London might now have to bring in direct rule after incinerator ruling

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Colin Buick, chair of 'No Arc21', is a happy man.

In September 2017, the department for infrastructure (formerly under a Sinn Féin minister), granted planning permission for a waste disposal incinerator at Mallusk.

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Was this the myth of the good Friday agreement ' like Moses' tablets of stone ' skewing the constitutional analysis away from continuity from 1920/21?

On 14 May 2018, Mrs Justice Keegan, sitting in the high court in Belfast, declared that Peter May, the permanent secretary of the department, had acted unlawfully in so doing.

Whatever of environmentalism — nimbies versus local councils — the case is of major constitutional significance (aside from the number of judicial reviews in Northern Ireland): the department is appealing, and the question of its powers (if any) may end up in the supreme court.

The political context is everything: given the assembly and executive collapsed in January 2017, and the Northern Ireland Office ('NIO') continues to decline to impose direct rule, Northern Ireland's eight departments are now seriously constitutionally exposed.

Following Mrs Justice Keegan's judgment, senior officials – like rabbits in headlights – must be wondering whether it will be best to do nothing all the time.

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Northern Ireland (which is not a state) does have a peculiar constitution. Under the Ministries of Northern Ireland Act (Northern Ireland) 1921, drafted by Sir Arthur Quekett (who had come north from the local government board in Dublin), departments (or ministries) were made bodies corporate with the power 'to acquire and hold land'.

This was antithetical to the UK constitutional tradition, based upon an absolutist sovereign. The Government of Ireland Act 1920, passed at Westminster, represented the first attempt at devolution in the UK.

Power flowed from the sovereign, to his lord lieutenant in Dublin (later governor in Belfast), and on to ministers who were members of the new privy council of Northern Ireland. They sat in the parliament of Northern Ireland, meeting in the Presbyterian theological college behind Queen's university.

Lord Londonderry, the new minister for education, told the senate, on 8 December 1921, that 'all these powers are vested in Ministers who are under the control of Parliament'.

This was incorrect. And the Quekett mistake — to which I first referred in my 2000 book on the Belfast agreement — became, and remains, the law in Northern Ireland (unlike Scotland, Wales and the UK).

That is why judicial review is against departments, and not ministers (except for the Northern Ireland Office, which is a UK department).

I have no doubt that Tony McGleenan QC, on behalf of the department for infrastructure, would have referred to this 1921 statute; Mrs Justice Keegan refers to him as having 'provided an impressive historical overview of the constitutional arrangements in Northern Ireland.'

However, the learned judge started with the Northern Ireland Act 1998.

Was this the myth of the good Friday agreement – like Moses' tablets of stone – skewing the constitutional analysis away from continuity from 1920/21? I think that is highly arguable.

She declined to accept that departments held powers tout court, and that Peter May – in the absence of an assembly, executive and ministers in September 2017 – was legally entitled to grant, or refuse, planning permission in Mallusk.

The court of appeal (or, if necessary, the supreme court) might come to focus on the NIO's unwillingness to re-enact the Northern Ireland Act 2000 at Westminster, and then suspend devolution while there is political disagreement.

Mrs Justice Keegan observed: 'I do not consider that Parliament can have intended that such decision making [as Peter May's] would continue in Northern Ireland in the absence of Ministers without the protection of democratic accountability.'

Forget about the merits of waste disposal by incinerator.

The Buick case may be the one that puts political accountability back into the constitution.

If the DUP and Sinn Féin will not get back into their involuntary coalition, then the secretary of state – mild-manner Karen Bradley accompanied by Sir Jonathan Stephens, her permanent secretary – may have no choice but to provide the missing ingredient of political accountability to the Westminster parliament … in other words, direct rule.

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