LADY CHIEF JUSTICE OF NORTHERN IRELAND

EPLANI AGM 2023

Twenty Five Years On – Constitutional Arrangements and Planning Challenges

26th April 2023

Good afternoon.

It is my pleasure to be speaking to you today. I want to express my gratitude to William Orbinson KC for inviting me to speak at your AGM. I am looking forward to engaging with you all after I share some thoughts with you about the interplay between planning disputes that have come before the courts and the operation of Northern Ireland's constitutional structures.

The events held last week to mark the twenty-fifth anniversary of the Good Friday/Belfast Agreement gave me cause to pause and reflect once again on our recent constitutional history, and in particular on the arrangements and institutions that provide the framework within which the Agreement operates. Within that framework, somewhat surprisingly perhaps, planning-related disputes that have played out before, and been adjudicated upon by, the Northern Ireland courts have led to constitutional developments in ways that, in 1998, we could never have imagined they would.

Of course, in law, context is everything. When reflecting upon Northern Ireland's recent constitutional history, we must appreciate that the context is nuanced and complex, delicate and shifting and our constitutional arrangements have been 'staccato' at times as Lord Bingham put it in the 2002 House of Lords' decision in *Robinson v Secretary of State*[1].

Continuing in the spirit of context being everything, I'm going take a brief journey through Northern Ireland's constitutional history, beginning as it does 102 years ago in 1921 with the implementation of the Government of Ireland Act 1920 and the creation of the legal jurisdiction of Northern Ireland. Over the following decades,

[1] [2002] UKHL 32

we see the establishment, and ultimate suspension, of the Parliament of Northern Ireland and the establishment of direct rule from Westminster, which remained in place until 1998 when the Belfast / Good Friday Agreement was concluded, laying the foundations for devolution of powers once again to a locally-elected Northern Ireland Assembly. Related to this domestic political agreement was the international British-Irish Agreement between the Governments of the United Kingdom and the Republic of Ireland. These agreements, which comprise commitments, have consistently been used to interpret our constitutional arrangements, an approach for which imprimatur is found in *Re Robinson* insofar as it recognises the 1998 Agreement, which does not have the force of law, as an interpretative aid to the Northern Ireland Act 1998.

The Northern Ireland Act gave effect to the Agreement by providing the framework for the Northern Ireland devolution settlement. It provides for the devolution of powers to the power-sharing Northern Ireland Assembly, for Northern Ireland departments to be led by Ministers appointed by the Assembly and for the system of scrutiny by Assembly Committees, including the Executive Committee comprising all the Northern Ireland Ministers.

The Assembly has legislative and executive competence for all matters that are transferred to it under powers in the Northern Ireland Act. Under the Act, prerogative powers and executive authority in relation to transferred matters are exercisable by Ministers or departments.[2] Ministers may have individual statutory powers[3] also and, by virtue of Article 4(3) of the Departments (Northern Ireland) Order 1999, Ministers are empowered to exercise the powers of their Department.

The Northern Ireland Act links the functions of Ministers to the functions of the Northern Ireland departments which were already in existence[4]. This new structure was complemented by the continuance of the historical practice under the Government of Ireland Act of conferring statutory powers upon specific Ministers or specific departments, rather than upon Ministers collectively.

[2] S.23 NIA
[3] S.22 NIA
[4] S.17(1) & (3) NIA

The overall effect of this framework is to create a structure whereby Northern Ireland Ministers act individually and not collectively. This structure of individual ministerial responsibility is a key distinguishing feature of the Northern Ireland constitutional arrangements. It differs from the structures pertaining within the UK Government and within the other devolved administrations of Scotland and Wales, where Ministers act collectively and powers may be exercised by any Minister, irrespective of their portfolio. Individual ministerial responsibility is therefore an important facet of the devolution settlement, creating what have been termed ministerial 'silos' and acting as the foundation for the exercise of executive authority on a cross-community basis. To complete this particular part of the constitutional picture, the offices of First Minister and Deputy First Minister are separate and, uniquely, their powers are exercised jointly with one another.

The role of the Executive Committee, or 'Executive' as it is known, is to agree a common position on matters cutting across responsibility of two or more ministers, to prioritise legislative proposals, to be responsible for external relations and to agree a Programme for Government linked to a budget. The Executive is a forum for discussion of, and agreement upon, matters by Ministers. It does not have executive powers and its powers with regard to ministerial functions is limited to approving, or not, the exercise of ministerial power by the relevant Minister where the matter falls within the Executive's role. By virtue of the Northern Ireland (St Andrews Agreement) Act of 2006, the functions of the Executive Committee now also include discussion of, and agreement on, 'significant or controversial matters' which are either 'clearly outside' the Programme for Government or are determined by the First and Deputy First Minister as matters to be decided by the Executive.

The St Andrews Agreement Act also introduced a statutory obligation to comply with the Ministerial Code and provided that Ministers have 'no ministerial authority' to act in a manner contrary to the Code.[5]

[5] S.28A(10) NIA

It is in the context of individual ministerial responsibility coupled with the unique role of the Executive Committee that we find a growing body of Northern Ireland jurisprudence relating to the legal obligations arising under the Ministerial Code.

While there has always been a Ministerial Code, the combined effect of the ministerial obligation to comply with the Code[6] and the lack of ministerial authority to act in a manner contrary to it[7] have given its content significant legal effect. The Ministerial Code places an obligation upon Ministers to refer to the Executive those matters which fall within its functions. These provisions are intended to prevent ministerial 'solo runs'. Taken individually and collectively, these are very important obligations, with potent legal effects.

Many of you will be familiar, with the High Court and Court of Appeal decisions in the case of *Re Buick*[8] where issues about the extent of the obligations imposed by the Ministerial Code, and the impact of those, came into sharp focus during a time of governmental stasis.

By way of brief factual background, in the absence of a Minister due to ongoing political difficulties, the Permanent Secretary of the Department for Infrastructure took a decision to grant planning permission for a major waste treatment centre and incinerator. A challenge was brought by a member of the public during the course of which issues of competence in decision-making within our constitutional structures had to be considered resulting in.

At first instance, the High Court, in a decision of mine, held that, in the absence of a Minister in charge, the Department did not have power to grant the planning permission. On appeal to the Court of Appeal, the focus turned to whether planning permission for a regional waste incineration plant was 'cross-cutting' and therefore required referral to the Executive, a point which had not occupied much space at first instance. The Court of Appeal held that the matter was cross-cutting, because the decision as to whether to grant planning permission 'engaged the interests' of

[6] S.28A(5)
[7] S.28A(1)
[8] [2018] NIQB 43 and [2018] NICA 26

the DAERA Minister. I pause to note that this language is different from the statutory language of 'responsibilities of two or more ministers'. Previously, planning decisions had not been considered to engage the responsibilities of other ministers.

As a result of the Court of Appeal's decision in *Buick*, legislation in the form of the Executive Committee (Functions) Act (Northern Ireland) 2020 was passed. This Act amended the Northern Ireland Act to specifically provide that planning decisions could be made by the Department for Infrastructure, or the Minister in charge of that Department, without recourse to the Executive Committee.

The passing of the 2020 Act did not end the matter, however. Devolved government was restored in January 2020 and, after the 2020 Act amendment came into force, it was announced that the then Minister for Infrastructure had granted full planning permission for the North-South electricity interconnector. It was common case in the judicial review challenge which followed that the Minister did not refer the decision to the Executive Committee. In its decision in the matter in *Re SAFE Electricity*[9], the High Court held that the Ministerial Code imposed obligations of referral to the Executive Committee which went beyond those contained in the governing statutory regime, for example, the amendments made by the 2020 Act which rendered the Minister's decision not 'cross-cutting'. The judge at first instance was of the view that the Ministerial Code should be amended to reflect the legislative changes brought about by the 2020 Act and, in the absence of that, found that the Minister had breached the Code but not to the extent that her decision could be quashed.

The matter subsequently came before the Court of Appeal where we had the benefit of submissions of considerable assistance from the Attorney-General, as well as focused submissions from counsel for the parties. We found that the case could be solved by a simple examination of the relevant statutory provisions in order to determine whether the Minister had breached the Ministerial Code. As the matter was one of statutory interpretation, the context was relevant. In this case, the context was clear. The express purpose of the relevant 2020 Act amendments was to remove

[9] [2021] NIQB 93

the requirement for the Minister to refer planning decisions to the Executive in order to obtain its agreement. We undertook a detailed process of statutory interpretation which, for those of you who are interested, is set out in the judgment, that ultimately led us to the conclusion that planning decisions are not now matters that require to be considered by the Executive. It followed, therefore, that the Minister had not acted in contravention of the Ministerial Code in making the decision without referring the matter to the Executive. As we said in our judgment, it is the Court's hope that this decision should provide clarity given the public interest in planning decisions being made in an efficient and effective way. Clarity has also been provided on the wider constitutional point regarding the interplay between the Ministerial Code and the relevant statutory framework.

Also in receipt of court attention is that part of the Ministerial Code[10] which provides that the Executive Committee shall provide a forum for discussion of and agreement upon significant or controversial matters that are clearly outside the scope of the agreed Programme for Government. This has been interpreted broadly and thus given rise to an increase in the number of decisions which must go to the Executive. Again, we find planning disputes at the heart of the case law. In the case of *Re Central Craigavon*[11] and in *SAFE Electricity* at first instance, the court considered that the issue of whether a matter was 'controversial' should be considered by reference to the views of other Ministers. However, in *Buick*, it may be argued that the Court of Appeal took a broader approach and considered the question by reference to the level of public interest in (and opposition to) the proposed incinerator. This is an issue which the courts may be asked to consider more closely: 'public controversy' may not be the same as 'politically controversial'.

On occasions where the Executive has failed to agree a Programme for Government, disputes in the planning arena have once again brought to the fore questions of how our constitutional structures operate. In *Re Central Craigavon*[12], it was held that, in the absence of a Programme for Government, not all significant or controversial

[10] Paragraph 2.3(vi)
[11] [2012] NI 60 (NICA)
[12] Ibid

decisions might need to be referred to the Executive. In *Re Buick*, the Court of Appeal reached the opposite conclusion. It concluded that the correct interpretation was for all significant or controversial decisions to be referred to the Executive unless they were within the Programme for Government. Section 20 of the Northern Ireland Act has now been amended to reflect the *Buick* interpretation[13].

I turn now to consider those parts of the Ministerial Code[14] which state that the Executive Committee shall provide a forum for discussion of, and agreement upon, significant or controversial matters which the First and deputy First Ministers have jointly determined should be considered by the Executive. Where they have so determined, a Minister is under a duty to bring the matter to the attention of the Executive to be considered by it[15]. Elucidation of this is readily found in *Re Minister for Enterprise, Trade and Investment*[16], another case in the field of planning law, whereby, without Executive approval, the Minister for Environment adopted the Belfast Metropolitan Area Plan, a statutory area development plan which had taken approximately 7 years to prepare. FM and dFM had jointly determined that the matter should be considered by the Executive on the basis that it was both significant and controversial. The Minister did refer the matter to the Executive, however, the Executive did not reach agreement and, against a background of ongoing objections from other Ministers, the Environment Minister eventually proceeded unilaterally to direct the Department to adopt the Plan. This led to a successful judicial review challenge by the Minister for Enterprise, Trade and Investment, an example demonstrating another unique feature of the Northern Ireland constitutional arrangements – Ministers challenging the actions of other Ministers in the courts. In that case, the decision was found to have been unlawful on the basis that the Environment Minister had no power to make a decision in violation of the Ministerial Code.

[13] S.1(2) Executive Committee (Functions)(NI) Act 2020
[14] Paragraph 2.3(vii)
[15] paragraph 2.4(vi)
[16] [2016] NIQB 26 and [2017] NICA 28

While not in the area of planning law, the case of *Re Solinas*[17] provides an interesting contrast. This case related to departmental funding for certain post-conflict community organisations. The First and deputy First Ministers decided that the matter should come before the Executive. After considering the matter, the Executive decided how the decision-making process should conclude thereafter. The Minister proceeded in a manner that was not in accordance with how the Executive had determined the matter should proceed. The court found no breach of the Ministerial Code, however, it quashed the Minister's decision on the basis of the procedural error.

The Ministerial Code does allow for the Executive can give retrospective approval for decisions[18]. While this does not feature heavily in the case law, presumably because the decisions tend to be of a contentious nature and frequently Executive approval might not be forthcoming, in the *Minister for Enterprise, Trade and Development* case, the Executive did give retrospective approval for the entirety of the Belfast Metropolitan Area Plan ('BMAP'), save for the contentious proposed planning policy which related to retail development at the Sprucefield site outside Lisburn. In the High Court, this was sufficient to prevent an order for certiorari. However, the remedies decision was overturned in the Court of Appeal and the adoption decision was quashed.

Where the courts have found a breach of the obligation to refer a decision to the Executive, they have invariably quashed the decision, illustrating the potency of the provision imposing the obligation. That said, there are some examples of decisions which were not quashed. In the case of *Re Central Craigavon*, the Minister had written in advance to colleagues and received supportive comments from most Ministers. The court concluded that the contravention of the Code was technical in nature and inadvertent. This was sufficient not to quash the planning policy on this ground. On appeal, the issue had fallen away as the policy was withdrawn.

[17] [2009] NIQB 43
[18] Paragraph 2.14

A further interesting question relates to standing. To date, the courts have not considered the question of whether individuals (as opposed to members of the Executive) have standing to bring challenges based upon a lack of Executive approval. So far, third party challenges such as in *Re Solinas* and *Re Central Craigavon* have been accepted and determined without dispute on standing.

This brief excursion through the case law illustrates the perhaps unique consequence of Northern Ireland Ministers having individual rather than collective responsibility. In the absence of agreement within the Executive, the concept of collective ministerial responsibility is heavily modified in Northern Ireland. There is now a long tradition of Ministers suing one another, something which is unheard of in other jurisdictions. Additionally, the case law highlights a phenomenon I term 'procedural deadlocks', which has exercised the courts in dealing with constitutional issues.

I am conscious, of course, that I am speaking to you at a time when there is no Northern Ireland Assembly, no Ministers in charge of Northern Ireland departments and no Executive Committee. That does not, however, detract from what I think is clear - we have in Northern Ireland a unique constitutional arrangement which has led to the Northern Ireland courts being called upon to deal with exceptional cases, which very often have their genesis in the field of planning law. This interplay between differing fields of law illustrates what I truly believe makes the practice of law in this jurisdiction so interesting and rewarding.

Thank you.