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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY CONRADH NA GAEILGE FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE EXECUTIVE COMMITTEE OF THE NORTHERN IRELAND ASSEMBLY

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Karen Quinlivan QC and Aidan McGowan (instructed by Michael Flanigan Solicitors) for the applicant
Philip McAteer (instructed by the Departmental Solicitor's Office) for the respondent

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SCOFFIELD J

Introduction

[1] By this application for judicial review, the applicant, Conradh na Gaeilge (CnaG), seeks to challenge the Executive Committee's ongoing failure to adopt an Irish language strategy pursuant to its duty under section 28D of the Northern Ireland Act 1998 (NIA). The applicant is a body, founded in 1893, which works to promote the Irish language in Ireland and around the world and which is partly funded by Foras na Gaeilge (the Irish language agency of the language body created under the North/South Co-operation (Implementation Bodies) (Northern Ireland) Order 1999). It has previously brought judicial review proceedings in relation to this same issue. In *Conradh na Gaeilge's Application* [2017] NIQB 27, Maguire J granted a declaration that the Executive Committee had failed to comply with its duty under section 28D to adopt a strategy setting out how it proposes to enhance and protect the development of the Irish language. Despite the making of that declaration, the Executive Committee has still failed to adopt any strategy. In those circumstances, the applicant now seeks further relief (including an order of *mandamus*) to ensure compliance with the Executive's statutory duty.

[2] Ms Quinlivan QC appeared with Mr McGowan for the applicant; and Mr McAteer appeared for the respondent. Mr Fee appeared for the Department for Communities (DfC) ("the Department"), as a notice party. I am grateful to all counsel for their helpful written and oral submissions.

The relevant statutory duty

[3] I deal in further detail below with a number of provisions of the NIA. However, it is appropriate to begin the discussion of the issues in this case by setting out the statutory provision which is at the centre of the matter. Section 28D of the NIA is in the following terms:

> "(1) The Executive Committee shall adopt a strategy setting out how it proposes to enhance and protect the development of the Irish language.
>
> (2) The Executive Committee shall adopt a strategy setting out how it proposes to enhance and develop the Ulster Scots language, heritage and culture.
>
> (3) The Executive Committee—
>
> (a) must keep under review each of the strategies; and
>
> (b) may from time to time adopt a new strategy or revise a strategy."

[4] This provision was inserted into the NIA by section 15 of the Northern Ireland (St Andrews Agreement) Act 2006 ("the 2006 Act'"). It came into force on 8 May 2007 by means of the operation of the provisions contained in section 1 of the Northern Ireland (St Andrews Agreement) Act 2007 and article 2 of the Northern Ireland Act 2000 (Restoration of Devolved Government) Order 2007 (SI 2007/1397), read with section 27(4) and (5) of the 2006 Act, as amended. A similar provision – a new section 28E – was also inserted which requires the Executive Committee to adopt what are sometimes referred to as 'social inclusion' strategies, tackling poverty, social exclusion and patterns of deprivation. That latter duty is potentially relevant when one compares and contrasts the progress which has been made by the Executive on the Irish language strategy on the one hand and the social inclusion strategies on the other, as the applicant invites the court to do.

Factual background

Circumstances preceding the earlier High Court declaration

[5] From May 2007 to 2012 no Irish language strategy, draft or otherwise, was created. Between July 2012 and November 2012, the Minister for Culture, Arts and Leisure ("the DCAL Minister") held a public consultation on draft strategies. Then, in June 2013, the Minister sent initial draft strategies to ministerial colleagues seeking views, which were followed by revised draft strategies circulated to ministerial colleagues in July 2014. On 30 January 2015, the DCAL Minister then published the draft strategies.

[6] On 23 December 2015, the Minister wrote again to ministerial colleagues inviting comments on a draft Executive paper which sought the Executive Committee's agreement to the draft strategies. This was designed, following a lengthy period of gestation, to secure the Executive's approval of the draft strategies and adoption of them, so as to satisfy the statutory obligation in section 28(1) and (2).

[7] However, the Minister's Executive paper was not included on the agenda of the Executive Committee meetings which followed its circulation, namely those of 21 January 2016, 10 February 2016 and 25 February 2016. This gave rise to the potential engagement of what is sometimes known as the 'three meeting rule'. That is to say, the non-inclusion of the Minister's paper on the agenda was outside the normal position (set out in paragraph 22 of the document entitled 'Conduct of Executive Business') whereby an Executive paper will normally be included on the agenda no later than the third meeting following the circulation of the initial draft.

[8] On 9 March 2016 the Minister requested that the draft Executive paper be included on the agenda of the forthcoming Executive meeting on 10 March 2016. This request was made pursuant to the 'three meeting rule' referred to above. As a result of this, the Minister's paper was then included on the agenda for the meeting of 10 March 2016. At that meeting, a request was made by three ministers, as permitted by paragraph 2.12 of the Ministerial Code and section 28A(8)(b) and (c) of the NIA, for the decision-making on the matter to proceed by way of a vote requiring cross-community support. The effect of this was that, in order to be agreed by the Executive, the Minister's paper required not only an overall majority but also a majority of both unionist and nationalist designated ministers voting on it (or, alternatively, a 60% majority with at least 40% of each of the designated unionist and nationalist ministers in support): see section 4(5) of the NIA. Such cross-community agreement was not achieved and therefore the Executive paper seeking approval of the strategies was not agreed.

[9] Between 10 March 2016 and 3 March 2017 no further steps were taken to secure compliance with the obligation under section 28D. On the later of these dates the High Court declared that the Executive Committee had failed to comply with its

duty. Much of the evidence in the present proceedings is focused on further actions – or, perhaps more accurately, inaction – since that time.

Circumstances following the earlier High Court declaration

[10] Shortly before the High Court granted the declaration mentioned above, there was a breakdown in the power-sharing arrangements in the devolved administration. As a result of this, there was no progress at all in relation to the draft strategies until January 2020, when the devolved institutions were restored. On 9 January 2020 the 'New Decade New Approach' deal (NDNA) was agreed as a basis for restoring devolution.

[11] In particular, at paragraph 4.6.2 of the NDNA document, it was agreed that the Programme for Government (PfG) could be underpinned by a number of key supporting strategies which included an Irish language strategy and an Ulster Scots strategy. It was noted (at paragraph 4.6.3) that the list of strategies set out was not exhaustive. Nonetheless, it was also noted that, "The parties agree that, within three months, a new executive will publish a comprehensive timetable for the development and delivery of these and other strategies necessary to achieve the outcomes of the Programme for Government." Further, at paragraph 5.21.3 of the document the parties also agreed as follows:

> "Under Section 28D of the Northern Ireland Act 1998 the re-established Executive will produce a draft Irish language strategy and a draft Ulster Scots Language, Heritage and Culture Strategy for consultations within 6 months. This will include programmes and schemes which will assist in the development of the Irish language and the Ulster Scots language, culture and heritage."

[12] In short, it was agreed that a timetable for delivery would be published within three months and, as an important staging post, a draft strategy would be published within six months of the new Executive being formed. No agreement was reached as to when the adopted strategy would actually be in place; but that was to be the subject of discussion and agreement before publication of the comprehensive timetable.

[13] The applicant has also placed reliance on a recommendation made by the Committee of Ministers – the organ of the Council of Europe which has responsibility for making such recommendations to the State Parties as may be required concerning implementation of their obligations under the European Charter for Regional or Minority Languages ("the Charter") – on 1 July 2020 to the following effect:

> "The Committee of Ministers… recommends that the authorities of the United Kingdom take account of all the

observations and recommendations of the Committee of Experts and, as a matter of priority:

1. Adopt a comprehensive law and strategy on the promotion of Irish in Northern Ireland; …"

[14] On 24 September 2020, the Minister for Communities ("the DfC Minister") announced that work could commence on the development of the suite of social inclusion strategies which had been referred to in the NDNA agreement. On 29 September 2020, departmental officials made a submission to the Minister with proposals for the development of the Irish language strategy. It was acknowledged in this submission that the proposed timetable had been "unavoidably delayed due to Covid." A co-design approach was to be used for the development of an Irish language strategy and Ulster-Scots language, heritage and culture strategy. This approach involves use of an expert advisory panel to begin the strategy development process; a strategy co-design group, involving key stakeholders, to advise on the development and content of the draft strategies and action plans; and a cross-departmental working group. In October 2020 the Department for Communities published the comprehensive timetable for the development of the social inclusion strategies which had been agreed by the Executive and also the names of the experts who would make up the Expert Advisory Panel for each such strategy. There was no similar progress in relation to the Irish language (or Ulster-Scots) strategy.

[15] On 6 November 2020 the Minister circulated a paper on the Irish language strategy to the Executive Committee. This paper included an indicative timetable for the development of the Irish language strategy, planning for Executive approval of the final draft strategy to be given in November 2021 and launch in December 2021. Thereafter, on a variety of dates, the Minister and/or the Department asked for this paper (or a revised version of the paper) to be included on the Executive Committee agenda or, alternatively, brought the paper up at an Executive Committee meeting in the section of the meeting set aside to deal with 'any other business.' The evidence suggests that the Minister and/or the Department sought to have the issue progressed within the Executive Committee at over 30 of its meetings between December 2020 and June 2021. Notwithstanding this, the paper on the Irish language strategy was never included on the Executive Committee agenda. As time passed without the paper having been substantively discussed, it had to be revised to update the proposed timetable. At times, the Executive Office (TEO) sought a variety of information from DfC, which responded to these requests; but no substantive progress was made. It is difficult to avoid any conclusion other than that the issue was being blocked from substantive consideration at the Executive Committee, notwithstanding the DfC Minister's concerted efforts to progress the paper and the work which it was to underpin.

[16] On 5 January 2021, the UK Government submitted an information document on the implementation of the recommendations for immediate action referred to at

para [13] above. This referred to the NDNA agreement, noted the Committee of Ministers' recommendations, and stated as follows:

> "In November 2020, the Minister for the Department for Communities agreed to the development of an Irish Language strategy and an Ulster-Scots Language, Heritage and Culture Strategy, using a co-design and co-production approach.
>
> … A timeline to deliver on the development of an Irish Language strategy and an Ulster-Scots Language, Heritage and Culture Strategy has issued to the Northern Ireland Executive to consider and agree to publish. This has not yet featured on the Northern Ireland Executive meeting agenda. It is proposed that the strategies will be published by the end of 2021, subject to Executive approval."

[17] The impression given in this response appears to be that matters were proceeding as planned and at a reasonable pace. As appears in para [15] above however, the matter had not at that stage been placed on the Executive Committee agenda notwithstanding a number of requests and, moreover, would not be considered in substance by the Executive over the period of the next six months.

[18] Meanwhile, in March 2021, the Department published the reports of the four expert advisory panels which would help inform the development of the four social inclusion strategies. In the same month, the Committee of Experts (a body created by the Charter to report to the Committee of Ministers) published its evaluation of the UK's implementation of the recommendations for immediate action contained in its fifth evaluation report. This document noted that neither a law nor a strategy for the promotion of Irish in Northern Ireland had been adopted; that a range of proposed legislation dealing with the Irish language had not yet been submitted to the Assembly; and that the timeline of six months in the NDNA document for the drawing up of an Irish language strategy had not been met. The committee encouraged the authorities to adopt an Irish language strategy as swiftly as possible, noting that this was a requirement in domestic law as well as an obligation under the Charter. It further noted that, in concrete terms, the strategy should contain goals and milestones, and concrete measures in education, culture and other spheres of public life. The committee also expressed the view that an Irish language Act and the strategy are integral to the protection and promotion of Irish in Northern Ireland, with the proposed strategy containing at least the substance of the undertakings under the Charter in respect of Irish. The committee asked the Department to take steps to expedite the development and adoption of an Irish language strategy.

[19] In the same month, on 18 March 2021, the Minister wrote to the First Minister and deputy First Minister, pointing out that the language strategies were now some

seven months behind the other strategies' co-design process; and noting that a critical point had now been reached when there could be no further delay if the Executive wished to publish the language strategies in its current mandate. There is then a variety of correspondence from the Minister to the First Minister and deputy First Minister seeking inclusion of her Executive Paper on the language strategies on the Executive agenda over the course of several months. On 22 June 2021, the Minister wrote again to the First Minister and deputy First Minister. In this letter she outlined that, following initiation of the current proceedings, the Department wished to withdraw the Executive paper. The Minister indicated that she had received legal advice to the effect that the work of the expert advisory panel should commence. On the same date, the Department commenced preparatory work on an Irish language strategy. (As an aside, Mr Julian de Spáinn, the applicant's General Secretary, has been appointed to the expert advisory panel in relation to development of the Irish language strategy, although in his personal capacity and not as a representative of Conradh na Gaeilge.) The substance of the Minister's letter of 22 June was in the following terms:

> "Following commencement of the Judicial Review proceedings against the Executive's failure to adopt strategies covering Irish Language and Ulster Scots Language, Heritage and Culture, I sought legal advice from the Departmental Solicitor's Office on progressing the work of the Expert Advisory Panels in the absence of agreement to publish a timetable.
>
> I am now in receipt of advice which have [sic] confirmed that I can take this forward as a preliminary step in the development of the strategies.
>
> I therefore wish to withdraw Executive paper EXEC-0381-2020. I am taking this step in order to protect the Executive and my Department from High Court action and ensure that this vital work commences without further delay."

[20] Since that time, the expert advisory panel has been appointed, as has the co-design group. It was hoped that the Department would be in a position to publish draft strategies for public consultation in early 2022; but, in the event, that has not occurred. The applicant accepts that the Covid-19 pandemic disrupted the anticipated timescales set out in the NDNA document but, nonetheless, contends that there is no proper justification for the egregious failure to move matters forward in relation to a draft Irish language strategy, particularly bearing in mind that in September 2020 the Executive approved and the DfC published a comprehensive timetable for the four social inclusion strategies which were to be prepared in a parallel track to the language and culture strategies. The applicant's affidavit evidence purports to set out a range of detriments to Irish-speakers, or those who

may wish to learn, promote or increase their use of Irish, which are said to arise from the absence of the strategy required by section 28D.

The applicant's grounds of challenge

[21] The applicant has four overlapping but conceptually distinct grounds of challenge. The first is a straightforward contention that the Executive Committee continues to be in breach of its statutory obligation under section 28D of the NIA by its failure to adopt a strategy. The second is that the Executive is also in breach of section 28D by virtue of its failure to take any steps to prepare a strategy. The third is that the respondent has unlawfully failed to give effect to the applicant's legitimate expectation that it would comply with the commitments set out in the NDNA agreement. Finally, the fourth ground of challenge is that the respondent is in contravention of the rule of law, particularly by reason of its failure to take action after the declaratory relief granted by the High Court in March 2017. I propose to deal with each of these grounds in turn.

Breach of section 28D: failure to adopt a strategy

[22] I agree with the applicant's assertion that this aspect of its challenge can be dealt with in short order. Maguire J has already granted a declaration to the effect that the Executive Committee, by failing to adopt a strategy setting out how it proposes to enhance and protect the development of the Irish language, is in breach of its statutory duty. That conclusion was unsurprising, given that the duty came into effect in May 2007 and that, almost 10 years later, no such strategy had been adopted. Even accepting, as Maguire J did and I consider one must, that the obligation did not require to be immediately satisfied, but that some reasonable period of time had to be allowed for formulation and consideration of the strategy, that period had plainly elapsed by the time of the High Court's earlier intervention. That is entirely consistent with Maguire J's observations at paras [5] and [17] of his judgment. The Executive Committee, on whom this clear statutory obligation has been imposed, is manifestly still in breach of it. The more complicated question, as the applicant to some degree accepts, is what the court can and should do about that.

[23] An interesting question raised in the course of argument in this case is whether the 'reasonable time' permitted to the Executive Committee to formulate and agree an Irish language strategy in order to enable it to adopt the strategy in compliance with section 28D(1) commences afresh each time a new Executive Committee is formed. On one view, the clock only starts when an Executive is formed. On another, the clock simply keeps running continuously from the initial imposition of the duty until its discharge. It is unnecessary for me to definitively determine this issue since, on any view, I am satisfied that the Executive Committee in existence at the time of the commencement of these proceedings had exhausted the leeway available to it in terms of the time available to comply with its statutory obligation under section 28D(1).

[24] Nonetheless, since the matter was addressed in argument, it seems to me that the correct position is as follows. An Executive Committee is a committee "of each Assembly" according to section 20(1) of the NIA. The Executive in place in 2021 is therefore to be taken to be the Executive Committee of the Assembly which was elected in 2017. The Executive Committee is not a body corporate with continuous legal existence and personality: it is an arm of the Assembly from which it is elected. Viewed in that way, the failure of the Executive Committee of the Assembly elected in 2017 to adopt an Irish language strategy is plainly in breach of the section 28D obligation. Even assuming the correct analysis is that time began to run for the fulfilment of the obligation merely since the formation of the Executive Committee when the Assembly ran the d'Hondt process for this purpose in January 2020 – which is in any event a highly relevant factor in the consideration – I would still have little hesitation in finding that that composition of the Executive Committee was in breach of its obligation to adopt an Irish language strategy by reason of its failure to do so in the period from January 2020 up to the commencement of these proceedings (and, indeed, up to its own collapse in February 2022, following the resignation of the then First Minister).

[25] The reasonable period of time available to an Executive Committee to comply with its obligation has to be judged according to all the circumstances. What is reasonable will be shaped, inter alia, by what has gone before. In the present case, given the lengthy period of failure on the part of preceding Executive Committees to comply with their legal obligations such that no Irish language strategy had been adopted at all – and particularly against the background of a previous High Court declaration to this effect *and* the renewed hope of expeditious progress in light of the commitments in the NDNA deal – it was incumbent upon the Executive to act with alacrity. It has plainly failed to do so. I acknowledge the impact of the Covid-19 pandemic on the work of Departments and the Executive Committee. I also acknowledge that the DfC's initial paper in early November 2020 had an indicative date for approval of the strategy in December 2021 (which post-dates the commencement of these proceedings). In light of the delay which had already occurred to that point, however, I do not consider that delivery within that timescale would have been reasonable. Greater urgency was required. In the event, even that timescale has not been met; or anything close to it. I am also bound to say that it is regrettable that, once these proceedings were commenced, it was determined that the Department *could* proceed with work which it had hoped to undertake earlier. Having done so, without any objection from the Executive Committee, it now seems clear that time was probably lost needlessly waiting for Executive approval for steps which could have proceeded in its absence. The question for the court, however, is simply whether the Executive has discharged its obligation to adopt a strategy within a reasonable period of time in all of the circumstances. It has not. I agree with Maguire J's conclusion (see para [17](iii) of his judgment) that the Executive cannot escape its legal obligation by seeking to blame others. For the reasons discussed below, it has the means at its disposal to drive the process forward, if needs be.

[26] Once an Irish language strategy has been adopted, each new Executive Committee plainly does not have to adopt a new one. The adoption obligation will have been discharged, subject then to the ancillary obligation contained in section 28D(3) on the part of later Executives to keep the strategy under review from time to time and revise it, as required.

Breach of section 28D: failure to take steps to prepare a strategy

[27] The applicant also contends that the Executive Committee is in breach of section 28D on the basis that it has failed to take any steps to prepare a strategy. This argument proceeds on the basis that the statutory obligation to adopt a strategy also includes an implied obligation on the Executive Committee "to secure preparation of a strategy which it can then adopt" or, at the very least, to take some active steps towards the adoption of a strategy. The respondent's case on this aspect of the applicant's challenge is essentially that the preparation of the strategy is a matter for the relevant minister at departmental level and nothing to do with the Executive, whose only responsibility is to "adopt" a strategy at the end of a process of formulation with which it is to have little, if any, involvement. A large part of the argument on this aspect of the case focused upon whether or not the Executive Committee itself has any power (or vires) to do anything other than approve or not approve what was placed before it.

[28] The applicant relies heavily on what was said by Maguire J in paragraph [18](iii) of the earlier challenge:

> "It is up to the Executive Committee to take whatever steps it needs to take to ensure that it complies with the obligation which Parliament has imposed on it. It cannot escape its obligation seeking to blame others. The Executive Committee remains the key body which has been at the centre of the delivery of government in Northern Ireland and it cannot simply avoid doing what the law requires."

[29] The reference to the Executive Committee taking "whatever steps it needs to take to ensure that it complies with the obligation" is obviously of assistance to the applicant. However, it does not appear that this was a conclusion reached specifically on the question of the Executive Committee's legal powers, much less a conclusion on this issue after full argument.

[30] The respondent relies on a range of dicta in a number of authorities which discuss the general feature of the constitutional regime established by the NIA to the effect that it is ministers and departments who exercise executive power and that the Executive Committee does not generally do so: see, in particular, Morgan J's observations at para [30] of his decision in *Re Solinas' Application* [2009] NIQB 43; and

Sir Paul Girvan's comments at para [57] of his decision in *Re Hughes' Application* [2020] NI 257.

[31] As a matter of general principle, the observations referred to in the authorities above are plainly correct. In respect of transferred matters, executive power in Northern Ireland is exercised on behalf of Her Majesty not by the Executive Committee (notwithstanding its name) but, rather, by ministers and departments: see section 23(2) of the NIA. The power of the Executive Committee to impact the exercise of executive functions arises primarily from section 20(3) and (4) of the NIA, in conjunction with section 28A(5) and (10). Section 20, in conjunction with the Ministerial Code, identifies certain matters which it is the function of the Executive Committee to consider and agree upon and which are accordingly required to be referred to it for such consideration. In respect of those matters, a Minister will be deprived of his or her ordinary executive powers and ministerial authority if they contravene the requirement to refer the matter to the Executive. Thus, the Executive only has a relevant function in certain areas and, where it does so, its role is reactionary and the effect on ordinary ministerial decision making is essentially negative: that is to say, the usual decision-maker is deprived of authority in the absence of Executive agreement. The operation of the relevant provisions in this regard was recently considered in some depth in *Re SEAT and Woods' Application* [2021] NIQB 93.

[32] The situation is more complex than the above summary suggests, however, for at least two reasons. First, the interlocking provisions of the NIA and the Ministerial Code make clear that a minister is required to act in accordance with decisions of the Executive Committee (see paragraph (f) of the Ministerial Pledge of Office; paragraph 1.4 of the Ministerial Code; and section 28(1) of the NIA). Through this mechanism, the Executive Committee is in effect empowered to give directions to a minister (who is, in turn, in charge of their own department). There is an interesting question as to whether it would be lawful or appropriate for the Executive Committee to direct a minister in this way in respect of a matter which did not fall for Executive decision-making under section 20 (although there are means by which the Executive could itself determine that the matter was a matter for it). In the present case, however, I reject any suggestion on part of the respondent that it was or would be powerless to manage the preparation of the draft strategy in any way, since it could do so by making decisions in accordance with which the DfC Minister was obliged to act.

[33] Second, and more directly relevant to the circumstances of this case, there are limited areas where the Executive Committee itself has a statutory function conferred upon it, where it need not simply be reactive to the (proposed) decision or action of a minister or department. Section 28D is an obvious example of this. (Others include the preparation of a draft Ministerial Code or amendments to such a code under section 28A(3); and the preparation of the social inclusion strategies under section 28E). When the Executive Committee exercises powers under section 28D, it is not exercising a general executive power of governance on behalf of Her Majesty but,

rather, exercising its own particular statutory function. In areas where the NIA specifically confers a role on the Executive Committee (other than its general role as a forum for discussing and agreeing upon certain matters under section 20) the observations in previous cases dealing with general government business, which are primarily for ministers and departments in the first instance, can and should be distinguished.

[34] For these reasons, I consider that the Executive Committee could, quite lawfully, take the decision-making in relation to the Irish language strategy into its own hands. This may be an unwieldy and inefficient way of addressing the issue and I certainly see nothing irrational in the approach which was adopted by the Executive, namely that the 'legwork' in relation to the various strategies should be left to the department most directly concerned. However, it is no defence to the applicant's second ground of challenge to say that Executive had no power to become involved.

[35] The more difficult question is whether its inaction in taking preparatory steps towards the adoption of an Irish language strategy was itself a breach of section 28D(1). I have concluded that it is not. That is because the section 28D(1) obligation is one of result. In Maguire J's words (at para [17](ii) of his judgment), it is "an obligation of outcome not means." The Executive could rationally take the view that it was best to permit the Department to devise a strategy which would come to it for approval and adoption at, or towards the end, of the draft strategy's development. I would not consider the Executive's failure to progress that work itself to represent a freestanding breach of section 28D(1).

[36] However, notwithstanding that in my view the section 28D(1) obligation is not one requiring certain preparatory acts to be undertaken on the part of the Executive, it may nonetheless be unlawful, on the basis of standard public law principles, for the Executive to act in a way which thwarts the statutory purpose of the adoption of an Irish language strategy. The repeated failure to permit the matter to be discussed or addressed at a variety of meetings might well appear to reach that threshold – but that is not a failure of the Executive Committee itself. Rather, the setting of the agenda is a function of the First Minister and deputy First Minister; and this case was not specifically directed towards their conduct.

[37] For these reasons, I do not consider the applicant's second ground of challenge to be made out.

Breach of legitimate expectation

[38] I can deal with the third aspect of the applicant's case relatively briefly. It is contended that the failure on the part of the Executive to publish a timetable for development and delivery of the strategy (leading to publication of a draft strategy for consultation within six months of the Executive's formation) is a breach of the applicant's legitimate expectation arising from the terms of the NDNA document.

The applicant referred me to the well-known formulation of the questions which arise in relation to a claim of breach of legitimate expectation in *R (Bibi) v Newman LBC* [2002] 1 WLR 237, at paragraph 19 (*per* Schiemann LJ):

> "In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do."

[39] In my judgment, this aspect of the applicant's case falls at the first hurdle. That is because the relevant public authority in this case – the Executive Committee – has not *committed itself* to anything. The NDNA document is expressed to set out the commitments of each Government (the UK Government and the Irish Government), in respect of which "no agreement is asked or required from the parties…". Insofar as this agreement is an international agreement, it is not (without more) enforceable as a matter of domestic law. Even assuming the relevant political parties, representatives of which make up those ministers holding posts within the Executive, agreed that the new Executive would publish a comprehensive timetable for the development and delivery of an Irish language strategy (amongst others) within three months and publish a draft strategy within six months as in the NDNA deal (see paras [11] and [12] above), that political agreement cannot, in my view, properly be said to represent a commitment on the part of the (then unformed) Executive by which it bound itself. That being so, the applicant's case based on legitimate expectation must fail.

[40] I should also add that – albeit the applicant contended it sought to enforce a *procedural* legitimate expectation which it enjoyed (since the purported commitments on which it relied related to *timings* and did not fetter the Executive's discretion over the content of the strategy) – I do not consider that to be the correct analysis. In order to be published in line with the NDNA timescales, the comprehensive timetable and, much more obviously, the content of the draft strategy would have to be *agreed* by the Executive (or, at least, by a sufficient number of the Executive to allow the relevant decision to be taken in accordance with the Executive's voting procedures). To comply with the NDNA agreement, the Executive would have to agree and produce something of substance. Albeit the draft strategy could have been subject to amendment in a more detailed process of consultation and refinement, to my mind it is plainly a substantive legitimate expectation which the applicant was seeking to enforce.

Contravention of the rule of law

[41] The applicant's final ground of challenge was that the Executive was acting in "contravention of the rule of law." This aspect of the challenge was founded upon

the fact that the High Court had previously, through the declaration granted by Maguire J in March 2017, declared that the Executive Committee had failed, in breach of its duty under section 28D of the NIA, to adopt an Irish language strategy. Set against that context, the applicant contends that the Executive's further failure to take appropriate steps to advance the policy "constitutes further illegality, and illegality of a much more serious nature, because it represents a disregard for a judgment of the High Court in contravention of the fundamental constitutional principle of the Rules of Law and the requirement that the executive government is subordinate to law." The applicant relied heavily on the judgment of the Supreme Court in *R (Miller) v Prime Minister* [2020] AC 373 at paras [39]-[40] in relation to the constitutional responsibility of the courts to enforce constitutional legal principles, which ought not to be shirked "merely on the ground that the question raised is political in tone or context." The applicant also relied on para [26] of that judgment which speaks of the subordination of the executive government to law (in that context statute law, reflecting the will of the sovereign Parliament) being the foundation of the rule of law in the United Kingdom.

[42] The wilful breach of a court order by the Executive, or ministers of the Executive, is a matter both of gravity and concern. In the present case, Maguire J did not grant a mandatory order, breach of which may have given rise to questions about punishment for contempt. Nonetheless, as I reiterated in *Re Napier's Application* [2021] NIQB 120 at paras [57]-[58], declaratory orders are made by the High Court in the expectation that public authorities will comply with them. I have little doubt that that would have been Maguire J's hope, and indeed expectation, when he granted the declaration which he did. Notwithstanding that, the later Executive Committee's failure to adopt an Irish language strategy *in response to the previous declaration* does not, in my view, give rise to a further ground of illegality (at least in this case). The source of the legal obligation upon the Executive remains the underlying statutory duty imposed by the NIA, reflecting the will of Parliament. One might say that the Executive's further failure to adopt an Irish language strategy, in light of the High Court's previous declaration, is *Wednesbury* unreasonable; but I doubt that that really adds anything material to the finding that it is in breach of its statutory duty. Failure to take action in response to the previous declaration may well undermine respect for the rule of law and is certainly liable to undermine public confidence in the administration of justice, as well as public confidence in the Executive itself. Nonetheless, in the absence of the court having granted a mandatory order capable of later enforcement, to point back to the previous declaration does not materially assist the applicant's case as a matter of law.

[43] The applicant's reliance on alleged contravention of the rule of law was advanced as a basis upon which the court should take "strong action" to remedy the breach. However, the courts grant remedies on the basis of legal principle and not to correct or punish some real or perceived affront to their authority or will. Previous non-compliance with a court order is plainly a relevant consideration but I do not consider that this dictates any particular result in the present context. I propose to address the question of remedy, to which I now turn, on the basis of the standard

principles usually applicable in this area, some of which were discussed in detail in the *Napier* judgment referred to above.

Relief and remedies

[44] The applicant sought an order of mandamus compelling the Executive Committee to immediately publish a comprehensive timetable for the development and delivery of the Irish language strategy "with a view to publication of a draft strategy" at some point shortly afterwards; and the adoption of a substantive strategy "as a matter of urgency" but in any event within a further period of around three months (or such other date as the court considered appropriate). DfC's position was that these timescales were simply not realistic, given the amount of work which remained to be done to develop, consult upon and publish the strategy.

[45] As matters now stand, the issue of the appropriate remedy has been simplified to some degree because of supervening events between the hearing of this case and the giving of judgment. There is presently no functioning Executive Committee in place, further to the collapse of the Executive with the resignation of the First Minister in February 2022 and the failure to re-form a functioning Executive since that time. The making of a mandatory order against the Executive Committee does not therefore arise. Nonetheless, since I heard argument on the issue, and it was the subject of some further written representations provided by the parties after the hearing, I offer the following views as to the correct approach.

[46] As explained in *Napier*, the courts will be slow to grant a mandatory order in judicial review proceedings in certain circumstances. One of those is where the making of the order would be such as to require political agreement on a matter of political controversy. For this reason, Mr McAteer submitted that the making of such an order in this case would be for the court to step into the political arena and trample on the separation of powers. I do not accept that objection since, in the present case, the requirement on the part of the Executive to adopt an agreed position is a direct result of the provisions discussed above which have been passed by Parliament. Any order that the Executive Committee adopt a strategy would merely be to replicate what Parliament has already required. Nonetheless, I accept Mr McAteer's broad submission that this is an area where the courts will be particularly cautious. That is partly because of the practical difficulty in requiring parties to agree; partly because the threat of use of the court's punitive powers might give rise to undue pressure on the part of various ministers to capitulate to unreasonable demands, or temptation on the part of others to impose unreasonable demands, as the case may be; and partly because, in the event of non-compliance, enforcement by way of the imposition of sanctions may be difficult.

[47] The respondent submits that enforcement would be difficult because the Executive Committee itself is not a body corporate and could not therefore be sanctioned as a body. The court would have to seek to apportion blame for non-compliance with its order that a strategy be agreed (a matter which might well

draw the court into the forbidden territory of political judgment). These are powerful objections, although they may be superable in certain cases. For instance, the order could be directed in substance and/or form to each member of the Executive and, in the case of non-compliance, only those shown to be thwarting the order might be sanctioned, provided this could be clearly determined. That such a course would be open is suggested by the decision of the Court of Appeal in *Re Cook (No 2)* [1986] NI 283, in which the Court discussed the possibility of committal proceedings being taken against the defaulting councillors where a district council was in breach of an order of the court to exercise its functions. *M v Home Office* [1994] 1 AC 377 also suggests that ministers can be held in contempt in both their personal and official capacities. In appropriate cases, the courts may be required to use their coercive powers where ministers simply fail to comply with their legal obligations. However, even if the Executive were still in place, this is not a case where I would have been prepared to accede to the applicant's request to grant an order of mandamus. I accept the respondent's submission that it would be premature to grant such an order at this stage, when the Department is now in the process of taking forward work on the draft strategy, which has not yet come before the Executive (albeit it is clear that part of the reason for the delay is the previous failure of the matter to make it onto the Executive agenda).

[48] The applicant did not seek a further declaration in its Order 53 statement; although in oral submissions, Ms Quinlivan accepted that a further declaration may be of assistance as a fall-back if the primary remedy sought by her client was not to be granted. In my view, a further declaration, specific to the Executive Committee which was in place when these proceedings were issued, is appropriate. That is so in light of the difficulties in granting any more intrusive form of relief either generally or at this particular time; and the fact that the defaulting Executive Committee is a committee of a different Assembly to that in respect of which the previous declaration was addressed. I will therefore make a declaration in the following terms:

> "The failure of the Executive Committee of the Northern Ireland Assembly to adopt a strategy setting out how it proposes to enhance and protect the development of the Irish language was, at the time of the commencement of these proceedings (on 27 May 2021), unlawful and in breach of section 28D(1) of the Northern Ireland Act 1998."

Conclusion

[49] For the reasons given above, Conradh na Gaeilge's application for judicial review is allowed on the basis that the Executive Committee was, at the time the proceedings were brought, in breach of its statutory duty under section 28D(1) of the Northern Ireland Act 1998. The only relief I propose to grant is the declaration set out at para [48] above.

[50] The court takes note of the fact that the Identity and Language (Northern Ireland) Bill is currently progressing through Parliament. Whether and in what terms the Bill is passed by Parliament remain to be seen. At present, however, it seems that the obligation on the Executive Committee to adopt an Irish language strategy under section 28D of the NIA is to remain unaffected. In the event that a new Executive is formed and is subject to that duty, the time available to it to adopt a strategy before it is in breach of its statutory obligation will have to be assessed against the then prevailing circumstances. Nonetheless, the fact that the duty has been unfulfilled for such a lengthy period, resulting in two High Court declarations to that effect, will be a powerful consideration tending towards the need for expedition.

[51] I will hear the parties on the issue of costs; but provisionally take the view that costs should follow the event in the usual way.