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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **11/3/16**

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 THE MINISTER OF ENTERPRISE, TRADE AND INVESTMENT FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION BY THE MINISTER OF THE ENVIRONMENT DATED 3 SEPTEMBER 2014

The Minister of Enterprise Trade and Investment's Application [2016] NIQB 26

TREACY J

Introduction

[1] By this application the Minister for Enterprise, Trade and Investment ("the DETI Minister") challenges a decision of the Minister for the Environment ("the DOE Minister") made on 3 September 2014 whereby he authorised and directed his Department to adopt the Belfast Metropolitan Area Plan ("BMAP"). Mr David Scoffield QC and Mr Peter Coll QC appeared for the Applicant and Mr Tony McGleenan QC and Mr Paul McLaughlin appeared for the Respondent. The Court is grateful to all Counsel for their excelled written and oral submissions.

[2] The DETI Minister contends that the DOE Minister had no authority to make his purported decision without the matter having been agreed by the Executive Committee by virtue of the provisions of s20(3) and (4) of the Northern Ireland Act 1998 (as amended) ("the 1998 Act"), read in conjunction with relevant provisions of the Ministerial Code.

Background

[3] On 11 January 2013 the previous DOE Minister announced that his Department intended to include as part of the BMAP retail strategy, a restriction on the expansion of Sprucefield Regional Shopping Centre ("SRSC") as being for bulky goods only. The DETI Minister wrote to the First Minister and Deputy First Minister

on 14 January 2013 expressing concern and in response, the First Minister and Deputy First Minister jointly determined that the BMAP retail strategy announced by the DOE Minister was a significant and controversial matter which should be considered by the Executive.

[4] On 24 January 2013 the DOE Minister was requested to bring forward an Executive Paper on the matter. Following this announcement the developer of the Sprucefield site withdrew the application for major development on 31 January 2013.

[5] At a meeting on 28 November 2013 between the DOE Minister and the First Minister and Deputy First Minister, the First Minister requested again that BMAP be brought to the attention of the Executive.

[6] On 13 December 2013 the DOE Minister provided an Executive Paper indicating his intention to authorise his Department to adopt draft BMAP. This was copied to the Attorney General following which the Attorney General wrote to the DOE Minister "offering advice on the issue of Executive approval for the adoption of BMAP".

[7] The DRD Minister responded to the DOE Minister's Paper on 16 December 2013 indicating his view that the draft BMAP should be brought to the Executive for approval. On 17 December 2013 the DOE Minister's Executive Paper was amended taking account of the advice provided by the Attorney General. This new version formally sought the agreement of the Executive that the Minister authorise his Department to adopt BMAP in the terms he proposed.

[8] The DSSPS Minister wrote to the DOE Minister on 20 January 2014 indicating disagreement with the terms of the draft BMAP. On 30 January 2014 the DOE Minister's Paper, although not included in the agenda, was raised at the Executive Meeting. It was considered that he should "arrange meetings with other Ministers to consider their concerns".

[9] On 4 March 2014 the DOE Minister answered an oral question in the Assembly making clear that the adoption of BMAP was "subject to the agreement of [his] ministerial colleagues" and that he could not be definitive about the timescale for adoption because of ongoing discussion with other Ministers. The DFP Minister responded to the DOE Minister's Executive Paper indicating that he did not agree with the bulky goods restriction on the expansion of Sprucefield and requested its removal.

[10] On 6 March 2014 the DOE Minister provided a third version of his Paper which continued to seek Executive agreement for him to authorise his Department to adopt BMAP. The Minister invoked the 'three meeting protocol' to have the Paper tabled at the next meeting of the Executive. The Paper was then tabled at an Executive meeting, discussed and it was agreed that an Executive Sub-group, chaired by the DOE Minister, should be convened to examine the issues relating to BMAP.

[11] On 11 March 2014 the DHSSPS Minister wrote a further letter, making further objections to the adoption of BMAP in its present form.

[12] The DSD Minister wrote to the DOE Minister on 17 March 2014 noting that BMAP was to be taken forward through the Executive Sub-group. This sub-group met on 6 May 2014 but no agreement was found in relation to the Sprucefield question. The DOE Minister agreed to consider the issues discussed and to report back to the Executive.

[13] In response to an oral question in the Assembly on 30 June 2014 the DOE Minister stated that it is "high time that the Executive acceded to my request to adopt it". The DOE Minister circulated a forth version of his Executive Paper on 1 July 2014 which provided an update and again sought Executive agreement that he authorise his Department to adopt BMAP.

[14] On 8 July 2014 an Executive meeting took place. The DOE Minister's Executive Paper was not tabled.

[15] On 9 July 2014 the DHSSPS Minister again wrote to the DOE Minister expressing concern regarding the restriction on the expansion of Sprucefield for bulky goods only.

[16] Notwithstanding the absence of Executive agreement and ongoing objection from Ministerial colleagues, the Environment Minister, in August 2014, indicated to officials that he wished to proceed with the adoption of BMAP and he "instructed officials to seek legal advice on the adoption of the Plan and in particular upon his Ministerial authority to proceed in this way, having previously requested the agreement of Executive colleagues".

[17] On 28 August 2014 the Chief Planner provided a submission to the DOE Minister on the adoption of BMAP, enclosing a further draft version of his Executive Paper. The following day the DOE Minister responded informing the Chief Planner that "he now intended to exercise his Ministerial authority and he authorised and directed me to proceed to adopt BMAP without any further delay". The appropriate Adoption Order was therefore made by the DOE on 3 September 2014 in accordance with the DOE Minister's instructions. On 4 September 2014 the DOE Minister provided his Paper informing the Executive, retrospectively, that he had authorised and directed his Department to adopt BMAP and on 8 September 2014 he made a statement to the Assembly regarding the adoption of BMAP.

[18] The issue was discussed at the Executive meeting on 25 September 2014 and the DETI Minister indicated that, on foot of legal advice she had received from the Attorney General, she proposed to take legal action against the DOE Minister. It was agreed that legal advice would be shared within the Executive and therefore on 26 September 2014, the DETI Minister shared her legal advice with the DOE Minister.

[19] There then followed an exchange of correspondence between the respective Ministers and their Departments and a meeting between the two Ministers but the DOE minister refused to alter his position.

The Applicant's Submissions

[20] The Applicant submitted that the Respondent acted *ultra vires* his powers:

(i) by reason of section 20(3) of the Northern Ireland Act 1998, in that the impugned decision cut across the responsibilities of other Ministers. It therefore fell within para19 of Strand One of the Belfast Agreement and it was a function of the Executive Committee to discuss and agree upon it, rather than for the Respondent to act unilaterally.

(ii) by reason of section 20(4)(a) of the Northern Ireland Act 1998, in that the impugned decision was one which was significant and/or controversial matter which was clearly outside the scope of the agreed Programme for Government. It was therefore a function of the Executive Committee to discuss and agree upon it, rather than for the Respondent to act unilaterally.

(iii) by reason of section 20(4)(b) of the Northern Ireland Act 1998, in that the impugned decision was one which the First Minister and deputy First Minister acting jointly had determined to be a significant or controversial matter which should be considered, discussed and agreed upon by the Executive. Again, therefore, it was a function of the Executive Committee to discuss and agree upon it, rather than for the Respondent to act unilaterally.

(iv) in that the impugned decision was a matter cutting across the responsibilities of two or more Ministers; and/or was a matter which is significant and/or controversial; and/or was a matter which had been determined by the First Minister and deputy First Minister acting jointly to be a matter which should be considered by the Executive (as *per* paragraph 2.4(i), (v) and (vi) of the Ministerial Code respectively). Making the decision unilaterally and without the agreement of the Executive was therefore contrary to section 28A(1) of the Northern Ireland Act 1998, with the effect that the decision was made without Ministerial authority by virtue of section 28A(10) of the Northern Ireland Act 1998.

The Respondent's Submissions

[21] The Respondent very helpfully summarised their grounds of resistance at para2 of their Skeleton Argument. Their submissions were as follows:

(i) the adoption of BMAP is not a "significant or controversial matter" generally;
(ii) the only issue which is alleged to be significant or controversial is the section of BMAP dealing with the bulky goods restriction for retail development at Sprucefield Regional Centre. This restriction is in

accordance with the Regional Development Strategy approved by the Executive in 2012;

(iii) The Regional Development Strategy is a component part of the pre-approved Programme for Government;

(iv) The adoption of BMAP is not "cross cutting". There is a statutory requirement for a plan of this type to be referred to the DRD for a certificate of general conformity with the Regional Development Strategy. The DRD certified that the adoption of BMAP was in general conformity with the RDS pre-approved by the Executive.

(v) No evidence has been laid to demonstrate how the adoption of BMAP is cross cutting in relation to the responsibilities of the DETI Minister. The DETI Minister raised no issue about the adoption of BMAP during the period from December 2013 to September 2014 when the DOE Minister sought to have the matter considered by the Executive.

(vi) The adoption of BMAP does not cut across the responsibilities of the Minister for Health. The only objection raised by the Health Minister related to the application of the bulky goods restriction upon retail development at Sprucefield. This is not a responsibility of the Department of Health.

(vii) The adoption of BMAP similarly does not cut across the responsibilities of the Minister for Finance and Personnel. The only issue he raised also related to the bulky goods restriction at Sprucefield. No other Minister raised any objection to the adoption of BMAP.

(viii) The requirement to ventilate cross-cutting issues is directed to matters that cut across the Departmental responsibilities of other Ministers. It is not directed to matters that cut across the narrow constituency or party political interests of individual Ministers. To use the Code to serve such interests is an abuse of power.

(ix) Insofar as there are any cross-cutting issues in relation to BMAP the statutory process discharged by DRD in confirming general conformity with the RDS addresses those issues.

(x) Even if the adoption of BMAP raised "significant or controversial" or "cross-cutting" issues, the requirement in the Ministerial Code and the Northern Ireland Act 1998 is for the Minister to bring the matter to the Executive Committee for consideration.

(xi) Under s23 of the Northern Ireland Act 1998 individual Ministers are the only source of executive or prerogative power. The Executive Committee does not have any executive or prerogative power.

(xii) Where a Minister brings a matter to the Executive Committee for consideration there is a concomitant imperative upon the Office of the First Minister and Deputy First Minister to bring the matter forward for consideration.

(xiii) The Executive Committee has devised its own procedures to ensure that matters are brought forward for consideration, where a Minister so requires (the Three Meeting Rule). The Minister of the Environment

invoked this rule, but the adoption of BMAP was still not included on the Executive's agenda for consideration and a vote.

(xiv) It is an abuse of power for the OFMDFM to declare a matter "significant and controversial" but then to refuse to allow the Executive Committee to debate, discuss and vote on the matter.

(xv) The failure to bring a matter before the Executive Committee is a breach of the statutory function outlined in s20 of the Northern Ireland Act 1998. Any requirement for agreement within the Executive Committee is predicated upon the discharge of the obligation to bring a matter forward for discussion. Where the Executive Committee refuses to discharge this obligation then there can be no impediment to a Minister who has invoked the Executive's own decision making procedures exercising his prerogative and executive powers pursuant to s23 of the Northern Ireland Act.

(xvi) The DOE Minister in this case has acted in accordance with the terms of the planning statutes which require him to have regard to the Regional Development Strategy in considering whether to adopt a development plan. The DETI Minister (and others) have sought through this litigation to compel the DOE Minister to repeal part of BMAP in a manner that runs expressly counter to his statutory obligations to adhere to the RDS pre-approved by the Executive. This is a further instance of the terms of the Ministerial Code being used for an improper purpose.

(xvii) Neither the Minister for Enterprise Trade and Investment, nor the Health Minister, nor any other Minister have ever identified any rational planning reasons to support the removal of the bulky goods restriction at Sprucefield or to depart from regional planning policy. On the contrary, all available empirical evidence supports its retention.

(xviii) The DETI Minister and the Executive could have taken steps to prevent the adoption of BMAP becoming operative prior to 9 September 2014. The Executive Committee could have invoked the urgent procedure pursuant to para2.14 of the Ministerial Code. Alternatively, a petition of concern could have been presented in the Assembly pursuant to s28B of the Northern Ireland Act 1998. Neither course was taken, notwithstanding the fact that the Assembly was in session on 8 September 2014 and the business conducted that day included the presentation of a Petition of Concern relating to report of the Committee for Social Development.

The St Andrews Agreement, the 2006 Act and the Ministerial Code

[22] The Northern Ireland (St Andrews Agreement) Act 2006 ("the 2006 Act") gave effect to the agreement reached between the UK and Irish Governments after the multi-party talks in St Andrews in 2006. The 2006 Act made important changes to the constitutional arrangements for Northern Ireland set out in the Northern Ireland Act 1998.

[23] As Mr Scoffield QC pointed out a core element of the St Andrews Agreement, as it related to Strand 1 issues, was the requirement that certain important decisions would be agreed at Executive level rather than remaining the preserve of any individual Minister. It is clear that one of the mischiefs that the St Andrews Agreement avoided was that of one Minister making a unilateral decision which affected another Minister, or to which another Minister objected, or which was properly a matter to be decided by the Executive as a whole, without there being any obligation on the first Minister to bring the matter to the Executive to be discussed and agreed upon there.

[24] Paras3 and 4 of Annex A to the St Andrews Agreement provided, *inter alia*, that:

> "3. The 1998 Act would be amended to require inclusion in the [Ministerial] Code of agreed provisions in relation to ministerial accountability. Consistent with paragraphs 19 and 20 of the Agreement, this would provide for the Executive to be the forum for:
>
> (i) the discussion of, and agreement on, issues which cut across the responsibilities of two or more Ministers, including in particular those that are the responsibility of the Minister of Finance and Personnel…
>
> …
>
> 4. The Code will also provide for the discussion of and agreement on any issue which is significant or controversial and:
>
> (a) clearly outside the scope of the agreed Programme for Government or
>
> (b) which the First Minister and Deputy First Minister agree should be brought to the Executive."

[25] The NIA was amended by the 2006 Act. S5(1) of the 2006 Act introduced a new s20(4) to the NIA, providing that the Executive Committee has 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."

[26] S20(3) of the NIA already provided that the Executive Committee "*shall have the functions set out in paragraphs 19 and 20 of Strand One of the Belfast Agreement*". Para19 of Strand One of the Belfast Agreement states:

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

[27] The Executive had already been statutorily designated as the forum, therefore, for agreement on 'cross-cutting' issues, amongst others. The 2006 Act thus provided that it would also be the forum for agreement on significant or controversial matters (even if they were not cross-cutting). These functions are now reflected in para2.3 of the Ministerial Code which states:

> "The Executive Committee will provide a forum for:-
>
> (i) The discussion of, and agreement on, issues which cut across the responsibilities of two or more Ministers;
> (ii) Prioritising executive proposals;
> (iii) Prioritising legislative proposals;
> (iv) Recommending a common position where necessary;
> (v) Agreement each year on (and review as necessary of) a programme incorporating an agreed budget linked to policies and programmes (Programme for Government)."

[28] S5(2) of the 2006 Act also inserted a new s28A into the NIA. The new s28A provides so far as matter as follows:

> "(1) Without prejudice to the operation of section 24, a Minister or junior Minister shall act in accordance with the provisions of the Ministerial Code.
>
> …
>
> (5) The Ministerial Code must include provision for requiring Ministers or junior Ministers to bring to the attention of the Executive Committee any matter that ought, by virtue of section 20(3) or (4), to be

considered by the Committee.

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

…

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

[29] It is clear that the new s28A was designed, through the mechanism of the Ministerial Code, to impose an obligation on Ministers to bring cross-cutting issues and significant or controversial matters to the Executive for agreement; and to deprive them of Ministerial authority to act in the event of a failure to do so.

[30] Pursuant to the requirement in s28A(5) the Ministerial Code incorporates provisions requiring a Minister to bring such matters to the Executive. Para2.4 of the Ministerial Code provides, *inter alia*, that:

"Any matter which:-

(i) cuts across the responsibilities of two or more Ministers;

...

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

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

...

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

Regarding (i), Ministers should, in particular, note that:-

> • the responsibilities of the First Minister and deputy First Minister include standards in public life, machinery of government (including the Ministerial Code), public appointments policy, EU issues, economic policy, human rights, and equality. Matters under consideration by Northern Ireland Ministers may often cut across these responsibilities…"

[31] Para2.5 of the Ministerial Code also provides an express mechanism for '*determining whether a decision which Ministers wish to take or have taken relates to a matter that ought, by virtue of section 20(3) or (4) of the Act, to be considered by the Executive Committee*'. It provides that:

> "Where a Minister or junior Minister wishes the Executive Committee to make such a determination, he or she shall set out in writing the details of the decision taken or to be taken, and why he or she believes it is or is not covered by paragraphs 2.4(i) to (v) above, and seek the views of the Executive Committee. The Executive Committee should normally make a response at its next meeting."

[32] Where a matter is properly 'called in' by the Executive, its function is to discuss and agree on that matter either unanimously or in the exercise of the Executive's own voting mechanisms. It becomes a matter for Executive decision-making and no longer one for the Executive authority of the Minister alone.

Discussion

[33] The 2006 Act made significant changes to the Constitutional arrangements for NI giving effect to the agreement reached between the UK and Irish Governments after the multi-party talks in St Andrews in 2006. A central feature of the agreement, as it related to Strand 1 issues, was the requirement that certain important decisions would be agreed at Executive level rather than by being taken by any individual Minister. The purpose behind these provisions was to avoid a Minister making a unilateral decision which affected another Minister, or to which another Minister objected, or which was properly a matter to be decided by the Executive as a whole, without there being any obligation on that individual Minister to bring the matter to the Executive to be discussed and agreed upon there. This is clear from paras3 and 4 of Annex A to the St Andrews Agreement and the amendments to the Northern Ireland Act 1998 effected by the 2006 Act. Paras3 and 4 provided that the 1998 Act would be amended to require inclusion in the Ministerial Code of agreed provisions in relation to ministerial accountability. This would provide for the Executive to be "the forum for the discussion of, *and agreement on*, issues which cut across the responsibilities of two or more Ministers, including in particular those that are the responsibility of the Ministry of Finance and Personnel ..." The Code made similar provision for discussion and agreement by the Executive on any issue "which is

significant and controversial and (a) clearly outside the agreed Programme for Government or (b) which the First and Deputy First Minister agree should be brought to the Executive".

[34] These requirements were duly enacted by the 2006 Act which effected significant amendments to the NIA 1998 and the constitutional arrangements governing NI. Of particular significance are the new provisions contained in s20(4)(a) and (b), and the new s28A of the NIA 1998 which I have earlier set out. By s20(4)(a) it is made clear that the Executive Committee has the function of "discussing and *agreeing* upon (a) significant and 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 and 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". This function supplemented the existing s20(3) which provided that the Executive Committee shall have the functions set out paras19 and 20 of the Belfast Agreement. Para 19 of the Belfast agreement providing that the Executive Committee will provide a forum for, *inter alia*, the discussion of, and agreement on, issues which cut across the responsibilities of two or more Ministers.

[35] The new s28A(10) is of particular importance since it makes it unequivocally clear that "… a Minister or junior Minister has no Ministerial authority to take any decision in contravention of a provision of the Ministerial Code ...".

[36] In my view it plainly follows from the above provisions that a Minister has no power to take a decision in violation of the Ministerial Code relating to the obligation to bring to the attention of the Executive committee any matter that requires to be considered by it for discussion and agreement by reason of being cross-cutting, significant or controversial.

[37] In the present case, the Minister, having failed to achieve any agreement at the Executive Sub-group, acted unilaterally and unlawfully by authorising and directing the Department to adopt the BMAP without informing the Executive until after the event and despite objections having been raised by other Ministers.

[38] The above conclusions are fortified by a brief review of some of the relevant authorities in this area. Thus in Re Solinas [2009] NIQB 43, - a 'significant or controversial' case – Morgan J (as he then was) quashed a decision of the Minister for the Department of Social Development to withdraw funding provided by her Department to the Community Transformation Initiative. The need for Executive approval of that decision is addressed at paras[29]-[36] of his judgment. The court found that the particular issue had been determined by the First Minister and Deputy First Minister to be a significant or controversial matter which should be considered by the Executive under s20(4)(b) of the NIA 1998. The Executive having done so, when the Minister failed to act in accordance with the decision of the Executive in relation to it, she was in breach of the requirements of the Ministerial Code and s28A(1) of the NIA. Accordingly the decision was quashed.

[39] Morgan J made clear at para[34] that when a matter was required to be brought to the Executive Committee for consideration but the Minister did not do so and instead made his or her own decision "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". While not every breach of s28A(1) automatically required the grant of a remedy, the court appeared to accept that a failure to refer a matter to the Executive which was required to be referred to it in breach of s28A(5), engaged s28A(10) and therefore rendered the decision unlawful.

[40] Like the present case Solinas was an instance of a Minister properly referring a matter to the Executive for consideration; but then simply proceeding to make the relevant decision unilaterally rather than permitting the Executive to reach its own decision on the matter.

[41] The court in Solinas observed:

> "[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…"

[42] Solinas is thus authority for the proposition that these provisions of the NIA and Ministerial Code resolve the possible conflict just referred to in favour of the Executive taking control of the matter. This conclusion was reinforced by the judge's observation observing at para[33] that the Ministerial Pledge of Office, the provisions of which are also contained within the Ministerial Code, "requires a Minister to support and to act in accordance with all decisions of the Executive Committee."

[43] In Re Central Craigavon Limited [2010] NIQB 73, a 'cross-cutting' case', Morgan LCJ granted a declaration in relation to a decision of the DOE adopting a draft planning policy (draft PPS5 on Retailing, Town Centres and Commercial Leisure Developments), which had previously been considered the responsibility of DRD. At para[24] he stated that it seemed clear that the transfer of staff, files and resources in connection with the policy "must have cut across the responsibilities of the two Ministers involved and accordingly placed a responsibility on them to bring the matter to the Executive to be considered".

[44] At para[28] of his judgment, he said:

> "I entirely accept that there are planning policy statements which clearly cut across the responsibilities of other Departments and must, therefore, go to the Executive before they can be

> issued. In some cases the nature of the cut across responsibilities is clear but the complexity of government often means that such issues arise in a multitude of less obvious circumstances. In this case for instance one sees within the document reference to the requirements of targeting social need and the guide to rural proofing. That tends to suggest that this policy has a wider context which involves the responsibilities of the ministers who must cater for those matters at least. It is also apparent that in the preparation of the draft in the period from 2001 until 2005 there was considerable joint work done by the Department and DRD. It is hardly surprising that a policy which deals with a common economic and social activity throughout Northern Ireland should cut across the responsibilities of Ministers on the Executive. I consider, therefore, that the adoption of this policy was a cross cutting issue and the decision to adopt the policy should have been brought to the Executive for its approval."

[45] I agree with the applicant that these comments have resonance in the present case, where the 'wider context' of BMAP, a policy dealing with economic and social activity throughout a large part of Northern Ireland, engages the responsibility of various Ministers in not dissimilar ways.

[46] Since, in the Central Craigavon case, "the Executive was at all times informed of the steps that the Ministers intended to take and no objection or issue was raised by any other member", the court determined the breach of the Ministerial Code to be technical not amounting to a contravention depriving the Minister of ministerial authority. He granted a declaration that the matter should have been brought to the Executive for approval as a cross-cutting issue.

[47] The courts further conclusion that draft PPS5 was unlikely to be significant or controversial within the terms of s20(4) was reached on the basis that it "had not apparently raised any interest at Executive level" and that, when Executive colleagues learned of it, "there was no enquiry or suggestion of controversy":

> "Whether or not something is controversial or significant in this context must refer to those matters which members of the Executive might believe to be so. The evidence does not indicate that this draft PPS raised any such concern."

[48] It follows from the foregoing that I reject the submissions of the Respondent which I have summarised at para[21] above.

Summary of the Court's Findings

[49] In light of the foregoing the Court concludes that the Respondent acted *ultra vires* his powers:

(i) by reason of section 20(3) of the Northern Ireland Act 1998, in that the impugned decision cut across the responsibilities of other Ministers. It therefore fell within para19 of Strand One of the Belfast Agreement and it was a function of the Executive Committee to discuss and agree upon it, rather than for the Respondent to act unilaterally.

(ii) by reason of section 20(4)(a) of the Northern Ireland Act 1998, in that the impugned decision was one which was significant and/or controversial matter which was clearly outside the scope of the agreed Programme for Government. It was therefore a function of the Executive Committee to discuss and agree upon it, rather than for the Respondent to act unilaterally.

(iii) by reason of section 20(4)(b) of the Northern Ireland Act 1998, in that the impugned decision was one which the First Minister and deputy First Minister acting jointly had determined to be a significant or controversial matter which should be considered, discussed and agreed upon by the Executive. Again, therefore, it was a function of the Executive Committee to discuss and agree upon it, rather than for the Respondent to act unilaterally.

(iv) in that the impugned decision was a matter cutting across the responsibilities of two or more Ministers; and/or was a matter which is significant and/or controversial; and/or was a matter which had been determined by the First Minister and deputy First Minister acting jointly to be a matter which should be considered by the Executive (as *per* paragraph 2.4(i), (v) and (vi) of the Ministerial Code respectively). Making the decision unilaterally and without the agreement of the Executive was therefore contrary to section 28A(1) of the Northern Ireland Act 1998, with the effect that the decision was made without Ministerial authority by virtue of section 28A(10) of the Northern Ireland Act 1998.

[50] In light of the conclusions of the Court I will hear the parties as to the appropriate relief.