of fundamental constitutional principle, to act without being accountable to Ministers": "This would be a striking consequence for an Agreement which was intended to usher in a new era of accountable governance and power sharing". Lord Justice Treacy concluded that even if Article 4(1) of the 1999 Order was ambiguous it ought to be construed consistently with established constitutional principle and the Agreement.

The Court of Appeal agreed that the decision in this case is a cross-cutting decision and said that the 1998 Act expressly attributes that function to the Executive Committee and provides a mechanism to ensure that the authority of Ministers is limited accordingly:

"There is no support in the Agreement for the suggestion that cross-cutting matters can be dealt with by Departments in the absence of Ministers and the allocation of responsibility for such matters within the 1998 Act to the Executive Committee can only be properly interpreted as excluding the Departments from the determination of such matters."

The Court of Appeal also considered that the issue of incineration as a means of waste disposal is controversial (having regard to the political views expressed) and significant (having regard to the importance of this issue for waste management policy in Northern Ireland and compliance with EU Directives). It said that these are matters that again required determination by the Executive Committee: "It would be contrary to the letter and spirit of the Agreement and the 1998 Act for such decisions to be made by Departments in the absence of a Minister."

The Court of Appeal said it was reinforced in these views by its recognition of the constitutional position of civil servants whose role is to advise Ministers and be accountable to them. It said that the Department's submissions would effectively turn civil servants into Ministers and "such a remarkable constitutional change would require the clearest wording" to provide any basis for the implication of such a major departure from established constitutional principles.

Judicial Communications Office

The Court said it had not heard argument in the appeal on the precise limits of any power of the Departments to take decisions but commented that:

“It follows from our analysis of the constitutional position of civil servants that 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.”

Conclusion

The Court of Appeal concluded that the decision made by the Department was crosscutting, significant and controversial. It was, therefore, a decision which could only be taken by the Executive Committee. Accordingly the appeal was dismissed.

The Court of Appeal commented that it was doubtful that any significant weight can be placed on the views of a Minister who has lost office as the political responsibility for responding to what has occurred in the interim is that of the incoming Minister. It said that observations on the limited powers available to senior civil servants in the absence of a Minister are contained within the judgment but that it expressed no final view on the competence of Departments to make decisions during periods when no Minister is in place.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (www.judiciary-ni.gov.uk).

ENDS

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Judicial Communications Officer
Lord Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921
E-mail: Alison.Houston@courtsni.gov.uk

Judicial Communications Office