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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JR264
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF
THE DEPARTMENT OF EDUCATION

Re JR264's Application
(School Development Proposal – Decision-making by Permanent Secretary)

Dessie Hutton KC and Steven McQuitty (instructed by Phoenix Law) for the applicant
Tony McGleenan KC and Philip McAteer (instructed by the Departmental Solicitor's Office) for the proposed respondent
Roisin McCartan (instructed by the Education Authority Solicitors) for the Education Authority and Board of Governors of Craigavon Senior High School, as interested parties

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SCOFFIELD J

Introduction

[1] This application is brought by a 14-year-old boy, known in these proceedings as 'JR264', by his father and next friend. He seeks to challenge a decision made on 19 December 2022 by the Department of Education ("the Department"), acting through one of its senior officials, its Permanent Secretary Dr Mark Browne. The substance of this decision was to approve a development proposal, known as DP 574, to close the Lurgan campus of Craigavon Senior High School ("CSHS"). The applicant's challenge is to the legality of this decision being taken by the Permanent Secretary of the Department, rather than by a Minister and in the absence of Ministerial oversight ("the vires challenge"); and, in any event, to the decision made by the Permanent Secretary even if, in principle, it was appropriate for him to make the decision ("the substantive challenge"). The applicant characterises this as two separate decisions: first, the decision of the Permanent Secretary that he was

authorised to take the decision on the development proposal under the Northern Ireland (Executive Formation etc) Act 2022 ("the 2022 Act"); and, second, the further decision to approve the development proposal.

[2] The applicant applied for anonymity on the basis of his status as a child and because, in the supporting affidavit evidence filed on his behalf, specific and sensitive information was disclosed about his health and education. There was no opposition to this application and anonymity has been granted to the applicant under article 170(7) of the Children (Northern Ireland) Order 1995 in order to protect his rights under article 8 ECHR for similar reasons to those set out in *Re XY's Application* [2015] NIQB 75, at paras [8]-[12]. Nothing should be published which is intended, or likely, to identify the applicant (including details relating to his next friend in these proceedings) or an address as being that of the applicant; save that it is permissible to identify the schools to which the development proposal relates and the fact that the applicant resides in Lurgan.

[3] Mr Hutton KC appeared with Mr McQuitty for the applicant; Mr McGleenan KC appeared with Mr McAteer for the respondent; and Ms McCartan appeared for the notice parties (the Education Authority ("EA") and the Board of Governors of CSHS). I am grateful to all counsel for their helpful written and oral submissions.

Relevant provisions of the 1986 Order

[4] The legislation governing the departmental function which is at issue in these proceedings is the Education and Libraries (Northern Ireland) Order 1986 ("the 1986 Order"). Part III of that Order deals generally with the provision of education. Article 14 is the key provision for present purposes. It is within a section of Part III dealing with the establishment, recognition and discontinuance of, and effecting changes to, grant aided schools. Article 14 deals with proposals as to primary and secondary education and Article 14(1) contains the obligation to submit various types of proposal to the Department for its consideration:

> "Where the Authority proposes—
>
> (a) to establish a new controlled school, other than a controlled integrated school;
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> (b) to have an existing school recognised as a controlled school, other than a controlled integrated school;
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> (c) to discontinue a controlled school;
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> (d) to make a significant change in the character or size of a controlled school;

> (e) to make any other change in a controlled school which would have a significant effect on another grant-aided school,
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> the Authority shall submit the proposal to the Department."

[5] Article 14(3) provides the Department with a power to direct an authority to submit a proposal to it, including a proposal that a significant change should be made in the character or size of a controlled school, in which case it is the duty of the authority to submit such a proposal. Article 14(4) provides that a proposal "shall be in such form and contain such particulars as may be required by the Department." The form of development proposals and the particulars which they must contain have been set out by the Department in a circular dealing with these matters, Development Proposal Circular 2017/09 ("the DP Circular").

[6] By virtue of Article 14(5A), before a proposal concerning an existing school is submitted to the Department by the EA, the EA must consult the Board of Governors of the school concerned, the teachers employed at that school, and the parents of registered pupils at that school. By virtue of Article 14(5B), the EA must also consult the trustees and managers of any other school which would, in the opinion of the EA, be affected by the proposal. It is these provisions which require the extensive pre-publication consultation process described below.

[7] Once the proposal is submitted to the Department, it must be provided to each school which would be affected by it and advertised in local newspapers. The advertisement must advise that objections to the proposal can be made to the Department within two months of the date on which the advertisement first appears: see Article 14(6)(b). The Department's function is then set out in Article 14(7), as follows:

> "Subject to Article 15(3), the Department, after considering any objections to a proposal made to it within the time specified in the notice under paragraph (6)(b), may, after making such modification, if any, in the proposal as, after consultation with the Authority… it considers necessary or expedient, approve the proposal and inform the Authority… accordingly."

[8] Article 14(9) provides that, "A proposal under paragraph (1), (2) or (3) shall not be implemented until it has been approved by the Department."

The applicant's circumstances

[9] The applicant resides with his father in Lurgan. He currently attends Lurgan Junior High School (LJHS) but was intending, in September of this year, to transfer to CSHS at its Lurgan campus. Presently, CSHS has two campuses: one in Lurgan and a larger one in Portadown. The development proposal at the heart of these proceedings is that the Lurgan campus will be closed. This will have the effect that the applicant will have to travel to the Portadown campus for his continued education if he still wishes to attend CSHS.

[10] There are specific aspects of the applicant's educational needs and circumstances which render it important, in his and his father's view, for him to continue to attend school in Lurgan, rather than to have to travel to Portadown. It is unnecessary for these to be addressed in any detail in this judgment, since the application is pursued on the basis of alleged legal errors which are unrelated to the applicant's own specific circumstances. It suffices for me to say that the applicant's own circumstances, such as they have been described in the evidence, have led me to conclude that he clearly has sufficient standing to bring this application.

[11] The applicant's father has averred that, like many families in Lurgan, he has been very concerned about the prospect of the CSHS Lurgan campus being closed. He says there has been widespread opposition to this proposal from the local community for many years. Indeed, as appears further below, it seems that the majority of parents of children who live in Lurgan are in favour of retaining non-selective Key Stage 4 provision in the town. This is felt keenly by parents whose children attend LJHS in the town, many of whom would naturally have progressed to the Lurgan campus of CSHS. As also discussed further below, the Board of Governors of LJHS are opposed to the development proposal. An affidavit on their behalf in support of this application has been sworn by the Chairperson of that Board, Mr Enderby. Their favoured outcome would be the expansion of LJHS to an 11-16 model, so that those of its Key Stage 4 pupils not transferring to a grammar school (typically, Lurgan College) would continue on at LJHS for Years 11 and 12. Issues of contention in the debate have included whether that latter option has been fully and fairly considered and explored; and the extent to which the respective options might support or undermine "the Dickson Plan", which is the educational model in place in the Craigavon area.

The Case for Change

[12] The development proposal was brought forward by the EA and was originally in the following terms:

> "Craigavon Senior High School will operate on a single site, 26-34 Lurgan Road, Portadown, with effect from 1 September 2022, or as soon as possible thereafter."

[13] The proposal was obviously supported by the EA, which has both responsibility for area planning in terms of educational provision and is also the managing authority for many of the schools affected, which are in the controlled sector, including both CSHS and LJHS. The Board of Governors of CSHS supports the proposal and the Principal of that school – the school most directly affected by the proposal – has filed an affidavit in support of the respondent's position and in opposition to the application for judicial review.

[14] The life of the development proposal commenced in January 2019, with a period of pre-publication consultation. That process was the subject of a previous judicial review challenge, which was heard by Huddleston J: see *Re MA2's Application* [2020] NIQB 34. The EA successfully defended the application, which was dismissed by the judge in March 2020. Nonetheless, the EA decided that, in light of the delay occasioned by the legal proceedings, it would be prudent to re-run that phase of the process. That was further delayed to a degree by the Covid-19 pandemic. However, the pre-publication consultation was re-run from December 2020 to February 2021.

[15] The pre-publication consultation phase involves consultation with a range of interested or potentially affected parties. In this case it involved consultation with staff, governors, parents and guardians of both campuses of CSHS; and of the four junior high schools in the area (Lurgan JHS; Clounagh JHS; Tandragee JHS; and Killicomaine JHS). The student councils of CSHS and the relevant junior high schools were consulted. Staff and parents of both Lurgan College and Portadown College were also consulted. Consultation letters were sent to some 98 other local schools. In addition, EA officers engaged with local elected representatives, parents' organisations and the local council (Armagh, Banbridge and Craigavon Borough Council – "the Council"). These consultation responses were then considered by the EA before it determined how best to proceed in its published proposal which was to be submitted to the Department.

[16] The proposal, when published, was accompanied by a 'Case for Change' which set out the EA's comments on the proposal and summarised the various issues raised in the pre-consultation phase, along with the EA's observations. The document is very detailed but helpfully sets out a high-level summary at the start. The summary states that the EA received support for the proposal but that there were some emerging themes by way of matters which it was asked to consider in taking the proposal forward, namely provision of a dedicated and free transport service from Lurgan to Portadown; provision of additional modular accommodation to meet the needs of CSHS; a long term strategic plan for CSHS by means of a new-build school "in a neutral/central location"; and support for CSHS in improving educational standards for all pupils and ensuring inclusion of both Lurgan and Portadown communities. It is clear that the EA felt that it had taken these comments on board and had given assurances which had, or which would in due course, meet or mitigate many of the concerns raised. As these proceedings show, this confidence is not shared by all in the local community.

[17] The summary of the Case for Change was candid about opposition to the proposal and the option favoured by the majority of consultation responses:

> "The majority of the responses received indicated support for an 11-16 Lurgan Junior HS as detailed in the consultation report. While there are detailed statements in support of this option it would still be the opinion of the Education Authority that, in considering this option, this could be seen as 'through stealth' the Education Authority is undermining the Dickson Plan as this would provide an inequality within the Junior High Schools and the pathways for pupils within the other Junior High Schools could be detrimentally affected by this option."

[18] The issue of the effect of various proposals on the Dickson Plan model had been a matter of debate in the pre-consultation phase. The summary of the Case for Change put the matter this way:

> "From the responses there was an argument that this option [extending LJHS to a 11-16 school] was still in keeping with the Dickson Plan, as pupils being accepted to the grammar school would transfer at 14, with those not going to grammar remaining at Lurgan Junior HS. Conversely to this, some respondents indicated that for pupils to transfer at 14 that this was detrimental to pupils' education, as transfer at 14 resulted in pupils having to settle into a new school and teachers. However, within the option as Lurgan Junior HS is an 11-16 school, this would not apply to all pupils, only those not transferring at 14 to grammar education.
>
> An option raised by a small number of respondents was for two all ability schools, one in Lurgan and one in Portadown. This option would move away from the Dickson Plan.
>
> Throughout all of the responses received, both for and against, there was support for the Dickson Plan. Transport was also a common issue for both those for and against. Those not in favour of the proposal raised concerns about the impact of travel times on homework, after school activities and the impact on local sporting/social activities. In all of the pre-publication consultation, it was acknowledged by the Education Authority that the current transport network would have to be reviewed, extended

> and routes provided. Entitlement to transport is not a cost to the parents, rather to the Education Authority."

[19] Section 1.4 of the Case for Change outlined the EA's rationale for change. Key drivers were a number of issues at the Lurgan campus of CSHS of which the EA had become aware over the past number of years relating to the curricular provision on the site; the condition of the site and the impact its environment was having on staff and pupils; the health and safety of staff and pupils; the security of the site; and the financial impact of operating across two sites in the way which CSHS has done to date.

[20] An Education and Training Inspectorate (ETI) inspection undertaken in September 2010 had identified that:

> "The school being split over two sites, and catering for KS4 pupils only, poses a structural constraint to curriculum provision and limits collaboration. Furthermore, there is duplication in the provision over both campuses which needs to be rationalised in order to provide all pupils with a wider range of options."

[21] In summary, the rationale for change was expressed to be to address "the curriculum provision on the site, the condition of the premises and the impact the environment has on staff and pupils; and the financial impact of operating across two sites." More detail about each of these issues is set out in later portions of the Case for Change document, particularly section 4 entitled 'Rationale for Proposal.'

[22] As to curriculum provision at the Lurgan campus, the EA was concerned that, although CSHS was compliant with the statutory requirements of the Entitlement Framework across its *two* sites taken together, there was limited choice for those pupils attending the Lurgan campus. Exam results had improved in recent years with new leadership at the school. One reason for this was that the school had introduced 15 additional courses to its curriculum offer. However, the majority of these additional courses were only available in the Portadown campus, due to limited facilities on the Lurgan campus. In addition, students wishing to pursue study in Drama or Music were unable to avail of these subjects at Key Stage 4 on the Lurgan campus.

[23] There were noted to be "significant accommodation challenges facing the Lurgan Campus" of CSHS. It has no access to music facilities, drama facilities, out-door recreation space or onsite outdoor sports facilities. Pupils are currently transported to Portadown to participate in after-school sport. The Lurgan campus has limited access to certain facilities through a shared arrangement with Southern Regional College (SRC), namely the sports hall, dining hall and assembly hall. It also has access to the SRC technology suite and classrooms for ICT and Home Economics. However, the sharing of facilities with the SRC brings its own complications. Other teaching arrangements are sub-optimal because of limited accommodation. There are no facilities for outdoor physical education (PE) and the facilities for indoor PE are

inadequate. Outdoor sports provision is accessed on the LJHS site; but this involves students walking across town or through housing estates in their PE kit for some 20 minutes on average to avail of facilities. Car parking is also inadequate as the car park is also used as the pupils' outdoor recreational area, which had additionally given rise to safety concerns. All of the above poses timetabling challenges because of the campus's reliance on both SRC and LJHS for use of certain facilities. There is no provision for outdoor activities at break, lunch or after school at the site. There are also limited after-school activities and therefore students wishing to avail of these leave class 15 minutes early to take a bus to the Portadown campus.

[24] A January 2018 ETI inspection found that the arrangements for safeguarding pupils at the Lurgan campus were unsatisfactory, with a wide range of health and safety issues in relation to the access and accommodation on both sites which required to be addressed urgently. The EA considered that these had been addressed and mitigated by it; but safeguarding concerns had not been eradicated completely.

[25] As to the school's financial position, it is currently operating at a financial deficit. At March 2020, this stood at an accumulated budget deficit of £2.15m. Of more concern was the fact that the deficit was projected to increase year-on-year, with financial projections suggesting in-year deficits of approximately £500,000 per annum. The EA assessed that split-site operation with duplication of provision was impacting CSHS's financial position and that the deficit would continue to grow each year as the school was unable to make savings whilst operating on a split site.

[26] In the EA's assessment, CSHS operating on a single site would have a wide range of benefits, allowing it to provide a broader choice of courses and extra-curricular activities; improving pupils' opportunities and experiences; and with improved accommodation and financial stability.

[27] The Case for Change proceeded on the basis that doing nothing was not an option given the issues arising with the Lurgan campus of CSHS. It did not assess a 'do nothing' option. Rather, in section 5, it considered the various sites available and – on the basis of site requirements, early engagement with stakeholders and in response to suggestions in the public domain – shortlisted four options for consideration, as follows:

(1) Relocation of Lurgan campus of CSHS onto the LJHS site, with a new-build school for 250 post-primary pupils ('Option 1');

(2) CSHS operating on a single site at its current Portadown campus ('Option 2');

(3) The Lurgan campus of CSHS being extended following relocation of the SRC Lurgan campus ('Option 3'); and

(4) LJHS changing to operate as an 11-16 school, with the option for pupils to transfer out to grammar provision at age 14 ('Option 4').

[28] Option 2 is, of course, what was presented as the development proposal. Option 4 is what appears to be the Lurgan community's preferred option. In submissions, Mr Hutton presented the realistic options as a 'straight fight' between these two alternatives.

[29] The Case for Change goes on to consider each option briefly, identifying a range of advantages and disadvantages of each. The applicant's submissions were especially critical of elements of the analysis and reasoning in this part of the EA document, suggesting in particular that the disadvantages of Option 2 had been downplayed and those of Option 4 had been overblown.

[30] Option 4 was described as being the expansion of LJHS from a 750-pupil, 11-14 controlled non-selective post-primary school to a 950-pupil, 11-16 controlled non-selective post-primary school with the option for pupils to transfer out to Key Stage 4 grammar school provision at age 14. Two advantages of this option were specified, namely "the retention of Key Stage 4 non-selective post-primary provision within Lurgan" and "improved accommodation to facilitate additional pupil numbers." Then:

> "The disadvantages of Option 4 are:
>
> - The closure of Lurgan Junior HS to establish a new 11-16 school.
> - Detrimental impact on curricular provision and staffing at Craigavon SHS, as the school would experience a reduction in 174 students.
> - Impact on the sustainability of Craigavon SHS as a 14-16 senior high school operating with approximately 460 students.
> - Staffing, and time to plan and implement curriculum provision to meet the needs of students in GCSE course provision and delivery – Key Stage 4, as Lurgan Junior HS is currently a Key Stage 3 school.
> - New build accommodation to include general classrooms, specialist and ancillary accommodation and site works would cost approximately £11m with a timescale of a minimum 5-7 years.
> - The need to have in place interim arrangements for the school until new accommodation is in place.
> - The disparity between Lurgan Junior HS and the three other Junior HSs.
> - Potential that other Junior HSs would seek to be 11-16 schools and Senior HSs would seek to be 11-19 schools thereby moving away from the Dickson Plan."

[31] The Case for Change also sets out a summary of responses to the pre-publication consultation. It is unnecessary to set out the detail of that here. It disclosed, however, that the vast majority of individual parental responses (over 75%) were opposed to the proposal. There was also widespread engagement by way of submission of a signed statement from 'Lurgan Schools for Lurgan Children', of which 807 were submitted opposing the proposal. In contrast, the majority of teaching staff who responded (again, over 75%) agreed with the proposal; as did the vast majority of Board of Governors or individual school governors who responded.

The statutory consultation

[32] The two-month statutory objection period (see para [7] above) commenced on 22 April 2021 and ended on 22 June 2021. During this period, the Department received a total of 35 responses: 20 objecting to the proposal and 15 responses in support. Objections were received from local elected representatives, from Lurgan Rugby Football and Cricket Club, from parents of children in the Dickson Plan system, from the Chair of the Parents' Forum, from the Board of Governors of LJHS, from the Council and others.

[33] The Board of Governors of LJHS proposed an alternative solution, equivalent to Option 4 discussed above, which they contended was the only viable and sustainable solution. A detailed 'scoping document' was prepared and submitted in this regard. This approach was also supported by the Council. The Council commissioned a report ("the Purdy and Harris Report") by Dr Noel Purdy and Dr Jonathan Harris of the Centre for Research in Educational Underachievement at Stranmillis University College, which was submitted to the Department. It also advocated Option 4 and argued that the loss in Lurgan of one of the three Dickson Plan schools would undermine the Dickson Plan. It considered that the proposal would lead to a falling enrolment at LJHS and the leakage of pupils to comprehensive post-primary schools in the wider area. Purdy and Harris concluded that the development proposal should be rejected on account of very strong community objection but also in terms of its failure to meet key indicators of the sustainability criteria in the Department's Sustainable Schools Policy, notably those of Accessibility and Strong Links with the Community.

[34] The EA provided a response to the Purdy and Harris Report, which Mr Hutton described in submissions as a surprisingly "combative" document. The EA took issue with the suggestion that the report was truly independent, since it was commissioned and approved by the Council's Area Planning (Education) Working Group which was opposed to the development proposal. The EA considered that the report showed a clear bias in favour of the Council's preferred option, and it challenged the authors' analysis and conclusions in a number of respects. (As I observed during the course of the hearing, notwithstanding the clear experience and expertise of its authors, the Purdy and Harris Report does not in these proceedings partake of the nature of an independent expert's report with an appropriately worded expert's declaration. It is

impossible to discount that it has been prepared, even in part, as an advocacy document with expert input, rather than as a wholly impartial expression of the authors' unvarnished personal views on its subject matter. Indeed, in its introductory section it is described as a "paper" which "represents an objection on behalf of" the Council. No information is available to me in relation to the letter of instruction provided to Dr Purdy and Dr Harris or the terms of their instruction or appointment. Their report is, however, a well-reasoned argument against Option 2 and in favour of Option 4.)

[35] Other responses at this stage of the consultation supported the proposal, including comments from the Controlled Schools Support Council (CSSC), the former Chair of the Dickson Plan Concerned Parents Steering Group, the Headmaster and Secretary to the Board of Governors of Lurgan College, some other parents of children in the Dickson Plan system, the Board of Governors and Principal of CSHS, and others.

The submission to the Permanent Secretary

[36] A submission on the development proposal had previously been submitted to the then Minister, Michelle McIlveen MLA, by her officials on 7 December 2021. She had asked for some of the data contained in the analysis to be updated. The submission seeking a determination on the proposal was then re-submitted on 21 October 2022; but the Minister did not make a decision on it before leaving office on 28 October 2022.

[37] A further submission was then submitted to the Permanent Secretary on 16 December from the Department's Area Planning Team (South-West Region) seeking a decision on DP 574 ("the submission"). The submission was lengthy and had a wide range of additional materials included as appendices. It summarised the EA's Case for Change document, which was also included in full as an appendix. Inter alia, the appendices to the submission included summaries of responses obtained during the statutory consultation; a full copy of the Purdy and Harris Report and the EA response to it; and the minutes of various Ministerial meetings with interested parties. The submission recommended that the development proposal be approved (with a modification to the implementation date to refer to the proposal taking effect from 1 September 2023 instead of on a date in 2022).

[38] The submission summarised the development proposal process to date. It went on to assess the existing arrangements and the proposal against the six sustainability criteria set out in the Department's Sustainable Schools Policy (SSP). A good deal of this discussion focused on the restrictions on the curricular offer at the Lurgan campus of CSHS, expressing the view that "learners based at that site may not be able to access their full curricular entitlement in which case the school may not be meeting the statutory requirements in full"; and on the significant accommodation challenges facing the Lurgan campus. The school's financial position was again discussed. The issues of accessibility and links with the community – to which I return below – were discussed only briefly in the body of the submission.

[39] Unsurprisingly, the submission relied heavily on the content of the EA's earlier Case for Change document; but it was not limited to discussion of that document. It also addressed other issues raised in the pre-publication consultation and during the statutory consultation period. In submissions, Mr McGleenan KC took me through the submission in some detail since it provided the information available to the Permanent Secretary and contained the rationale underpinning his decision.

[40] The Permanent Secretary was also provided with advice, in Appendix M to the submission, on the question of whether it was appropriate for him to exercise the departmental function of approving (or not approving) the development proposal. The import of the advice was that it was in the public interest for a decision to be made and that the development proposal should be approved.

The Permanent Secretary's decision(s)

[41] The Permanent Secretary, Dr Browne, accepted that advice and approved the proposal accordingly. That is why these proceedings have been brought. In recording his decision, a number of comments are set out in the cover note to the submission. In these comments, the Permanent Secretary has summarised the decision and his reasoning. It confirms that he had read all of the materials provided to him by officials and that he had carefully considered the proposal. As to whether it was proper for him to make the decision, the following text is relevant:

> "In the absence of a Minister for the Department, the Northern Ireland (Executive Formation etc) Act 2022 enables me to make a decision with regard to this development proposal and I am satisfied that it is in the public interest to do so.
>
> This proposal was published on 22 April 2021, the statutory two-month objection period ended on 22 June 2021 and a submission was originally submitted for consideration to the Minister on 7 December 2021. I am aware that the former Minister asked for the submission to be refreshed with the most up to date data on 4 October 2022 and this was re-submitted on 21 October 2022 for a decision. However, no decision was taken before the Minister left office. It is entirely appropriate to decide upon this proposal now as considerable time has elapsed from publication and it is important for the Department to bring certainty to everyone connected to Craigavon SHS and to ensure that the necessary changes are made in the best educational interests of the children and young people attending Craigavon SHS."

[42] The Permanent Secretary's comments then note that the proposal has elicited many differing views as to how the provision of education should be delivered in the Craigavon area. He expressed himself satisfied that the submission before him had comprehensively analysed all views and evidence in support of and in objection to the proposal. The core of his reasoning on the substantive decision is set out in the following passages from his recorded comments:

> "Having carefully considered all of the information, evidence, views for and against, I agree with the points made in the conclusion (paras 246-268). Having visited Craigavon SHS in Portadown and Lurgan, it is clear that the Lurgan site is not fit for purpose, there are limitations on the curricular offer, there are safeguarding risks, there is no adequate outside space for recreation and managing the site is a continuing financial drain on the school's budget which is already under significant pressure.
>
> There is consensus between all interested parties who have commented on this proposal that the Lurgan site is not fit for purpose.
>
> Since this proposal was published an increasing number of children and young people are electing to move to the Portadown campus to access the curricular offer and better facilities available there. During the 2021/22 academic year, 23 students (25% of the Lurgan cohort) moved from the Lurgan to the Portadown Campus.
>
> There is an initial estimate of £86k for additional transport costs which would be offset by a reduction in the duplication of provision and the costs associated in managing the Lurgan site which is adding a further £198k per annum to Craigavon SHS expenditure.
>
> I am confident that approving DP 574 for Craigavon SHS to operate on one site will address the shortfalls in educational provision at the Lurgan Campus by ensuring pupils have access to the full curriculum, will provide a safe educational setting for all pupils, enhance the quality of educational provision and assist the school in moving towards a more stable financial situation, thus helping to improve the sustainability of Craigavon SHS."

Relevant provisions relating to the vires issue

[43] Section 22(2) of the Northern Ireland Act 1998 provides as follows:

> "Functions conferred on a Northern Ireland department by an enactment passed or made before the appointed day shall, except as provided by an Act of the Assembly or other subsequent enactment, continue to be exercisable by that department."

[44] Article 4 of the Departments (Northern Ireland) Order 1999 ("the Departments Order") is relevant. It provides at article 4(3) that:

> "Subject to the provisions of this Order, any functions of a department may be exercised by—
>
> (a) the Minister; or
>
> (b) a senior officer of the department."

[45] Pursuant to article 2(3), references to a "senior officer of a department" are references to a person who is employed in that department and is either a member of the Northern Ireland Senior Civil Service or a member of the Northern Ireland Civil Service ("NICS") designated by the department as a senior officer for the purposes of the Departments Order.

[46] One of the provisions of the Departments Order to which article 4(3) is subject, however, is article 4(1), which provides that:

> "The functions of a department shall at all times be exercised subject to the direction and control of the Minister."

[47] Article 4(2) gives some further detail about this direction and control, in non-exhaustive terms, including that the Minister may distribute the business of a department among its officers of the department in such manner as he or she thinks fit.

[48] The basic position in respect of a departmental function (such as the approval of a development proposal by the Department of Education under Article 14(7) of the 1986 Order) is that this may be exercised by the Minister *or* a senior officer of the department such as its Permanent Secretary, *subject to* the direction and control of a Minister. The extent to which article 4(1) constrained decision-making by senior civil servants in the absence of Ministerial oversight *before* the Parliamentary intervention contained in the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 (or now the 2022 Act) was not finally determined in the *Buick* litigation which gave rise to the 2018 Act. The ratio of that case (see *Re Buick's Application* [2018] NICA 26, at paras [52]-[54]) relates to decisions which would have required referral to the Executive for discussion and agreement. The majority of the Court of Appeal also

considered that civil servants were precluded from taking decisions which would ordinarily have gone before a Minister for approval (see paras [51] and [56]). This potentially left some scope for civil servants to take decisions on limited issues which would not have required Ministerial input. In the present case, that debate is irrelevant since it is common case that the decision under challenge in this case *would* have been made by the Minister had a Minister been in post; and, more importantly, the legal and political landscape has been seismically affected by the provisions of the 2018 and 2022 Acts in this regard.

[49] The current starting point for consideration of this issue is the terms of the relevant provisions of the 2022 Act. Section 3(1) is the key provision for present purposes. It is in the following terms:

> "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 mentioned in subsection (2) if the officer is satisfied that it is in the public interest to exercise the function during that period."

[50] At the time material to these proceedings, subsection (2) defined the relevant period as being the period beginning when the 2022 Act was passed and ending either when an Executive is next formed or with the expiry of the period of 6 months beginning with the day on which the Act is passed, whichever happens first. The Act was passed on 6 December 2022. On the date of the respondent's impugned decision in this case, therefore, the arrangements set out in section 3(1) were due to expire in some 5½ months at the latest (although the period has now been extended indefinitely by the Northern Ireland (Interim Arrangements) Act 2023, which received Royal Assent last week, simply until an Executive is next formed).

[51] Section 3(3) 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 Assembly is not to be treated as preventing the exercise of that function as mentioned in subsection (1).

[52] Pursuant to section 3(4), the Secretary of State must publish guidance about the exercise of functions by a senior officer of a Northern Ireland department in reliance on section 3, "including guidance as to the principles to be taken into account in deciding whether or not to exercise a function." Before publishing this guidance the Secretary of State was obliged to have regard to any representations made by members of the Northern Ireland Assembly (see section 3(6)). By virtue of section 3(5), senior officers of Northern Ireland departments must have regard to that guidance.

[53] Section 5 of the 2022 Act provides as follows:

> "(1) Sections 3 and 4 have effect despite anything in the Northern Ireland Act 1998, the Departments (Northern Ireland) Order 1999 (S.I. 1999/283 (N.I. 1)) or any other enactment or rule of law that would prevent a senior officer of a Northern Ireland department from exercising departmental functions in the absence of Northern Ireland Ministers.
>
> (2) No inference is to be drawn from sections 3 and 4 or this section as to whether or not a senior officer of a Northern Ireland department would otherwise have been prevented from exercising departmental functions."

The Secretary of State's Guidance

[54] Guidance was duly published by the Secretary of State, as required by section 3(4) of the 2022 Act ("the SSNI Guidance"). It was published in draft alongside the Bill and later formally presented to Parliament on 19 December 2022. Para 7 of the guidance notes that it sets out the principles to which senior officials must have regard when taking decisions on matters which, ordinarily, would have been referred to Ministers to decide or agree. Interestingly, para 8 emphasises the fact that, in carrying out their functions, departments must also take into consideration wider pressures on the Northern Ireland budget, which might be thought to contain a steer towards the implementation of money-saving measures being in the public interest at the current time.

[55] For present purposes, however, the key portions of this guidance are those set out in paras 9-11 under the heading 'Guiding principles for decision-making.' Para 9 is particularly emphasised by the applicant in the submissions on his behalf. It states as follows:

> "Some decisions should not be taken by civil servants without the direction of elected Ministers. NI departments should therefore first consider the public interest of having elected Ministers taking and guiding 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."

[56] I accept the respondent's submission that this paragraph is to be read together as a whole rather than, as the applicant's approach favoured, treating the first two sentences as a stand-alone instruction to consider, first and in isolation, whether the relevant decision falls within a category which should simply not be addressed in the

absence of a Minister. All parties accept that there will be certain decisions which, on analysis, should be left for consideration and determination by elected politicians. The second part of para 9 of the guidance gives examples of what these types of decisions will be, whilst recognising (by the use of the word "normally") that it may be permissible or appropriate in some circumstances even for this type of decision to be taken in the absence of a Minister. The import of para 9 is that senior officials must bear in mind the general public interest in elected representatives taking and guiding decisions of departments of government: that is the essence of democratic government. The strength of that public interest will vary with the type of decision at issue, as the remainder of para 9 of the guidance illustrates; but it must always be factored into the overall assessment of the public interest. Civil servants considering reliance upon the section 3 power to exercise functions (which would ordinarily require Ministerial decision or input) should therefore bear in mind the general public interest in democratic decision-making and reflect carefully on the nature of the decision at issue.

[57] More detailed considerations which should be taken into account where a senior official is considering exercising a departmental function in the absence of a Minister are set out in para 10. It sets out "principles to be taken into account" when considering whether there is a public interest in taking a decision in the absence of a Minister. The guidance is therefore not prescriptive as to outcome. It provides a list of factors to be considered, which may point in favour (or against) a senior official exercising a function without Ministerial oversight. Consistently with the statutory text of section 3(1), para 10 of the SSNI Guidance emphasises that the overriding consideration is the assessment of the public interest in the circumstances. The principles enunciated are as follows:

> "(a) The primary principle that departments must control and manage expenditure within the limits of the appropriations set out in Budget Acts, and as set out in the Secretary of State's statement to Parliament of 24 November.
>
> (b) The principle that Departments should exercise a function where failure to do so might result in:
>
> - failure to comply with a statutory obligation;
>
> - even greater budgetary pressures for the next financial year or significant financial costs to the public purse;
>
> - significant detriment to the provision of a public service or public safety;

- failure to address a civil contingency, or manage a significant risk; or

- a significant loss of an opportunity to realise a significant public advantage for:

  - public finances; or
  - the NI economy; or
  - inward investment; or
  - job creation; or
  - tackling disadvantage; or
  - reducing division; or
  - carbon reduction.

(c) The principle that the policy direction of former Ministers should normally continue to be followed unless it conflicts with principles (a) or (b), or there is a significant change in circumstance or new compelling objective evidence which undermines or which changes the basis on which the original policy direction was based, which lead the senior officer to conclude that it is not in the public interest to do so.

(c) The principle that it is a priority to maintain the delivery of public services as sustainably, effectively, and efficiently as possible."

[58] Finally, para 11 of the guidance sets out a range of further principles which should also be taken into account, as follows:

"(a) the principle that where decisions to be taken materially cut across or impact upon the responsibilities of another NI department, discussions with the relevant department(s) should take place and due regard should be given to the views of the relevant department(s).

(b) the principle that where decisions are deferred, the public interest consequences of a deferral should be kept under review. This recognises that, with the passage of time, there may be the need to take decisions on matters previously deferred.

(c) the principle that where decisions are not taken, NI departments should continue to advance

> preparatory work as far as possible until such time
> as decisions can be taken by Ministers."

[59] These principles may be thought to be of less significance than those set out in paras 9 and 10 of the guidance in terms of whether a senior officer should exercise a departmental function. The first relates to obtaining other departmental views where, had a Minister been in place, a cross-cutting issue would have had to have been referred to the Executive Committee. The second and third relate to what a department should do or consider where a decision has been deferred. Although these highlight the option of a department deferring a decision until a Minister is re-appointed (or at least deferring for the present, to be reconsidered in future) they give little guidance as to when deferral will be appropriate. The primary guidance in relation to those matters is to be found in the principles set out in paras 9 and 10.

Summary of the applicant's grounds

[60] As to the vires issue, the applicant has pleaded a number of grounds of challenge, which might be summarised as follows:

(a) The 2022 Act did not empower the Permanent Secretary to make the decision on the development proposal in this case; and the Permanent Secretary erred in law by considering that it did so. This is because none of the instances set out in the statutory guidance where a senior officer may exercise functions without Ministerial oversight arose in this case.

(b) Additionally, it was not in the public interest for the Permanent Secretary to make the decision on the development proposal in this case. The statutory guidance recognises the public interest in having elected Ministers taking certain decisions, particularly those (such as this, in the applicant's submission) which represent major policy decisions, where there is strong opposition and/or where such decisions would habitually have been taken by a Minister in the past, amongst other features.

(c) The Permanent Secretary misdirected himself as to whether the decision did or did not represent a major change of an existing policy; acted without appropriate information in relation to the costs implications of the decision; misunderstood the implications of not taking the decision; and wrongly took into account a consideration that approving the proposal would be consistent with an earlier Ministerial statement.

(d) The Permanent Secretary failed to have regard, adequately or at all, to the SSNI Guidance.

(e) The Permanent Secretary's decision was infected with actual or apparent bias because, in assessing the public interest factors in support of his making a decision on the development proposal, he impermissibly conflated

considerations relevant to that decision with considerations relating to the substantive decision.

(f) The Permanent Secretary wrongly took into account the fact that, in a previous period of Ministerial absence, the then Permanent Secretary of the Department had made decisions on development proposals which, the applicant submits, was legally irrelevant.

(g) In addition, it is contended that the Permanent Secretary's decision that he was authorised to take the decision under the 2022 Act was irrational and an unlawful breach of the applicant's legitimate expectation that the decision would be taken by an elected Minister.

[61] As to the substantive decision, the applicant contends as follows:

(a) That the Permanent Secretary failed to have regard "adequately or at all" to a variety of relevant factors, including (i) the Dickson Plan and whether DP 574 was or was not consistent with that educational model; (ii) the alternative proposal (of LJHS operating as a school for 11-16 year olds), as to which the applicant contends the Permanent Secretary was misled; (iii) the independent report of Dr Purdy and Dr Harris from Stranmillis College; and (iv) the possibility of collaborative arrangements between CSHS Lurgan Campus and other schools in Lurgan as an alternative means of provision of greater subject choice for pupils.

(b) The Permanent Secretary erred in material fact in relation to the costings of the proposal.

(c) The decision was made in breach of the requirements of procedural fairness, having regard to the fact that a number of people had made representations to the previous Ministers which were then not taken into account by the ultimate decision-maker.

(d) The decision was contrary to the SSP and/or the DP Circular.

(e) The decision was *Wednesbury* unreasonable on a variety of bases (reflecting a number of the points made above).

The court's role

[62] It is abundantly clear to me that the debate about the future of the Lurgan campus of CSHS has engendered strong feelings and emotion on both sides of the debate but, perhaps principally, on the part of those who feel that their children are being disadvantaged by being deprived of appropriate educational provision in their home town. I wish to emphasise that it is not the role of the court in judicial review proceedings to adjudicate on the merits of the competing arguments about whether

CSHS should operate on a single site or not, nor whether LJHS should be extended. The statutory scheme described above allocates those functions (in the circumstances of this case) to the EA in the first instance and then, in an approval role, to the Department. Those bodies have experience and expertise in this field which the court simply does not. My role is limited to conducting (what is often called) an audit of the legality of the respondent's decision, namely to determine whether the Permanent Secretary has acted unlawfully in reaching his decision. In these circumstances, unless the respondent has acted in a way which is irrational (in what lawyers call "the *Wednesbury* sense") it is not for me to assess the merits of the decision. The law permits decision-makers to make decisions which are unpopular, or which a judge might himself or herself even consider to be 'wrong', provided that the decision is lawfully made. That is a consequence of the nature of the court's supervisory jurisdiction.

[63] In this field, there is ample authority that the court's review on the merits should be one which is light-touch. Where the territory is one in which the decision-maker has considerable internal expertise and experience, the court will recognise that and the threshold of establishing irrationality in such circumstances will be a high one. By way of example only, in *KE's Application* [2016] NIQB 9 – another judicial review application relating to a school development proposal in this jurisdiction – Colton J said, at para [50], that:

> "The Minister is obliged to make a decision on a specific proposal which comes about after an express scheme setting out requirements in terms of pre and post-consultation. It is clear from the authorities that in such cases the court's role is a limited one. It in effect performs a supervisory role and should not engage in a merits assessment of the decision challenged."

[64] Given the nature of many aspects of the applicant's challenge, it is also worth summarising the legal position which applies where it is contended that the decision-maker did not look closely enough at a certain issue. Provided the relevant considerations have been taken into account and the decision-maker has not strayed into irrationality, it is not for the court to assess the weight to be given to any particular factor. Nor is it generally for the court to determine what factors are or are not relevant, unless this is clear as a matter of law (for instance, where these are set out in the governing statutory scheme). Nor is it for the court to dictate the level of inquiry in which the decision-maker must engage if they have considered an issue and determined not to embark on certain further enquiries, again subject to the over-arching threshold of *Wednesbury* irrationality. These limitations are reflected in Hallet LJ's helpful summary of the law relating to duties of inquiry in public law at para [100] of her judgment in *R (Plantagenet Alliance) v Secretary of State for Justice* [2014] EWHC 1662 (Admin).

[65] In *KE's Application* Colton J (at paras [54]-[55]) applied that approach. He also adopted the useful summary of the principles set out by Lindblom J in para [19] of

Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin) in relation to planning challenges as being applicable, with such modification necessary to suit the context, in school development challenges. I proceed on the same basis. In particular, the third and fourth principles summarised by Lindblom J, in relation to the weight to be attached to material considerations and to the application of policy, are clearly apposite in this case. Another relevant principle applicable in the town planning sphere which is of equal relevance in the sphere of school planning challenges are that submissions summarising the merits of the proposal are to be read fairly and without "excessive legalism."

[66] The applicant urged me to approach the issues in this case with a greater intensity of review than might otherwise be the case on the basis that the courts are deferential to decision-makers' judgment on twin bases – specialist knowledge and democratic accountability – only one of which is present in this case (see, for instance, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, at para [62]). I accept below that it is appropriate to exercise a heightened intensity of review in relation to whether a function should be exercised pursuant to the 2022 Act (see para [99]). However, in this case, if the function is properly exercisable under that Act, it seems to me that there is no basis for exercising a more intensive form of review in relation to the substantive decision than would otherwise be the case. That is for two reasons. First, the primary basis upon which the courts exercise a limited review function in such areas is because of the specialist knowledge and expertise which is involved on the part of the decision-maker. That is not diluted by the fact that the decision is taken by a senior officer of the relevant department. Second, it remains the case that the decision-maker in question is the person or body to whom, in the present circumstances, Parliament has allocated the relevant decision-making function. That follows from the 2022 Act. It is true that democratic accountability is highly attenuated in these circumstances, since there is no Assembly to hold a Minister to account for the operation of his or her department. There remains some limited accountability in the form of the ability of Members of Parliament to question the propriety of the arrangements put in place by the 2022 Act or to raise issues about decisions taken pursuant to it. (Indeed, the SSNI Guidance contains reporting mechanisms, at para 15, which are designed to this end). Members of the Legislative Assembly, although not sitting, can still make representations to departments and urge reconsideration. The electorate can also in due course seek to express their judgment on the manner in which the country is now being governed and whether or not this is justified or appropriate. This is little substitute for the usual holding to account of Ministers and departments by the operation of the Assembly's oversight mechanisms. However, it is the system which, for now, Parliament has deemed appropriate for the governance of this part of the United Kingdom.

The vires issue

[67] Leaving aside for the moment the obligation to have regard to the statutory guidance issued by the Secretary of State, the key factor in relation to the question of

whether the Permanent Secretary was entitled to make the impugned decision in the absence of a Minister is the statutory test of whether the relevant senior officer "is satisfied that it is in the public interest to exercise the function during that period." The starting point is the clear comment recorded by the Permanent Secretary when making the decision that he *was* satisfied that it was in the public interest for him to do so (see para [41] above).

[68] The applicant was critical of the Permanent Secretary's comment that the 2022 Act enabled him to make a decision "and" that he was satisfied that it was in the public interest to do so. This could no doubt have been more felicitously phrased. The 2022 Act only allows a function to be exercised, which would otherwise not be exercisable during Ministerial absence, *if and when* the relevant officer is satisfied that it is in the public interest for him or her to do so. Nonetheless, I consider Mr Hutton's criticism of the wording used in the Permanent Secretary's recorded comment as being an instance of the excessive legalism which is eschewed in the authorities. I am satisfied that the Permanent Secretary understood that he could only exercise the relevant function under section 3(1) of the Act if he was satisfied that this was in the public interest; and that his comment is designed to record that he was so satisfied. I do not read it as displaying any error of law.

[69] The Permanent Secretary was advised that the 2022 Act enabled him to make a decision with regard to the development proposal. It was plainly the view of departmental officials advising him that it was in the public interest for a decision to be made on it. In reaching the view that it was in the public interest for him to take the decision, the Permanent Secretary's recorded comments indicate that he was influenced by the delay which had arisen in the decision-making on the proposal to date (particularly from the conclusion of the statutory objection period in June 2021); the importance of promoting certainty for all those to be affected and those engaged in the debate; and, perhaps most importantly, in order to make "the necessary changes… in the best educational interests of the children and young people attending Craigavon SHS." Put simply, he concluded that it was in the public interest for the present situation – of both inadequate provision at the Lurgan campus of CSHS and ongoing uncertainty in relation to the way forward – not to be permitted to continue.

[70] Indeed, the one point on which all parties appear to agree is that the present situation at the Lurgan campus of CSHS is unsatisfactory and should not continue. The Permanent Secretary's comments describe the Lurgan site as being "not fit for purpose" for the reasons which he summarised (see para [42] above). That sentiment has been echoed in one way or another by all the key protagonists in this case. For instance, in a meeting with the Minister, Mr Doug Beattie MLA (a staunch opponent of the proposal) is on record as stating that the Lurgan campus is not fit for purpose and not suitable for the pupils. A former LJHS Principal who attended that meeting with Mr Beattie also noted that a health and safety report has shown that the Lurgan campus was not fit for purpose. To similar effect, in correspondence to the Minister in October 2022, the local MP Carla Lockhart (another staunch opponent of the proposal) referred to the "dire estate situation" at the campus; to the fact that "the

facilities are not adequate for the young people who attend"; and to it being a situation which "is quite shocking and one that cannot continue." In a motion passed by the local Council, it was noted that the current site "has proven to be woefully unsuitable for first class education." On an ongoing basis, the facilities at the Lurgan campus were preventing pupils having full access to the curriculum, amongst other concerns. It seems everyone agreed that something must be done, and sooner rather than later: the key debate was what the new solution should be.

[71] In addition, it is clear that the operation of the Lurgan campus is a drain on the resources of CSHS, partly due to the duplication of costs and additional costs which arise from operating on a split site with campuses which are not in very close proximity to each other. In circumstances where the CSHS budget was running at a significant deficit, which was increasing year on year, it is entirely rational to take the view that something should be done urgently to stem the tide of financial loss, particularly in the present climate of highly constrained public expenditure. This is reflected in the Permanent Secretary's reference to the Lurgan campus being a "continuing financial drain on the school's budget which is already under significant pressure." The reasoning is not quite expressed in the colloquial term that something must be done to stop the school 'losing money hand over fist' but there is certainly a flavour of that permeating the classically restrained tone of the civil service language used.

[72] Set against that, the Permanent Secretary was also aware that the proposal had originally been published in April 2021 and submitted to the then Minister for a decision in December 2021. For a variety of reasons there had been delay in making a determination upon whether the proposal should be approved, notwithstanding the previous Minister having been strongly urged by a range of parties to do so. The Permanent Secretary would also have been aware, as Mr McGleenan emphasised to the court in his submissions, that any further material delay in approving the proposal (should it otherwise be appropriate to do so) would result in its implementation being pushed back for at least one further academic year, if not more. Indeed, whatever the decision on the proposal, additional delay would push back the ultimate solution to a degree which exacerbated the concerns which caused the EA to bring forward the proposal in the first place.

[73] In those circumstances, it was perfectly rational in my judgment for the Permanent Secretary to take the view that it was in the public interest to exercise the departmental function of determining the question of approval during the period of Ministerial absence. A bad situation was becoming worse and it was a perfectly legitimate view that it was in the public interest that the nettle be grasped. This would be so whether the Permanent Secretary's decision had been to approve *or disapprove* the development proposal on behalf of the Department. It was a rational view that it was in the public interest in the circumstances described above that a decision be taken, one way or the other, in order to move forward the process of resolving the difficulties identified with the Lurgan campus of CSHS. However, the justification for

doing so applies *a fortiori* where (as here) the departmental advice was to approve the proposal.

[74] It follows from what I have just said that I reject the argument advanced by the applicant to the effect that the Permanent Secretary had to determine whether it was in the public interest for him to make a decision in a manner which was totally detached from the merits of the substantive issue to be determined. First, there is nothing in the text of section 3 of the 2022 Act which impels such an unnatural approach. A senior officer of the relevant department must consider whether he or she "is satisfied that it is in the public interest to exercise the function during that period." In considering the public interest, it would be wholly artificial to leave out of account the way in which the departmental function would be exercised if it was indeed exercised during the relevant period. On the applicant's case, even where it was abundantly clear that there was only one proper course, that would have to be left out of account. I do not believe that was the statutory intention.

[75] Second, the SSNI Guidance also does not support that view. Although a senior officer of a department should first take into account the general public interest in having elected ministers taking and guiding decisions, in considering the issue before them para 10 of the guidance directs them also to take into account principles which obviously engage the consequences and the effects of the decision which would be taken by them in the event that the relevant function was exercised. These include the effects on the relevant department's obligations to manage expenditure and comply with statutory obligations; on its aims of reducing the risk of greater budgetary pressures and avoiding significant detriment to the provision of public services; and on its potential to lose opportunities to realise significant public advantages, amongst other things. These considerations are plainly not merits-neutral. There is, of course, nothing wrong with civil servants providing advice on the merits of a decision to be made. That is a core part of their function of advising the relevant Minister (when one is in place). That advice is capable of being taken into account in considering whether it is or is not in the public interest for the relevant function to be exercised in reliance upon section 3. Accordingly, I reject the applicant's challenge to the effect that the Permanent Secretary impermissibly took into account, in determining whether or not he should exercise the relevant function, his view on the outcome in the event that the function was exercised in such a way as to amount to some form of unlawful bias or predetermination.

[76] With those basic points in mind, for completeness I nonetheless set out below my consideration of the applicant's more detailed points of complaint in relation to the Permanent Secretary's 'decision to decide.'

[77] The applicant, in written argument, invited me to have regard to Parliamentary materials in relation to the Bill which became the 2018 Act in order to assist in the construction of (what was submitted to be) the ambiguous phrase "public interest" in section 3 of the 2022 Act. Mr Hutton did not press this issue in his oral submissions but merely rested on his argument in writing. I decline to accept that invitation for

the following reasons. Even assuming that it is appropriate to consider pre-enactment materials in relation to Statute A as an aid to construction of Statute B where the latter statute uses the same language or re-enacts provisions in materially identical terms to those in the earlier statute, the *Pepper v Hart* conditions must still be met. These were helpfully re-stated in more recent times in *R v Adams* [2020] UKSC 19, at para [33].

[78] In the first instance, I do not consider that the use of the phrase "public interest" is "ambiguous or obscure, or leads to an absurdity." Open-textured tests calling for the exercise of judgment – such as whether something is "in the public interest" or "in the interests of justice" – are commonplace in legislation. The mere fact that the concept requires an evaluative judgment to be made does not mean that the statutory test itself is "ambiguous" such as to require resort to pre-enactment materials as an aid to the construction of the words used. Indeed, the issue is not one of construction in my view but, rather, an impermissible attempt to seek to discern the intended or anticipated manner of exercise of the power and then limit the power accordingly.

[79] In addition, the statements relied upon by the applicant, even where they were made by the Secretary of State in the course of the passage of the Bill which became the 2022 Act, are not "clear" in the sense required by the third *Pepper v Hart* condition. The Secretary of State explained some of the things which senior officials could or might do in the event that the Act was passed (as an explanation of why the Bill was being brought forward and dealt with urgently by Parliament). Read fairly, his comments were not purporting or intending to be prescriptive or exhaustive in that regard; much less to constrain the exercise of the section 3 power by defining a limited concept of what was (or was not) in the public interest, as that phrase was used in the Bill. If Parliament wished to hedge the exercise of the power or limit it to certain categories of decisions only, it could have done so in the express wording of the statute. It did not. Insofar as that has been done, it has been done only in a relatively weak fashion by means of requiring senior officials to take into account the SSNI Guidance.

[80] The applicant's reliance on these materials (and on the reference in the Explanatory Notes to the 2018 Act to the *Buick* decision having restricted the ability of senior officers of Northern Ireland departments to take decisions which were necessary "to ensure the continued delivery of public services") were designed to suggest that the Act only permits limited departmental functions to be exercised by senior civil servants in order to enable public services to continue to be run ('to keep the lights on') or where the decision is the mere implementation of a policy which has previously been agreed. As I have observed above, the terms of the Act are not so limited. The sole condition for the exercise of a function under section 3 (other than having regard to the SSNI Guidance) is that the senior officer is satisfied that it is in the public interest to exercise the function during the relevant period.

[81] The applicant's emphasis in his written submissions on the decision on DP 574 being significant and controversial (and his complaint that the SSNI Guidance does not address this factor) seems to me to give too little weight to the clear meaning and

implications of section 5(1) of the 2022 Act (set out at para [53] above). The provision made in section 3 is designed to trump "anything" in the Northern Ireland Act 1998, the statute which effectively provides a constitution for Northern Ireland, or indeed anything in "any other enactment or rule of law that would prevent a senior officer of a Northern Ireland department from exercising departmental functions in the absence of Northern Ireland Ministers." A provision of this nature and breadth is, indeed, quite extraordinary. Much of the applicant's case on this aspect of his challenge, however, invited the court to go beyond the sole statutory condition contained in section 3(1) of the 2022 Act, and beyond the limited duty to "have regard" to the Secretary of State's Guidance, in order to erect additional impediments to the exercise of a function in reliance on section 3. In view of the statutory wording, I do not consider it would be appropriate for the court to do so.

[82] The statutory scheme places some considerable faith in the judgment and discretion of the senior civil service in Northern Ireland, no doubt with the promoters of the legislation having made some assessment of the level of reticence or willingness likely to be displayed by it in entering the executive arena. The only other handbrake on the exercise of functions by senior departmental officials in the absence of Ministers, such as it is, is the guidance issued by the Secretary of State. As Mr McGleenan submitted, however, a "have regard" obligation is generally recognised as being a relatively weak obligation in public law terms (see, for instance, the discussion in *Re OV (a minor's) Application* [2021] NIQB 78, at para [46] and following). Particularly in the present context, where the statutory judgment to be made is open-textured and potentially multi-faceted, and where the statutory guidance is designed to give "guidance as to the *principles to be taken into account* in deciding whether or not to exercise a function", this is not a muscular obligation. It is unsurprising that the SSNI Guidance does not purport to be prescriptive or normative but, rather, gives guidance only in general terms and by way of principles or considerations upon which a senior departmental officer should reflect. I reject the utility of the analogy the applicant sought to draw with the approach of the courts in this jurisdiction to statutory guidance given in the very different context of immigration decision-making in relation to children.

[83] In light of the above, the key question for me is whether the Permanent Secretary in this case complied with his obligation under section 3(4) and (5) of the 2022 Act to have regard to the SSNI Guidance in deciding whether or not to exercise the relevant departmental function; and, relatedly, whether he took into account the relevant principles set out in that guidance. I am satisfied that he did so, particularly given the detailed advice addressed to him on these issues in Appendix M to the submission. On one view, that is enough to dispose of the challenge relating to the Secretary of State's Guidance. If, however, the Permanent Secretary erred in law in his understanding of the guidance, there may still be a basis for the court intervening, since the guidance would then not have been properly taken into account.

[84] On the other hand, the guidance is laden with terms which require the exercise of judgment or assessment on the part of the senior official who is required to have

regard to it. It is drafted, as one might expect, to reflect a set of principles or considerations to be taken into account, not as a fixed check-list, much less as a set of clearly defined legal conditions or obligations. When understood in this way, it becomes clear that many aspects of the applicant's challenge to the Permanent Secretary's consideration of the guidance amount to irrationality challenges on assessments which he made when taking the relevant principles into account. Put another way, many of the applicant's complaints, properly analysed, are about the *application* of the principles set out in the SSNI Guidance, rather than about any error of law into which he may have fallen.

[85] For instance, the applicant contends that although the decision may represent an outworking of the Sustainable Schools' Policy, it nonetheless still amounts to a "major policy decision" which, pursuant to the guidance, should be left for consideration by a Minister. In particular, it is contended that the development proposal represents a major change to an existing policy as it marks "a clear departure from the Dickson Plan model of education in the relevant area." The applicant makes this case on the basis that the approval of DP 574 means that there will be, for the first time since at least 1995, no non-selective option for children from age 14 in the Lurgan area. I discuss the issue of the Dickson Plan in further detail below (see paras [116]-[132]). However, I do not consider that the Permanent Secretary fell into legal error in failing to characterise the decision on this proposal as a "major policy decision" under para 9 of the SSNI Guidance.

[86] It is questionable whether this was a policy decision at all, rather than an operational decision in the context of schools' area planning. It is important to bear in mind that it was a proposal under Article 14(1)(d) of the 1986 Order to change the character of an existing school. However, even if it was a policy decision of sorts, the Department was entitled to view this as not being a "major" policy decision. That is not to under-estimate its importance to the pupils affected or their parents, or indeed to CSHS; but, in the scheme of policies and policy areas for which the Department is responsible, it is understandable that the Department did not consider this to be a major policy decision. This issue was pressed by the applicant principally on basis that the development proposal was a "major change of an existing policy." Although Mr McGleenan was keen to emphasise that the Dickson Plan was not a Department of Education policy, I consider there to be force in the applicant's riposte that, as a result of Minister Weir's statement (see para [118] below), the continuation of the Dickson Plan in the Craigavon area had effectively been adopted as a departmental policy. Nonetheless, for the reasons which I elaborate upon below, it was not irrational (and, so, not a legal error) for the Permanent Secretary to consider that the proposal did not result in a major change to the policy to give effect to the Dickson Plan. Rather, it was a question of judgment as to how best to do that.

[87] Mr Hutton made some forensic criticism of the content of Appendix M to the submission and, in particular, the text of what I understand to be a pro forma template in use throughout the NICS to assist senior officials in considering whether any particular decision should, or should not, be made pursuant to section 3(1) of the 2022

Act. As I observed during the course of the hearing, it might well be that the template could be improved upon, particularly by means of a more fulsome recital or exposition of the content of para 9 of the SSNI Guidance. (Para 3 of the template directs the officer simply to whether "the decision under consideration is a *major policy decision* within the terms of paragraph 9 of the Guidance", without reference to the sub-categories which elucidate that term.) However, I am satisfied that the content of para 9 of the guidance was properly taken into account. The text entered in this portion of the template describes why, in the Department's view, the decision in question did not fall within those categories of decisions in para 9 of the guidance which will normally be left for Ministers. The decision is described as "an outworking of established policy" and "business as usual." The following is then noted:

> "The decision on DP 574 is routine business and is neither a major/new policy, programme or scheme, nor a new major public expenditure commitment, nor a major change of existing policy, which would require a Ministerial decision."

[88] Although the applicant is critical of a number of these views or characterisations, it is entirely clear that the Permanent Secretary directed himself by reference to the range of decisions which will normally be left for Ministers as set out in para 9 of the guidance. He did not confine himself simply to the question of whether or not the decision was a "major policy decision" without considering the examples of types of decision which might be considered as falling within that category. The applicant's real complaint is that the Department did not consider this decision to be of the magnitude which he considers appropriate.

[89] Further, the applicant contends that this decision was of the type which should not be taken in the absence of a Minister because it involves "new major public expenditure commitments." Again, that is not a question of law for the court. The Department was entitled to consider that the expenditure commitments involved were not major in light of both its own budget and the fact that at least one of the aims behind the proposal was to stem a recurring annual deficit. As to the cost to the Department, the initial investment was to be met from the Minor Works Programme. Medium term investment required modular accommodation at CSHS for additional classrooms and toilets, amongst other things. The EA estimated the cost of this as approximately £1m to £2m, with the Department considering that the additional classrooms and toilet provision would cost in the region of £1.5m. There was nothing irrational in the view that this was not major public expenditure for the Department. It was also not obliged to take into account at this point possible future expenditure on a new-build school for CSHS, since that is clearly a separate proposal which will require further consideration, consultation and approval in due course in a separate process.

[90] The applicant also contends that it was wrong for the Permanent Secretary to take into account that, during previous periods of Ministerial absence, decisions on

development proposals had been taken by the then Permanent Secretary. I do not consider this to be an irrelevant consideration. The applicant proceeds on the assumption that the proposals which had previously been dealt with by a senior official related only to minor or uncontentious matters such as "tweaks" to school enrolment numbers; but there is no proper evidential basis to establish that this was the case. The respondent's evidence is that, in periods of Ministerial absence, a Permanent Secretary has regularly taken decisions on school development proposals: between May 2017 and January 2000 the then Permanent Secretary made 86 decisions on development proposals under Article 14 of the 1986 Order.

[91] Particular issue was taken on behalf of the applicant with the observations contained within the submission in relation to the reference in the guidance, at para 10(b), to "the principle that Departments should exercise a function where failure to do so might result in… failure to comply with a statutory obligation." Appendix M noted as follows:

> "Article 14 of The Education and Libraries (Northern Ireland) Order 1986 provides the legislative/statutory basis for the Department to make decisions with regard to Development Proposals for primary and secondary education. Therefore, failure to make a decision with regard to DP 574 may result in a successful legal challenge against the Department."

[92] The applicant argued that the possibility of a successful legal challenge was not the question raised by the guidance. In addition, he submitted that Article 14(7) of the 1986 Order does not impose any obligation on the Department to determine a proposal within a specific period of time. Certainly, it does not do so expressly; but I agree with Mr McGleenan's submission (without having to finally determine it) that there is an implied obligation within the statutory scheme that the Department will give a decision upon a proposal submitted for its approval and that it will do so within a reasonable period of time. There was a risk that a challenge could have been brought, and may have succeeded, on that basis. The Permanent Secretary was advised that the Principal of CSHS had sought an update on a decision "on numerous occasions." The Board of Governors of CSHS was obviously pressing for a decision. It might well be that the risk of legal challenge was slight; or that deferral to permit Ministerial determination (if otherwise considered appropriate) may have been a basis upon which a court would consider that any delay was reasonable. However, this was not a wholly irrelevant consideration to take into account. In any event, the time pressure which was clearly influential in the Permanent Secretary's decision-making, as evident from his recorded comments, did not relate to this factor but to the more practical considerations (discussed at paras [69]-[72] above) which gave rise to the very concern on the part of CSHS that a decision be progressed.

[93] The Department also considered that a variety of the other considerations expressed in bullet points within para 10(b) of the SSNI Guidance in one way or another pointed towards it being in the public interest for the decision to be taken.

[94] The applicant also relied upon the fact that, on 21 March 2022, the then Minister (Ms McIlveen MLA) was asked by a local MLA, Mr Beattie, whether she would commit to telling the community in Lurgan what the decision on the Lurgan campus would be. The Minister responded that, "A decision regarding the Lurgan campus will be made and announced this week." In the event, it was not. On the applicant's case, this represented a public, unambiguous Ministerial commitment that the Minister would make and publish a decision on DP 574 by end of March 2022. On its face, that seems correct. However, in my view that statement cannot found a legitimate expectation, enforceable in this application, that only a Minister would make the decision in whatever future circumstances may arise. The representation was clearly that *that Minister* would make a decision within a week. Since that representation was made, the Minister left office without having made a decision and the 2022 Act was later introduced. In those circumstances, it could not conceivably be an abuse of power in my judgment for the Department to consider that it was not bound by the Minister's representation. The 2022 Act changed the legal landscape. Moreover, any complaint about the Minister having failed to give effect to the legitimate expectation which her statement engendered ought to have been brought long ago, within three months of the expectation having been frustrated. In fact, the Minister having promised a decision in March 2022 which then did not materialise might well be thought to be a factor which weighs in the balance in favour of a decision now being made during the period of Ministerial absence rather than delaying it for a further significant period.

[95] It is also relevant that the Department's own DP Circular, updated in 2018, makes clear that the Article 14 function may be exercised by the Permanent Secretary. Para 1.2 of that circular states as follows:

> "The statutory power to decide on DPs is a power of the Department of Education. When a Minister is in place the Department must exercise that power subject to any direction the Minister gives. In the absence of a Minister, the decision-making powers of the Department in relation to DPs are exercised by the Permanent Secretary."

[96] Similar references to the Permanent Secretary making the relevant decision are also contained in paras 8.24 and 10.11 of the circular. This expression of Departmental policy – that such decisions would be made by the Permanent Secretary during periods of Ministerial absence – was in place and remained unchanged during the period of Ministerial tenure from January 2020 to October 2022.

Conclusion on the vires issue

[97] As the applicant's skeleton argument states in its opening sentence, "These proceedings arise in the all too familiar context of political stalemate and stasis in Northern Ireland." In *Re JR80's Application* [2019] NICA 58, the Court of Appeal in this jurisdiction was critical of similar arrangements under the 2018 Act (at para [109]) as now operate under the 2022 Act:

> "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."

[98] I endorse those sentiments. A similar view was expressed by Sir Paul Girvan in *Re Hughes' Application* [2018] NIQB 30, at para [68] (albeit before the 2018 Act had been passed), which was expressly endorsed by the Court of Appeal at para [63] of the judgment of Stephens LJ in *Re JR80*. Nonetheless, as Mr McGleenan politely but firmly reminded the court on more than one occasion, the present arrangements represent the clear will of Parliament, as expressed in the 2022 Act, as the means to address the current political situation in this jurisdiction. In the *JR80* case, the Court of Appeal held the predecessor arrangements to be lawful (see paras [109]-[113]). As it recognised, there will remain some decisions which it is inappropriate for senior members of the civil service to take in the absence of Ministers. But the 2022 Act is expressed in terms which mean that this is largely a matter of self-policing by the senior civil service, with reference to the guidance published by the Secretary of State. It is evident to any reader of that guidance that the principles it sets out may also pull in different directions in any given case: for instance, controlling and managing expenditure within budget limits might well require decisions to be taken which would represent a major change to an existing policy. Senior civil servants have been placed in an unenviable position.

[99] I accept Mr Hutton's submission that, in light of the inroads into democratic accountability which the 2022 Act plainly makes, the court ought to exercise a heightened degree of scrutiny in respect of assessments by senior civil servants that it is in the public interest for them to exercise departmental functions which would usually be reserved to Ministers or require Ministerial input. Nonetheless, the scope for judicial intervention in light of the clear wording of sections 3 and 5 of the Act is limited. Even applying a more intense degree of review, in the nature of anxious scrutiny, I see no basis for quashing the Permanent Secretary's view that it was in the public interest for the relevant departmental function to be exercised. His view that the sole statutory condition was met was rational and properly informed by consideration of the SSNI Guidance.

The substantive challenge

[100] Turning to the challenge to the substance of the decision to approve the development proposal, this too amounts largely to a rationality challenge in a number of respects. According to the Purdy and Harris Report there was "universal

agreement" that the current provision was unsatisfactory, with a desire for change. I have already drawn attention (at para [70] above) to the general consensus that something needed to be done to address the unsatisfactory provision at the Lurgan campus of CSHS. The key issue was *what* should be done; and whether it was lawful for the Department to consider that the development proposal should be approved as the way forward (at least in the medium term). It is of significance in this regard, in my view, that both the EA (the managing authority for all of the schools most directly affected) and the Board of Governors of CSHS itself considered that DP 574 was the appropriate way forward.

[101] Nonetheless, the applicant's case was that the Department misdirected itself, or failed in its duty of inquiry, in four key areas: the costings for the proposal; the good sense of the alternative Option 4; the development proposal's effect on the Dickson Plan; and its compliance with the Sustainable Schools Policy. I address each of these in turn (taking the second and third together).

The costings

[102] The applicant contends that the costings of Option 2 were not properly considered. He relies on the DP Circular which, at para 6.3, says as follows in relation to the preparation of a Case for Change:

> "Consideration must be given to the realistic financial implications of a DP. As well as savings, proposals may involve additional resource and capital costs. All relevant costs and benefits should be set out and should be supported by robust educational and financial evidence. Potential options for delivering the proposed change should be considered prior to the publication of the DP as the DP process does not provide for consideration of options or for determining which option is best value for money. This is particularly important when there is a need for capital expenditure for adjustments to or additional accommodation."

[103] In particular, the applicant submits that the costs of the proposal were not supported by robust financial evidence. In the submission to the Permanent Secretary the financial and resource implications were summarised in the following terms:

> "The Case for Change (CfC) advises that investment from the Minor Works Programme would be required to provide for Craigavon Senior High School (SHS) operating solely from the Portadown Campus.
>
> It further advises that medium term investment would be in the form of high quality modular accommodation to

provide for additional classrooms, music suite, learning and support, multi-purpose rooms and toilets. In addition, internal refurbishment/change of use works would also be required to provide additional science accommodation. This initial investment would be approximately £1m-£2m.

The Department, however, considers that the school has a shortfall of six classrooms and would require associated additional toilet provision. A high level, indicative only, estimate of cost has been calculated at £1.5m. These estimates have been prior to the recent rise in construction costs.

The Education Authority (EA) will subsequently seek major capital investment for the construction of a new build Craigavon SHS, on a location to be determined, pending approval and funding being obtained"

[104] The body of the submission suggests that the Investment and Infrastructure Directorate (IID) of the Department estimated capital costs as being some £1.5m. In addition, it was noted in relation to transport that, "An initial estimate of an additional £86k in transport costs is anticipated." Mr Hutton suggested that, in a meeting between the Minister and elected representatives in June 2021, a commitment had been given to obtaining further detail about the transport costs, since Mr Buckley MLA contended that the cost of travel had not been calculated and factored in, at a time when the estimate of £86,000 referred to above was already known. However the relevant Departmental official, Mr Broderick, is recorded merely as having agreed "to ensure that travel costs will be considered in the assessment of the proposal." The Department submits, and I accept, that nothing other than an estimate can be provided because the true transport costs will not be known until the actual number of pupils applying to transfer to the Portadown campus and eligible for transport assistance are known. Consideration will have to be given to the number of pupils requiring additional transport, the locations from where they will be travelling, and the bus routes (some of which are likely to be new) which will be used for this purpose.

[105] In considering these issues the Permanent Secretary noted that the additional transport costs of around £86,000 would be offset by the saving in costs of running the Lurgan Campus, estimated at £198,000 per annum. He noted, therefore, that if the development proposal was approved it was expected to have the effect of saving financial resources on an annual basis and would help the school progress towards achieving financial sustainability.

[106] The applicant complains that the estimate for transport was produced before the recent rise in fuel and transport costs. I see no merit in this point. The Permanent Secretary was expressly advised that there were substantial transport costs. He was also advised that the figure of £86,000 was simply "an initial estimate." Indeed, he

was further advised in the text of the submission that the estimate was "prior to the recent rise in fuel and transport costs." He would have been aware at the point of decision therefore that transport costs *at that point* were likely to be higher than the estimate. But fuel costs fluctuate. Indeed, as the respondent's evidence notes, they have since decreased (in advance of the implementation of the proposal), with the weekly estimates from the national statistics on road fuel prices showing a continuing downward trend since a high point in July 2022. There was nothing irrational in my view about the Permanent Secretary not requiring more detail on the estimated transport costs at that point given the fluctuation in fuel prices. In addition, he was entitled to take the view that the additional transport costs (as best they could be forecast at that point) were more than outweighed by the estimated annual savings through economies of scale of just under £200,000 per year if the split site was rationalised.

[107] The Department was alive to this issue. It was for it to take a view as to whether the proposer, the EA, had provided sufficient detail in its Case for Change to allow the relevant costs to be properly considered. In the case of the capital costs, the Department obviously interrogated the EA's estimate and reached its own assessment of what was likely to be required. Applying the appropriate legal principles to this aspect of the applicant's case (see para [64] above), there was nothing irrational or unlawful about the Department determining the approval of the proposal without requiring more detailed figures.

Option 4 and the Dickson Plan

[108] A major contention on the part of the applicant was that the submission to the Minister did not seek to determine the issue of whether approval of DP 574 would be consistent with the Dickson Plan. In short, the applicant contends that the Permanent Secretary should have concluded that the proposal's approval was contrary to, or undermined, the Dickson Plan and, so, amounted to a major policy decision. Further, it is submitted that the Permanent Secretary misdirected himself by failing to conclude that Option 2 (represented by the proposal) undermined the Dickson Plan and/or by concluding that Option 4 (the majority of parents' preferred option) undermined the Dickson Plan, when it did not.

[109] Much of the applicant's challenge to the substance of the decision focuses on the suggestion that Option 4 was not fully or properly considered. It is worth saying something, therefore, about the nature of the departmental function at issue under Article 14 of the 1986 Order. The Department must approve or not approve *the proposal before it*. That is not to say that an alternative approach, which may be preferable, is entirely irrelevant, since it would be open to the Department to decline to approve a proposal because it considered that another option should be brought forward. (Indeed, Article 14(3) would permit the Department to direct an authority, such as the EA in this case, to bring forward a different proposal. I was informed that this power is rarely, if ever, exercised, which is perhaps unsurprising since it would likely require an authority to bring forward a proposal to which it was not genuinely

committed, if at all. Nonetheless, the power is there to be exercised in appropriate circumstances.) The Department might even decline to approve a development proposal if it was persuaded that the proposer had not properly considered other potential solutions or options. However, the level of inquiry which is required in respect of alternatives which have been considered and rejected by the proposer must be determined by reference to the nature of the statutory scheme. The Department is not the initial decision-maker. Its job is to consider the proposal before it, which has been formulated after an earlier period of statutorily mandated consultation; and the Department cannot be expected to go back to square one and re-undertake the process as if it was the proposer.

[110] In *Re XY's Application* (*supra*), Stephens J considered a case where part of the applicant's challenge related to a purported failure on the part of the decision-maker to fully or properly consider alternatives (in that case, amalgamation of certain schools) to the development proposal. At para [67] of his judgment, Stephens J emphasised that the statutory scheme required consultation *on the proposal* rather than alternatives to it which might be favoured by some:

> "The obligation to consult is in relation to the proposal. The statutory procedure does not involve consultation on options or possible alternatives. Furthermore in the particular context of this decision making process I do not consider that the provision of the reasons for rejecting amalgamation was necessary in order for the consultees to express meaningful views on amalgamation…"

[111] The judge later (at paras [85]-[87]) rejected a related argument that the Minister ought to have made more enquiries as to the reasons for rejecting amalgamation in that case. In short, the degree to which the alternative to the proposal had to be considered was shaped by the statutory function of determining (only) the proposal before him. The two-stage nature of the process, with consideration of alternatives to be addressed primarily before the publication of the proposal, is also reflected in para 6.3 of the DP Circular, which states:

> "Potential options for delivering the proposed change should be considered prior to the publication of the DP as the DP process does not provide for consideration of options or for determining which option is best value for money."

[112] In the present case, in the words of para 249 of the submission to the Permanent Secretary, appearing within the conclusion section of the document which he expressly adopted in his comments accompanying the decision, the EA, having considered a number of options including Option 4, "concluded that Option 2 best met the needs of pupils and Craigavon SHS, by operating on a single site on the Portadown campus."

[113] The submission to the Permanent Secretary indicates that allowing the present situation to continue is "not an acceptable situation" (see para 260). The applicant's submissions were highly critical of the suggestion in that paragraph that, other than the development proposal itself, there was an "absence of any alternative solution." He contended that this showed that Option 4 had not been properly assessed. I do not accept this for a variety of reasons.

[114] The submission must be read fairly and in the round. It is clear that Option 4 was discussed and evaluated in both the Case for Change and in the submission to the Permanent Secretary itself. The Permanent Secretary would have been well aware both that this was the most popular option locally and was being strongly pressed by the Board of Governors of LJHS, by the Council, and by the Purdy and Harris Report. He had access to all of the relevant material in this regard, including the Purdy and Harris Report and the LJHS scoping document, each of which promoted Option 4 and compared it favourably to the option forming the basis of the development proposal. It is clear that this was not the option favoured by the EA, which was the managing authority in respect of both schools, LJHS and CSHS. It is also clear that the Permanent Secretary considered Option 2, reflected in the development proposal, to be a better option taking everything into account, including the six sustainability criteria discussed below. It was the one which, in the words of the submission, "best met" the needs of pupils and CSHS. It was the option which, in the EA's and Department's judgment, was less likely to undermine the Dickson Plan in the medium to long term.

[115] The Permanent Secretary was also plainly aware that strong objection was taken, on the part of opponents of the proposal, to the suggestion that Option 4 would undermine the Dickson Plan. The Purdy and Harris Report suggested at one point that removing the non-selective pathway within Lurgan would render the Dickson Plan "unworkable." The debate was ultimately between two options with competing views as to which represented a greater threat to the Dickson plan. The difficulty for opponents of the proposal is that the Department, like the EA, remained persuaded that the proposal represented the best way forward.

[116] Some focus has obviously been placed upon the impact of the various options on the delivery of the Dickson Plan model of education in the Craigavon area. That is unsurprising given that this model of provision is well established in the area (at least in the controlled sector); that it seems to be widely popular amongst parents and pupils; and that a previous Education Minister (Peter Weir MLA) had committed to its maintenance. It was therefore right for considerations of this type to inform the debate and the respondent's decision.

[117] However, I do not view these issues as being ripe for legal debate in the context of proceedings such as these for two reasons. First, the precise nature or content of the Dickson Plan is not a matter of law. It is accordingly not an error of law to misdirect oneself as to its nature or core principles. Second, the same issue is not amenable to challenge as a material error of fact, since there is obviously debate about

the precise nature of the Dickson Plan in its modern formulation and, more importantly, the effect of each of the options upon its continued vitality in the area. That assessment involves questions of judgment and predictive evaluation. It is in my view unarguable to suggest that the court could properly hold that the respondent had erred in fact or in law in relation to these matters such as to justify the grant of relief. Again, the only proper basis upon which it seems to me that the court could do so is if an irrational conclusion was reached which was material to the overall decision to approve the proposal. But a rationality challenge faces the same difficulties, namely that this is territory in respect of which there are few, if any, clear-cut answers. That said, in deference to the arguments presented on this issue, I set out my conclusions in respect of it below.

[118] On 6 June 2016, at a visit to Birches Primary School to celebrate the 50th anniversary of the opening of the school, Minister Weir noted that the Dickson Plan had proved very successful in the local area and had strong support from the local community. He commented that, during the previous Assembly mandate, there had been concerns created over a threat to effectively dismantle the plan. In this context, he said:

> "I want to assure people locally that I will be offering support and assurance for the continuation of the Dickson Plan system, and will be ushering in a period of educational stability on the issue. This is something that works, and so I will ensure that the Dickson Plan is not removed either directly or undermined through stealth, and that any threat is now lifted."

[119] It is common case that, in making those comments, the then Minister was not commenting directly on any of the options discussed in the context of the development proposal which forms the backdrop to these proceedings. Nonetheless, in the Case for Change the EA expressed the opinion that there were restrictions upon it from making changes to the Dickson Plan. That view was based upon the desire to act consistently with the policy direction set by the former Minister.

[120] The Dickson Plan originated in the late 1960s. It draws its name from its architect, Jack Dickson, who was then Director of Education for County Armagh and subsequently Chief Executive of the former Southern Education and Library Board. The Case for Change describes the Dickson Plan historically as follows:

> "Under this plan, rather than sitting the 11 plus test, as happened elsewhere in Northern Ireland, children transferred from primary school to all ability junior high schools at age 11 and after three years transferred either to grammar schools or technical colleges."

[121] It is recognised that the plan has evolved since its inception. With the advent of the common Northern Ireland Curriculum for all schools in 1989, the original concept of academic and technical vocational pathways became outdated. By the early 1990s, it was also clear that the outcomes of those pupils attending technical college at 14 were poor. As a result, the non-selective 14-16 school CSHS was created, operating over its two campuses.

[122] In the Case for Change document, the EA stated as follows in relation to Option 4:

> "While the Minister's statement does not relate directly to Option 4, as it was made in June 2016, the Education Authority, in taking forward this option, believe that this would undermine the Dickson Plan 'through stealth' as this would provide an inequality within the Junior High Schools. Furthermore, the pathways for pupils within the other Junior High Schools could be detrimentally affected by this Option. In addition, given the timescales involved for providing the accommodation, this option has not been considered further."

[123] It is important not to lose sight of the last sentence of the quotation above. There was a variety of perceived disadvantages of Option 4 set out in the Case for Change (see para [30] above). Of these, the applicant has chosen to focus on the EA's view – which he says is misguided – that it would undermine the Dickson Plan. However, quite separately, the EA was convinced that the timescale for providing the extended school ("a minimum of 5-7 years") made it an option unworthy of further consideration. It was further concerned about the detrimental impact on CSHS if there was a significant decrease in its enrolment in favour of an extended LJHS, amongst other things.

[124] The applicant relies upon the judgment of Huddleston J in *Re MA2's Application*, at para [46], as providing the legal definition of the Dickson Plan. There, the learned judge said this:

> "In terms of the principle [*sic*] tenets of the Dickson Plan, from the evidence before the court, the Plan appears difficult to define but what one can say with certainty is that its core – perhaps its only – principle is that academic selection is deferred from age 11 to age 14. That seems to have been its provenance and on that essential point the parties do seem at least to be in accord."

[125] So, the applicant submits, any option which ensures that academic selection is deferred from age 11 to age 14 is consistent with the Dickson Plan. However, it seems to me that the portion of Huddleston J's judgment cited above was not setting out to

define the Dickson Plan as a matter of law. As I have already observed, the core tenets of its operation is not, in fact, a matter of law. Nor was Huddleston J intending to be definitive about the nature or content of the plan in its modern-day formulation. That is clear from his reference to the content of the plan being "difficult to define"; from his attempt only to discern the principal tenets of the plan; and from his reference to the core principle he identified (on the evidence before him and on the basis of the limited agreement between the parties) being "perhaps" the plan's only principle.

[126] In para 250 of the submission to the Permanent Secretary, departmental officials have said, "The nature of the Dickson Plan is that KS3 is provided in JHSs and KS4 is provided at SHS or grammar schools with pupils transitioning at age 14." It expressed the view that Option 4 "would not resemble the current format of the Dickson Plan system." That said, the original Dickson Plan scheme (which was provided in evidence) did not specify the *location* of the schools. In section 4 of the original plan (entitled, 'Structure of Secondary and Full-Time Further Education in the Lurgan/Portadown "New City" Area') the "main outlines of the Scheme" are set out. These include transfer from primary to secondary school at age 11; that children "will remain at the secondary school (which might be designated "High School") for three years"; that, after that, pupils "will transfer either to… the Grammar School… or… the Technical College"; and that "the grammar school, the technical college, and the 'feeding' secondary (High) Schools would form a unit within which there would be the closest possible co-operation."

[127] Since 1965 there has been some change to the schools participating in the scheme, notably with the Catholic maintained schools opting out of the plan (a matter to which I return shortly). However, it is a rational contention that a significant feature of the current operation of the plan is that children attend all-ability junior high schools for three years and then transfer to another school (rather than remaining in an 11-16 school) for further education in a pathway appropriate to their ability, interests or needs.

[128] In section 3 of the Purdy and Harris Report, dealing specifically with the Dickson Plan, it said – rather than using the phrase "unworkable" which is used elsewhere – that the development proposal would represent "a significant and *potentially* damaging change to the Dickson Plan rather than its "continuation"" [my italicised emphasis]. In the section of the report dealing specifically with Option 2, it is noted that this option "*preserves* the Dickson Plan in terms of selection/transfer at 14 but in practice removes 14-16 non-selective provision from Lurgan." The report accepts that it is "true" that the development proposal "sustains the Dickson Plan in the format in which it has existed for the last 50 years" in "the sense that it maintains selection at 14"; but goes on to say that "it is completely untrue in the sense that the Dickson Plan has never before removed provision for an educational key stage… from one of the two main towns in the plan" which "represents a clear change to existing provision."

[129] Option 4 would also, of course, represent a clear change to existing provision. The ultimate view that Option 4 may in due course undermine the Dickson Plan was not, in my judgment, an irrational one. There were a number of apparent concerns in this regard. First, that a 'junior high school' at which a pupil might undertake *all* of their Key Stage 3 and 4 education, without having to transfer out to a new senior high school, would be extremely attractive and have a pull factor over other junior high schools in the area for pupils who may not wish to attend a grammar school at Key Stage 4. This might affect the other junior high schools' sustainability or, in the alternative, persuade them to lobby for a similar extension, rendering them 11-16 high schools also catering for both junior and senior cohorts. Even with only one high school operating in this way, CSHS would lose a significant number of pupils (estimated at 174), thereby impacting its sustainability both in terms of finances and breadth of provision. Undermining the senior high school for the area could make the Dickson Plan model less attractive generally or result in CSHS pushing to become an 11-16 or 11-19 school so that it enjoyed the same advantage as the extended LJHS, namely that a pupil could complete their entire secondary education at the one school. For those pupils at the extended LJHS, the draw of remaining in one's school with established friendships and relationships might also deter pupils who might otherwise have transferred to one of the grammar schools within the Dickson Plan at age 14 from doing so. Indeed, this option was strongly opposed by Lurgan College which saw it as a threat to the Dickson Plan.

[130] In relation to Catholic schools which had been within the Dickson Plan, before 2015 St Michael's Grammar School was a 14+ school, whilst St Mary's High School and St Paul's Junior High School were Year 8-12 schools, with a selective system operating at Year 10 to allow pupils to transfer out to a grammar school. Following DP 291, which was submitted by the Council for Catholic Maintained Schools and the Mercy Congregational Trustees and approved by the then Education Minister John O'Dowd MLA in February 2014, these three schools amalgamated to form a new co-educational, non-academically selective, 11-18 voluntary grammar school (St Ronan's College). The applicant contended that the two Catholic high schools just mentioned illustrated that schools catering for Years 8-12 (as an extended LJHS would do in Option 4) showed that this was compatible with the Dickson Plan. By the same token, the EA could claim support for its position on the basis that these schools no longer remain within the plan. Having altered the initial model of mandatory transfer at age 14, participation in the Dickson Plan was later jettisoned.

[131] In its response during the statutory consultation period the Board of Governors of the CSHS argued that minimal weight should be placed on the Purdy and Harrison Report because of (what they suggested was) the very narrow consultation process undertaken by its authors. In response to the report, the CSHS Board argued that "any suggestion of an 11-16 school in Lurgan would have significant impact on the viability of the Portadown campus of Craigavon Senior High School and the entire Dickson Plan." In its response the CSSC also expressed the view that the EA, in identifying its preferred option, had sought to maintain the integrity of the Dickson Plan. These are matters about which there were hotly contested views, and counter-views, and a

variety of perspectives, all seeking to predict the effect of various options on the continued vitality of the overall educational model in operation in the area.

[132] I do not consider that the Department's consideration of this issue evinces any legal error. The locally popular Option 4 was clearly considered in some detail. Option 2 was preferred on rational grounds, which went beyond the contested issue of the respective options' impacts on future operation of the Dickson Plan. The question of the effect on the Dickson Plan of each option is not, in truth, a legal issue but one of judgment. Again, I have not been persuaded that it was irrational for the Department to take the view that there was greater risk of undermining that plan generally in the medium to long term by favouring Option 2 over Option 4.

[133] Finally on this issue, the applicant was critical of the Case for Change's statement that a disadvantage of Option 4 was "the *closure* of Lurgan Junior HS to establish a new 11-16 school." This may well be a matter of semantics. In my view Mr Hutton was likely right to say that the school could be extended by a development proposal significantly altering its character under Article 14(1)(d) rather than one proposing its closure under Article 14(1)(c). But it would no longer simply be a *junior* high school; and it may well need to relocate to a new site. For all intents and purposes it would resemble a new school. In any event, it is clear that the substantive merits and demerits of this option were weighed and I do not consider that anything material turns on the use of the word "closure" in that portion of the Case for Change.

The Sustainable Schools Policy

[134] The applicant further contended that the new arrangement would not be sustainable, or compliant with the SSP, in respect of the criteria of accessibility and strong links with the community. He argued that the Department had wrongly failed to conclude that the development proposal contravened this policy.

[135] The SSP – formally entitled 'Schools for the Future: A Policy for Sustainable Schools' – was published by the Department in 2009. It is designed to be an important tool in the area-based planning approach to school development. It built on the Report of the Independent Strategic Review of Education in Northern Ireland conducted by Professor Bain ("the Bain Report"), which was published in late 2006, and which raised the importance of having schools which were viable in both educational and financial terms. The SSP sets out six sustainability criteria, namely Quality Educational Experience; Stable Enrolment Trends; Sound Financial Position; Strong Leadership and Management by Boards of Governors and Principals; Accessibility; and Strong Links with the Community. Various more detailed indicators are associated with each criterion. The criteria and indicators are said to "provide a framework for assessing the range of factors which may affect a school's sustainability." However, the policy emphasises that some indicators will be more important than others; that the intention is not to have a mechanistic application of the criteria and indicators but to use them as a tool to assess how a school is

functioning; and that there are no formulae or weightings attached to them, since their relative importance will vary on a case-by-case basis.

[136] Nonetheless, a theme is that the first criterion, that of ensuring a quality educational experience for pupils, is of overriding importance since it is, after all, the purpose of the educational system. This appears, for instance, from the Ministerial Foreword to the policy (which notes that school sustainability "should first and foremost be about the quality of the educational experience of our children"); from para 1.2 (which recounts the Bain recommendation that a school should not be considered viable "if the quality and breadth of education it provides is less than satisfactory", whatever its other strengths); from para 1.10 (which explains the purpose of the policy, with the objective being to improve the quality of education offered to pupils of all ages); from para 6.4 (which notes that it is necessary "that the common goal of a high quality education for all children should not imply a strictly uniform application of the criteria regardless of circumstances"); and from para 6.6 (which notes the Bain Report's comment that "the key issue for the question of sustainability must be the quality of the education provided").

[137] The applicant argued strongly that the Department failed to properly address the issue of accessibility in relation to the development proposal. In my view, there was merit in the criticism that parts of the Case for Change document dealt with the issue of accessibility in a cursory fashion. However, in the options appraisal portion of the document, identified disadvantages of Option 2 included the issue of accessibility to pupils living in Lurgan (since the Lurgan and Portadown campuses of CSHS are 4.5 miles apart) and additional transport costs. The issue was therefore clearly flagged.

[138] In addition, the submission addresses this issue in a variety of ways. The pre-publication consultation summary made clear that responses which were not in support of the proposal raised transport as an important theme. It outlined that transport was one of the overriding concerns of respondents, particularly that transporting Lurgan children to Portadown would have a detrimental effect on them and adversely impact on their school day and access to after-school and other activities. A major concern was about parents having to pay for transport. EA officers advised that it was aware that the current transport system was not designed for an additional 200 pupils to travel between Lurgan and Portadown and that new transport routes would be required should the proposal be taken forward. Sample comments expressing the detail of concerns about the new transport arrangements were set out in some detail in the summary. The Purdy and Harris Report, attached to the submission, made clear that they recommended that the development proposal be rejected on the grounds of accessibility, as well as the criterion relating to strong links with community.

[139] On the other hand, the submission also referred to a range of maps illustrating that the vast majority of pupils live within a 10 mile mapping radius of the school's

Portadown campus. In terms of the impact of the proposal, the submission to the Permanent Secretary said this:

> "Some pupils living in outlying areas, and already travelling a distance to Lurgan JHS, may have additional travel to Portadown but this is still unlikely to exceed the SSP's guidance on travel time of less than 45 minutes for post-primary pupils, i.e. 1.5 hours per day in total."

[140] The EA response to the Purdy and Harris report took issue with the concerns about accessibility if the development proposal was approved. It pointed out that two thirds of the young people enrolled in CSHS are in the Portadown campus already. (This is relevant to an assessment of the overall sustainability of CSHS in terms of the accessibility criterion but might legitimately be thought to be somewhat beside the point in terms of considering the accessibility for pupils likely to transfer from the Lurgan campus.) Reliance was placed on the fact that the EA had repeatedly said that transport arrangements would be considered further if the proposal was approved. This was to include the development of direct routes from outlying towns to the Portadown campus, rather than through Lurgan, thus shortening travel time from what some parents might have anticipated (if their child had to travel to Lurgan from a more rural location only then to be transferred to Portadown).

[141] In summary, the view was taken that the new transport arrangements for those who would previously have attended the Lurgan campus but who would now attend the Portadown campus of CSHS would be satisfactory and would be unlikely to breach the accessibility indicator that home to school travel times should be less than 45 minutes for post-primary pupils; or, at the very least, that the number of pupils for whom this indicator was breached, if any, would be very small, as indicated in the illustrative maps provided for this purpose. As Mr McGleenan pointed out, the SSP specifically states that: "It should be noted however that the distances and times stated are guidance. It is not possible to be absolutely prescriptive." It is not the case that if one or more pupils who wish to attend the school will have to travel more than 45 minutes to do so then the proposal is unsustainable and cannot proceed. In addition, since school transport would be provided by the EA in cases where that was required, the concern about cost to parents was misplaced or overblown.

[142] As to strong links with the community, again the options appraisal portion of the Case for Change identified a "potential loss of interrelationships with the local community in Lurgan" on a range of bases and "potential lack of support from the community in Lurgan" as being disadvantages of Option 2, as well as the first listed disadvantage of "loss of controlled non-selective Key Stage 4 education in Lurgan." Notwithstanding this, the EA considered that the school has strong links with the community it serves and that it has the support of the local business community who provide work placements for students annually in what is a very successful programme. In the submission, reference was also made to the ETI inspection report of September 2020, which highlighted the Governors' view that the school had a good

reputation in the local community. This issue was also therefore flagged up, although the overall view seems to have been that CSHS has good links with the community in the Craigavon area and that this would continue even though many Lurgan parents may be unhappy with their children having to travel to Portadown to attend the school. The degree and quality of parental involvement with the school is only one indicator of strong links to the community. Others relate to the number of children in the vicinity attending, the school's contribution to the community, and the use of buildings outside formal educational purposes.

[143] In considering the sustainability criteria, the focus of the advice set out in the submission was on the *lack of* sustainability of continuing provision at the Lurgan campus, since it was judged that the current accommodation there was restricting pupils access to aspects of the curriculum and to after-school activities and impacting on their learning, in addition to the significant financial concerns which had arisen at least in part because of operation over a dual site. This gave rise to concerns about the sustainability of the present situation, particularly in terms of the first and third criteria, quality educational experience and sound financial position. Ultimately, it is clear that the significance of these issues was considered to outweigh concerns about accessibility and community links in the event that the development proposal was implemented. Indeed, the Permanent Secretary might well have been influenced in this regard by the fact – recorded in his comments on the submission – that, since the proposal was published, around 25% of the Lurgan campus cohort had elected to move to the Portadown campus to access the curricular offer and better facilities there. Whilst the publication of the proposal will no doubt have had an effect in these decisions (particularly for pupils who did not wish to remain in the Craigavon campus for Year 11 with no new Year 10 intake), the fact that some pupils had already begun to vote with their feet was a consideration which could properly be taken into account in assessing the position generally.

[144] As already mentioned, the SSP itself (at para 6.6) makes clear that, as the Bain Report stated, the *key issue* in respect of the question of sustainability must be the quality of education. The concluding section of the submission of the Minister echoed this, stating that "the provision of a quality educational experience for pupils is paramount" (see para 264). In taking the view that significant improvements in the first sustainability criterion outweighed any concerns about the fifth and sixth (which the EA and department clearly considered to have been exaggerated) the Permanent Secretary was reaching a view which was not only rationally open to him but also consistent with the inbuilt weighting within the SSP towards prioritising the criterion of quality education experience.

[145] I conclude that the SSP was properly considered and that both the existing and proposed operation of the school was assessed against the relevant criteria, using them as tools to assist the decision-making as intended. The Permanent Secretary was aware that there were issues and concerns about a number of the criteria as they would relate to the single-site school but lawfully considered that these did not require approval of the development proposal to be withheld.

Procedural fairness

[146] Finally, the applicant complained that the Permanent Secretary did not meet with any organisation or person opposed to the proposal, including other affected schools in Lurgan, the Council or individual elected representatives. He did, however, visit both the Lurgan and Portadown campuses of CSHS. This was said to be "to see for himself the education environment provided to children and young people." He spoke to staff and attended a Board of Governors' meeting. The applicant complains that some representatives opposed to DP 574 had met with previous Ministers in the expectation that the points they made would be taken into account by them as the decision-maker; but that that did not occur.

[147] There was, in my view, nothing unfair about the procedure adopted, much less any substantial prejudice to the applicant or other objectors. Those parties opposed to the proposal had a full opportunity to make their case in respect of this both during the pre-publication consultation period and during the statutory objection period once the proposal had been published. As discussed above, the case against the proposal was detailed in a variety of ways in the papers considered by the Permanent Secretary. In addition, the submission provided to him summarised meetings and interactions between previous Ministers and Departmental officials on the one hand and, on the other, elected representatives including Carla Lockhart MP and Doug Beattie MLA. Minutes of meetings with these representatives were attached as appendices to the submission. So too was an agreed note of a meeting with Council representatives, accompanied by Dr Purdy and Dr Harris, along with a briefing paper which the two academics had provided for this meeting. The earlier representations were fully summarised such that the Permanent Secretary was aware of the relevant issues.

[148] There was nothing unfair, in my view, in the decision-maker taking the opportunity to visit the school to see the situation on the ground for himself. There is no indication whatever that any new or significant point was raised at this point of which objectors were unaware or with which they had an inadequate opportunity of dealing. Furthermore, the respondent's evidence establishes that, in advance of making the impugned decision, on 30 November and 7 December 2022, the Permanent Secretary responded to two of the representatives who had been most engaged by the issue (Ms Lockhart and Ald Moutray) to advise that, in the absence of a Minister, he had already advised that it was his intention to take decisions on development proposals. Notwithstanding this, no requests were made for further representations to be made at that stage (nor, indeed, at any stage following Minister McIlveen leaving office or following the enactment of the 2022 Act).

[149] Those opposed to the proposal had a fair opportunity to engage with the process. As I have already commented above, the issue was that the Department was not persuaded by the points made that it was appropriate to withhold approval from DP 574.

The current position and the potential withholding of relief

[150] The EA's evidence addressed the difficulties in stopping the implementation of the proposal at this late stage even if the court considered there to be merit in any of the grounds of challenge. Where a decision has been made by the Department to approve a development proposal, it is the EA's duty under Article 14(9A) of the 1986 Order to implement the proposal; and that is what the EA has been doing since the date of the decision impugned in these proceedings. Planning has proceeded on the basis that all Year 11 pupils will be educated on the Portadown campus from September of this year. The affidavit of Michael McConkey, a Head of Service within the EA, addresses in summary the steps which have been taken in that regard. Funding has been expedited and secured; and contracts have been awarded for the provision of additional accommodation on the Portadown campus. Contractors have been appointed to provide prefabricated modular classroom accommodation and a double modular science unit, toilet block and internal refurbishments. In addition, the online application process for senior high schools opened on 24 April 2023, with applications closing on 5 May. Parents and pupils have been advised of the proposed implementation of the proposal and have made decisions on that basis.

[151] On these bases, along with likely significant disruption to curricular planning (addressed in further detail in an affidavit from the Principal of CSHS, Ruth Harkness), the EA indicated an intention to invite the court to decline to grant relief by way of a quashing order even if the applicant had been successful in some aspect of his challenge. It is said that it "would be a monumental task now to go back and halt or worse still undo the work done to date", even leaving aside the legal implications for the EA of its having already entered into contractual commitments and having expended a significant amount of public resources. Ms Harkness's affidavit has emphasised the preparatory work undertaken by CSHS for the new arrangements, including in relation to staff recruitment and deployment, curricular provision, timetabling, reallocation and procurement of resources, and transfer arrangements.

[152] The extent to which issues of prejudice such as those summarised above can or should be taken into account in order to withhold certain forms of relief where the application for judicial review has been brought within time are not straightforward (see, for instance, the brief discussion of this issue in *Re Fernmount Trading (NI) Ltd's Application* [2021] NIQB 89, at paras [28]-[29]). Even where a timely application has been made, there will be cases where, for a variety of reasons, it is not in the public interest for a court to grant intrusive relief. At the same time, decision-makers (or the beneficiaries of their decisions) cannot negate the court's supervisory function by timing decisions or their implementation in such a way that they can then claim that a meritorious challenge has been timed out. For the reasons given above, I do not need to grapple with these difficult issues in this case, since I have not been persuaded that there is any proper basis for granting relief to the applicant.

Conclusion

[153] For the reasons given above, I consider there to be no merit in the applicant's challenge on the *vires* issue. The 2022 Act was enacted in the terms in which it has been to permit senior officials to make decisions just such as this.

[154] As to the substance of the decision, ultimately, I consider there to be significant force in Mr McGleenan's submission that much if not all of the applicant's case – although ingeniously pleaded and presented with forensic skill – amounts to a merits challenge. The Permanent Secretary considered all of the relevant issues and was aware of the strong local opposition to the proposal from parents and others in Lurgan. However, the decision reached was rational, both as to the level of inquiry undertaken and the outcome.

[155] As this case was dealt with by way of a rolled-up hearing, I grant the applicant leave to apply for judicial review in relation to both key aspects of his challenge (without dealing separately with the grounds, some of which were plainly stronger than others) but, having not found any of the applicant's grounds to be made out, I dismiss the substantive application.

[156] I recognise that this result is likely to be disappointing for the applicant and his father and, indeed, for many more who may have been supportive of his application. As I have emphasised above, however, the role of the court is limited in disputes of this type. It is the EA's function to determine how best to plan and provide educational provision in this context; and it is the Department's function to determine whether any proposal brought forward by the EA should be permitted to proceed. Several of the arguments advanced in these proceedings touched upon the merits of the issues which are not for me to determine. In my judgment, the Department has acted within the bounds of what was legally open to it. Although – as I have little doubt the Permanent Secretary would agree – it would have been preferable for a democratically elected Minister to have reached a decision on this proposal, the 2022 Act provides for any departmental function to be exercised by a senior official where, as here, they are satisfied that it is in the public interest to do so.

[157] Both the Case for Change and the Department's evidence in these proceedings refer to the EA making clear that its long-term strategic plan for CSHS is in the provision of a new build school, the location of which has not yet been determined, but with indications given of an intention that this should be in a neutral or central location. To that degree, the current proposal is a temporary measure, although there is understandable scepticism about the expedition with which the new build school will be brought forward. In any event, no doubt the debate will continue as to how secondary educational provision in the Craigavon area should develop. In the exercise of its functions as the relevant statutory planning authority, the EA should continue to keep the situation under review. If the proposal at the heart of these proceedings is implemented and gives rise to consequences unforeseen to the EA or significantly of more concern than it or the Department anticipated in relation to the sustainability of CSHS or LJHS, it should obviously be prepared to reassess matters.

[158] In the meantime, I wish the applicant well in his continued education, along with those other pupils who will now be due to commence their Key Stage 4 education at the Portadown campus of CSHS. I trust that the EA and the Board of Governors of CSHS will work with him, and others for whom the proposed change has raised concerns or fears (particularly in relation to transport), conscientiously and expeditiously to ensure that the transfer process is as smooth as possible.

[159] I will hear the parties on the issue of costs.