**Neutral Citation No: [2019] NICA 58** | *Ref:* **STE11083**

**Judgment: approved by the Court for handing down** | *Delivered:* **04/11/2019**

***(subject to editorial corrections)****

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

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**IN THE MATTER OF AN APPLICATION BY JR80 FOR JUDICIAL REVIEW**

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**Before: Stephens LJ, Treacy LJ and Maguire J**

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**STEPHENS LJ** (delivering the judgment of the court)

**Introduction**

[1] The major questions in this appeal are constitutional including questions as to who if anyone has the responsibility for considering and if appropriate implementing a recommendation to pay compensation to the victims of historical institutional abuse. If no one then whether the prescribed statutory mechanism of having an Assembly election should now be implemented. Also whether the present constitutional arrangements for Northern Ireland are invalid in that decisions are allowed to be taken by civil servants who are not accountable to the Assembly

[2] The appellant, who we continue to anonymise as JR80, states that he was physically, psychologically and sexually abused as a child in an institution in Northern Ireland. The Historical Institutional Abuse Inquiry set up by Northern Ireland's devolved Assembly under the Historical Institutional Abuse Act (NI) 2013, chaired by Sir Anthony Hart, a retired High Court Judge, in its report published on 20 January 2017 found that between 1922 and 1995 many children were abused in institutions in Northern Ireland. The report contained a number of recommendations including that the victims of abuse should receive compensation in the form of a lump sum payment of between £7,500 and £100,000 from a Government funded compensation scheme to be established by the Northern Ireland Executive and to be administered by a newly created Historical Institutional Abuse Redress Board which would determine eligibility ("the recommendation"). The report urged speedy implementation regardless as to whether the Redress Board was put on a statutory footing or on an ex gratia basis and suggested that priority

should be given by the Board to those applicants who were over 70 or in poor health. However the publication of the report and the recommendation came at a time of constitutional upheaval in relation to devolved government in Northern Ireland as on 9 January 2017, some 11 days prior to publication the deputy First Minister resigned which by operation of section 16B(2) of the Northern Ireland Act 1998 ("the NIA 1998") meant that the First Minister also ceased to hold office at that time. Since that date there has been no First Minister or deputy First Minister. On 2 March 2017 an Assembly election was held. Until that date the Northern Ireland Ministers other than the First Minister and the deputy First Minister were still in office but section 16A(2) NIA 1998 provides that the Northern Ireland Ministers should all cease to hold office on the date of the poll. Since that date there have been no Northern Ireland Ministers. Also since that date the Assembly has sat on only two occasions but failed on each occasion to elect a speaker. In effect the devolved institutions in Northern Ireland have collapsed. There is no Executive. There is no capacity for any devolved legislation. However the Northern Ireland departments continue in existence and continue to operate. Despite the collapse of the devolved institutions the position is that the political parties in Northern Ireland support the implementation of the recommendation as does the Secretary of State for Northern Ireland ("the Secretary of State"). However the Office of the First Minister and deputy First Minister which is now termed the Executive Office states that it can only undertake preparatory work but has no power to implement the recommendation. The Secretary of State also states that he has no prerogative power to bring in an ex gratia compensation scheme. So as yet the recommendation, despite being universally supported, has not been implemented and no compensation has been paid to any victim which is to be seen in the context that many of the victims are elderly, including JR80 and some have died since the end of 2017 which was the date by which Sir Anthony Hart stated the recommendation should be implemented if the Executive and Assembly acted positively and energetically.

[3] The applicant, who perceived that the constitutional upheaval in devolved government in Northern Ireland has led to delay in implementing the recommendation brought judicial review proceedings seeking amongst other matters an order requiring either the Secretary of State or the Executive Office to take the steps necessary to establish a redress mechanism for survivors of historical institutional abuse. The application was heard by McCloskey J who in an extensive and comprehensive judgment dismissed it on all grounds under citation [2019] NIQB 43. The appellant now appeals to this court.

**Devolution notice**

[4] The devolved institutions in Northern Ireland are constituted under the NIA 1998 as amended which gives legislative control over certain matters (known as 'transferred matters') to the Northern Ireland Assembly. Section 4 NIA 1998 provides that transferred matters means any matter which is not "excepted" or "reserved." A typical example of an excepted matter is international relations so

that the conduct of foreign policy is not transferred; that is devolved. It is common case that the Historical Institutional Abuse Inquiry and the implementation of the recommendation are transferred matters; that is those matters are devolved to the Northern Ireland institutions. Section 79 and Schedule 10 provides for notice to be given when in proceedings issues arise for instance as to whether a matter is or is not transferred or is or is not within the competence of the Assembly. Those issues are known as "devolution issues" which by Schedule 10 paragraph 1 NIA 1998 includes "(d) any question arising under this Act about excepted or reserved matters." There were a number of questions in this appeal which fell within the meaning of devolutions issues such as whether, pursuant to Section 23 NIA 1998 the Secretary of State for Northern Ireland retains executive and/or prerogative authority in relation to any transferred matters in Northern Ireland and in particular in relation to the transferred matter of the implementation of the recommendation. As a consequence we ordered that notice of the devolution issues be given to amongst others the Attorney General for Northern Ireland under Order 120 Rule 3 of the Rules of the Court of Judicature (Northern Ireland) 1980.

**Appearances**

[5] Mr Macdonald QC, SC and Mr McGowan appeared on behalf of the appellant, Mr McGleenan QC and Mr McLaughlin appeared on behalf of the Secretary of State, and Mr McAteer appeared on behalf of the Executive Office. We are grateful to all counsel for their written and oral submissions. The Attorney General for Northern Ireland having entered an appearance to the devolution notice provided written submissions for which we are grateful and also offered to make oral submissions if requested.

**The devolved constitutional arrangements for Northern Ireland**

[6] The turbulent historical context in Northern Ireland has given rise to various constitutional arrangements since 1920 for devolved government.

[7] The Government of Ireland Act 1920 established the different entities of Northern Ireland and Southern Ireland with both constitutionally remaining part of the United Kingdom. The 1922 Anglo-Irish Treaty led to the establishment of Southern Ireland as a separate independent State whilst Northern Ireland remained part of the United Kingdom with its own devolved institutions. Those provisions remained in place until the Northern Ireland (Temporary Provisions) Act 1972 introduced "Direct Rule."

[8] The Sunningdale Agreement led to the Northern Ireland Constitution Act 1973 and the Northern Ireland Assembly Act 1973 under which a devolved power sharing Assembly was established in Northern Ireland. Those constitutional arrangements did not succeed which led in turn to the Northern Ireland Act 1974 which again brought in "Direct Rule" which was envisaged to be temporary but in fact continued for 24 years.

[9] The Belfast Agreement dated 10 April 1998 between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland followed intense negotiations involving the political parties in Northern Ireland and both of those Governments. It led to the NIA 1998 made on 19 November 1998 which again set up power sharing devolved institutions in Northern Ireland which are described in the judgments in this court in an *Application by Colin Buick for Judicial Review* [2018] NICA 26. The basis of the devolved institutions was the principle of mandatory coalitions. It is sufficient for the purposes of this appeal to state that (in relation to transferred matters) section 5 provides that the Assembly may make laws, to be known as Acts. Section 16A makes provision for the appointment of First Minister, deputy First Minister and Northern Ireland Ministers following Assembly elections within a fixed time period. In summary the First Minister is to be nominated by the largest political party and the deputy First Minister is to be nominated by the second largest with the two positions having the same governmental power and their decisions being made jointly**.** The Northern Ireland ministerial positions are allocated to parties with significant representation in the Assembly so that with the exception of justice, the number of ministries to which each party is entitled is determined by the D'Hondt system. This means that major parties cannot be excluded from participation in government and power-sharing is enforced by the system. Section 32 provides that if the period specified in section 16A ends without the offices of First Minister and deputy First Minister and the Ministerial offices to be held by Northern Ireland Ministers having been filled then the Secretary of State shall propose a date for the poll for the election of the next Assembly. Section 20(1) provides that there shall be an Executive Committee of each Assembly consisting of the First Minister, the deputy First Minister and the Northern Ireland Ministers and section 20(4) provides that the committee shall have the function of discussing and agreeing upon amongst other matters, 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 21 provides that the Northern Ireland departments existing on the appointed day shall be the Northern Ireland departments for the purposes of this Act. Each of the departments are to be headed by a Minister but unlike the position in other jurisdictions it was 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. There is no collective responsibility in respect of the areas allocated to individual Ministers.

[10] In accordance with the Northern Ireland Act 2000 the Assembly has been suspended four times with periods of direct rule between 11 February and 30 May 2000, 10 August 2001 (24-hour suspension) 22 September 2001 (24-hour suspension) and 14 October 2002 – 7 May 2007.

[11] As we have indicated the devolved institutions collapsed following the events of 9 January 2017. Since then direct rule has not been reintroduced but rather there has been an extended period during which attempts have been made to secure agreement between the political parties in Northern Ireland so that an Executive can be formed.

[12] In effect as from 9 January 2017 decisions in Northern Ireland, if they have been taken at all in the main have been taken by Northern Ireland departments though with some legislation being passed in the UK Parliament. This court gave judgment in *Buick* on 6 July 2018 holding that powers exercisable by Northern Ireland departments in the absence of Ministers are subject to the limitation that those departments may not exercise functions in respect of matters that would normally be required to be referred to the Executive Committee of the Assembly because they are cross-cutting, significant or controversial. On that basis a departmental decision to grant planning permission for a major infrastructure project was quashed. The decision in *Buick* led to the UK Parliament enacting the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 ("the 2018 Act") which received Royal Assent on 1 November 2018. The explanatory notes state that the principal aim and function of the Act was to facilitate a period where the Executive can be formed and talks can take place. The Act sought to achieve that aim by (a) extending the period of time within which Northern Ireland Ministers can be appointed and devolved government formed; (b) providing that the Secretary of State has no duty to call an Assembly election but rather has a discretionary power to do so if she judges that it is in the public interest; (c) enabling decisions to be taken by Northern Ireland departments; and (d) enabling key public appointments to be made in the absence of Northern Ireland Ministers.

[13] The Northern Ireland (Executive Formation etc) Act 2019 ("the 2019 Act") received Royal assent on 24 July 2019. It extended the period for forming an Executive to 21 October 2019 and gave a limited power by regulations to further extend that period to 13 January 2020. The 2019 Act also required the Secretary of State to publish a report explaining what progress has been made towards the formation of an Executive

**The prerogative power to make ex gratia payments**

[14] The prerogative does not derive from statute but is a matter of common law which enables the government to function. Parliament may not create new prerogatives but it may confer statutory powers which may be very similar in character to prerogative powers. At common law the prerogative powers though *vested* in Her Majesty can only be *exercised* through and on the advice of ministers of the Crown who are responsible to the UK Parliament. However the *exercise* of the prerogative powers may also be devolved by statute for examples of which see section 23 NIA 1998 and section 53 of the Scotland Act 1998. In Northern Ireland's devolved model of government those who exercise the prerogative in relation to transferred matters are responsible to the Assembly.

[15] It is common case that Northern Ireland Ministers in relation to transferred matters have prerogative power to make ex gratia payments from public funds. It is also common case that the making of ex gratia payments is "lawful if, but not unless, there is Parliamentary authority for the disbursements," see *Re McFarland's Application for Judicial Review* [2004] NI 380 at 395 paragraph [41] per Lord Scott, *Auckland Harbour Board v R* [1924] AC 318 at 326 – 327 per Viscount Haldane and *Re W's Application* [1998] NI 19 at 27 letters f – g and 28 b.

[16] Another matter about which the parties agree is that the redress scheme as contained in the Historical Institutional Abuse (Northern Ireland) Bill presently before the UK Parliament is a redress scheme that requires legislation and cannot be introduced on an ex gratia basis even if there was UK Parliamentary or Assembly authority for the disbursements. We agree and we need only mention two examples as to why the scheme in the Bill requires legislation. The first is that in clause 10 the Bill envisages the redress board compelling the giving of evidence. The second, also in clause 10 envisages the establishment of an offence if there is a failure to give evidence.

[17] The appellant, whilst acknowledging that legislation is required for the scheme in the Bill is concerned that if it is not enacted that there should be the potential for an alternative simpler redress scheme on an ex gratia basis which would not require legislation except to authorise the disbursements. This then leads to the question as to whether the prerogative power to make ex gratia payments is capable of being exercised by either the Secretary of State or by a Northern Ireland department or whether in the present constitutional upheaval this prerogative power is not capable of being exercised.

[18] The prerogative being derived from common law can be curtailed or abrogated by statute. "The statutory curtailment or abrogation may be by express words or, as has been more common, by necessary implication" see paragraph 48 of *Miller* [2017] UKSC 5, [2018] AC 61; [2017] NI 141. In *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513 it was stated by Lord Mustill at 564 that "once the superior power of Parliament has occupied the territory the prerogative must quit the field." Furthermore it was stated in *Miller* that "(it) is inherent in the residual nature that a prerogative power will be displaced in a field which becomes occupied by a corresponding power conferred or regulated by statute." In *Attorney-General v De Kyser's Royal Hotel* [1920] AC 508 the House of Lords held that the Crown could not revert to prerogative powers when the legislature had given to the Crown statutory powers. Thus for the duration of the statutory powers, the prerogative was in abeyance. So in this case any consideration of the prerogative power to establish an ex gratia redress scheme must also consider whether there has been express or by necessary implication statutory curtailment or abrogation of the prerogative or whether the prerogative power has been displaced because the field has become occupied by a corresponding power conferred or regulated by statute. Those questions will involve consideration as to whether the

Historical Institutional Abuse Act (NI) 2013 has curtailed or displaced the prerogative power to establish an ex gratia redress scheme.

**Factual background in relation to the recommendation**

[19] The Inquiry into Historical Institutional Abuse Act (Northern Ireland) 2013 empowered the First Minister and deputy First Minister acting jointly to cause an inquiry to be held. It also provided that the terms of reference of the Inquiry were set out in a statement to the Assembly made by the First Minister and deputy First Minister acting jointly on 18 October 2012. Section 11 provided that the chairperson must deliver the report of the Inquiry to the First Minister and deputy First Minister at least two weeks before it is published. Section 12 provided that the chairperson must make arrangements for the report of the Inquiry to be published. Section 13 provided that whatever is required to be published under section 12 must be laid before the Assembly by the First Minister and deputy First Minister acting jointly, either at the time of publication or as soon afterwards as is reasonably practicable. The Act is silent on the issue of implementing the report.

[20] The terms of reference of the Inquiry stated that the "Chair of Investigation and Inquiry Panel will provide a report to the Executive …" and that "the nature or level of any potential redress (financial or the provision of services) is a matter that the Executive will discuss and agree following receipt of the Inquiry and Investigation report."

[21] The report was provided to the First and deputy First Minister on 6 January 2017 and was published on 20 January 2017. The report stated that the Inquiry had found evidence of systemic failings to a greater or lesser degree in the majority of the institutions and homes it investigated. It also stated that there was evidence of sexual, physical and emotional abuse, neglect and unacceptable practices across the institutions and homes examined.

[22] The deputy First Minister had resigned on 9 January 2017 and as we have indicated this meant that since that date there has been no First or deputy First Minister and since 2 March 2017 there have been no Northern Ireland Ministers.

[23] On 23 January 2017 the report was debated in the Assembly. All the speakers welcomed the report and called for the speedy implementation of its recommendations.

[24] On 12 June 2017 Sir Anthony Hart wrote to the leaders of each of the political parties with members elected to the Assembly urging them to ensure that if an Executive is formed that the recommendations are implemented in full by it as a matter of urgency. The letter went on to state that should an Executive not be formed then it will be for HM Government to carry out all the functions of government in Northern Ireland.

[25] On 30 June 2017 Sir Anthony Hart wrote to the then Secretary of State, The Rt Hon James Brokenshire MP urging him to put in hand the necessary steps to implement the recommendations in full as a matter of urgency and without delay.

[26] On 3 August 2017 a meeting took place between David Stirling, Acting Head of the NI Civil Service ("HOCS") and Sir Anthony Hart which was followed by a meeting on 11 August 2017 with a panel of experts on redress. The panel of experts considered that the recommendation if implemented in its current form would "fall short of fair and just compensation" and that a number of changes should be made to the scheme every element of which should be informed by input from survivors. Those suggested changes led to further consideration by the Executive Office as to the potential costs of the redress scheme.

[27] On 17 August 2017 David Stirling then Head of the Civil Service wrote to party leaders and on 13 December 2017 he wrote to Sir Jonathan Stephens of the Northern Ireland Office stating that to maintain momentum preparations would continue for the establishment of the necessary administrative arrangements to deliver the Hart recommendations and that work should proceed on draft legislation. He stated that in view of the ongoing political uncertainty the legislation would be prepared on the basis that it could be laid in either the Assembly or Parliament.

[28] By 17 August 2018 Mark Browne of the Executive Office wrote again to Sir Jonathan Stephens stating that two pieces of primary legislation were on track for September 2018 but that the immediate and crucial decision point will be next month when the Executive Office will move to launch the consultation phase. He expected the analysis of the consultation to be completed by mid/late March 2019 at which juncture, Executive Office would be unable to take the process any further in the continuing absence of a devolved administration. In those circumstances, the only legislative route available would be primary legislation at Westminster.

[29] The consultation opened on 19 November 2018 and closed on 10 March 2019. The consultation period had been extended at the request of some of the victims' and survivors' groups.

[30] On 13 May 2019 the Historical Institutional Abuse Implementation Branch of the Executive Office provided a report on the consultation responses. On 14 May 2019 the then Secretary of State, The Rt Hon Karen Bradley MP wrote to HOCS informing him that there remained a number of decisions and open questions that she was keen for the parties to consider in an expedited manner as part of the ongoing talks. She asked the NI political parties to review these issues and seek a consensus on a way forward. On 11 June 2019 the party leaders wrote to the Secretary of State informing her of the outcome of their talks in relation to a redress scheme. They suggested various amendments to the scheme which necessitated amendments to the draft legislation.

[31] On 2 July 2019 HOCS appointed an Interim Advocate for Victims and Survivors of Historical Institutional Abuse who subsequently requested a change to the draft legislation which was then amended by the Executive Office.

[32] On 18 July 2019 the UK Government made a commitment to introduce legislation in the UK Parliament by the end of 2019 in the absence of a restored NI Executive. The commitment was on the basis that all costs are met from within the NI Block Grant and that the Assembly will take forward the Bill if it is restored before the legislation is introduced.

[33] On 18 July 2019 HOCS wrote to the Secretary of State reporting that following cross-party agreement on all key issues having been reached that the necessary amendments had now been made to the draft legislation which was attached to the letter. By letter dated 23 July 2019 the Secretary of State stated that as HOCS was aware the UK Government had committed to introducing HIA legislation at Westminster by the end of 2019 should the NI Executive not be restored.

[34] On 24 July 2019 The Rt Hon Julian Smith MP was appointed as Secretary of State.

[35] During October 2019 the legislation was introduced in the House of Lords. The applicant desires that the Bill is enacted but was fearful that if there was a general election that it could be lost. If for whatever reason the Bill is not enacted he submits that there should be an ex gratia redress scheme and that it is necessary to establish whether it is possible to set up such a scheme.

**Factual background in relation to the restoration of the Executive and the constitutional arrangements in Northern Ireland since January 2017**

[36] Since January 2017 all three Secretaries of State have maintained the view that the re-introduction of direct rule would be counter-productive. Since January 2017 there has been one Assembly election. It did not resolve the political impasse. All three Secretaries of State have maintained the view that calling a fresh election was likely to be damaging to the prospects of achieving political agreement as it was likely to be divisive and unlikely to lead to any significant change in outcome. The applicant does not seek to establish that an Assembly election will be efficacious.

[37] Political talks with the objective of restoring the Executive have occurred on a number of occasions. Most recently formal round-table political talks were opened in May 2019 and broke up for the summer recess. Jonathan McAdams a senior Civil Servant within the Northern Ireland Office states that while no agreement was reached progress was made. He states that regular contact has been maintained with the political parties since that time and that the current Secretary of State has also maintained regular contact with all NI political parties and the Irish Government. He states that the preferred course of the Secretary of State is to allow

the political talks to continue and that this remains the best means of achieving the agreement necessary for a new Northern Ireland Executive.

[38] As we have indicated the position since January 2017 is that Executive decisions, if they have been taken at all have been taken by Northern Ireland departments though with some decisions being implemented by legislation passed at Westminster. The attitude to passing legislation at Westminster was summarised by the response of the Secretary of State to the pre-action protocol letter in which it was stated that he "has been very clear that in the absence of an Executive, he will not interfere in devolved matters in Northern Ireland except to the extent that it is absolutely necessary to do so in order to allow public administration to continue and public services to be maintained." The Westminster Parliament has intervened with legislation such as the Northern Ireland (Ministerial Appointments and Regional Rates) Act 2017 which amongst other matters set regional rates for the 2017-18 rating year and the 2018 Act which amongst other matters in the absence of Northern Ireland Ministers permitted the exercise of appointments to various public bodies such as the Northern Ireland Policing Board to be made by Ministers of the Crown.

**The issues for determination as identified on behalf of the appellant**

[39] On behalf of JR80 the issues identified for determination together with the submissions as to why they arise are:

(i) In the absence of NI ministers, does the Secretary of State (by virtue of sections 1 and 23 of the NIA 1998) have residual prerogative and executive powers as respects transferred matters? *(It is submitted that this arises because the main problem is that there are no NI ministers in place and the NIA 1998 is predicated on the premise that they will be in place.)*

(ii) Are sections 1, 2 and 3 ("the provisions") of the 2018 Act valid enactments? *(It is submitted this arises because the provisions purport to authorise decisions by civil servants that are essentially political or "ministerial" notwithstanding the absence of democratic oversight or control by elected and democratically accountable Ministers (section 3) and permits this for up to three years (section 1) with the real possibility of even further extension, as already demonstrated.)*

(iii) If the provisions are valid enactments and the Secretary of State has no residual executive powers, who has power to make decisions which (as per the *Guidance* provided by the Secretary of State under section 3(2) of the 2018 Act) should *not* be made by officials in the absence of ministers? *(It is submitted that this arises because, even under the 2018 Act and the Guidance (which purport to address the main problem), there would still be a vacuum in governance in NI concerning what, by definition, are the most important issues concerning transferred matters.)*

(iv) If the provisions are *in*valid enactments and the Secretary of State has no residual executive powers, who has the power to make decisions which, as per *Buick*, should not be made by officials in the absence of an Executive? *(It is submitted that this arises because Buick made it clear that the powers of officials are seriously limited, so that there would still be a vacuum.)*

(v) If the answer to questions 3 and 4 is that no one has the power to make such decisions, is this compatible with constitutional principle, including the rule of law, the common law requirement that there should be no persisting vacuum in governance and the provision in s.23(1) of the NI Act 1998 that "the executive power in Northern Ireland continues to be vested in Her Majesty"? *(It is submitted that this arises inevitably if the Secretary of State is correct in his submission that he has no residual power in the absence of NI ministers, whether or not the provisions are valid.)*

(vi) Does the Secretary of State have any power to implement any of the recommendations of the report, including the redress scheme and/or interim awards of compensation, on an *ex gratia* basis?

(vii) Does the Executive Office have any power to implement any of the recommendations of the report, including the redress scheme and/or interim awards of compensation, on an *ex gratia* basis? *(It is submitted that these last two issues are the immediate issues concerning the Applicant, pending the implementation of any legislative scheme that may or may not materialise in due course.)*

(viii) Was it open to the Secretary of State to give a direction under s.26 of the NIA 1998 to a NI department that they should establish a redress scheme and/or interim compensation scheme as recommended by the report and, if so, did the Secretary of State fail to exercise that discretion? *(It is submitted that this arises because, if the Secretary of State did not have any power to give effect to the recommendation himself, the question arises whether he could and should have achieved this by exercising an alternative statutory power.)*

(ix) Was the Secretary of State in breach of his/her duty to set a date for a fresh election prior to the coming into force of the 2018 Act?

**(x)** Has the Secretary of State properly exercised his/her discretion under the 2018 Act in deciding not to set a date for a fresh election? *(It is submitted that these two issues arise because setting a date for a new election was the mechanism devised and mandated by Parliament to resolve impasses in the political process, whether or not they may be regarded by the court as necessarily efficacious.)*

**The first instance judgment**

[40] The application for judicial review was heard by McCloskey J who delivered his substantive judgment on 12 April 2019 followed by a postscript dated 27 June 2019.

[41] The Judge analysed the impact of constitutional conventions distinguishing between the laws of the constitution and the conventions of the constitution with the latter not being enforced by the courts or by the Houses of the Parliament. The Judge recorded that none of the parties invoked any particular constitutional convention either as a source of legal power for taking the action which the applicant pursues or as a shield for justifying a refusal or reluctance to do so. The Judge stated that it seemed likely that the developing practice whereby legislative activity by the UK Parliament in areas falling within the competence of the local devolved institutions – such as budget or public appointments – is instigated by the Secretary of State for this jurisdiction, on occasions preceded by a formal request from the HOCS, is probably to be viewed as an evolving constitutional convention peculiar to Northern Ireland in the abnormal governance circumstances prevailing here.

[42] The Judge turned to the applicant's submission that as a matter of constitutional law it can never be the case that no one has executive or prerogative power in relation to significant devolved matters in Northern Ireland either at all or over a prolonged period ("the governance vacuum issue"). The judge referred to the speeches in *Robinson v Secretary of State for NI & others* [2002] NI 390 of Lord Bingham, Lord Millet and Lord Hoffman and in particular to the sentence at paragraph [11] within the speech of Lord Bingham that:

> "It is in general desirable that the government should be carried on, that there should be no governmental vacuum."

The Judge whilst acknowledging that a vacuum in governance had occurred in Northern Ireland considered that the dicta in the speeches in *Robinson* fell markedly short of purporting to formulate a principle of constitutional law whether in the context of the NIA 1998 constitutional arrangements or more widely that any vacuum in governance should be of short duration. The Judge stated that the language which their Lordships used was not the language of legal or constitutional principle. In particular he observed that a statement that something is "in general desirable" is most unlikely to have been intended to operate as a pronouncement of legal or constitutional principle. In summary he stated that where a vacuum in the governance in Northern Ireland occurs even a protracted one and no matter how regrettable that this was it was to be viewed through inter-related prisms of political reality and consequential prejudice and disadvantage to the population rather than infringement of any constitutional principle or contravention of NIA 1998.

[43] The Judge rejected the applicant's challenge to the validity of Section 3 of the 2018 Act which challenge was on the basis that it enabled a continuation of a vacuum in governance and thereby infringed the constitutional principle advanced on behalf of the applicant that there should be no or no prolonged vacuum in governance.

[44] The Judge then considered the alternative challenge to Section 3 of the 2018 Act that it was not law as it permits senior departmental officials to make significant and/or controversial decisions in the absence of ministerial direction and control. The Judge having analysed the impact of the 2018 Act considered that the applicant's challenge fell measurably short of establishing that sections 1-3 of that Act are of the extreme, offensive or repugnant nature contemplated by Lords Steyn and Hope in *R (Jackson & others) v Attorney General* [2006] 1 A.C. 262. The Judge added that it was far from clear that the court was competent to declare that any of the provisions of the 2018 Act are not law in any event.

[45] The applicant's ground of challenge based on the guidance under the 2018 Act was then considered by the Judge. The challenge was stated to be on the basis that:

> "(a) The Secretary of State is legally empowered to issue guidance on the establishment of a redress scheme and
>
> (b) Has acted unlawfully in the Wednesbury irrational sense, by failing to do so vis a vis the Executive Office".

The Judge held that the Executive Office which is a Northern Ireland department has no express specific function with regard to implementing any of the HIA Inquiry report recommendations. The Judge accepted the primary submission on behalf of the Executive Office that it has no legal power to implement the HIA Inquiry report recommendations relating to redress. The Judge considered that the Executive Office has no function in the matter of implementing any aspect of the report beyond the legislation preparatory work it had undertaken. Nor has it any statutory power or responsibility to do so. The Executive Office is not a legislator and thus cannot introduce legislation. Nor can it exercise any of the powers of the moribund Executive. Furthermore it is invested with no executive powers. The Judge also considered that guidance does not amount to directions or instructions; there being no obligation to follow guidance.

[46] The Judge then considered the ground of challenge that the Secretary of State has a duty or power conferred by section 23(1) of the NIA 1998 to establish by executive act, a redress scheme for victims in accordance with the recommendations of the HIA Inquiry report. The Judge considered that the HIA report and its recommendations belong to the domain of transferred matters wherein the Secretary of State is not legally equipped with any executive legislation or prerogative

authority. He held that Section 23 of NIA 1998 does not provide the applicant with a route to any other remedies sought against the Secretary of State.

[47] The applicant had relied on Section 26(2) NIA 1998 contending that there were actions capable of being taken by the Executive Office which were required for the purposes of giving effect to any international obligations and that this in turn gave rise to an obligation on the part of the Secretary of State to give directions to the Executive Office. The applicant had relied on a number of international obligations including Article 14 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment ("the Torture convention"). The Judge found as a fact that the brutality and sexual abuse described by the applicant is embraced by the definition of "torture" in Article 1 of the Torture Convention and constitutes, as a minimum, inhuman or degrading treatment or punishment within the embrace of Article 7 of the International Covenant on Civil and Political Rights. The Judge rejected this ground of challenge. In the summary of the Judge's conclusions he stated that Section 26(2) of the NIA 1998 applies as the UK government is subject to international treaty obligations to provide redress to the applicant and other victims of the torture or inhuman or degrading treatment or punishment identified in the HIA inquiry report. The Judge stated that the Executive Office is, within the embrace of Section 26(2) the Northern Ireland department involved in the post-HIA report scenario but he concluded that the Executive Office had accomplished all that could be legally expected or required of it in the post-report scenario.

**Consideration of submissions as to constitutional principles and aids to interpretation**

[48] Before considering the issues for determination identified by the appellant we consider it appropriate to set out and consider the submissions as to the applicable constitutional principles and as to aids to interpretation.

**(a) The constitutional principle of Parliamentary sovereignty**

[49] The sovereignty of the Westminster Parliament in constitutional law was described by Lord Simon of Glaisdale in *Pickin v British Railways Board* [1974] AC 765 at 1029 letters F to G. Under that principle "the courts in this country have no power to declare enacted law to be invalid." In *R (Miller) v Secretary of State for Exiting the European Union* [2018] A.C. 61; [2017] NI 141 Lord Neuberger and the other Supreme Court Justices delivering the majority judgment at paragraph [42] stated that "Parliamentary sovereignty is a fundamental principle of the UK constitution, …" and that it "was famously summarised by Professor Dicey as meaning that Parliament has "the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.""

[50] However parliamentary sovereignty is not absolute. It has been qualified by measures enacted by Parliament itself. Examples of such qualifications are to be found in the European Communities Act 1972 and the court's discretion to make a declaration of incompatibility with Convention rights under section 4 of the Human Rights Act 1998.

[51] The question remains as to whether there are limits to Parliamentary sovereignty at common law.

[52] In *R (Jackson & others) v Attorney General* [2006] 1 A.C. 262 the question was whether the Hunting Act 2004 was invalid it being contended that its enactment without the consent of the House of Lords was not in accordance with the provisions of section 2 of the Parliament Act 1911. The principle in *Pickin* that the courts in this country have no power to declare enacted law to be invalid was affirmed by Lord Bingham of Cornhill at page 281 paragraph [27]. However the issue as to whether the Hunting Act 2004 had been passed in accordance with the Parliament Act 1911 was justiciable as it concerned the proper interpretation of section 2(1) of the 1911 Act. Lord Nicholls of Birkenhead stated that the "question of statutory interpretation is properly cognisable by a court of law even though it (related) to the legislative process." He added that "Statutes create law" and that "the proper interpretation of a statute is a matter for the courts, not Parliament" see page 289 paragraph [51]. Lord Bingham stated that the "issue concerns no question of parliamentary procedure such as would, and could only, be the subject of parliamentary inquiry, but a question whether, in Lord Simon's language, these Acts are "enacted law." It can be seen that the issue in *Jackson* turned on the proper construction of section 2 of the 1911 Act which is a "question of law which cannot, as such, be resolved by Parliament." On that basis *Jackson* authoritatively defines one particular circumstance in which the courts will hear and give judgment upon the question as to whether an Act of Parliament is invalid. However on an obiter basis Lords Steyn and Hope raised questions as to whether there were other circumstances in which the courts could declare an Act of Parliament to be invalid. Lord Steyn stated that in "exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish." However he went on to state that it "is not necessary to explore the ramifications of this question in this opinion. No such issues arise on the present appeal." Lord Hope at paragraph [120] stated that "Parliamentary sovereignty is an empty principle if legislation is passed which is so absurd or so unacceptable that the populace at large refuses to recognise it as law." It can be seen that *Jackson* did not decide that there was a common law exception to the principle that "the courts in this country have no power to declare enacted law to be invalid" but even if there was such an exception the threshold for its operation is extraordinarily high. It is on the basis of these obiter comments in *Jackson* that Mr Macdonald contends that the 2018 Act is in breach of such constitutional fundamentals or is so absurd or so unacceptable leading to the

populace at large refusing to recognise it as law that this court should declare it to be invalid.

[53] A common law exception to Parliamentary sovereignty was also considered obiter by Lord Hodge in *Moohan v Lord Advocate* [2015] AC 901 at 925 paragraph [35]. He stated that he did "not exclude the possibility that in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law, informed by principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful." He added that the "existence and extent of such a power is a matter of debate, at least in the context of the doctrine of the sovereignty of the United Kingdom Parliament" but that "such a circumstance (was) very far removed from the present case" so that there was "no need to express any view on that question." It can be seen that *Moohan* is not authority for either the existence or extent of such a power but rather gives another illustration of the extraordinarily high threshold for the operation of such a power if it did exist.

[54] Parliamentary sovereignty was reaffirmed by the Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union* [2018] A.C. 61; [2017] NI 141 at paragraphs [42] – [43] and as recently as 24 September 2019 by that Court in *R (Miller) v The Prime Minister* [2019] UKSC 41; [2019] 3 W.L.R. 589 at paragraph [41] as being one of the fundamental constitutional principles namely that the "laws enacted by the Crown in Parliament are the supreme form of law in our legal system, with which everyone, including the Government, must comply."

**(b) The constitutional principle of accountability**

[55] Another fundamental principle of the UK constitution is that of Parliamentary accountability, which in relation to devolved government in Northern Ireland means accountability to the Assembly or *perhaps* absent an Assembly *at least* accountability to the UK Parliament.

[56] In *Miller* at paragraph [46] it was stated that the constitutional principle of "Parliamentary accountability as described by Lord Carnwath in his judgment in the first *Miller* case" was "no less fundamental to our constitution than Parliamentary sovereignty" and the passage cited in support was (*R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, para 249). The judgment in *Miller* continued by recounting that as:

> "Lord Bingham of Cornhill said in the case of *Bobb v Manning* [2006] UKPC 22, para 13, "the conduct of government by a Prime Minister and Cabinet collectively responsible and accountable to Parliament lies at the heart of Westminster democracy". Ministers are accountable to Parliament through such mechanisms as their duty to answer

> Parliamentary questions and to appear before Parliamentary committees, and through Parliamentary scrutiny of the delegated legislation which ministers make. By these means, the policies of the executive are subjected to consideration by the representatives of the electorate, the executive is required to report, explain and defend its actions, and citizens are protected from the arbitrary exercise of executive power."

[57] In *Miller* it was also stated at paragraph [48] that "the longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government: the antithesis of the democratic model." So questions arise in this case as to whether the Northern Ireland departments which have been left to make decisions are accountable and if so to whom. If they are not accountable whether there is a legal limit on the duration of that lack of accountability.

**(c) The interpretative approach to the constitutional provisions applicable to Northern Ireland**

[58] Lord Bingham in *Robinson v Secretary of State for Northern Ireland and others* [2002] NI 390 categorised the NIA 1998 as in effect a constitution whilst recognising that it did not set out all the constitutional provisions applicable to Northern Ireland. He continued at paragraph [11] by stating that "(so) to categorise the 1998 Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue." He added that "the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody." It can be seen that the generous and purposeful interpretation has to bear in mind the values which the constitutional provisions are intended to embody. One of those values is the democratic ideal but Lord Bingham identified other values which "this constitution is also seeking to promote" in paragraph [10] as "being participation by the unionist and nationalist communities in shared political institutions, …." We consider that this is an extremely significant value which should aid a generous and purposeful interpretation of the NIA 1998 and should also aid consideration of, for instance the constitutional propriety of decisions to extend the period for the formation of devolved institutions in Northern Ireland. There is a balance to be struck between the present unsatisfactory impasse with in effect government by civil servants on the one hand and on the other the reintroduction of direct rule which might persist and will adversely impact on the ability of unionist and nationalist communities to participate in shared political institutions.

**(d) The appellant's submission of a constitutional principle that there should be no vacuum in governance**

[59] Mr Macdonald also relied on *Robinson* seeking to establish a constitutional principle that there should be no vacuum in governance either at all or for a prolonged period both as a method of challenging the validity of the 2018 Act as amended by the 2019 Act and as an aid to the interpretation of the NIA 1998. Lord Bingham at paragraph [11] stated that "It is in general desirable that the government should be carried on, that there be no governmental vacuum." We agree with McCloskey J that a statement that something is "in general desirable" is unlikely to have been intended to operate as a pronouncement of legal or constitutional principle. We consider that Lord Bingham was using this as one of the aids to the construction of Section 32(3) NIA 1998. We consider that the sentence does not embody a fundamental constitutional principle but rather that it is an aid to the construction of the NIA 1998.

[60] At paragraph [15] Lord Bingham considered the impact of section 32(3) NIA 1998 which imposed a duty on the Secretary of State after a period of six weeks to propose a date for the poll for the election of the next Assembly. He stated that "Parliament thereby expressed its intention that in this eventuality the Secretary of State should have not only a power but a duty to bring matters to a head. *There was to be no protracted stalemate, no persisting vacuum in the conduct of the devolved government*" (emphasis added). Mr Macdonald also emphasised that sentence in support of a constitutional principle that there should be no persisting vacuum in the conduct of devolved government. However we consider that in this sentence Lord Bingham identified the will of Parliament as then expressed in section 32(3) NIA 1998 rather than expounding a fundamental constitutional principle. The will of Parliament as to a *persisting vacuum in the conduct of the devolved government* is now to be found in the 2018 Act as amended by the 2019 Act which has removed the duty to propose a date for a poll and replaced it with a discretion to do so thereby envisaging the continuation of the present stalemate whilst there is a prospect that it will be resolved. The will of Parliament in those Acts was to allow the shared institutions further "time to operate and take root."

(e) **The appellant's submission of a constitutional principle as to the vindication of rights**

[61] Mr Macdonald also relied on *Ashby v White & others* 92 ER 126 KB seeking to establish a constitutional principle or at least an aid to interpretation that if an individual has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it. *Ashby* concerned the question as to whether an individual who has a right to vote at an election for Members of Parliament may maintain an action against the returning officer for refusing to admit his vote. Holt CJ in giving judgment maintained firstly that the plaintiff had a right and privilege to give his vote: secondly, in consequence thereof, that if he be hindered in the enjoyment or exercise of that right, the law gives him an action against the disturber, and that this is the proper action given by the law. In doing so he stated:

> "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."

[62] An inquiry recommendation does not create a right to the implementation of that recommendation. It may create a right to have the recommendation considered so that if appropriate it can be implemented. On the facts of this case the recommendation has been considered by the then Secretaries of State and by the present Secretary of State and accordingly any such right has been vindicated. We do not consider that this submission informs the outcome of this appeal.

## The first issue identified by the appellant

**In the absence of NI ministers, does the Secretary of State (by virtue of sections 1 and 23 NIA 1998) have residual prerogative and executive powers as respects transferred matters?**

### (a) The provisions contained in section 23 NIA 1998

[63] Section 23 NIA 1998 is headed "Prerogative and executive powers" which heading in broad summary provides the context for the section which in the Bill was amendable during the debate in Parliament, see *R v Montila* [2004] UKHL 50 at [34], an *Application by Raymond McCord, JR83 and Jamie Waring for Judicial Review* [2019] NICA 49 at paragraph [107] and Section 16.7 of Bennion on Statutory Interpretation (Seventh Edition).

[64] Section 23(1) provides that "(the) executive power in Northern Ireland shall continue to be vested in Her Majesty." Executive powers not only includes numerous statutory powers but also includes the prerogative power so that (particularly given the context of the heading) the prerogative power is a part of the executive power which are not relinquished by but rather undiminished remain vested in Her Majesty. Schedule 2, Paragraph 22(b) NIA 1998 provides that section 23(1) is an excepted matter so that unless the NIA 1998 specifically provides for the exercise of prerogative and executive powers by the devolved institutions then they are not transferred; that is devolved.

[65] The transfer of prerogative and executive powers is dealt with in Section 23(2) which provides that "(as) respects transferred matters, the prerogative and other executive powers of Her Majesty in relation to Northern Ireland *shall*, subject to subsections (2A) and (3), be *exercisable* on Her Majesty's behalf by any Minister or Northern Ireland department" (emphasis added). The Historical Institutional Abuse Inquiry and the implementation of the recommendation are transferred matters so prerogative and other executive powers in respect of those matters shall be exercisable on behalf of Her Majesty by any Minister or Northern Ireland department. Section 7(3) NIA 1998 provides that "Minister", "unless the context otherwise requires, means the First Minister, the deputy First Minister or a Northern Ireland Minister." It is not suggested in this case that the context requires otherwise.

[66] A feature of section 23(2) is that it provides that the prerogative and other executive powers in relation to transferred matters are exercisable on Her Majesty's behalf by *any Minister or Northern Ireland department*. However the ability to exercise executive or prerogative powers by any Minister or Northern Ireland department is subject to subsection (2A) which provides that so "far as the Royal prerogative of mercy is exercisable on Her Majesty's behalf under subsection (2), it *is exercisable only by the Minister in charge of the Department of Justice*" (emphasis added). There has been resort to the Royal prerogative of Mercy in Northern Ireland for which see

*Rodger's Application for Judicial Review* [2014] NIQB 79 and *Terence McGeough's Application for Judicial Review* [2012] NICA 28.

[67] Another exception to the feature in section 23(2) that prerogative and other executive powers in relation to transferred matters are exercisable on Her Majesty's behalf by *any Minister or Northern Ireland department* is contained in section 23(3) which provides that "(as) respects the Northern Ireland Civil Service and the Commissioner for Public Appointments for Northern Ireland, the prerogative and other executive powers of Her Majesty in relation to Northern Ireland shall be exercisable on Her Majesty's behalf by *the First Minister and the deputy First Minister acting jointly*." Section 23(4) provides that "the *First Minister and deputy First Minister acting jointly* may by prerogative order under subsection (3) direct that such of the powers mentioned in that subsection as are specified in the order shall be exercisable on Her Majesty's behalf by *a Northern Ireland Minister or Northern Ireland department* so specified."

**(b) Is there a NI Minister or NI department capable of exercising the prerogative in relation to the recommendation or in relation to the Royal prerogative of mercy or the prerogative in relation to the civil service**

[68] The first question is whether there is any Northern Ireland Minister or Northern Ireland department which can exercise the prerogative power in relation to the recommendation by for instance setting up an ex gratia redress scheme.

[69] There has been no First Minister, deputy First Minister or a Northern Ireland Minister for some 2 years and 7 months so that it is common case that there is no Northern Ireland Minister who can exercise any prerogative or executive powers in relation to the recommendation.

[70] The question then becomes whether a Northern Ireland department can do so given that the departments remain in existence but also given that there are no Ministers and there is no Executive Committee.

[71] In an *Application by Colin Buick for Judicial Review* [2018] NICA 26 this court considered whether, in the absence of Northern Ireland Ministers, departments can exercise statutory functions and, if so, what legal constraints apply to the extent of departmental decision-making. The majority judgment in *Buick* held that cross-cutting decisions, which are decisions which cut across the responsibilities of two or more Northern Ireland Ministers are allocated to the Executive Committee and cannot be dealt with by departments in the absence of Northern Ireland Ministers. It is common case that the implementation of the recommendation is cross cutting so that in accordance with the decision of this court in *Buick* but subject to the 2018 Act in the absence of an Executive Committee no Northern Ireland department may exercise any prerogative or executive power in relation to it.

[72] The same position exists in relation to the Royal prerogative of mercy as there has been no Minister in charge of the department of Justice since 2 March 2017.

[73] In relation to the prerogative in respect of the civil service there has been no First Minister or deputy First Minister since 7 January 2017 and there have been no Northern Ireland Ministers since 2 March 2017.

[74] We conclude, subject to the 2018 Act that there is no Northern Ireland Minister or Northern Ireland department that can exercise the prerogative in relation to the recommendation or that can exercise the Royal prerogative of mercy or the prerogative in relation to the civil service.

**(c) The questions**

[75] In the absence of any Northern Ireland Minister or Northern Ireland department capable of exercising the prerogative power in relation to the recommendation by for instance setting up an ex gratia redress scheme, the question arises as to whether that particular prerogative power, although it remains undiminished and vested in Her Majesty is not capable of being exercised or whether in the absence of a Northern Ireland Minister or department capable of exercising it the Secretary of State can exercise it. Another formulation of the question is whether Her Majesty, on the advice of the Secretary of State or any Secretary of State is prevented from exercising the prerogative powers.

[76] In the absence of any Minister in charge of the department of Justice the question is whether the Royal prerogative of mercy, although it remains undiminished and vested in Her Majesty is not capable of being exercised or whether in the absence of that Minister the Secretary of State can exercise it.

[77] In the absence of a First Minister and a deputy First Minister again the question becomes whether those prerogative and executive powers are in abeyance in Northern Ireland or whether in the absence of an operable power its exercise resides in the Secretary of State under section 23(1).

**(d) The 2018 Act**

[78] The conclusion that there is no Northern Ireland Minister or department that can exercise the prerogative in relation to the recommendation is subject to consideration of the 2018 Act.

[79] An overview of the 2018 Act contained in the explanatory notes is that it:

(i) Extends the period provided in the Northern Ireland Act 1998 for Northern Ireland Ministers to be appointed until 26 March 2019 with the possibility to extend that period for up to 5 months by statutory instrument,

(ii) Clarifies that a senior officer of a Northern Ireland department is not prevented from exercising a function of the department during the period for forming an Executive if they are satisfied that it is in the public interest to do so,

(iii) Requires the Secretary of State to provide guidance to Northern Ireland departments about the exercise of those functions,

(iv) Enables the Secretary of State and the Lord Chancellor to exercise appointment functions normally exercised by Northern Ireland Ministers in relation to specified offices, and enable by regulations further such functions to be exercised by UK Ministers,

(v) Replaces the requirement for UK Ministers to consult, or obtain the approval of, Northern Ireland Ministers or the Executive Committee before exercising appointment functions with a requirement to consult the relevant Northern Ireland department, and

(vi) Enables the Secretary of State to exercise any appointment function of a Northern Ireland Minister that is exercisable jointly with other persons who include the Secretary of State, following consultation with the relevant Northern Ireland department.

[80] The mechanism for a senior officer of a Northern Ireland department exercising a function of the department during the period for forming an Executive is contained in Section 3.

[81] Section 3(1) provides that "(the) absence of Northern Ireland Ministers does not prevent a senior officer of a Northern Ireland department from exercising a function of the department during the period for forming an Executive if the officer is satisfied that it is in the public interest to exercise the function during that period." Section 23(2) NIA 1998 provides that "(as) respects transferred matters, the prerogative and other executive powers of Her Majesty in relation to Northern Ireland shall, …, be exercisable on Her Majesty's behalf by any Minister or Northern Ireland department." We consider that this means that the exercise of the prerogative in relation to the recommendation is a function of any department but most appropriately is a function of the Executive Office. The effect of section 3(1) of the 2018 Act is that the Executive Office can exercise the prerogative power in relation to the recommendation and as will be seen despite the fact that it is a cross-cutting matter.

[82] Section 3(2) provides that "(the) Secretary of State must publish guidance about the exercise of functions in reliance on subsection (1), including guidance as to the principles to be taken into account in deciding whether or not to exercise a function" and section 3(3) provides that "Senior officers of Northern Ireland

departments must have regard to that guidance." Section 3(9) provides that before "publishing guidance under subsection (2) the Secretary of State must have regard to any representations made by members of the Northern Ireland Assembly."

[83] Section 3(4) gives retrospective effect to decisions of any senior officer by providing that "(the) absence of Northern Ireland Ministers is not to be treated as having prevented any senior officer of a Northern Ireland department from exercising functions of the department during the period beginning with 2 March 2017 and ending when this Act is passed." In this way the exercise of functions by senior officers prior to the Act being passed are legitimized. After the Act is passed the express power to exercise a function of the department is contained in section 3(1).

[84] Section 3(5) provides that "(the") fact that a matter connected with the exercise of a function by a Northern Ireland department has not been discussed and agreed by the Executive Committee of the Northern Ireland Assembly is not to be treated as having prevented the exercise of that function as mentioned in subsection (1) or (4)." In this way a decision to exercise the prerogative in relation to cross cutting matters is validated. A decision post the commencement of the 2018 Act by a department in relation to the exercise of the prerogative in relation to the recommendation would be valid even if it was cross cutting. However section 3(6) provides that

> "(6) Subsections (4) and (5) do not apply in relation to the exercise of a function before this Act is passed if—
>
> (a) proceedings begun, but not finally decided, before this Act is passed involve a challenge to the validity of that exercise of the function, and
>
> (b) the application of those subsections would affect the outcome of the proceedings,
>
> but nothing in this subsection prevents the re-exercise of the function in the same way in reliance on subsection (1)."

The complaint in this case is that the Executive Office did not exercise the prerogative function in relation to the recommendation rather than that the function was exercised. On that basis we do not consider that the exception in section 3(6) applies despite the fact that these proceedings began before the 2018 Act was passed.

[85] The 2018 Act does not address the exercise of the Royal prerogative of mercy and of the prerogative in relation to the Civil Service the first of which cannot be exercised in the absence of a Minister in charge of the department of Justice and the second cannot be exercised in the absence of a First Minister and a deputy First Minister.

[86] We conclude that the 2018 Act if valid permits the Executive Office to exercise the prerogative in relation to the recommendation for example by establishing an ex gratia redress scheme.

### (e) **The legislative background to section 23 NIA 1998**

[87] Mr McGleenan in support of his contention that no residual ability to exercise prerogative powers in relation to transferred matters are vested in the Secretary of State contrasted the provisions of section 23 NIA 1998 with the equivalent provisions in earlier legislation which interposed between the Monarch on the one hand and the devolved departments on the other, first the Lord Lieutenant, then the Governor and then finally the Secretary of State.

[88] Mr McGleenan analysed section 8(1) of the Government of Ireland Act 1920, section 1(1) of the Northern Ireland (Temporary Provisions) Act 1972, section 7(1) of the Northern Ireland Constitution Act 1973, and section 1(3) and schedule 1 paragraphs 2(1)(b) and 2(2) of the Northern Ireland Act 1974, section 1(8) and paragraph 4 to the schedule the Northern Ireland Act 2000

[89] On the basis of all the previous equivalent legislative provisions in relation to prerogative and executive powers it was stated that there was a relevant difference with the provisions of section 23 NIA 1998 which did not refer to the Secretary of State or to the executive powers being delegated to him or to those powers being exercisable by him. Rather the NIA 1998 retained the statutory technique of the executive power in Northern Ireland continuing to be vested in Her Majesty and then provided that in relation to transferred matters it shall be exercisable on Her Majesty's behalf by any Minister or Northern Ireland department. This it was suggested made it clear that the Secretary of State was not intended to have and did not have any ability to exercise prerogative powers even if the devolved institutions were incapable of doing so. Furthermore it was suggested that if the Secretary of State did have residual prerogative powers then this would amount to direct rule by the exercise of those powers and that direct rule was an option available to Parliament which option had not been taken when Parliament had passed the 2018 and 2019 Acts.

### **(f) Previous authorities in relation to the construction of section 23 NIA 1998**

[90] In *Buick* the judgment at [34] stated obiter that although there was "no express exclusion of the executive and prerogative powers of a Minister of the Crown as in the Scotland Act, the Agreement did not contemplate such a Minister having prerogative or executive power in respect of transferred matters and the better view is probably that such Ministers are excluded from exercising prerogative or executive power in respect of such matters."

[91] The central issue in the *Application by Brigid Hughes for Judicial Review* [2018] NIQB 30 was a challenge to the ongoing failure of the Executive Office, the Executive Committee, the Department of Justice for Northern Ireland, the Minister of Justice and the Secretary of State to put in place adequate funding to prevent further delays in relation to what have come to be called legacy inquests relating to deaths during the years of violence. In that case Mr Macdonald who appeared on behalf of the applicant contended that in the absence of a working devolved administration the executive power which continues to be vested in the Crown under section 23(1) NIA 1998 must in the circumstances be exercisable by the Secretary of State. Dr McGleenan, Mr Coll and the Attorney General contended that as respects transferred matters the prerogative and other executive powers are exercisable only by Northern Ireland ministers or by Northern Ireland departments. It was also contended that there being no ministers the executive powers are exercisable by the Northern Ireland departments. Sir Paul Girvan in giving judgment stated at paragraph [67] that

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

At [69] Sir Paul Girvan continued by stating

> "While Mr Coll argued that it is possible and legally permissible for the departments to indefinitely provide government in Northern Ireland without ministers a long term hiatus in normal accountable government is something that would necessitate action by the Secretary of State and Parliament, at least in political terms and probably as a legal imperative. *For present purposes it is not necessary to come to a conclusion other than that in the absence of fresh statutory provisions executive power in respect of devolved*

> *matters and in respect of the control of Northern Ireland departments is not exercisable as such by the Secretary of State*. However the sovereign government and the Secretary of State have a power and a duty to ensure the lawful proper governance of Northern Ireland and are accountable to Parliament for that as they are on questions such as whether direct rule should be reintroduced or whether changes need to be made in the constitutional arrangements for the government of Northern Ireland. Ultimately Parliament can legislate to ensure the proper and lawful government of Northern Ireland if devolved government is not being provided in a way which is compatible with the principles of democratic and accountable government" (emphasis added).

[92] It can be seen that the members of this court in *Buick* were of the view and Sir Paul Girvan decided in *Hughes* that the Secretary of State did not have residual prerogative and executive powers as respects transferred matters.

[93] Sir Paul Girvan expressed concern that there should not be a lengthy vacuum of power in Northern Ireland, whilst stating that there was in effect a form of political vacuum in which departments continued to function. He went on to state that ultimately Parliament can legislate to ensure the proper and lawful government of Northern Ireland if devolved government is not being provided in a way which is compatible with the principles of democratic and accountable government. As will become apparent we echo those concerns given that we consider that government by civil servants is neither democratic nor appropriately accountable. We also agree that section 23 NIA 1998 is to be read in the context of section 1 which declares that "Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section …." That declaration in section 1 underlines that the UK Parliament has a power and a duty to ensure the lawful proper democratic and accountable governance of Northern Ireland.

**(g) Consideration of the equivalent provision in the Scotland Act 1998**

[94] Section 53 of the Scotland Act 1998 provides that functions, including the functions of Her Majesty's prerogative and other executive functions which are exercisable on behalf of Her Majesty by a Minister of the Crown "shall, so far as they are exercisable within devolved competence, be exercisable by the Scottish Ministers *instead of* by a Minister of the Crown" (emphasis added). The emphasised words expressly exclude the exercise of executive and prerogative powers of a Minister of the Crown. If that formulation had been used in the NIA 1998 then it would be completely clear that the Secretary of State could not exercise prerogative or executive powers in relation to transferred matters. However we do not consider the

difference in wording as between section 53 of the Scotland Act 1998 and section 23 NIA 1998 is determinative.

**(h) Conclusion in relation to section 23 NIA 1998**

[95] A literal construction of section 23 is that the prerogative *shall be exercisable* on Her Majesty's behalf by any Minister or Northern Ireland department. That does not allow for the exercise of the prerogative by the Secretary of State.

[96] The question is whether a purposeful interpretation could lead to any other conclusion.

[97] As illustrated by the decision in *Buic*k prior to the 2018 Act there was a vacuum in governance in Northern Ireland. Despite the passage of that Act there remains a vacuum in governance. Some prerogatives can be exercised by Northern Ireland departments under the 2018 Act but others such as the prerogative of mercy can now only be exercised in Northern Ireland if the UK parliament passed legislation in a specific case or if it expressly authorised its exercise by for instance the Secretary of State. That vacuum in governance is an aid to the construction of section 23 pointing in the direction of a residual power to exercise the prerogative in the Secretary of State. However the value in the NIA 1998 of "participation by the unionist and nationalist communities in shared political institutions, …." aids a generous and purposeful interpretation of the NIA 1998 so as to prevent any residual power to exercise the prerogative in the Secretary of State. Finally the principle of Parliamentary sovereignty points firmly towards there being no residual prerogative power in the Secretary of State given that the UK Parliament in passing the 2018 and 2019 Acts decided not to impose direct rule. Any other construction of section 23 to the effect that there was a residual power in the Secretary of State would amount to the imposition of a form of direct rule by virtue of residual prerogative power which is exactly what the UK parliament has declined to introduce by passing those Acts.

[98] We consider that under the scheme contained in section 23 NIA 1998 the exercise of the powers of Her Majesty are handed over to be exercised on her behalf by operation of statute and cannot be recalled otherwise than by statute.

**The second issue identified by the appellant**

**Are sections 1, 2 and 3 ("the provisions") of the 2018 Act valid enactments?**

**(a) The basis upon which it is submitted that the provisions are invalid.**

[99] Section 1 of the 2018 Act as amended by the 2019 Act extends the period of time for Executive formation. It is contended that this section is invalid as it perpetuates undemocratic and unaccountable rule by civil servants and also that it perpetuates a continuing vacuum in governance. Section 2 as amended by the

2019 Act permits a limited power to further extend the period for Executive formation. Again on the same basis it is contended that this is invalid. Section 3 enables senior officers of a Northern Ireland department to exercise functions of the department in the absence of a Minister and in the absence of the Executive Committee. It is contended that this is the antithesis of the role of civil servants who ordinarily are not the decision makers but rather neutral advisors and furthermore that civil servants are not elected or accountable. It is also contended that this perpetuates a vacuum of governance in Northern Ireland as the guidance under section 3 means that certain decisions cannot be taken in Northern Ireland. Therefore it is suggested that section 3 is invalid.

**(b) The guidance under section 3 of the 2018 Act**

[100] The guidance is dated November 2018. Paragraphs 9 to 12 set out the guiding principles for decision making. Paragraph 9 states that:

> "Some decisions should not be taken in the absence of Ministers. NI departments should therefore first consider the public interest of having locally elected accountable Ministers taking decisions. Any major policy decisions, such as the initiation of a new policy, programme or scheme, including new major public expenditure commitments, or a major change of an existing policy, programme or scheme, should normally be left for Ministers to decide or agree."

Whilst such decisions should normally be left for Ministers to decide or agree so that is the default position the guidance then continues at paragraphs 10 to 12 to set out the circumstances in which decisions can be taken in the absence of Ministers.

**(c) Whether the Northern Ireland departments are accountable**

[101] In relation to devolved government there is no Assembly, there are no Ministers, there are no committees of the Assembly, there are no written questions or answers and in effect the government is now carried on by the Northern Ireland departments. Those departments do not have to report, explain or defend their actions. The civil servants in those departments are not subject to the Ministerial Code which by section 28A (1) NIA 1998 requires a Minister or junior Minister to act in accordance with its provisions. The only protection of citizens from arbitrary exercise of executive power is the self-imposed restraint of the departments and aspects of the guidance.

[102] It was suggested by Mr McGleenan that the departments were accountable to the UK Parliament through the Northern Ireland Affairs Committee. However, that Committee was appointed by the House of Commons to examine the expenditure, administration and policy of the Northern Ireland Office and its associated public

bodies. It does not examine the expenditure, administration or policy of any of the Northern Ireland departments.

[103] We accept that there is an attenuated degree of accountability in that the Secretary of State has a power and a duty to ensure the lawful proper governance of Northern Ireland and is accountable to the UK Parliament for that as he is on questions such as whether direct rule should be reintroduced or whether changes need to be made in the constitutional arrangements for the government of Northern Ireland. That is a degree of accountability at a higher level but he is not accountable for the Northern Ireland departments.

[104] There is also a degree of accountability in the guidance in that paragraph 15 provides that:

> "In order to ensure transparency, NI departments should publish a full report on progress on the Outcomes Delivery Plan …. This guidance recognises the agreement of NI departments to present it to the NI Assembly and share it with the Secretary of State who will in turn lay it in Parliament. The Secretary of State will also promptly share this with the NI political parties."

Paragraph 17 provides that:

> "In maintaining records NI departments should consider how best to maintain records on decisions that have been taken in the absence of Ministers using this Guidance. Such records should be made available to incoming Ministers when an Executive is appointed. A monthly summary report of decisions taken using this Guidance should be prepared by NI departments and shared with the Secretary of State. The Secretary of State will promptly make these reports available to Parliament and to the NI political parties."

By following this guidance the Northern Ireland departments will be held to account by Ministers once appointed, proper records will be kept, the Secretary of State will be involved, the reports are made available to Parliament and there will be an opportunity for political parties to make their views known. Indeed it is correct that the Northern Ireland political parties have been consulted in relation to the recommendation. The consultation led to changes in the redress scheme.

[105] We acknowledge that the guidance contains an attenuated degree of accountability but it has to be seen in the context that the Northern Ireland political

parties who are the representatives of the electorate have no power absent an Executive.

[106] In conclusion we consider that in Northern Ireland ministers are accountable to the Assembly but in the absence of an Assembly there is only an attenuated degree of democratic accountability. That position is perpetuated by the 2018 and 2019 Acts.

[107] We agree with Sir Paul Girvan that the "normal Westminster Convention is that civil servants do not make policy this being a matter for ministers who are accountable to Parliament." That convention also applies in Northern Ireland and it has been subverted by the 2018 and 2019 Acts.

[108] We consider that if the departments follow the guidance that there remain areas in which a senior officer of a Northern Ireland department will not exercise a function of the department so that decisions that a Minister would have made will not be made by the department.

[109] We consider that the present arrangements do not provide good governance for Northern Ireland, they are not democratic and have led to government by civil servants with only an attenuated degree of accountability.

**(d) Whether the provisions are invalid**

[110] The present arrangements are to be found in the 2018 and 2019 Acts passed by the Westminster Parliament. The sovereignty of the Westminster Parliament in constitutional law means that the courts in this country have no power to declare enacted law to be invalid. At paragraphs [52] and [53] we have summarised the obiter comments as to whether there is a limit to Parliamentary sovereignty at common law. There is no decided authority for such a limit. We do not consider that this court has any jurisdiction to declare the provisions to be invalid.

[111] Even if there was a limit to Parliamentary sovereignty we consider that the extraordinarily high threshold for its operation has not been met in that the 2018 Act is not in breach of such constitutional fundamentals and is not so absurd or so unacceptable as to lead to the populace at large refusing to recognise it as law. In stating that it is not in breach of such constitutional fundamentals we take into account that the values of accountability and democracy are not the only values. Another of the values which the NIA 1998 is seeking to promote is participation by the unionist and nationalist communities in shared political institutions. As we have indicated we consider that this is an extremely significant value which should aid consideration of the constitutional propriety of decisions to extend the period for the formation of devolved institutions in Northern Ireland. Furthermore the aim of attempting to restore the Executive is to be seen in the context that no political party has refused to form an Executive come what may. The assessment as to whether

there is a prospect of an Executive being formed lies in the macro-political dimension and is clearly not one that could be described as absurd.

[112] If there was a protracted period where there was not good governance in Northern Ireland so that the position was absurd then the primary responsibility would be on the Westminster Parliament to intervene. McCloskey J stated at [69] that

> "where a vacuum in the governance of Northern Ireland occurs, *even a protracted one* and *no matter how regrettable* I consider that this is to be viewed through interrelated prisms of political reality and consequential prejudice and disadvantage to the population, rather than infringement of any constitutional principle or contravention of NIA 1998."

In so far as McCloskey J was contemplating that it should be the responsibility of the UK Parliament to intervene in order to deal with a protracted vacuum with highly regrettable consequences then we agree. However we add that it is not necessary in this case to decide or to express a view as to whether absent such intervention in the case of absurdity there would be a legal remedy.

[113] We conclude that the provisions are valid.

**The third issue identified by the appellant**

**If the provisions are valid enactments and the Secretary of State has no residual executive powers, who has power to make decisions which (as per the *Guidance* provided by the Secretary of State under section 3(2) of the 2018 Act) should *not* be made by officials in the absence of ministers?**

[114] Decisions can and have been made through primary legislation passed by the Westminster Parliament.

**The fourth issue identified by the appellant**

**If the provisions are *in*valid enactments and the Secretary of State has no residual executive powers, who has the power to make decisions which, as per *Buick*, should not be made by officials in the absence of an Executive?**

[115] This issue does not arise as the provisions are valid enactments.

**The fifth issue identified by the appellant**

**If the answer to questions 3 and 4 is that no one has the power to make such decisions, is this compatible with constitutional principle, including the rule of**

**law, the common law requirement that there should be no persisting vacuum in governance and the provision in s.23(1) of the NI Act 1998 that "the executive power in Northern Ireland continues to be vested in Her Majesty"?**

[116] For the reasons which we have given we consider that the present arrangements are constitutionally valid.

**The sixth and seventh issues identified by the appellant**

**Does the Secretary of State have any power to implement any of the recommendations of the report, including the redress scheme and/or interim awards of compensation, on an *ex gratia* basis? Does the Executive Office have any power to implement any of the recommendations of the report, including the redress scheme and/or interim awards of compensation, on an *ex gratia* basis?**

[117] The answer to the first question is no for the reasons which we have given.

[118] As we have indicated the Executive Office can exercise prerogative powers in relation to the recommendation in accordance with the 2018 Act. The only issue is whether the Historical Institutional Abuse Act (NI) 2013 has curtailed or displaced the prerogative power to establish an ex gratia redress scheme. We do not consider that it has given that it is silent on the issue of implementing the report. Sir Anthony Hart contemplated that the recommendation could be on an ex gratia basis. We consider that he was correct in so contemplating.

[119] We will grant a declaration to that effect. That does not mean that an ex gratia redress scheme must be set up. The exercise of the prerogative is discretionary.

**The eighth issue identified by the appellant**

**Was it open to the Secretary of State to give a direction under s.26 of the NIA 1998 to a NI department that they should establish a redress scheme and/or interim compensation scheme as recommended by the report and, if so, did the Secretary of State fail to exercise that discretion?**

[120] In so far as relevant section 26(2) NIA 1998 provides that "if the Secretary of State considers that any action capable of being taken by a Minister or Northern Ireland department is required for the purpose of giving effect to any international obligations, … he may by order direct that the action shall be taken." The discretion to give directions arises if (a) the Secretary of State considers that action is required for the purpose of giving effect to any international obligations and (b) that the action is capable of being taken by a Minister or Northern Ireland department. There are no Northern Ireland Ministers so there is no action capable of being taken by a Minister. There are Northern Ireland departments, including the Executive Office so it is necessary for the Secretary of State to consider what department is capable of giving effect to any international obligation which in turn

will involve identifying the international obligations to which effect could be given. If the Secretary of State considers that there is no obligation to which effect could be given or that there is no department capable of giving effect to a particular obligation then the courts on judicial review would determine whether the consideration by the Secretary of State was *Wednesbury* unreasonable. If the Secretary of State did consider that there was an international obligation to which effect could be given by a particular department then the next decision for the Secretary of State, not for the courts, is whether discretion should be exercised in order to give a direction. The exercise of that discretion would also be subject to judicial review on the basis of the *Wednesbury* test.

[121] Mr Macdonald on behalf of JR80 relied on a number of international obligations but referred specifically to Article 14 of the Torture Convention which states

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

[122] There was no evidence that the Secretary of State had considered exercising his powers under section 26. We consider that he ought to have done so particularly given the finding of McCloskey J that the abuse amounted to torture. We are prepared to grant a declaration to that effect. We make it clear that this will not require the Secretary of State to give any direction but merely requires him to expressly consider doing so.

**The ninth and tenth issues identified by the appellant**

**Was the Secretary of State in breach of his/her duty to set a date for a fresh election prior to the coming into force of the 2018 Act? Has the Secretary of State properly exercised his/her discretion under the 2018 Act in deciding not to set a date for a fresh election?**

[123] We consider that the first question is now academic given that since the 2018 Act there is a discretionary power as opposed to a duty to set a date for a fresh election.

[124] The second question should be formulated as to whether the Secretary of State has made a decision which is *Wednesbury* unreasonable. There was no

suggestion that an election would be efficacious and given the evidence submitted which we have set out at paragraphs [36] – [38] it is not tenable to suggest that the discretion has been exercised unlawfully.

**Conclusion**

[125] We allow the appeal in that

(a) the Executive Office can exercise the prerogative to set up an ex gratia redress scheme. We will hear counsel in relation to the terms of the declaration;

(b) the Secretary of State should consider giving a direction to the Executive Office under section 26 NIA 1998. We will hear counsel in relation to the terms of the declaration.

[126] We dismiss the appeal in that

(a) the Secretary of State has no residual prerogative powers as respects transferred matters;

(b) the Secretary of State has no prerogative power to set up an ex gratia redress scheme;

(c) the provisions of the 2018 Act as amended by the 2019 Act are valid;

(d) there will be no order directing the Secretary of State or the Executive Office to take steps necessary to establish a redress mechanism.

[127] We will hear counsel in relation to the issue of costs.