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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION

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IN THE MATTER OF AN APPLICATION BY JOHN HAMILTON HASSARD, ROBIN BRUCE, CAROL PORTER, ROBERT MCKEAN, DAVID PEOPLES, WILDRIDGE COOTE, DERICK DONNELL, DAVID BRUSH AND VICTOR BRUSH AS MEMBERS OF THE ALTERNATIVE A5 ALLIANCE

AND IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 67BA OF THE ROADS (NORTHERN IRELAND) ORDER 1993 (AS AMENDED)

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Mr Marc Willers KC and Mr Acland Bryant (instructed by McIvor Farrell Solicitors) on behalf of the Applicants
Mr Paul McLaughlin KC and Mr Michael Neeson (instructed by the Departmental Solicitor's Office) on behalf of the Respondent
Mr Stephen Toal KC and Mr Plunkett Nugent (instructed by Conor Sally & Co Solicitors) on behalf of Niall McKenna, Michael Kerr, Grainne Donnelly, Barbara Ward, Benny Hurl, Damien Harvey, Seamus Marlow, Colin Mullin and Sean Quinn as Committee members of the Enough is Enough campaign group, Interested Parties

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McALINDEN J

Introduction

[1] This is an application under Article 67BA of the Roads (Northern Ireland) Order 1993 (as amended) by the members of the Alternative A5 Alliance and named individuals ("the applicants") for an order quashing the decision of the Minister for Infrastructure ("the Minister") and/or the Department for Infrastructure for Northern Ireland ("the Department") dated 2 October 2024 to proceed with the first phase of the A5 dual carriageway. The applicants also seek orders quashing the subsequent Direction Order, "The Trunk Road T3 (Western Transport Corridor – Sion Mills (North) to Ballygawley (West) Order (Northern Ireland) 2024" made on 10 October 2024 and coming into operation on 13 November 2024, and the consequential vesting and stopping up orders, made on 15 October 2024, which came into operation on 25 November 2024, consisting of the Notice of Making Vesting Orders (NMVOs) for Sion Mills (North) to Omagh (South) and Omagh (South) to

Ballygawley (West), together with the NMVO for Mitigation Measures and The Private Accesses on the A5 Western Transport Corridor – Sion Mills (North) to Ballygawley (West) (Stopping Up) Order 2024 (SUPA).

[2] The decision was made under Article 67 of the Roads (Northern Ireland) Order 1993 (as amended). This statutory challenge is under Article 67BA. Article 67BA(1) sets out the circumstances in which and the time within which an application can be made. It is in the following terms:

> "67BA(1) If a person aggrieved by a decision of the Department to proceed with the construction or improvement for which an environmental statement has been made desires to question the validity of the decision on the ground that—
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> (a) it is not within the powers of this Order; or
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> (b) any requirement of this Part has not been complied with in relation to the decision;
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> he may, within 6 weeks from the date on which the decision is first published under Article 67A(8), make an application for the purpose to the High Court."

Article 67BA(2) then sets out the powers of the court. In so far as relevant to this application it is in the following terms:

> "(2) On any such application, the Court—
>
> (a) …
>
> (b) if satisfied that the decision is not within the powers of this Order, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any requirement of this Part, may quash the decision, or any aspect of it, either generally or insofar as it affects any property of the applicant."

[3] It is accepted for the purposes of this challenge that at least two members of the Alternative A5 Alliance (AA5A) are "persons aggrieved" within Article 67BA(1).

[4] As far back as 2011, a public inquiry was held into the proposed A5 dual carriageway scheme by inspectors appointed by the then Department of Regional Development at which an Environmental Statement (ES) was considered. In July 2012,

Mr Danny Kennedy, the Minister for Regional Development accepted the inspectors' main recommendations and announced his intention to proceed with the scheme and with the making of a Direction Order designating the proposed road as a trunk road and with the requisite Vesting Orders providing for compulsory land acquisition.

[5] The AA5A issued its first challenge and in April 2013 Stephens J quashed these decisions on the basis that there had been a failure to make an appropriate assessment (AA) of the implications of the scheme for designated habitats of nature conservation importance (see Alternative A5 Alliance's Application [2013] NIQB 30). Following this, a new ES and draft Direction Order, draft Vesting Orders, and draft Stopping Up of Private Accesses Order were subsequently prepared and advertised for comment between October and December 2016. The Planning Appeals Commission (PAC) was appointed to conduct an inquiry into the representations made following the consultation.

[6] On 24 May 2017, the PAC issued its report to the Department for Infrastructure (DfI) and in November 2017, the DfI announced that it was proceeding with the whole scheme and made a Direction Order for the proposed route from Newbuildings, a village on the east bank of the Foyle river, about 5km southwest of Derry/Londonderry to Ballygawley in County Tyrone, and Vesting Orders for what was described as Phase 1A of the scheme from Newbuildings to north of Strabane.

[7] The AA5A issued its second challenge and in November 2018, the DfI submitted to judgment in favour of the Alliance on the basis that these decisions were caught by the *Buick* decision [2018] NICA 26 and ministerial authority was needed for these decisions. The Department had taken the decisions in the absence of a minister due to the non-functioning of the Northern Ireland Executive.

[8] In March 2019, the DfI published for consultation an addendum to its 2016 ES (the 2019 ESA) and Reports to Inform Appropriate Assessments (RIAA) relating to designated habitats potentially affected by the scheme. In September 2019 the DfI appointed the PAC to hold another inquiry into the 2019 ESA and the RIAAs, and any consultation responses received in respect of same. On 4 December 2019, the PAC convened a pre-inquiry meeting. Thereafter, stage 1 of the Public Inquiry which considered the effects of the proposed scheme on the environment and habitats took place over four days between 18 and 21 February 2020. These hearings were followed by a stage 2 hearing which took place over three days between 11 to 13 March 2020, when non-environmental issues were addressed.

[9] The PAC provided an interim report to the DfI in September 2020 and as a result of the contents of this interim report, the Public Inquiry was adjourned to allow for yet another addendum ES to be provided. In an interim statement made in March 2021, the DfI accepted the PAC's interim recommendations relating to flood risk and exploring possible alternatives to the proposed route and set out its response to every recommendation in the PAC's interim report of September 2020 One year later in March 2022, the DfI published for consultation a new addendum to the ES (the 2022

ESA) along with the updated RIAAs and a notice of intention to vest additional lands. The 2022 ESA included a revised version of every chapter of the ES, a new flood risk assessment, an alternative route study, a phasing report, and impact assessments relating to the agricultural industry and other local businesses

[10] In June 2022, the Climate Change (Northern Ireland) Act 2022 ("the 2022 Act"), which had been introduced into the Assembly after the 2020 Public Inquiry, received Royal Assent. In September 2022, the DfI provided the PAC with details of the 219 responses it had received to its March 2022 consultation process. On 19 October 2022, the PAC wrote to those who had made those representations to the DfI and to the existing participants in the public inquiry to inform them that the public inquiry would reconvene in January 2023, and this would be preceded with a public hearing on 15 November 2022. Prior to this meeting taking place, the DfI wrote to the PAC informing it that the DfI intended to publish seven additional items of environmental information. At the public hearing on 15 November 2022, the PAC postponed the scheduled resumption of the public inquiry because it considered that it would be unfair to non-departmental participants to have to digest and respond to the new environmental information within such a short timescale.

[11] In December 2022, the DfI produced what it described as an environmental assessment matrix which depicted the relationships between the 2016 ES and the 2019 and 2022 ESAs. In January 2023, the DfI made available for consultation a report containing layout drawings covering the entire length of the scheme together with longitudinal profiles and cross-sections. This consultation generated 112 further representations.

[12] The reconvened public inquiry sat in public over a period of nine days between 15 to 19 May 2023 and 30 May 2023 to 2 June 2023. The AA5A were legally represented, as they had been throughout the present inquiry process. A new campaign group entitled "Enough is Enough" which was formed as a result of an initiative of the Tyrone Gaelic Athletic Association, and which is strongly in favour of the new scheme primarily as a result of the number of local people who have been killed on the existing A5 was also represented at the resumed hearing.

[13] On 31 October 2023, the PAC delivered its final comprehensive report on the A5 scheme. The report which runs to 248 pages was drafted by Mr G A Kerr (Commissioner) and Mr T A Rue (Assessor). Just short of a year later, on 2 October 2024, the DfI made and published its decision to proceed with the first phase of the A5 scheme. As indicated above, the Direction Order was made on 10 October 2024 and became operative on 13 November 2024. On 15 October 2024, the consequential vesting and stopping up orders were made and these came into operation on 25 November 2024. In essence, the DfI decided to proceed with only part of the scheme at this time, consisting of a 53.5km section running from the proposed Junction 8 south of Strabane to the proposed Junction 15 near Ballygawley, including the proposed 1.4km long westward extension of the existing A4 (the dual carriageway running from the end of the M1 at Dungannon to Ballygawley.

[14] In relation to the remaining parts of the scheme, the DfI indicated that it would continue to progress those portions (Ballygawley to Aughnacloy and Strabane to Newbuildings) "in accordance with the existing draft statutory orders" and would make a decision on whether to proceed with those parts of the scheme at a later date.

[15] On 13 November 2024, the AA5A issued their legal challenge. This prompted a first review by the Court on 19 November 2024 at which the DfI requested time to consider the challenge, and a further review of the matter was timetabled. This took place on 29 November 2024 and at this review the Enough is Enough group was provided with interested party status with the right to be provided with all the papers, to attend the hearing and to make written and oral submissions. A hearing date in February 2025 was provided but this proved unachievable, and a further review took place on 4 February 2025 and the hearing was rescheduled for March 2025. At a final review on 24 February the Court was updated as to parties' state of readiness and the matter then proceeded to a substantive hearing over five days between 18 and 20 March 2025 and 1 and 2 April 2025.

[16] The overall context of the scheme is clearly and succinctly set out by Stephens J in part two of his 2013 judgment between paras [9] and [42] and I gratefully adopt and incorporate that factual background in this judgment. Before dealing with the AA5A's seven specific grounds of challenge, I think it would be important to expand the chronology to some extent to incorporate references to some important dates prescribed by the Climate Change (Northern Ireland) Act 2022 and in order to do so it will be necessary to provide an overview of the 2022 Act and the duties it imposes on Northern Ireland government departments.

Climate Change (Northern Ireland) Act 2022

[17] The Act was enacted on 6 June 2022 and came into operation on 7 June 2022. The main purposes of this legislation are to provide mechanisms: (a) for the setting of targets for the years 2050, 2040 and 2030 for the reduction of greenhouse gas emissions; (b) for a system of carbon budgeting; and (c) for the provision of reports and statements in respect of those targets and budgets. In addition, the Act confers powers on the Department for Agriculture, Environment and Rural Affairs (DAERA) to impose climate change reporting duties on public bodies in Northern Ireland. The Act requires DAERA to consult with the UK Committee on Climate Change when making any regulations under the Act and the Act also empowers and requires that Committee to produce reports on how Northern Ireland is doing in terms of reaching its emissions targets and to provide relevant advice to Northern Ireland government departments. The Act also mandates the establishment of an independent office to be known as the "Northern Ireland Climate Commissioner", whose general functions and responsibilities are to oversee and report on the operation of this Act.

[18] Part 1 of the 2022 Act deals with emissions targets and sectoral plans. In essence, adopting the year 1990 as the baseline year for net atmospheric emissions of

carbon dioxide, methane and nitrous oxide, and the year 1995 for a number of other specifically identified, though less well-known, greenhouse gasses, the Act requires Northern Ireland government departments to ensure that by 2050, the net emissions of these gasses are 100% below the baseline, allowing for the appropriate crediting and debiting of carbon units. Whatever else happens, unless the targets are changed by legislation, the net emissions of carbon dioxide in 2050 must be 100% below the 1990 baseline for that gas, whereas the net emissions of methane in 2050 need only be reduced by 46%. However, overall net emissions in 2050 must be 100% lower than the baseline.

[19] It is important to note that under section 9 of the 2022 Act, the Northern Ireland emissions of a gas for a period are "emissions of the gas from sources in Northern Ireland in the period, and emissions of the gas from international aviation or international shipping that count as Northern Ireland emissions for the period (as determined by regulations under section 10)." The power to make regulations under section 10 is a power to make provision for emissions of a greenhouse gas from international aviation or international shipping to count as Northern Ireland emissions of the gas including how those emissions are to be taken into account when calculating the baseline year figures. It would appear that unless and until such regulations are made, the 2022 Act and the duties imposed thereunder are focused on emissions from sources within Northern Ireland and this is relevant in the context of this challenge.

[20] As indicated above, the primary government department with overall responsibility for the Act is DAERA and under the Act, DAERA was required to set targets for the years 2030 and 2040 which were in line with the 2050 target and those targets had to be laid before the Assembly and approved by 6 June 2024. This did not occur but in a subsequent written ministerial statement issued on 9 December 2024, Mr Muir, the DAERA minister, informed the Assembly that the 2030 target would be a 48% reduction, and the 2040 target would be 77% reduction. The Assembly duly approved these figures on 11 December 2024.

[21] Under section 4 of the Act, all the Northern Ireland government departments are under a duty to ensure that the net emissions account for the year 2030 is at least 48% lower than the baseline and that the net emissions account for 2040 is in line to achieve the 2050 target.

[22] Under section 13 of the Act, each Northern Ireland government department is under a duty to develop and publish sectoral plans relating to their sector of the economy which set out how the targets in section 1 (the 2050 target), section 3 (the 2040 target) and section 4 (the 2030 target) will be achieved by each sector. These plans must include proposals and policies to ensure that these targets are met. The Department for the Economy (DfE) is responsible for the production of sectoral plans for the energy sector and the industrial processes sector. The DfI must develop and publish sectoral plans for the infrastructure sector and the transport sector and these sectoral plans must include proposals and policies for planning, construction, public

and private transport, including the infrastructure needed for electric vehicles. Interim sectoral reports on the progress being made in each sector must also be published by the relevant department.

[23] Part 2 of the Act deals with the setting of carbon budgets. Under section 23 of the 2022 Act, DAERA is tasked with setting carbon budgets which are the maximum total amount for the net Northern Ireland emissions account for each budgetary period. The first budgetary period is the period between 2023 and 2027 and each subsequent five-year period constitutes a subsequent budgetary period. Prior to setting carbon budgets for each period, DAERA must consult with the public and a number of statutory consultees including relevant bodies in the Republic of Ireland and must lay its proposals before the Assembly. Under section 27, DAERA was required to set carbon budgets for the first three budgetary periods (2023-2027, 2028-2032, and 2033-2037) before the end of 2023 and then to set budgets for the fourth and subsequent periods at least 12 years before the start of the period in question.

[24] DAERA is tasked with setting carbon budgets which are consistent with meeting the 2030, 2040 and 2050 emissions targets and under section 24 of the Act, the Northern Ireland government departments are required to ensure that the net Northern Ireland emissions account for each budgetary period does not exceed the carbon budget for that period. Carbon budgets for the first three periods set out above were finally set on 11 December 2024. Under the Climate Change (Carbon Budgets 2023-2037) Regulations (Northern Ireland) 2024, the carbon budget for the 2023-2027 budgetary period is an annual average of 33% lower than the baseline, the carbon budget for the 2028-2032 budgetary period is an annual average of 48% lower than the baseline and the carbon budget for the 2033-2037 budgetary period is an annual average of 62% lower than the baseline.

[25] Part 3 of the Act relates to DAERA's responsibility to devise and publish reports referred to as "Climate Action Plans" (CAPs) for each budgetary period which set out its proposals and policies for meeting the carbon budget for that period (section 29). Each such CAP must set out such proposals and policies covering the areas of responsibility of each Northern Ireland government department. When developing proposals and policies, each department must ensure that they are consistent with the targets set out in the relevant carbon budget.

[26] Having consulted with the relevant sector-specific advisory groups, each Northern Ireland government department must provide DAERA with its proposals and policies in its areas of responsibility for each budgetary period before the end of the first nine months of that period. DAERA must then lay the draft CAP for the relevant budgetary period before the Assembly before the end of the first year of that period. DAERA is also required to publish the draft CAP for public consultation for a period of not less than 16 weeks ending on a day which is not less than 10 working days before the draft CAP is laid before the Assembly and DAERA must then lay the results of the public consultation before the Assembly at the same time as it lays the relevant draft CAP. These timeframes have not been met. A draft CAP was eventually

published and put out for consultation on 19 June 2025, four days before this judgment was delivered.

[27] When deciding on its proposals and policies for the purposes of feeding these proposals and policies into the CAP process, each Northern Ireland government department must have regard to the desirability of co-ordinating those proposals and policies with corresponding proposals and policies in other parts of the UK and the Republic of Ireland and elsewhere and should, where appropriate, consult with relevant public bodies in other jurisdictions and should commission relevant financial, social economic and rural impact assessments (section 30). By way of reinforcement, section 33 stipulates that proposals and policies that make up the CAP must ensure that the relevant carbon budget is achieved in a number of listed sectors including transport and infrastructure.

[28] For each budgetary period, DAERA must prepare and publish interim progress reports setting out the progress that is being made towards implementing the policies and proposals set out in the relevant CAP. Each Northern Ireland government department must provide DAERA with information relating to the progress it has made in its areas of responsibility in implementing its proposals and policies aimed at meeting the relevant carbon budget **(**section 38). Within two years of the end of a budgetary period, DAERA must prepare and lay before the Assembly a final statement relating to the relevant budgetary period which contains details of all relevant emissions and removals and all relevant carbon credits and carbon debits. Each final statement must state what the final carbon budget for that period was and must indicate whether the carbon budget for the relevant period has been met. Each final statement must go on to explain why the carbon budget has or has not been met by, *inter alia*, providing an assessment of the extent to which the proposals and policies for meeting the carbon budget set out in the CAP for the relevant period have been carried out and have contributed to the carbon budget for the period being met or not being met, as the case may be. Each Northern Ireland government department has a statutory responsibility to feed into the development of the final report by providing DAERA with the relevant information in respect of its sectoral areas of responsibility (section 39).

[29] If a final report reveals that the carbon budget for the relevant period was not met, DAERA must within 3 months of the final report lay a further report before the Assembly setting out proposals and policies for making up the lost ground in subsequent budgetary periods. Each Northern Ireland government department must assist in this regard (section 40). DAERA is under further specific reporting requirements for the years 2030, 2040 and 2050 (section 41).

[30] Section 52 is an important provision and it is worth setting it out in full:

"**Duties to ensure that targets etc are met**

52(1) The duties mentioned in sections 1, 3 to 5 and 24 on the Northern Ireland departments (namely, to ensure that the net Northern Ireland emissions account is below a certain amount and that the net Northern Ireland emissions account for carbon dioxide for 2050 is below a certain amount) are duties on each of them—

(a) to exercise its own functions, so far as is possible to do so, in a manner that is consistent with the achievement of that objective,

(b) so far as is consistent with the proper exercise of its own functions, to co-operate with each of the other departments in the performance by the other department of the other department's duty under paragraph (a), and

(c) to draw up and implement such plans, policies and strategies as may be appropriate for the purpose of performing its duties under paragraphs (a) and (b).

(2) The Northern Ireland departments should, as far as reasonably practicable, align such plans, policies and strategies to those of the Republic of Ireland.

(3) Subsection (1) is in addition to (and does not limit) the duties under other sections of this Act."

[31] Although the 2030 target has been confirmed and the 2040 target has now been set and carbon budgets for the first three budgetary periods have been adopted, no sectoral plans and no CAPs have been forthcoming, although a draft CAP has very recently been published. In essence, they remain works in progress. Nevertheless, the duties imposed by the Act on each Northern Ireland government department (individually and in co-ordination with each other) to develop and implement proposals and policies to ensure that Northern Ireland remains within the set carbon budgets in each budgetary period and that the 2030, 2040 and 2050 targets are met are live, active, continuing and meaningful duties. Further, under section 52 of the 2022 Act, each Northern Ireland government department must exercise its own functions, so far as it is possible to do so, in a manner consistent with the objective of staying within the set carbon budgets for the relevant budgetary periods and meeting the set net emissions reductions targets for 2030, 2040 and 2050.

The PAC report

[32] The first ground of challenge raised by the AA5A is that, in the absence of a CAP and in the absence of any relevant sectoral plans, the DfI has abjectly failed to demonstrate compliance with its section 52 duty when deciding to progress a significant part of this scheme. It is argued that the decision to progress a significant part of this scheme in the absence of a CAP or any relevant sectoral plans is patently irrational. In this context, it is clear that in making this decision, the DfI was exercising its own functions within the meaning of section 52(1)(a) and (b). In order to analyse this and indeed every aspect of the AA5A's challenge, it is necessary to consider the detail of the PAC report and the DfI responses to it.

[33] The PAC report dated 31 October 2023 has a number of sections. Following the introduction, there is a section on strategic issues which is broken down into subsections dealing with the issues of justification, funding, human rights, alternatives and phasing. The next section contains an in-depth analysis of the updated ES. The various habitats reports are then discussed. The proposed supplementary vesting order including land adjacent to Tully Bog is then discussed. This section is followed by the overall conclusions.

[34] The first section I intend to turn to is the section on strategic issues and the subsection on justification. The objectives of the scheme as identified by the government were to improve road safety, improve the roads network in the west of the province and North/South links, reduce journey times and improve journey reliability. Higher level objectives included balancing regional infrastructure, improving competitiveness and economic prosperity through improving connectivity and accessibility across the region (sections 2.33 and 2.34). The PAC looked at each of these in turn.

[35] Although the PAC considered that the scheme objectives and higher-level objectives lacked measurable performance indicators (section 2.37) they went on to consider each in turn. In relation to the issue of road safety, the PAC concluded at section 2.63 that the scheme would have a large beneficial effect on road safety. Section 6.62 is worth setting out in full:

> "Each of the political representatives who appeared at the inquiry emphasised the road safety case for proceeding with the scheme. The dignified testimony of victims and the bereaved, which was personally difficult for them to give, was powerful in emphasising the social impacts of past carnage on the road. The expertise of medical professionals who have had to deal with the consequences of accidents added a vital consideration to the road safety picture. It appears to us that DfI's traffic model may underestimate the casualties that would be saved by the scheme given the rising trends that are apparent, and they

> admit that the model is conservative. We regard it as undisputable that the saving of human lives and the reduction in the suffering caused by road accidents would be a large benefit of the scheme."

[36] In relation to the issue of journey times, the PAC concluded that the scheme would be of considerable benefit to local communities. It would greatly ease conditions and thereby speed up traffic on the existing A5. Short-distance and long-distance users of the new road would experience substantial journey time savings in the region of a total of 9,000 hours daily (see sections 2.83 and 2.84). Similarly, in relation to the issue of regional balance, the PAC concluded that the provision of a dual carriageway on the Western Transport Corridor (WTC) would make a significant beneficial contribution towards balancing infrastructure provision across the region (see section 2.95).

[37] In relation to the issue of enhancing North/South links, the PAC noted the potential for improved North/South links if the proposed Finn Crossing (a multi-span bridge across the River Finn and the associated flood plain) was constructed by the Irish government. The PAC concluded that by facilitating the Finn Crossing at the Tyrone/Donegal border, the scheme would have a significant beneficial effect on North/South links (section 2.101). However, at the other end of the proposed road, the PAC concluded that for various reasons, the scheme is incomplete and does not involve a new physical North/South link across the Tyrone/Monaghan border. The PAC recommended that the DfI should abandon the current incomplete design for the section of the scheme between Ballygawley and Aughnacloy and await the publication of a detailed design for the new N2 Clontibret to the Border Road Scheme, including confirmation of the intended construction standard and route, and agreement on a tie-in point and synchronised completion date (see section 2.338).

[38] In relation to the issue of economic competitiveness, the PAC, having heard evidence from the department, various local councils including Donegal County Council, road haulage operators and representative organisations, a local chamber of commerce, a multi-national engineering company and a local milk and dairy products producer, concluded that the scheme would have a large beneficial effect on economic competitiveness and "could be transformative" (see section 2.137).

[39] The PAC then looked at the related issues of the overall cost of the scheme and whether it was likely that government funding (north and south) would be made available to complete the scheme within the proposed timeframe. It noted in section 2.173 that the overall cost of the scheme at 2022 prices was £1.7 billion including a quite shocking figure of £90 million sunk costs (money spent to date which cannot be recovered). Despite highlighting a number of obvious risks to funding, the PAC concluded that if the DfI decided to proceed with the scheme it was more likely than not that funding will become available to complete the scheme by the end of the financial year 2028/2029 (see section 2.200).

[40] In its consideration of human rights issues, the PAC noted that official figures indicated that the total land take for the scheme would be approximately 1,209 hectares affecting 314 farms. It would involve the demolition of eight homes and one traveller site and it would temporarily affect direct access to over 180 dwellings. It would impact on seven areas of land used by local communities (see section 2.214). In the absence of updated figures setting out the number of households that would be affected by compulsory acquisition, the PAC inferred from the available information that hundreds of households would suffer an interference with their Convention rights due to the expropriation of their property for the scheme and that there is potential for many other people to suffer an interference with or limitation on their convention rights due to the impact of the scheme on the amenity enjoyment of their land. The PAC concluded that the scheme would involve large-scale interferences with and limitations on rights identified in article 8 of the ECHR and article 1 of the First Protocol to the ECHR.

[41] Having considered the evidence presented to it including impact statements provided by the AA5A, the PAC concluded that many have had their lives seriously affected by the threat of vesting. Several have suffered from anxiety and depression and have needed medical help. The PAC opined that:

> "The uncertainty has been going on for about 14 years, which is a substantial portion of any person's life. While it is important to consider evidence dispassionately, the human dimension must never be overlooked."

See section 2.222 of the PAC report.

[42] The PAC went on to state that:

> "If the confidence expressed by DfI's officials about the availability of funding for the scheme turns out to be misplaced, it is conceivable that the prospect of implementation could stretch well into the 2030s. The preferred route was announced in 2009. In our opinion the prolongation of blight and uncertainty into a third decade would have an excessive and disproportionate effect on the interests and wellbeing of persons whose lands and properties are proposed to be vested."

The PAC concluded that those whose human rights would or might be infringed by the scheme are entitled to know whether it is going ahead or not. They need reasonable certainty so they can make plans for their businesses and their lives. As a result, the PAC concluded that any authorisation should be time-limited and not open-ended. Noting that planning permission usually lapses if the authorised development does not commence within five years, the PAC concluded that the scheme also needed a defined cut-off date. The ES was originally published in 2016

and was updated in 2022. All the assessments were predicated on the road being open to traffic by 2028. The information on which the assessments rely will become increasingly stale as time goes by. The PAC, therefore, formally recommended (Recommendation 3) that authorisation for any part of the scheme be time-limited so that if physical construction of that part does not commence by the end of the 2027-2028 financial year, that authorisation will lapse (see sections 2.225 to 2.229).

[43] Section 3 of the PAC report deals with the updated ES. One issue of concern was whether the traffic model used by the DfI in the ES was appropriate. The PAC carefully considered this issue and concluded that it was satisfied that for the purposes of traffic forecasting "a fixed demand approach to modelling is appropriate in this instance" (see section 3.56). Despite numerous issues being raised by the AA5A, the PAC concluded that the traffic model used by the DfI was adequate for Environmental Impact Assessment (EIA) purposes (see section 3.80).

[44] The issue of climate impact which is a key element of the ES is addressed between sections 3.422 - 3.464 of the PAC report. This portion of section 3 of the report is of central importance when considering the first ground of challenge in this case. The PAC acknowledged that the proposed section of dual carriageway would be the largest road-building project ever undertaken in Northern Ireland with consequent impacts on greenhouse gas emissions during the construction and operation phases (see section 3.422). The PAC noted that both the UK and ROI government had declared climate emergencies and that objectors to this scheme had argued that it was now imperative for governments to take meaningful steps to disincentivise private car use which was a recognised environmentally damaging activity (see section 3.426).

[45] The PAC noted the enactment of the 2022 Act and specifically referred to the duty set out in section 52. It went on to summarise the important provisions of the legislation. The PAC noted that in February 2023, the Northern Ireland Greenhouse Gas Projections Update published by DAERA estimated that the million tonnes of carbon dioxide equivalent ($MtCO_2e$) fell from 28 $MtCO_2e$ in 1990 to 21 $MtCO_2e$ in 2020 with an estimated continued fall to 18 $MtCO_2e$ by 2031. If these estimates are accurate, then the 2030 target set out in the 2022 Act will be missed as it requires a reduction to 15 $MtCO_2e$. In 1990, transport greenhouse gas (GHG) emissions amounted to 3.4 $MtCO_2e$ and they are expected to decline to 3.1 $MtCO_2e$ by 2031. This limited reduction of 300,000 tonnes of carbon dioxide equivalent (tCO_2e) will probably be achieved by stricter emissions standards being implemented in respect of new vehicles and the shift towards electric vehicles. The 2023 Projections Update concluded that in order to meet the statutory targets set out in the 2022 Act, "additional policies and initiatives which provide emissions savings are being developed" (see section 3.429).

[46] The PAC noted the contents of the UK Climate Change Committee (CCC) report dated March 2023 entitled: "The path to a Net Zero Northern Ireland", the Executive Summary of which stated that the 2022 Act had set an "extremely stretching legal target" (the 2050 GHG reduction target) which went significantly beyond the

CCC's previous advice on what would be a fair and achievable contribution from Northern Ireland to the achievement of the UK-wide Net Zero emissions. The PAC noted that the CCC's earlier advice which was set out in its 2020 "Balanced Pathway" report had been updated in its 2023 report which now contained recommended actions for the Northern Ireland government to take which were consistent with the UK achieving Net Zero by 2050. However, the CCC noted that this "Balanced Pathway" approach was predicted to only bring about an 83% reduction in Northern Ireland's emissions by 2050, when compared to levels in 1990. This "Balanced Pathway" approach was already considered by the CCC to be "very ambitious", with most sectors having to decarbonise almost completely, with residual emissions in 2050 coming predominantly from the agriculture sector, which has a greater share of economic activity in Northern Ireland than in the UK as a whole, making Net Zero much more challenging to achieve for Northern Ireland (see section 3.430 of the PAC report and the Executive Summary of the 2023 CCC report).

[47] In an earlier part of the Executive Summary of the 2023 CCC report the following stark message is set out:

> "In this report we provide advice to Northern Ireland on how the legislated target might be reached, and on the levels for the 2030 and 2040 interim targets and the First (2023-2027), Second (2028-2032) and Third (2033-2037) Carbon Budgets on the path to it.
>
> There are essential new policy requirements for the Northern Ireland Executive in meeting the Net Zero legal target and the interim targets advised in this report. So far, the Committee has not seen evidence of policy ambition at this scale in Northern Ireland. That must change. This report is designed to illustrate the actions and outcomes that policies must drive to achieve decarbonisation at the pace required."

[48] The PAC went on to note in section 3.431 of its report that the CCC in its 2023 report had developed a "Stretch Ambition" pathway that projected a 93% reduction in emissions on 1990 levels by 2050. However, this required Northern Ireland to take a number of "stretching actions" in order to bolster the contribution of greenhouse gas removals and, therefore, balance some of the residual emissions from agriculture. These "stretching actions" would involve a "rapid ramp up" in afforestation rates to reach 3,100 hectares per year by 2035, six times the rates reported in 2021/22 and the inclusion of engineered removals based on carbon capture and storage (CCS) from both solid biomass grown in Northern Ireland and anaerobic digestion of wastes to produce biomethane. This would entail CO_2 capture in Northern Ireland and transportation (eg shipping) to store the CO_2 elsewhere and would require significant investment and infrastructure development.

[49] Returning to the 2023 CCC report itself, it went on to state:

> "These are radical actions, but even with their achievement we estimate that there remains a gap to the legislated Net Zero target. We have therefore considered two 'speculative' pathways, one with deployment of direct air capture of CO_2 (DAC) technology, which is expected to have high costs and may be difficult to deliver at scale in time, and another where livestock numbers are approximately halved by 2050, going significantly further than the reduction of almost a third in our Balanced Pathway.
>
> Our assessment is that some DAC deployment would be required, but that the further reduction in livestock numbers would reduce this need significantly. It is up to Northern Ireland to decide whether to pursue other speculative options to reduce net emissions in addition to DAC."

[50] It is clear that in its 2023 report, the CCC was of the view that Northern Ireland would have to go down a "speculative pathway" if it were to achieve its 2050 legal reduction target. The PAC, in its report at section 3.431, noted that the CCC had recommended a number of near-term actions which were required to get on track to the 2050 legal target, including a significant reduction in emissions from transport to 2.4 $MtCO_2e$ by 2030 and to 0.2 $MtCO_2e$ by 2050. These targets are all the more daunting because in table 3.2 of the 2023 CCC report, it is highlighted that between the baseline date of 1990 and 2019, transport emissions in Northern Ireland had actually risen from 3.4 $MtCO_2e$ to 4.3 $MtCO_2e$.

[51] Turning to the impact of the construction of the scheme and its operation as a road thereafter, the PAC in section 3.432 concluded that the estimated 322,000 tCO_2e for construction emissions from materials and transport of materials, transport of waste, and plant and equipment set out in the 2022 ESA at table 15.19 should be regarded as an under-estimate due to no account being had for carbon emissions due to soil disturbance and the use and disposal of felled timber. It also noted that the operational energy use from lighting of the scheme had not been quantified and that there had been a mistake made in respect of the estimated magnitude of carbon sequestration to be achieved by tree planting associated with the scheme. The PAC noted that at the third phase of the public inquiry, the DfI accepted that this mistake meant that an additional 2.8% had to be added to the estimated total GHG emissions during the operational phase, raising the figure from 575,000 tCO_2e to 591,100 tCO_2e.

[52] The PAC subsequently noted at section 3.450 and section 3.451 of its report that in the absence of agreed carbon budgets for Northern Ireland (the PAC report was published over a year before the publication of the first three carbon budgets in

December 2024), the DfI had produced a table in the 2022 ESA (table 15.23) setting out the proposed scheme's impacts on three UK carbon budgets. In table 15.23 of the 2022 ESA, total GHG emissions for the construction phase (2023 to 2028) were estimated at 322,000 tCO_2e; total GHG emissions for the operation phase (2028 to 2087) were estimated at 575,000 tCO_2e; and total GHG emissions for the life cycle (2023 to 2087) were estimated at 897,000 tCO_2e. Table 15.23 sought to demonstrate that these emissions, when appropriately assigned to the relevant UK carbon budgetary periods, constituted very small percentages of the relevant carbon budgets.

[53] The PAC in its final report indicated that it was not persuaded that table 15.23 provided a suitable or meaningful comparison, given the existence of statutory emissions reduction targets in Northern Ireland. It highlighted the fact that the CCC in its 2022 report to the UK Parliament had advised that substantial investment in road building should proceed only if it can be demonstrated how it fits within a broader suite of policies that are compatible with the UK's net zero trajectory. The CCC noted that the Scottish and Welsh governments had committed no longer to invest in road building to cater for unconstrained increases in traffic volumes (see section 3.541).

[54] The PAC concluded that even though the figures in table 15.23 underestimate the GHG gases likely to arise from the scheme, these figures served to demonstrate that during the operational phase, emissions would amount to an average of nearly 9,600 tCO_2e per annum. Using the figures in table 15.23, the PAC estimated that by 2031, the construction and operational phases would have generated approximately 350,000 tCO_2e with this figure rising to 532,000 tCO_2e by 2050. The PAC stated that based on these estimates in the period up to 2031, the scheme would generate more GHG emissions than the anticipated reduction of 300,000 tCO_2e (from 3.4 $MtCO_2e$ in 1990 to 3.1 $MtCO_2e$ by 2031) for the entire transport sector (see section 3.453).

[55] The PAC also considered submissions from An Taisce, the National Trust for Ireland, in respect of the failure of the ES or any of the addenda thereto to address the effects on climate of GHG emissions generated by scheme traffic in the Republic of Ireland. It was argued that the scheme would incentivise and generate car-based travel between the east midlands of ROI and Donegal via the A5 and no consideration had been given to additional trips from one part of the ROI to another that would not be undertaken but for the new dual carriageway (induced trips). The initial DfI position was that conditions favourable to induced traffic were unlikely to feature on the A5 corridor.

[56] The PAC final report at section 3.446 highlighted the fact that it had raised the absence of any reference to induced trips in the ESA in its interim report and it regarded this as an omission. In its responding Interim Statement, the DfI had stated that it would review its assessment of the effects and impact of induced travel and would include any update in its next addendum to the ES. However, the 2022 ESA did not make any reference to induced trips and this stance was justified by the DfI stating that any impact from induced trips would be marginal. The PAC noted that this stance did not sit well with the fact that one of the justifications for the scheme was

that it would bolster tourism by facilitating more people visiting from ROI. The PAC noted that the DfI had "once again failed to consider this potentially important matter" (see section 3.447).

[57] The PAC commented on tables 15.24 and 15.25 of the 2022 ESA report which set out potential additional mitigations during the construction and operational phases of the scheme and it noted that there was no certainty that they would be implemented and, in any event, they would have limited impact (see section 3.449). Consideration of all these matters and issues led the PAC to conclude at section 3.454 that in the context of current Northern Ireland emissions reduction targets, the scheme would have a large adverse impact on climate.

[58] Crucially, the PAC noted at section 3.455 that the need to reduce GHG emissions is not just one material consideration to be weighed against others; it is a legal imperative by virtue of the 2022 Act. It went onto state:

> "It seems to us that it would not be lawful, having regard to Section 52 of the Act, for DfI to decide to proceed with any part of the scheme unless it can demonstrate that such a decision would not prevent the statutory targets being met."

[59] Referring back to the Executive Summary of the 2023 CCC report, the PAC concluded in section 3.456 that if the CCC was correct when stated that even a "Stretch Ambition" pathway would only achieve a 93% reduction in emissions from 1990 levels by 2050, then:

> "it is difficult to imagine how the emissions caused by the proposed scheme could be accommodated within the statutory target to achieve a 100% reduction. If the current trajectory of Northern Ireland GHG emissions continues, it is also difficult to envisage the scheme being compatible with the target to reduce such emissions by 48% by 2030."

[60] The PAC stated that the possibility cannot be excluded that the DfI, in consultation with DAERA and other Northern Ireland government departments, might find a way to progress at least some part of the scheme while staying within the carbon budgets. The PAC concluded that this would not be easy and there must not be a fudge: "Clarity, certainty and transparency are essential." The PAC then set out a number of recommendations that it considered necessary to reconcile the scheme with the emissions targets, "if that is indeed possible" (See section 3.460).

[61] The PAC then set out four crucial recommendations that are of central importance in the context of this challenge. The PAC recommended that the DfI should not proceed with any part of the scheme unless satisfied that the construction and operation of that part of the scheme will not prevent the emissions targets

specified in sections 1, 3, 4 and 24 of the 2022 Act being met (Recommendation 14). It also recommended that the DfI should not announce a decision to proceed with any part of the scheme until DAERA has published the first three carbon budgets and a CAP for 2023-2027 (Recommendation 15). It also recommended that if DfI were to announce its intention to proceed with any part of the scheme, it should simultaneously publish revised estimates of total GHG emissions likely to arise from the part of the scheme being authorised which should deal with the various perceived shortcomings highlighted in paras [51], [55] and [56] of this judgment including an estimate of the quantum of emissions arising from induced trips originating or terminating in the ROI (Recommendation 16). Finally, the PAC recommended that the DfI, if it announces a decision to proceed with any part of the scheme, should simultaneously publish detailed calculations (agreed with DAERA) "showing the expected trajectory of net Northern Ireland greenhouse gas emissions through 2030 to 2050 in the absence of the scheme, and the impact on that trajectory of the greenhouse gas emissions expected to arise from the construction and operation of the part of the scheme being authorised" (Recommendation 17).

[62] Section 4 of the PAC report deals with the various habitats' reports prepared under the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995 as amended. After a general discussion of the relevant legal framework, the PAC noted in section 4.14 that in March 2022, revised RIAAs were published in respect of a number of designated special areas of conservation (SACs) and Ramsar (wetlands of international importance) sites including the Tully Bog SAC, and it is this particular SAC that features prominently in the challenge brought by the AA5A. The PAC report specifically deals with the Tully Bog SAC between section 4.98 and section 4.193.

[63] The Tully Bog SAC is a 36-hectare area of active raised bog and degraded raised bog still capable of natural regeneration which is located 4km north-west of Omagh. It is also an area of special scientific interest (ASSI). Condition assessments carried out by the NIEA in 2008 and 2014 suggested that the active raised bog is in unfavourable, declining condition due to increased drying out. There is no formal government management plan in place for the bog at present although the charity, Ulster Wildlife, with some funding from NIEA, has commenced conservation works on the bog, including the re-wetting of the bog by blocking drains and installing peat dams, installing a number dip wells to monitor the water table at various locations on the bog, and removing invasive rhododendron plants from the SAC.

[64] The proposed dual carriageway would be sited to the east of Tully Bog, running in a roughly north south direction at that point. At its closest point, the finished road would be some 250m to the east of the bog but a working corridor to the side of the actual carriageway would reduce this distance somewhat and a link road associated with the new carriageway would come within approximately 125m of the SAC. Flood compensatory storage areas would be created between the road and the SAC and construction in this area would last three years (see section 4.99).

[65] The screening process set out in section 3 of the 2022 RIAA raised two concerns about the potential impact of the construction of the dual carriageway on the bog. These concerns centred on: (a) the possible impact of airborne pollutants, including nitrogen compounds, that could lead to a deterioration of the raised bog habitat; and (b) the possible alteration of the local hydrology through excavations or surcharging that could reduce the availability of water to the site, leading to a degradation of the raised bog habitat (see section 4.100 of the PAC report).

[66] The issue of interest in the present proceedings is the risk of the increased deposition of nitrogen compounds on the SAC as a result of the construction and operation of the dual carriageway. It is postulated that the increased deposition of nitrogen compounds on the SAC, particularly ammonia, could give rise to a deterioration of the raised bog habitat through two main mechanisms. Firstly, ammonia, particularly in its dry state, can be toxic to some of the bryophyte species (liverworts, hornworts and mosses) growing on the bog. Secondly, some of the other competing species of plants can tolerate and even thrive in the presence of increased amounts of nitrogen and so the biodiversity of the bog could be altered (see section 4.109 and section 4.110 of the PAC report).

[67] The PAC noted that although the government is presently doing nothing to remedy the presently unfavourable conservation status of this SAC, the DfI had indicated that it was committed to re-wetting the bog to mitigate any potential increase in the deposition of nitrogen compounds on the SAC consequent upon the construction and operation of the road. However, it would appear that this re-wetting work has largely been left to Ulster Wildlife to commence and continue and the ability of Ulster Wildlife to continue to do this work is dependent on continued funding from NIEA (which is far from assured) and engagement and co-operation from landowners. Further, the PAC noted that while on-site management may improve the resilience of the habitat, such management does not address off-site pressures.

[68] The PAC highlighted the lack of a formal conservation action plan for this SAC and noted that as this SAC was also an ASSI, the DfI had a statutory duty to restore and enhance the site and should, therefore, promote and fund a conservation action plan for the site which should make specific provision for ongoing and longer-term maintenance of any hydrological works and the continued suppression of invasive species. The PAC also noted that a survey of the SAC in 2020 revealed that despite the involvement of Ulster Wildlife there had been no significant improvement in the overall condition of the bog since the last survey in 2014. However, it was noted that Ulster Wildlife had only started their work in mid-2019 and that it would take several years for the bog habitat to respond positively to the management measures taken by Ulster Wildlife.

[69] Having heard evidence from departmental witnesses, the NIEA and Ulster Wildlife, the PAC concluded at section 4.125 that in order to determine how best to deal with the problem of ammonia and nitrogen deposition at Tully Bog, it was essential to gain the fullest possible understanding of how these forms of air pollution

are currently affecting the SAC. The PAC expressed surprise that work critical to establishing the environmental baseline does not appear to have been done. It was critical of the failure to garner data and report on soil chemistry and plant nitrogen accumulation across the SAC. It noted that the SAC had not been carefully examined for tell-tale signs of damage from nitrogen deposition. The PAC concluded that such deficiencies should be remedied before an Appropriate Assessment (AA) is produced (see section 4.125 of the PAC report).

[70] The PAC went on to note that the RIAA that had been presented to the PAC was heavily reliant upon air quality modelling and that all model studies have associated uncertainties. However, the PAC was of the view that such uncertainty did not mean that it was impossible, on the basis of the best information available, to establish, to the standard of reasonable scientific certainty, the absence of adverse effects on the SAC. The existence of modelling uncertainties could be addressed by adopting a precautionary approach to the values to be attributed to variables inserted into the models. The PAC indicated in its report that it had set out to perform a thorough and in-depth examination of the evidence that had been presented to it in order to test the scientific soundness of the DfI's opinion that the construction and operation of the road would have no adverse effect on the SAC to a standard of reasonable scientific certainty (see section 4.127 of the PAC report).

[71] Crucially, the PAC went on to note that the DfI's air quality expert witness, Dr Beverly Tuckett-Jones, had stated in her evidence that when addressing impacts where professional judgment is required, she took account of uncertainties by maximising impacts and minimising mitigation and, thereby, avoided over-optimism. The PAC stated that it accepted that this approach was consistent with the precautionary principle (see section 4.128 of the PAC report). The PAC was also satisfied that the inclusion of ammonia (NH_3) emissions from motor vehicles in any air quality assessment was further evidence of adherence to the precautionary principle. However, the PAC was not supportive of the DfI's approach in using the central traffic forecast in the dispersion model. The PAC in section 4.137 of its report considered that it would have been consistent with the precautionary principle to apply a higher growth forecast as a sensitivity test especially when Dr Tuckett-Jones had stated that she had adopted the approach of maximising impacts and minimising mitigation.

[72] Starting at section 4.130 of its report, the PAC gave detailed consideration to all the available evidence which related to the assessment of potential impacts of nitrogen deposition from the proposed road onto the SAC, the nature and extent of any such impacts, and the efficacy of mitigation measures including planting and the creation of surrounding buffer zones on which ammonia producing agricultural practices would no longer be permitted, and, reviewing the whole process by which impacts on air quality were calculated. They concluded at section 4.174 that:

> "The figures have a spurious appearance of precision. They are in reality the product of numerous assumptions

> layered upon each other, including reliance on the central traffic forecast; use of modelling data; large adjustments to those data by means of sophisticated statistical techniques; adoption of standard values and rates; disregard of seasonal variations in ammonia emissions; and application of unverified hypotheses about the benefits of planting. While DfI's consultants have paid heed to the precautionary principle at many stages in the process, the sheer number of variables and the scope for error at each stage are such that it is impossible to view the final numbers in the mitigation scenarios as anything other than guesstimates."

[73] After further analysis of the evidence presented to it, the PAC concluded at section 4.189 of the report that:

> "while we are satisfied that the air quality calculations were carried out thoroughly and conscientiously, we have come to the view that the RIAA has placed far too much reliance upon them. The misapplication of the 1% screening threshold at the second stage of habitats assessment is an example of category confusion. Two elements are signally lacking – an ecological assessment of the implications of the predicted small increase in nitrogen deposition on part of the designated site; and an indication as to how the scheme would affect the prospects of the conservation objective to restore the active raised bog to favourable condition being achieved in the long-term."

As a result, the PAC was not satisfied that the RIAA demonstrated beyond reasonable scientific doubt that the scheme would not adversely affect the integrity of Tully Bog SAC (see section 4.190 of the report). The PAC then went on to make a number of recommendations in respect of issues that should be addressed in the Appropriate Assessment and that, if the DfI went on to address these issues, then:

> "It would be for DfI to decide whether any further public consultation should take place and what form any consultation should take."

[74] The PAC made three recommendations in relation to Tully Bog SAC. In Recommendation 24, the PAC recommended that the DfI should not proceed with the road unless no reasonable scientific doubt remains that the integrity of Tully Bog SAC would not be adversely affected and, if necessary, to investigate alternative routes further from the designated site. In Recommendation 22, the PAC urged the DfI, if it decided to proceed with the road, to commit sufficient funds to ensure that all the

necessary re-wetting works and invasive species removal works were completed before the construction of the road commenced.

[75] Recommendation 23 was the most detailed recommendation in respect of the Tully Bog SAC and it dealt with five issues which the PAC considered should be addressed by DfI when finalising the AA. Firstly, the PAC recommended that the DfI should provide a detailed description of how the bryophytes and vegetation communities present at the designated site, and the active and degraded raised bog features for which it was designated as a SAC, are affected by current ammonia and nitrogen deposition levels and existing hydrological conditions and how those effects are likely to evolve over the period to 2028, if the scheme does not proceed.

[76] Secondly, the PAC recommended that the DfI should re-do its air quality calculations using the data already gathered by abandoning reliance on keeping exceedance of the critical level or load to less than 1% and by abandoning any reliance placed on proposed mitigation planting, the impact of which cannot be verified and/or will not materialise by 2028. The air quality impacts of creating buffer zones where agricultural practices which produce ammonia are not permitted should be presented as a range, taking account of seasonal fluctuations. The sensitivity test should use a higher traffic growth scenario in accordance with the most up-to-date Department of Transport guidance.

[77] Thirdly, it was also recommended that the DfI should provide a detailed description of how, in the realistic worst-case scenario emerging from the amended calculations, the bryophytes and vegetation communities present on Tully Bog SAC, and the active and degraded raised bog features for which it was designated as a SAC, would or could be affected were the road to open in 2028.

[78] Fourthly, it was recommended that the DfI provide an ecological assessment as to how the proposed road would affect the prospects of the conservation objective to restore the active raised bog to favourable condition being achieved in the longer-term. Finally, the PAC recommended that the DfI should take steps to ensure that all data and analyses relevant to the assessment of impacts on the Tully Bog SAC would be contained in the AA, so as to avoid the need for constant cross-referencing with other scheme documentation.

[79] The terms "critical level" and "critical load" are explained in section 4.130 of the PAC report. Critical levels "are concentrations of pollutants in the atmosphere (measured in $\mu g/m^3$) above which direct adverse effects on receptors, such as human beings, plants, ecosystems or materials, may occur according to present knowledge" and the critical load is "a quantitative estimate of exposure to one or more pollutants below which significant harmful effects on specified sensitive elements of the environment do not occur according to present knowledge." This is measured in kilograms of pollutant per hectare per year.

[80] The PAC had noted earlier in its report at sections 4.138-4.139, that the RIAA modelling results indicated that although it was predicted that there would be an increase in the level of NO_2 in the atmosphere due to the operation of the road, the scheme would not result in the critical level of NO_2 being exceeded in the proposed opening year of the scheme. The PAC also noted that these results indicated that the critical level of NH_3 across the entire SAC would be exceeded with or without the scheme, due to existing background levels mainly emanating from agricultural practices, but the critical level would be exceeded to a greater extent with the scheme becoming operational.

[81] Similarly, the modelling results predicted that the critical load would be exceeded with or without the scheme but to a greater extent with the scheme becoming operational with the most serious impact being predicted to occur in the area of the bog nearest the new road. The DfI's case was that the impact of the new road would be minimal and would be more than matched by the mitigation measures that were proposed. The PAC's overall conclusions were that the DfI's approach to measuring the air quality impacts of the scheme, both in relation to methodology and evaluation of data, was insufficiently robust and, at the same time, the DFI had placed too much reliance on some mitigation measures, whereas the PAC did not put much store in the evidence assembled by the DFI in respect of mitigation achieved by planting.

[82] In the concluding section of the report (section 6) the PAC made a number of important points. In the introductory paragraph, the PAC made the following broad statement. It noted that the A5 scheme had been:

> "trapped for more than a decade in a cycle of information gathering, public consultation and abortive decision making. The repeated delays were due primarily to a series of unforced errors by the Department – the failure to carry out habitats assessment; the purported exercise by civil servants of powers they did not at the time possess; and the conscious disregard of the Department's own technical guidance on flood risk. Our report and recommendations are intended to help the Department avoid further pitfalls."

[83] Having reiterated their views that the sections of the scheme between Newbuildings to south of Strabane (unacceptable risk of flooding) and between Ballygawley to Aughnacloy (incomplete and premature) should not proceed at present, the PAC repeated its conclusions that the section of the scheme now under challenge (Ballygawley to south of Strabane) would have large beneficial effects on road safety, journey times, economic competitiveness, balancing regional infrastructure and north/south links at the Tyrone Donegal border. However, the PAC did not shy away from also highlighting the significant adverse effects which this scheme would give rise to including impacts on climate which were described as

"of particular importance as there is a statutory requirement to meet emissions targets."

[84] The PAC reiterated that in its report it had advised the Department "to review the methodology it used when assessing the implications of the scheme" for Tully Bog SAC and "unless it can ascertain that there would be no adverse effect on the integrity of that protected site, to investigate alternative routes further away." The PAC in section 6.31 went on to state that: "we have weighted the substantial benefits offered by the proposed off-line dual carriageway against the adverse environmental effects and the interferences with and limitations on human rights" and:

> "We are satisfied that the balance is decisively in favour of proceeding with those parts of the scheme, amounting to nearly two thirds of its length. There are, however, two caveats. The first is that the Department must show that the scheme, if proceeded with, will not prevent the mandatory greenhouse gas emissions being met. The second is that a route adjustment may be needed in the vicinity of Tully Bog, depending on the outcome of the review of the habitats assessment."

Departmental statement

[85] As stated above, the DfI issued its response to the PAC report and its decision to proceed with that part of the scheme from south of Strabane to Ballygawley in a Statement by the Department on the Report on the Public Local Inquiries into the A5 Western Transport Corridor Road Scheme on 2 October 2024. The Statement commences with the following declaration:

> "The A5 Western Transport Corridor (A5WTC) was recognised as a Flagship Project by the Executive in 2015 and is a commitment of the Executive and the British and Irish governments in New Decade: New Approach 2020."

Having set the scheme in this context, I do not propose to recite in detail the contents of the Statement but, instead, I will concentrate on the sections of the Statement that are primarily relevant to the challenge brought by the AA5A.

[86] Section 2.4 of the Statement deals with "Project Governance/Delivery." It is noted that at the inception of the scheme, the North South Ministerial Council agreed an A5WTC project management structure consisting of a "Cross Border Steering Group" and an "A5 Technical Group" made up of the DfI and Transport Infrastructure Ireland (TII) and the "A5 Project Team" made up of the DfI and project consultants. It was intended that the Cross Border Steering Group would report to the North South Ministerial Council Transport Sector and plenary meetings. The Statement at section 2.4.3 indicates that DfI:

> "continues to work closely with the Department for Transport in the Republic of Ireland, with meetings held to discuss issues of common interest, including the A5WTC. Since the restoration of the NI Executive in February 2024, the North South Ministerial Council structures have been re-established, with the first Transport Sectoral meeting held on 27 June 2024. The Joint Communique from this meeting noted the level of collaboration across Administrations, further reinforced by the establishment of a new cross-border working group that would specifically take forward the A5 and N2 schemes at the Border interface."

[87] In addition to the various bodies referred to above, the Statement at section 2.4.4 refers to the setting up of the "A5WTC Project Board" which was established in 2023 "to ensure senior level support in the delivery of the project and to address, at a strategic level, any challenges that may arise." The Project Board consists of the Senior Responsible Owner (presently Mr Colin Hutchinson), the Deputy Project Director, Client Project Managers:

> "and a number of Project Advisors from key stakeholders such as the Northern Ireland Environment Agency (NIEA) and Department of Finance (DoF). It is planned that the Board will benefit from a member of the Department of Transport from the Irish Government at the construction stage."

It is worthy of note (section 2.4.6) that the A5WTC project has been subject to and has successfully passed several gateway reviews including an Investment Decision Review – Phase 1A in November 2017 where the Office of Government Commerce was stated to be the relevant Review Board.

[88] Turning then to the substance of the Statement and noting that although the DfI proceeds to set out its detailed responses to the PAC's most recent recommendations in section 5 of its Statement, it does partially address an issue of substance in an earlier section of the Statement which has a bearing on the challenge being brought by the AA5A and that is the issue of the interference with human rights resulting from the construction of the road. At section 2.6.9 of the Statement, the DfI states that, in relation to the PAC assessments and opinions set out at sections 2.217, 2.32, 5.12, 5.20 and 6.11 of the PAC report, it concurs:

> "with the assessment of the PAC contained in the above paragraphs including its overall assessment on human rights justification contained in paragraph 6.11."

[89] At section 2.6.17, the DfI acknowledges that the decision to proceed with only part of the new road at this stage will "not deliver the full range of the Department's objectives and the anticipated benefits" and that:

> "to that extent the proportionality assessment and the current balance of public and private interests is different to the one considered by the PAC and which is reflected in the Department's March 2022 Report."

However, the DfI Statement asserts that it remains of the view that any interference with human rights as a result of the current decision remains justified but, acknowledging the concerns expressed by the PAC in relation to uncertainty arising from the timing of commencement of constructions work following a decision to proceed, the DfI carried out a further Human Rights Impact Assessment (HRIA) in September 2024 (v4.0) "which includes the latest information available at this time and has been completed to inform the decision to proceed with part of the scheme at this time."

[90] This up-dated HRIA, which was completed in early September 2024, runs to 27 pages. At page 4 of the Assessment, it is highlighted that approximately 766 hectares of land "is required for the construction and mitigation impacts of the part of the scheme being authorised, the vast majority of which will be vested by the Department." Of this, 531 hectares would be higher-grade land (Grade 2 and 3a), which equates to 0.12% of the higher-grade land in Northern Ireland and 0.55% of the higher-grade land in County Tyrone. The HRIA estimates that the number of households which would be affected by vesting for the part of the scheme being authorised would be 86 residential properties. Based on 2021 Census data, this is estimated to equate to 393 people. In addition, for the part of the scheme being authorised, the DfI estimates that 135 farms would "experience a minor adverse impact", 48 farms would "experience a moderately adverse impact" and 57 farms would "experience a substantial adverse impact." Whilst acknowledging that "some adverse impacts upon some businesses are expected", it is asserted that "the new A5WTC will not prohibit or otherwise impair the entitlement of any business owner to continue any existing businesses." The number of businesses within a 200m corridor of the existing A5 which may also be impacted by the part of the scheme being authorised is estimated to be "43 Business or other non-residential properties." The HRIA notes that: "Compensation is payable by the Department in respect of any lands vested in terms of land value, severance, injurious affection and disturbance. If not agreed, the amount of compensation will be determined by an independent expert Tribunal."

[90] At page 27 of the HRIA, it is estimated that the project will temporarily affect direct access to over 130 residential properties and will necessitate the demolition of 3 residential dwellings. The development will compromise 2 approved planning applications "at some level" and have "slight impacts on another 10 cases." However, irrespective of the extent of the careful consideration given to the potential for this

part of the scheme to adversely impact upon the human rights of those living in the affected areas, the lawful basis for any interference, the assessment of necessity and proportionality including the weighing up of the arguments for and against pushing ahead with this part of the scheme, what is clear is that this updated HRIA does not directly deal with the human rights issue that most concerned the PAC which was the potential for open-ended uncertainty as to whether this section of the scheme would ever be commenced. Further, this issue is not addressed in the sections of the Statement that are set out between 2.6.11 and 2.6.27. In section 2.6.13, reference is made to Chapter 5, section 5.2.6 of the Statement. However, careful consideration of the relevant section of Chapter 5 does not reveal any consideration of the human rights concerns raised by the PAC which gave rise to PAC's Recommendation 3. It would appear that the DfI has failed to address this issue from a human rights perspective. However, more will be said about this when I come to consider section 5.2.6 of the Statement.

[91] Prior to considering section 5.2.6 of the Statement, it is necessary to look carefully at section 5.2.5 which relates to the funding of the scheme and the nature and extent of the cost burden sharing between the governments north and south. The DfI notes that at the time the PAC considered the matter of funding, the only figures set out by the Irish government were those quoted in New Decade, New Approach in January 2020 in which the Irish government reaffirmed its commitment to providing €75M up to 2022. In respect of Northern Ireland budgetary allocations, the Statement notes that:

> "Executive agreed Flagship projects are usually considered to be the top funding priority and therefore are addressed at the outset from the budget available to the Executive."

[92] The Statement goes on to observe that the Irish government's announcement in February 2024 to commit €600M to the scheme: "provides a substantial degree of certainty around funding." The Statement notes that this commitment was reinforced through the Joint Communique from the North South Ministerial Council Transport Sectoral Meeting issued on 27 June 2024. This was followed up by correspondence between the Northern Ireland Infrastructure Minister and the Taoiseach on 2 August 2024 in which the Infrastructure Minister updated the Taoiseach as to the likely progression of the scheme in stages and sought reassurance as to the availability of funding. The Taoiseach promptly responded on 7 August 2024 confirming the Irish government's commitment to provide €600M and indicated that the Irish Minister for Transport: "would follow up in due course regarding the detailed expenditure profile."

[93] The Statement then notes that it has been further agreed that:

> "funds will be released jointly by the Department for Infrastructure and the Department of Transport in line with this commitment, relevant budgetary and approval

> processes in both jurisdictions and normal project management arrangements, reflecting the fact that budgets in both jurisdictions have not yet been set for 2025/26 onwards."

The Statement goes on to note that although both departments have committed to working to give effect to the Taoiseach's commitment through the parallel budget processes that govern public expenditure in both jurisdictions, it is not possible:

> "at this time to have a written agreement between the two jurisdictions which specifies multiyear spending profiles and contributions with the degree of precision recommended by the PAC."

[94] The intricacies of bilateral funding of an infrastructure project of this magnitude and complexity cannot be understated and, with respect to the PAC, perhaps it was being a tad unrealistic in relation to the degree of financial certainty that it sought to elicit in its Recommendations. What is abundantly clear from the DfI Statement is that there is a clear desire on the part of both governments to proceed with this scheme as soon as possible. When the DfI issued this Statement, it hoped to commence work on the section of the proposed dual carriageway between Ballygawley to south of Strabane in early 2025 and to commence the link work between the existing A4 and the new A5 at Ballygawley early in 2026. At the hearing of this challenge, it was asserted that the main impediment to the commencement of this work is this legal challenge and not any uncertainty in respect of immediate funding. If this assertion is correct, this clearly has a bearing on whether the PAC's Recommendation 3 and the DfI refusal to comply with it as a matter of principle has any legal significance at this stage.

[95] Turning then to section 5.2.6 of the Statement; in this section, the DfI sets out its reasoning for refusing to accept the PAC's Recommendation 3 that the construction of any authorised section of the scheme must commence by the end of the financial year 2028/29, otherwise the said authorisation automatically lapses. The Statement declares that the DfI remains committed to commencing construction of those parts of the road which have been authorised at the earliest opportunity and by the end of the financial year 2028/29. If this is a genuine commitment, one might legitimately ask why it would not be possible to simply comply with the PAC's Recommendation 3, in view of the fact that the authorised work will have commenced long before the expiry of the deadline? The DfI in its Statement makes the case that the giving of such an undertaking would be "wrong in principle." It argues that this project is the largest infrastructure project ever undertaken in Northern Ireland and it will require a very significant investment of public funds. It is a project of an entirely different magnitude from other projects usually authorised through the planning process. The DfI relies on the fact that the project is being promoted by a public authority:

> "which is funded exclusively by and is subject to the constraints and uncertainties of the public expenditure system. The project is therefore funded in an entirely different manner than a private development for which private sector funding might otherwise be more certain."

[96] This rationale appears to fly squarely in the face of the generally confident and upbeat assessment concerning the availability of funding for the scheme set out in section 5.2.5 of the Statement. In essence, the DfI appears to be saying that they are not prepared to give any such undertaking just in case there is a problem with funding, even funding for the commencement of the authorised section of the scheme. The Statement raises the spectre of unforeseen delays resulting from "the possibility of competing spending priorities emerging in the interim period."

[97] There appears to be a marked inconsistency in the DfI's approach to Recommendation 3. On the one hand, the DfI appears to be saying that, but for this legal challenge, the work on the approved section would be commencing right about now, therefore, any such undertaking is utterly unnecessary; and, on the other hand, the DfI is asserting that it would be wrong in principle to give such an undertaking, due to the risk of the commencement of the authorised work being delayed as a result of funding difficulties.

[98] The DfI Statement contains a second justification for refusing to give such an undertaking and this is one which appears, at first blush, to be more compelling than the first justification proffered by the DfI. In simple terms, the DfI asserts that "a condition of this nature may also have undesired impacts upon outstanding commercial negotiations with the designated contractors." What the DfI means by this is that if such a condition were to be included in the authorisation, a contractor, knowing about the existence of such a condition, could play hard ball and hold out for a better price, knowing that if the government did not give in to the contractor's demands and pay the price sought, the work would not commence within the time-limit and the authorisation would be lost. Such a condition would potentially give the private contractor a commercial advantage in its negotiations with the public body sponsoring the project.

[99] On the face of it, this appears to amount to a rational concern. However, there is no getting away from the fact that the PAC's Recommendation 3 was inspired by the PAC's concerns that the human rights of affected individuals would be infringed by the continued uncertainty concerning the commencement of the work and section 5.2.6 of the Statement does not address this concern at all. There may be a good, coherent and cogent reason for rejecting the PAC's Recommendation 3 and that good, coherent and cogent reason may be the second justification offered in section 5.2.6 of the Statement but where the PAC has clearly raised a human rights concern as the justification for Recommendation 3, it really is incumbent upon the DfI, when putting forward reasons for rejecting Recommendation 3, to at least address, in some shape or form, the human rights concern raised by the PAC. I will deal with the parties' written

and oral submissions on this issue later in this judgment but, at this stage, solely on the basis of the contents of the PAC report, the DfI Statement and the updated HRIA, a relevant matter appears not to have been addressed by the DfI when deciding to reject the PAC's Recommendation 3.

[100] I now turn to discuss the section of the DfI Statement which deals with the PAC's Recommendation 14 which is to the effect that no construction of any part of the scheme should commence or proceed unless and until the DfI is satisfied that the construction and subsequent operation of that part of the scheme will not prevent the emissions targets specified in sections 1, 3, 4 and 24 of the 2022 Act being met.

[101] In its Statement at 5.3.16, the DfI acknowledged that at the time of making the Statement, the first three carbon budgets for Northern Ireland had not been set. Things have obviously moved on since the Statement was issued and on 11 December 2024, the first three carbon budgets were fixed as described in para [24] above. The 2030 and 2040 targets arising from the provisions of sections 3 and 4 of the 2022 Act were published on 9 December 2024 (see para [20] above).

[102] Bearing in mind that the first three carbon budgets and the 2030 and 2040 targets have now been set and at the time that the decision was taken a CAP had not been developed, agreed and published, the DfI's stance is that the 2022 Act does not prohibit:

> "the authorisation of new infrastructure development, nor does it prohibit the authorisation of new development which may give rise to an increase in GHG emissions either during construction or operation."

The DfI Statement acknowledges that section 52 of the 2022 Act requires it and every other NI government department to exercise their own functions, so far as is possible to do so, in a manner that is consistent with meeting the 2030, 2040 and 2050 targets and not exceeding the carbon budgets that have been set. The DfI also acknowledges that under section 29(4) of the 2022 Act, the DfI and other government departments, when developing policies, must ensure that those policies are consistent with the targets set out in the carbon budget. The Statement goes on to assert that this means that departments whose functions include authorising infrastructure development:

> "should therefore consider the emissions implications of such projects as part of the discharge of this duty and other duties under the Act."

[103] In its Statement the DfI also acknowledges that sections 13, 20 and 21 of the 2022 Act place duties on the DfI to develop and publish a sectoral plan for the transport sector setting out how the transport sector will contribute to the achievement of the emissions targets in sections 1, 3 and 4 of the 2022 Act. The DfI then goes on to explain that in order to "inform the transport decarbonisation pathway", a Transport

Emissions Model (TEM) with a "more focused understanding of transport emissions specific to Northern Ireland" was developed in 2024 by specialists on behalf of the DfI as a "carbon management tool" for the transport sector which the DfI will use to inform its "decisions and priorities around carbon emissions and its climate responsibilities." In its Statement, the DfI asserts that the TEM will act "as a strong enabler of informed decision making by" the DfI and that it "materially increases the degree of confidence" the DfI "can have about the likely net impact of its combined policies and proposals for delivering net-zero within the transport sector." It is asserted that this tool is consistent with UK wide approaches and is consistent with relevant legislation and guidance and it uses equivalent methodology to the model used in the Republic of Ireland but is bespoke to Northern Ireland, "as it uses information on existing vehicle fleets in Northern Ireland and projections."

[104] The DfI goes on to assert that although work is ongoing to finalise an agreed transport decarbonisation pathway for Northern Ireland, the modelling (which models stock turnover in the Northern Ireland fleet) "demonstrates that the transport sector can almost fully decarbonise by 2050" and this takes into account the "increase and type of vehicles using the A5 following its construction." It is clear from the Statement that much depends on the accuracy of the description of the existing Northern Ireland vehicle fleet that is contained in the TEM and the accuracy of the prediction as to how the Northern Ireland vehicle fleet is likely to change each year going forward. The DfI is adamant that the TEM accurately describes the existing Northern Ireland vehicle fleet and also models future projections which are more aligned "with UK policy changes and those future years projections represented in the CCC NI advice" with change projected "on a year-to-year basis (based on policy)." It would appear that the DfI, in its modelling exercise, has adopted "the worst-case scenario for GHG" which incorporates "high-level national UK policy based on the 2035 ban on internal combustion engines (ICE) for light duty vehicles (LVD), with two separate…scenarios for HGV based on EU and UK policy targets."

[105] In its Statement, the DfI has set out at Table 5.3-2 "an updated GHG emissions assessment for Section 2 and Phase 1B, and the whole scheme." In this Table, the "predicted net increase in emissions resulting from the construction and operation of the A5WTC" are compared to the UK and Northern Ireland carbon budgets (remembering that the Northern Ireland carbon budgets have now been set). The DfI then asserts that the A5WTC scheme is "expected to result in an increase in emissions (~972,520 tCO_{2e}) in both the construction and operational phases, compared to the scenario where the scheme is not built" and that "in light of the status of the A5WTC as an Executive Flagship project, the Executive will need to consider the increased carbon emissions associated with the A5WTC project when meeting its obligations under the Act."

[106] The gist of the Statement appears to be that DAERA, as the responsible Executive Department, will have to factor all this into account when devising its first CAP, a draft of which has just been published but which has still to be consulted upon, debated and approved. However, it is asserted that prior to "considering and

approving the decision to proceed with this part of the scheme, "the Executive was fully informed of the predicted additional GHG emissions associated with the construction and operation of the road" and it follows that the emissions generated from the construction of the scheme "will therefore be included within the Executive's plans to deliver the emissions reduction targets specified in sections 1 ,3, 4 of the Act, and as required by section 24 of the Act to ensure that any carbon budget set under the Act is not exceeded." It is worthy of note that the DfI Statement estimates that the scheme is "expected to contribute 0.4621% to CB1, 0.1019% to CB2 ns 0.1163% to CB3.

[107] In summary, the DfI Statement asserts that its modelling demonstrates that the transport sector will "almost fully decarbonise by 2050" and it is confident that "it will still be possible to achieve its transport sector obligations and that the transport emissions from the scheme will not be incompatible with achieving the objectives of the Act." Jumping ahead a little, in relation to the CAP issue, the DfI argues that when one considers the estimated minor contribution of the scheme to the three published Northern Ireland carbon budgets, one can have confidence that "given the priority afforded to the Scheme, it will not prevent the emissions targets specified in Sections 1, 3, 4 and 24 of the Climate Change Act (Northern Ireland) 2022 from being met." In other words, given the Executive's unflinching support for the scheme, it can be assumed that when DAERA, in publishing the draft CAP, will have factored in the GHG emissions resulting from the scheme into the plan to meet the Northern Ireland carbon budgets and the targets set out in the 2022 Act. It is to be noted that the draft CAP for the years 2023 to 2027 was published and put out for consultation on 19 June 2025, four days before this judgment was delivered but it does not refer to the proposed road and certainly does not state that the construction of the proposed road has been taken into account when dealing with the issues of meeting carbon budgets and statutory GHG emissions reductions targets.

[108] I will fully set out and assess the parties' arguments on this issue in a subsequent section of this judgment but I feel it is important to make a number of observations and raise a number of issues at this stage. The PAC Recommendation 14 refers to the DfI being:

> "satisfied that the construction and operation of that part of the scheme will not prevent the emissions targets specified in Sections 1, 3, 4 and 24 of the Climate Change Act (Northern Ireland) 2022 from being met."

[109] Bearing in mind what the CCC has said about the prospects of Northern Ireland achieving the GHG emission reduction targets it has set itself, what if the reality of the situation is that the targets set in sections 1, 3, 4 and 24 of the 2022 Act will not be met even if the scheme is not progressed? If that were to be the case, then it could be argued by the DfI that the scheme will not prevent the emission reduction targets being met on the analogous basis that one cannot be guilty of murder if the person is already dead. However, that cannot be how this recommendation should be interpreted. If Recommendation 14 is to make any sense at all then it must mean that

the DfI has to be satisfied that the overall Northern Ireland emissions reduction targets set out in the 2022 Act will be met and that these targets will be achieved even taking into account the GHG emissions which will inevitably result from the construction and operation of the road.

[110] If this is how this recommendation is to be interpreted, then one might ask what is the legal basis for such a recommendation and, if there is a sound legal basis for such a recommendation, is there any logical reason why such a recommendation should only attach to this scheme rather than being applicable to other major projects? If the legal basis for such a recommendation is the 2022 Act, then, taking this to its logical conclusion, should such a recommendation not be attached to all major infrastructure projects so that no major infrastructure project can proceed unless the government is satisfied that Northern Ireland is on track to meet the targets set out in the 2022 Act? My concern about getting into such issues is that if I do, I will inevitably find myself having to engage in a task of generally interpreting the relevant sections of the 2022 Act and generally describing and delineating the nature and extent of the duties imposed on Northern Ireland government departments under the 2022 Act, in a case where the parties have not expressly asked the Court to engage in such an exercise.

[111] I now turn to discuss the section of the DfI Statement which deals with the PAC's Recommendation 15 which is to the effect that no construction of any part of the scheme should commence or proceed unless and until the first three carbon budgets for Northern Ireland have been set and the first CAP has been finalised for the period 2023 to 2027:

> "setting out proposals and policies covering the areas of responsibility of each Northern Ireland department, including those of the Department for Infrastructure."

In section 5.3.17 of its Statement, the DfI refused to accept this composite recommendation and to some extent things have moved on from the making of the recommendation and the DfI's response in that the first three Northern Ireland carbon budgets have now been set and a draft CAP has just been published and put out for consultation on 19 June 2025.

[112] It is clear that Recommendation 15 follows on from Recommendation 14 which I have interpreted as meaning that no construction work should commence unless the DfI is satisfied that the overall Northern Ireland emission reduction targets set out in the 2022 Act will be met and that these targets will be achieved even taking into account the GHG emissions which will inevitably result from the construction and operation of the road. Following on from that, I interpret the Recommendation 15 overlay to Recommendation 14 as meaning that the PAC is of the view that the only rational way in which the DfI can be so satisfied is if the DfI is able to point to a finalised CAP which contains workable proposals and policies covering the areas of responsibility of each Northern Ireland department including DfI indicating how it is

intended that these targets will be met.

[113] It is clear from the Statement that the DfI does not accept that a finalised CAP has to be in place for the DfI to be so satisfied. The Statement noted that work was ongoing on the preparation of the first draft CAP which, as it is a cross-cutting measure, will have to be approved by the Executive before going out for consultation. In essence, the DfI asserts that it is doing all that is required of it to decarbonise transport and it is confident that all the other departments are doing likewise in respect of their various spheres of responsibility, including the construction sector, and, bearing in mind that this scheme is an Executive Flagship project, the draft CAP will have to factor in the impact of the construction and operation of the road in setting out proposals and policies indicating how it is intended that the 2022 Act targets will be met, and, in such circumstances, it is unnecessary for the DfI to await the publication of a finalised CAP in order to commence construction work on the road.

[114] This matter will be addressed in greater detail below when I come to consider the respective parties' submissions; but it strikes me that there are a number of important issues here that really need to be clearly set out at this stage. The consultation on and approval of a CAP are legal requirements under the 2022 Act; requirements which have not been met to date, publication of a draft having just taken place.

[115] The whole rationale or purpose behind having a CAP for each carbon budget period is to devise, publish, consult on, settle and agree proposals and policies that are geared to ensuring that the relevant carbon budget is met and that the targets set out in and under the 2022 Act are achieved on time. The need to publicly consult on the draft CAP and to obtain Assembly approval are geared to ensuring that these proposals and policies have genuine democratic credentials. For the DfI to assert that a CAP does not need to be in place before it commences the construction of this major infrastructure project because, in essence, it is a given that, as this is an Executive Flagship project, the CAP will factor the emissions attributable to this scheme into the choice of policies and proposals set out in the CAP, seems to me to ignore the requirement for democratic legitimacy enshrined in the architecture of the 2022 Act.

[116] If the approach advocated by the DfI was to be followed, the public and the Assembly would to be presented with what is, in effect, a *fait accompli* in the sense that any CAP would be tweaked and tailored in such a way as to facilitate this scheme, irrespective of what else has to be shelved, restricted or curtailed, or what new technologies have to be embraced and rolled out in order to stay within the carbon budget and to achieve the 2030, 2040 and 2050 targets. My concern, which I freely express at this stage, is that this approach runs contrary to the whole spirit of the 2022 Act. However, having considered the draft CAP that has now been published on 19 June 2025, there is no specific mention of the proposed new road or its potential impact on climate change objectives and yet it would appear that overall, Northern Ireland may have difficulty staying within the first carbon budget that has now been set. Page 124 of the Quantification Report published on 19 June 2025 contains the following

summary:

> "Table 4.2 presents the projected outcomes of the Tailwinds, Central and Headwinds Scenario against the first carbon budget. In the Tailwinds Scenario, the carbon budget is met with a projected 34.0% AAR from the 1990 baseline. In the Headwinds Scenario, projected emissions are an average of 32.3%, that is less than the 1990 baseline over the first carbon budget period. Therefore, in the Headwinds Scenario, which is the least optimistic scenario, the CCC advised carbon budget would not be met. Further detail of the sector breakdown of projected emissions in the Tailwinds and Headwinds Scenarios are available in Appendix B."

Appendix B reveals that from a sectoral perspective, transport will not meet the target set for that sector during the first budgetary period.

[117] I now turn to discuss the section of the DfI Statement which deals with the PAC's Recommendation 16 and, in particular, bullet point four which recommends that if the DfI "announces a decision to proceed with any part of the scheme" it should contemporaneously publish:

> "revised estimates of the total greenhouse gas emissions likely to arise from the part of the scheme being authorised, including an estimate of the quantum of emissions arising from induced trips originating or terminating in the Republic of Ireland."

[118] This recommendation was accepted by the DfI and there is an updated GHG emissions assessment for the entire scheme which is presented in Annex A of its Statement. It is stated in Annex A that since the ESA 2022 GHG assessment, there have been updates to a number of relevant best practice standards and guidance and that the 2024 assessment "has followed the most up to date guidance at the time of writing." At the time that the Statement and Annex A were published, it was estimated that the construction emissions would amount to 448,200 tCO_{2e} and the operation emissions would amount to 524,320 tCO2e, assuming a lifespan for the road of 60 years.

[119] In respect of the parts of the scheme that it is intended to proceed with at this stage, the construction emissions would amount to 266,510 tCO_{2e} and the operation emissions would amount to 388,250 tCO_{2e} again assuming a lifespan of 60 years. Section 4.1 of Annex A deals with the extent of the study area and in terms of operational emissions, it is stated that:

> "Such emissions include those for traffic using the

> Proposed Scheme as well as the surrounding regional road network to gain access."

[120] Section 5.2.2 of Annex A deals with End User Emissions. It is stated that these are derived from the bespoke Northern Ireland Transport Emissions Model (TEM) tool which calculates tailpipe emissions. Much store is placed on the fact that in calculating these revised estimates, the DfI has relied on this TEM tool that was developed by specialists on behalf of the department in 2024. This is the department's carbon management tool for the transport sector and:

> "will be used to inform the Department's decisions and priorities around carbon emissions and its climate responsibilities."

In order to validate this tool, the DfI sought input from the CCC and the Department for Transport in London. It would appear that both bodies have acknowledged the "high level of local detail that has been built into the model" and they have requested that the "outputs and learnings" are shared with them "for future carbon budgets and NI advice."

[121] Annex A also reveals that for the A5WTC scheme, operational transport emissions have "been generated in TEM" using the road traffic input data from the:

> "A5 Strategic Transport model (DM and DS models) which again uses a Northern Ireland specific vehicle fleet profile."

Emissions have then been derived from the "European Computer Model to Calculate Emissions from Road Transport (COPERT v5.6)."

[122] Pausing there, it would seem that one model feeds into another model which in turn feeds into a third model to produce emissions estimates and we then learn that the "TEM allows schemes to be modelled against three of the climate scenarios within the CCC advice", namely, the Business as Usual (BaU) scenario, the Northern Ireland balanced pathway for decarbonisation scenario and the Northern Ireland stretch pathway scenario. Annex A then states that the:

> "BaU scenario presents the worst-case scenario for GHG, and it is this scenario which the A5WTC scheme has been modelled in the TEM against."

The choice of this scenario is hardly surprising as it has to be borne in mind that the CCC was sceptical of the Northern Ireland Executive's ability to stick to the proposed balanced pathway, let alone the stretch pathway.

[123] In relation to the specific issue of induced trips, it is set out in section 7.2 of Annex A and repeated elsewhere that the:

> "quantum of GHG emissions arising from induced trips originating or terminating in the Republic of Ireland has been assessed using 1% and 3% included demand scenarios."

However, the rationale for adopting this approach is not explained in the Statement or Annex A thereof. I will set out and deal with the parties' submissions on this issue later in this judgment.

[124] The DfI Statement then goes on to deal with PAC Recommendation 17 which recommends that if the DfI "announces a decision to proceed with any part of the scheme" it should contemporaneously publish detailed calculations which have been agreed with DAERA showing the expected trajectory of GHG emissions in Northern Ireland in the period between 2030 and 2050 in the absence of the scheme and the impact on that trajectory of the GHG emissions expected to arise from the construction and operation of the part of the scheme being authorised. This recommendation was not accepted by DfI.

[125] The DfI position as set out in its Statement is that the preparation of detailed calculations showing the expected trajectory of GHG emissions across Northern Ireland is "not a matter for bilateral agreement between DfI and DAERA." Further, the DfI asserts that it is not possible at this stage to show the trajectory for GHG emissions with or without the proposed scheme as:

> "there is not a clear picture at a Northern Ireland level of all the other schemes and emitting activities which will happen between now and the 2050 Net Zero Target."

It is asserted that there is unlikely to be full clarity in respect of these issues in the short term but that any decisions taken now will need to be factored into "how the Act's net emissions reduction targets will ultimately be met."

[126] The Statement then goes on to extol the virtues of the bespoke TEM which is described as a "vital tool for understanding baseline emissions" which will assist the DfI "in its decision making and priorities around climate going forward." It is then asserted that the TEM has outlined a pathway that demonstrates that the transport sector "can almost fully decarbonise by 2050." Crucially, the Statement makes the following point:

> "The rate at which this decarbonisation will happen will be related to the level and timing of policy implementation (Reduce, Shift and Switch) being developed as part of the CAP. The assumptions around the increase and type of vehicle that will use the A5 following its construction are taken into account in this model."

[127] The Statement then makes the following frank admission:

> "In the absence of an approved Climate Action Plan and more detailed knowledge of the carbon impact of future infrastructure projects, it is not currently possible to show the trajectory with and without the Proposed Scheme. However, whilst the scheme will result in an increase in emissions, the A5WTC is a priority investment for the Northern Ireland Executive, and therefore the emissions generated from the construction and operation will need to be factored into the Executive's plans to meet the emissions reduction targets specified in sections 1, 3 and 4 of the Act and as required by section 24 of the Act to ensure that any carbon budget set under the Act is not exceeded."

[128] This passage set out at internal pages 165 and 166 of the Statement encapsulates the DfI's defence to the 2022 Act based parts of the applicants' challenge. In essence, the DfI is saying that in respect of the transport sector, it will do its bit to ensure that the transport sector is almost fully decarbonised by 2050, and the TEM gives it confidence that this ultimate goal can largely be achieved; but as regards the overall Northern Ireland position, who knows! That is a matter for the other departments, in particular DAERA. Although there is no clear picture as yet, given that the A5WTC is such an important project which is a priority of the Executive, it can safely be assumed that DAERA will construct a CAP which will be accepted by the Executive, including the other departments, and the Assembly which both allows for the construction and operation of this road and puts Northern Ireland on a trajectory to reach the 2030, 2040 and 2050 targets and keeps Northern Ireland within its set carbon budgets. Other infrastructure projects may have to go by the wayside and other sectors may have to be squeezed further to achieve these goals but that will happen because it must if the road is to be built and the targets are to be met and the budgets are not to be exceeded. However, the draft CAP that has just been published is silent on the subject of this major infrastructure project and its impact on climate change objectives.

[129] As presently formulated, the DfI's approach is entirely aspirational and the Statement frankly admits this. The PAC was far from satisfied with this (it will be alright on the night) approach and the question for this court is whether the DfI's decision to proceed with the construction of these sections of the road is lawful, in the absence of the DfI being able to demonstrate that Northern Ireland can realistically reach the 2030, 2040 and, most importantly the 2050 targets and remain within the carbon budgets that have now been set, bearing in mind that those budgets have been set to steer Northern Ireland on a pathway which enables it to meet the 2050 ultimate target. I will deal with the parties' arguments on this point in a subsequent section of this judgment but from an all-embracing climate change perspective, this stance really is not good enough and does not even pay lip service to the legal requirements set out

in the 2022 Act.

[130] I now intend to set out the DfI's responses to the PAC Recommendations 22, 23 and 24 which relate to Tully Bog SAC. In summary, it is the DfI's position, as set out in section 6.4.1 of the Statement, that it is satisfied that, taking account of the proposed mitigation measures, the construction and operation of "this part of the Scheme" will not, by itself or in combination with other known plans or projects, adversely affect the Tully Bog SAC, having regard to the conservation objectives relating to that SAC.

[131] In relation to Recommendation 22, the DfI position is that Ulster Wildlife, funded by the NIEA, carried out rewetting works and the removal of rhododendron plants between 2018 and 2022 and that these works will "improve the resilience of the bog habitat and … contribute to its conservation and restoration." However, these conservation works "do not comprise essential mitigation measures" which have been identified as being "necessary to reduce or eliminate any adverse effects which the road scheme may have upon the integrity of the bog." The DfI position is that mitigation for the road scheme is being "fully achieved" by removing land from agriculture in an area surrounding Tully Bog. In addition to that, the DfI has consulted with the NIEA in relation to its "ongoing commitment" to drain blocking, managing scrub and the removal of invasive species and it undertakes to "agree a future action plan to assist with future works and it will provide funding to assist with its implementation." However, as the conservation work will in all likelihood be carried out by Ulster Wildlife at the behest of the NIEA and the DfI has no means of dictating timescales for that work to be completed, the DfI does not accept that the commencement of the construction of the road should be delayed until the proposed conservation works have been completed. The DfI is also amenable to providing funding "towards the longer-term maintenance of the hydrological works and the suppression of invasive species" at the Tully Bog SAC. However, the DfI is keen to stress that the RIAA "does not rely on site management measures to improve resilience" in order to conclude that there is no Adverse Effect on Site Integrity (AESI).

[132] In relation to Recommendation 23, the DfI Statement notes that updated bryophyte and habitat surveys were undertaken in 2024 and that details of these are incorporated in the updated August 2024 RIAA. Included in this is an analysis (based on published literature and site data) of the likely effects on the condition of the SAC "due to existing site pressures, including ammonia levels and hydrological conditions." Further, the DfI is keen to stress that the Tully Bog RIAA does not rely on "keeping exceedance of the critical level or load to less than 1%" in order to conclude no adverse impact on integrity.

[133] The DfI Statement at section 5.4.5 confirms that the DfI is abandoning any reliance on any proposed mitigation planting whose impacts cannot be verified or which will not be effective by 2028 and would also present the predicted air quality impacts of displacing agriculture as a range taking account of seasonal fluctuations in ammonia emissions and ammonia concentrations resulting from farm activities. Additional surveys were conducted to ensure that daily and seasonal fluctuations "are

represented in the air quality modelling outputs used in the conclusions of the updated August 2024 RIAA." Further, in relation to the issue of "sufficient scientific certainty", the "key sources of possible uncertainty have now been explicitly quantified."

[134] The DfI in its Statement is keen to demonstrate that it is going above and beyond what is required to ensure that the proposed scheme does not have an adverse impact on the integrity of the SAC. In particular, it states that consideration of "a higher growth traffic scenario is not standard practice for environmental assessments." However, in order to address all the PAC's stated concerns, the DfI has conducted additional modelling of impacts across the full range of traffic growth forecasts, from the high growth scenario, through the core growth scenario to a low growth scenario and this analysis has been reported within the updated August 2024 RIAA which has concluded that there are "no adverse effects on site integrity."

[135] In essence, the DfI Statement asserts that the mitigation measures which will be put in place will alleviate any negative impacts resulting from the construction and operation of the road in the vicinity of Tully Bog. The DfI is confident that these mitigation measures will ensure that the construction and operation of the road will "have no effect on the bryophytes and vegetation communities at the designated site and the active and degraded bog features for which it was designated as a Special Area of Conservation …" Further, it is asserted that the updated August 2024 RIAA demonstrates that the scheme and the delivery of mitigation for the scheme "does not affect the long-term prospects of achieving the conservation objective of restoring the active raised bog to favourable condition." The DfI notes that in the Tully Bog Conservation Plan, it is noted that the restoration of favourable condition will primarily be achieved through "hydrological management measures and the control of encroaching scrub and invasive species within the SAC itself."

[136] The applicants in their challenge to the DfI's decision to proceed with the construction of the road near the Tully Bog SAC concentrate on the PAC Recommendation 24 in relation to the need to demonstrate that no reasonable scientific doubt remains that the integrity of Tully Bog SAC will not be adversely affected and if that cannot be demonstrated then the DfI should investigate alternative routes further away from the SAC. The DfI firmly asserts in its Statement that it has conducted detailed air quality monitoring and this demonstrates beyond reasonable scientific doubt that the conclusions of the updated August 2024 RIAA (that there will be no adverse effects on site integrity) are based on a robust worst case. It is further firmly asserted that with mitigation measures, air quality impacts from the road scheme across the entirety of Tully Bog SAC are entirely negated and there is, therefore, no need for alternative routes to be considered. It is to be noted that, as set out in section 6.3.5 of the Statement, the scheme specific mitigation measures will include an Adaptive Monitoring Programme (AMP) which will be put in place during the construction phase and "over an appropriate period post-construction to be agreed with NIEA" and that in relation to Tully Bog SAC, agricultural practices contributing ammonia will be removed from land in the vicinity of the SAC in

perpetuity to eliminate the risk of "adverse effects from N-deposition and NH_3 concentrations on the Bog resulting from the Proposed Scheme." It is proposed to achieve this through the vesting of land or, in the case of one landowner, by an Article 117 Agreement under the Roads (Northern Ireland) Order 1983 and in default of such agreement, the relevant lands will also be vested.

[137] Turning then to the August 2024 RIAA, the Stage 1 screening exercise contained therein concluded that by virtue of proposed road's "proximity to and potential effect pathways (ie hydrological and/or ecological connectivity)", the likelihood of the proposed road "having a significant effect" on the Tully Bog SAC could not be excluded on the basis of objective information and as a result a Stage 2 Appropriate Assessment was mandated.

[138] When one reads the Appropriate Assessment which constitutes Stage 2 of the August 2024 RIAA, it is clear from section 4.3.1 and elsewhere in the RIAA that data from a number of sources were used in the Appropriate Assessment including data contained in the 2010 and 2016 ES and the 2019 and 2022 ES addenda. Data was also garnered from the hydrology and drainage assessments carried out in 2021 and the site surveys undertaken in 2021 (15 sites) and 2023/2024 (27 sites). The more recent survey (2023/2024) was accompanied by landowner interviews in order to understand the agricultural practices coinciding with the survey period. Data was also derived from the Air Pollution Information website (APIS) and from air quality modelling undertaken in 2021/2022 and 2023/2024. Finally, use was made of data contained in the Tully Bog SAC Conservation Objectives document which is set out at Appendix 3 to the Appropriate Assessment and the Tully Bog Conservation Action Plan (2020-2030).

[139] The pollutants which are of relevance to the SAC because of their potential to have a deleterious effect on the SAC are oxides of nitrogen (NO_x) ammonia (NH_3) and nitrogen deposition (N-dep). Previously, air quality assessments concentrated on the NO_x emissions from motor vehicles. However, the August 2024 RIAA specifically acknowledges that more recent research has shown that emissions from traffic also contribute to roadside NH_3 concentrations and subsequently to nitrogen deposition and this has implications for nitrogen sensitive habitats close to roads including areas of blanket bog. Therefore, NH_3 traffic emissions are included in the Appropriate Assessment and this, it is argued, is clearly consistent with the precautionary principle.

[140] The Appropriate Assessment also lists a number of tools, best practice, guidance documentation and models that have been utilised in order to assess NH_3 vehicle emissions and the impact that those emissions have on adjacent areas of nitrogen sensitive land. Reference is made to the Calculator for Road Emissions of Ammonia (CREAM V1A) produced by the same group of researchers who in 2020 published a paper evidencing the contributions from traffic to roadside NH_3 concentrations and nitrogen deposition. Reference is also made to the National Highways tool for assessing ammonia impacts from traffic schemes based on the ratio

between emissions factors for NO_x and NH_3. Reference is also made to the Air Quality Technical Advisory Group (AQTAG) guidance documentation published by the Environment Agency which *inter alia* is stated to provide "appropriate pollutant deposition velocities" based on vegetation size for nitrogen containing pollutants such as NO_2 and NH_3. It is asserted in section 4.3.9 that this enables "discrete air quality modelling of nitrogen deposition rates within identified nitrogen-sensitive habitats, associated with emissions of NO_x and NH_3 from vehicles." The Design Manual for Roads and Bridges (DMRB) guidance (2009) was also utilised as it "provides a suitable checklist to identify interactions and potential effects on the integrity of European designated sites."

[141] Finally, the mitigation potential of the proposed mitigation measures in this case has been assessed using the Cambridge Environmental Research Consultant's (CERC) ADMS-Roads software *dispersion model combined with statistical methods." The methodology and results are summarised in the body of the Appropriate Assessment and presented in greater detail in Appendix 5 to the AA.

[142] It is important to note at this stage that in respect of Tully Bog, the DfI is heavily reliant on the proposed mitigation measures to demonstrate that the scheme will not have an adverse impact on Tully Bog. The main mitigation measure is "Displacement of Agriculture" which is, in essence, stopping agricultural practices on land which result in the production of ammonia. The proposed scheme will give rise to the "Displacement of Agriculture" by two means. Firstly, the vesting of lands to build the road will naturally mean that those lands are no longer available for ammonia producing agricultural practices. Secondly, the vesting of lands specifically for the purpose of stopping the spreading of manure on those lands or the entering into agreements with landowners whereby they agree not to spread manure will mean that these additional areas will no longer be available for ammonia producing agricultural practices.

[143] Obviously, as the atmospheric spread of ammonia as a result of agricultural practices is weather dependent, it is to be noted that meteorological data for the year 2019 from the nearby Castlederg meteorological observation site was used in the Appropriate Assessment. Long-term climate change predictions (wetter winters with more extreme weather events and drier, warmer summers) have also been taken into account. NH_3 emissions from agricultural practices in the Appropriate Assessment were originally derived from the National Atmospheric Emissions Inventory (NAEI) mapped data on a 1km x 1km grid but these figures were adjusted on the basis of "site specific activity data" from landowner interviews "coupled with emissions factors from the 2023 European Monitoring and Evaluation Programme (EMEP) guidebook produced by the European Environment Agency." The three agricultural practices which are considered to give rise to NH_3 emissions are manure spreading, animal grazing and fertiliser application. Unsurprisingly, it is postulated that over 90% of ammonia emissions come from manure spreading, with 9% from fertiliser application and less than 1% from animal grazing.

[144] In addition to the "Displacement of Agriculture" mitigation measure, it is proposed to plant a shelter belt of trees to the south-east of Tully Bog. However, the impact of this measure will only really be felt over time as the shelter belt matures and as a result no account has been taken of any beneficial impacts from such planting during the early years of operation of the road. In section 4.3.24, it is asserted that the traffic and agricultural impact model outputs have been compared with the results obtained from site monitoring and these outputs have been found to be "demonstrably robust."

[145] Obviously a lot of variables or inputs go into the various models in order to produce outputs in terms of NH_3 concentrations and N-dep on various sections of Tully Bog. Rather than producing outputs solely from the "worst-case" inputs, a "Monte-Carlo" statistical simulation methodology has been used whereby inputs like traffic flows, vehicle and agricultural emissions, and meteorological conditions are randomly sampled from within their potential future ranges to generate many (running into the thousands) iterations (outputs) of the impacts. These outputs are then statistically analysed and it is then possible to conclude that any given output is likely to occur, for instance, once every hundred years, once every twenty years or three out of every four years. The once every hundred years output is described as the "plausible but unlikely" worst-case scenario, the once every twenty years output is described as the "probable" worst-case scenario and the three out of every four years output is described as the "typical" worst-case scenario. It is stated that this approach takes into account both "high and low growth traffic forecasts, emissions uncertainty and the intermittent nature of emissions of ammonia from slurry/fertiliser spreading events throughout the year. It is asserted that in assessing the amount of mitigation required, the plausible worst-case scenario is adopted which is it said is another example of the precautionary approach being adhered to.

[146] In relation to the issue of what is actually preventing the achieving favourable condition, according to the DfI, the Tully Bog Conservation Action Plan (2020-2030) indicates that the hydrological (drainage blocking) and the scrub and invasive species management work carried out by Ulster Wildlife at the behest of NIEA between 2018 and 2021 will deliver significant short-term improvements to the integrity of the Tully Bog site. However, additional work is still required to "deliver long-term improvements that will lead to favourable condition and eliminate threats entirely within the site." This work will be carried out when funding becomes available and it is clear that the DfI is amenable to providing funding for this work as an adjunct to the development of the road. It is hoped and anticipated that these conservation measures will go some way towards providing some resilience against the ongoing damage resulting from elevated ammonia levels caused by intensive livestock agriculture that is conducted on the lands surrounding the Tully Bog. However, and this is a matter of crucial importance, it is asserted that if the road is not built, the damage resulting from elevated ammonia levels caused by intensive livestock agriculture taking place on these adjacent lands will continue into the future and may increase, and the damage occasioned by this will be all the greater unless the long-term conservation and management measures described above are implemented, without

which favourable condition will not be achieved.

[147] According to the DfI the Air Pollution Information System site provides an interactive map of the UK divided in to 5km x 5km squares which, amongst other measurements, gives average measurements for the levels of NO_x and NH_3 in each surveyed square, with the latest figures relating to 2020-2022. For Tully Bog, the average levels for NO_x are 2.8 to 3.4 µg/m^3 and the average levels for NH_3 are 3.6 to 3.8 µg/m^3. This gives a N-dep range of 16.1 to 16.5 kgN/ha/yr. This means that current levels are below the EU air quality critical level (CL) of values for NO_x for vegetation which is 30 µg/m^3. However, the NH_3 levels are well above the United Nations Economic Commission for Europe (UNECE) critical level of values for ammonia which is set at 1 µg/m^3 and the N-dep is also well above the lower critical load (LCL) for raised bog which is currently set at 5 kgN/ha/yr. It is not all bad news because it would appear that the 2020-2022 figures represent an improvement on the 2017-2019 figures with the most noticeable reduction in the case of NO_x. It is also to be noted that the UK has some of the highest levels of N-dep in Europe with 97% of bog sites exceeding the lower limit of the critical load in 2014.

[148] It is asserted by the DfI, and I do not consider that this assertion can be seriously challenged, that the main sources of N-dep at Tully Bog "are from long-term historic agriculture and intensive livestock agricultural land uses, including transboundary depositions, with only minor contributions from existing roads." In terms of the likely impact of the new road, it is asserted by DfI that its sophisticated modelling indicates strongly that the road will contribute to an increase in NO_x emissions, the overall level of NO_x emissions will still not rise to anywhere near the annual mean NO_x critical level. The maximum predicted total with the new road is 6.6 µg/m^3 which is well below the critical level of 30 µg/m^3.

[149] In relation to ammonia, it is asserted by the DfI that the critical level is exceeded across the entire SAC to a significant extent at present and, in the absence of significant changes in agricultural practices in the adjacent lands, this will continue to be the case. However, in the absence of mitigation, the critical level will be exceeded to a greater extent if the road becomes operational, although the amount of the increase is less than 0.1 µg/m^3. However, this is sufficient to require the DfI to conclude that in the absence of mitigation:

> "direct (toxic) effects on sensitive plant species, particularly lower plants, as a result of NH_3 arising from the Proposed Scheme cannot be ruled out."

[150] The N-dep critical load is also presently exceeded across the entire SAC to a very significant extent with agriculture being the prime culprit. The DfI accepts that, in the absence of mitigation, the extent of the excess will increase possibly by as much as 0.55 kgN/ha/yr and, as a result, the DfI is willing to accept that in the absence of mitigation:

> "potentially significant adverse effects on the sensitive feature (Raised Bog) caused by the Proposed Scheme operation cannot be ruled out."

[151] Leaving out of account the mitigatory impact of shelter belt planting, the focus of the DfI, when addressing the issue of mitigation in respect of the SAC, has concentrated on the proposals which involve the removal of NH_3 contributing agricultural practices from the land surrounding the bog "in perpetuity." This means, *inter alia,* the permanent stopping of manure spreading and the prevention of the application of fertilisers. As stated above, this will be achieved entering into legally binding land use or management agreements with landowners and/or by vesting. It is also asserted that the land which is separately vested for the construction of the road will no longer be available for NH_3 contributing agricultural practices. When modelling the impact of mitigation, it is asserted by the DfI that a precautionary approach has been adopted which involves including in the inputs, high-growth traffic forecasts, the intermittent nature of manure spreading and fertiliser application, "uncertainty associated with meteorological data, emissions factors deposition velocity and model verification, and the displacement of livestock grazing activity."

[152] It is the DfI's case that with mitigation, any negative impact which the road may have in respect of NH_3 and N-dep will be removed although the:

> "background concentrations of ammonia and deposition of nitrogen are sufficiently in excess of the critical level and critical load respectively that total NH_3 and N-deposition will likely continue to exceed these metrics for some time to come, irrespective of the application of mitigation for the A5WTC impacts."

It is asserted that with mitigation measures in place on the surrounding lands, all 36.06 ha of the bog will experience a reduction in concentrations of NH_3 and N-dep with the greatest reduction occurring at the margins of the site closest to the areas where agricultural emissions presently occur. The DfI confidently asserts that as a result of mitigation, there will be "no adverse effect on the integrity of the SAC arising from the Proposed Scheme alone" and that there is "no reasonable scientific doubt that" the identified mitigation measures "will be sufficient to completely remove adverse impacts from road traffic emissions" emanating from the proposed road.

[153] In terms of just how confident the DfI is about the impact of mitigation, it is stated in section 8.1.4 that "there is a high degree of confidence" that the proposed road will not adversely affect the integrity of the SAC either alone or in combination with other plans or projects. "There are no uncertainties or known gaps in the information which may undermine this conclusion."

[154] Appendix 5 sets out the Air Quality Monitoring and Modelling Update prepared in August 2024 prepared by Dr Bethan Tuckett-Jones. Section 1.1.6 sets out

the additional work carried out the preparation of the 2024 update, following on from the 2022 ESA. This additional work consisted of a six-month ammonia survey around and on the SAC in order to get a better handle on the seasonal fluctuations of agricultural emissions coupled with land owner surveys covering both typical agricultural activities and specific activities during the monitoring period. In addition to these matters, further "dispersion modelling work" was conducted in order to better understand the uncertainties in the "modelled road impacts and the impacts of the removal of agricultural activities including alternative traffic growth scenarios." The DfI asserts that this additional work has confirmed that the modelling undertaken as part of the 2022 ESA "was, as designed, conservative" and the final recommendation for land vesting now covers a smaller area than the "originally proposed buffers" essentially because it has been ascertained that the impact of stopping emitting agricultural practices on adjoining lands had been underestimated and less land has to be vested or managed by agreement to achieve complete mitigation.

[155] It is asserted by the DfI that the result which had to be achieved in preparing this update was that sufficient land should be vested or subject to enforceable management agreements "to ensure that there is no reasonable scientific doubt that, after mitigation, there will be no increase of any magnitude, in either ammonia concentrations over the bog or nitrogen deposition to the bog habitats" resulting from the proposed road.

[156] The use of only worst-case assumptions as inputs in the modelling in order to achieve the removal of reasonable scientific doubt was rejected as this would result in the minimisation of mitigation to "zero mitigation potential" which would be "unreasonable" and would lead to a "significant overestimate in the required land take." The approach adopted by the DfI was to use the Monte Carlo statistical method of randomly choosing inputs from across the possible ranges for each input and then to set the level of vesting and land management at the minimum level which will "demonstrate with 99 percent confidence that there will be no increase in ammonia concentrations or nitrogen deposition" over the SAC resulting from the road. The modelled result of adopting this approach is that the majority of the SAC will experience significant beneficial impacts "but, in the worst case, the maximum impact anywhere in the SAC will be marginally below zero, ie a very slight, not significant, benefit."

[157] Section 3.1 of the August 2024 update provides a fuller description of the Monte Carlo statistical modelling simulation. The multiple inputs used in the modelling (traffic flows, vehicle emissions, meteorological data, etc) can vary within certain ranges. In the Monte Carlo simulation, there is a random sampling of discrete values for each input from within the pre-determined range and the combination of these randomly sampled inputs from across the various ranges generates many iterations (numbered in their thousands), each representing a possible outcome of the impact of the proposed road scheme. The key output by which iterations are ranked is "maximum impact, after mitigation, anywhere within the bog." The distribution of

outcomes arranged in centiles is then analysed and the amount of land vesting and/or management is assessed as the minimum necessary to ensure that the outputs in 99 of the 100 centiles show at least a marginally beneficial impact.

[158] In sections 4.2.2 to 4.2.4 of the August 2024 update, the distribution of 10,000 Monte Carlo simulations is illustrated and it is clear that at the ninety-ninth centile (grading the most favourable outcomes in the first centile and the most unfavourable outcomes in the hundredth centile) the proposed extent of vesting and land management which gives rise to the outputs in the ninety-ninth centile still has a very marginal positive impact (overall reduction) across the entire SAC for both N-dep and ammonia concentrations. No part of the site is adversely affected either in terms of critical level (ammonia) or critical load (N-dep) at the ninety ninth centile. Finally, it is asserted in section 4.2.9 of the 2024 update that it has been demonstrated that the vesting and management of lands adjacent to the SAC which will prevent the carrying out of nitrogen emitting agricultural practices on those lands will (beyond reasonable scientific doubt) have a beneficial impact on the annual mean nitrogen deposition and annual and short-term ammonia concentrations over the sensitive habitat.

[159] I will consider the parties' arguments on this issue at a later stage of this judgment, but I have to say at this juncture that, standing back and looking at the overall present condition and future outlook for Tully Bog, it is clear to me that the scrutiny of and focus on the condition of this SAC over the last number of years as a result of this proposed road have the potential to give rise to material beneficial outcomes in that there is a renewed commitment to conservation measures coupled with proposed mitigation measures which, if implemented, will see less pressure overall on this SAC both from within and externally from the surrounding environment. It would appear to me that the construction of this road with the associated primary and supplementary vesting of lands and land management agreements will remove nitrogen emitting agricultural practices from those adjacent lands and it is abundantly clear that these nitrogen emitting agricultural practices are having and, unless abated, will continue to have, damaging impacts on this and many other areas of protected bog land throughout the United Kingdom. In short, Tully Bog will be better off with this road than without it.

Parties' submissions in relation to each of the grounds of challenge

Applicants' submissions re breach of section 52(1) of the Climate Change (Northern Ireland) Act 2022 and/or irrationality

[160] The applicants argue that the DfI, in determining whether to proceed with the proposed road, is, in the language of section 52(1)(a) acting in the "exercise of its own functions" and, therefore, the DfI, so far as it is possible to do so, has to exercise its functions in a manner which was consistent with the fulfilment of the duties set out in sections 1, 3, 4, 5 and 24 of the 2022 Act. The applicants highlight the fact that the scheme, if it proceeds, will contribute significantly to GHG emissions and that the updated assessment of such emissions carried out by the DfI in response to the PAC

report indicates that the estimated emissions will be 8% higher than the estimates that had been presented to the PAC in the 2022 ESA. Thus, it is argued, the estimated climate impact of the proposed road is even greater than the PAC had understood it to be when it produced its report.

[161] It is argued that the 2022 Act sets binding emissions targets that act as stepping stones and ensure progress towards the key goal of net zero by 2050. The DfI and all other Northern Ireland government departments are duty bound to ensure that each emissions target or stepping stone is met. There is no discretion. The 2050, 2040 and 2030 targets must be met and the carbon budgets must not be exceeded. However, sections 40 and 41 cater for the possibility of carbon budgets being exceeded in that these are "catch up" provisions which require DAERA to formulate rectification measures to enable Northern Ireland to make up for the lost ground in the next budgetary period if the carbon budget is exceeded during the previous budgetary period.

[162] The applicants also place reliance upon sections 13 to 22 of the 2022 Act which require Northern Ireland government departments to develop and publish sectoral plans which set out how each sector of the economy will meet the statutory emissions targets. They also rely on section 29 which requires DAERA, with input from all other government departments, to devise a CAP for each budgetary period which sets out the proposals and policies which will result in the carbon budgets for the relevant period being met. No sectoral plans have been published by any Northern Ireland government department and DAERA has just published its first draft CAP. It is argued by the applicants that in the absence of a finalised CAP or any sectoral plans, the DfI cannot demonstrate that the carbon budgets that have now been set will not be exceeded either with or without the inevitable contribution to greenhouse gasses which will result if the proposed road is built and becomes operational. As a result, it is argued that the DfI cannot demonstrate that it is in compliance with section 52(1) of the 2022 Act.

[163] The applicants specifically rely on sections 3.455 and 3.456 of the PAC report (see paras [58] and [59] of this judgment). They argue that the PAC's analysis of the 2022 Act is legally sound and the DfI's decision to proceed with the road without having complied with the PAC's Recommendations 14 to 17 is unlawful in that it breaches section 52(1) of the 2022 Act.

[164] According to the applicants, the phrase "acting in a manner consistent with" in section 52(1) means acting in a way that ensures that the 2030, 2040 and 2050 statutory targets are met and that the published carbon budgets are not exceeded. The applicants urge this court to adopt a contextual, purposive approach to the interpretation of this statutory provision in line with the lofty authorities of *Attorney General's Reference (No 5 of 2002)* [2005] AC 167 at para [31], *Cusak v Harrow LBC* [2013] 1 WLR 2022 at para [58], *Uber BV and Others v Aslam and Others* [2021] UKSC 5 at para [70] and *CG Fry & Son Ltd v Secretary of State for Levelling up, Housing and Communities* [2024] EWCA Civ 730 at para [68]. Reliance is placed upon the judgment of

Humphreys J in case of *Coolglass v An Bord Pleanála* [2025] IEHC 1 at paras [102] and [109] which concerns the interpretation of a similar provision in the Republic of Ireland, namely, section 15 of the Climate Action and Low Carbon Development Act 2015. The applicants also urge this court to pay close regard to the *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* decision of the Grand Chamber of the ECtHR {GC} no 53600/20, 9 April 2024. The applicants point in particular to paras [544] to [546], [550] and [573]. I set these paragraphs out in full.

> "544. As stated above, the Court already held long ago that the scope of protection under Article 8 of the Convention extends to adverse effects on human health, well-being and quality of life arising from various sources of environmental harm and risk of harm. Similarly, the Court derives from Article 8 a right for individuals to enjoy effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change (see paragraph 519 above).
>
> 545. Accordingly, the State's obligation under Article 8 is to do its part to ensure such protection. In this context, the State's primary duty is to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change. This obligation flows from the causal relationship between climate change and the enjoyment of Convention rights, as noted in paragraphs 435 and 519 above, and the fact that the object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied such as to guarantee rights that are practical and effective, not theoretical and illusory (see, for instance, *H.F. and Others v. France*, cited above, § 208 *in fine*; see also paragraph 440 above).
>
> 546. In line with the international commitments undertaken by the member States, most notably under the UNFCCC and the Paris Agreement, and the cogent scientific evidence provided, in particular, by the IPCC (see paragraphs 104-120 above), the Contracting States need to put in place the necessary regulations and measures aimed at preventing an increase in GHG concentrations in the Earth's atmosphere and a rise in global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights, notably the right to private and family life and home under Article

8 of the Convention.

550. When assessing whether a State has remained within its margin of appreciation (see paragraph 543 above), the Court will examine whether the competent domestic authorities, be it at the legislative, executive or judicial level, have had due regard to the need to: (a) adopt general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments; (b) set out intermediate GHG emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies; (c) provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets (see sub paragraphs (a)-(b) above); (d) keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence; and (e) act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures.

573. In conclusion, there were some critical lacunae in the Swiss authorities' process of putting in place the relevant domestic regulatory framework, including a failure by them to quantify, through a carbon budget or otherwise, national GHG emissions limitations. Furthermore, the Court has noted that, as recognised by the relevant authorities, the State had previously failed to meet its past GHG emission reduction targets (see paragraphs 558 to 559 above). By failing to act in good time and in an appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework, the respondent State exceeded its margin of appreciation and failed to comply with its positive obligations in the present context.

574. The above findings suffice for the Court to find that there has been a violation of Article 8 of the Convention."

[165] It can be seen that article 8 of the Convention may be engaged in the context of the state's response to GHG emissions induced climate change and it may be possible

for a "victim" in the Convention sense to invoke article 8 where it is alleged that the state has failed to set out pathways "(by sector or other relevant methodologies) deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies" or to "act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures." In the Northern Ireland context, it would seem that the failure to finalise a CAP and sectoral plans may give rise to potential breaches of article 8. However, at least in relation to those aspects of the applicants' challenges that arise out of the 2022 Act, article 8 is not invoked or relied upon. Therefore, I am not convinced that the *KlimaSeniorinnen* decision or for that matter the *Coolglass* case really assist in relation to the proper interpretation of section 52 of the 2022 Act.

[166] The applicants argue that the mere fact that the Executive and the other Northern Ireland government departments have been made aware of the GHG emission burden resulting from the construction and operation of the proposed road does not by itself satisfy the duties set out in the 2022 Act. In order to fully comply with these duties, it is argued that the climate impact of the proposed scheme must be firmly situated within the quantitative projections and analysis of the effects of the strategies, plans and policies for reducing GHG emissions. In support of this argument, reliance is placed on the case of *R (Friends of the Earth) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 at paras [176] and [185].

[167] It is argued that as there is no CAP (although it is to be noted that a draft CAP was published on 19 June 2025) and there are no sectoral plans (even in draft form at present), there is absolutely no proper way of assessing and analysing how this proposed road fits in with other schemes and projects within each sectoral area so as to ensure that the overall emissions reductions required to meet the 2030, 2040 and 2050 targets are achieved and the carbon budgets are not exceeded. The need for such assessment and analysis, it is argued, is all the more obvious in the context of Northern Ireland when one takes into account the views firmly expressed by the CCC when it effectively concluded that it is going to be very difficult for Northern Ireland to achieve the reductions needed to meet these targets and stay within the carbon budgets. The applicants justifiably rely on the clear statement of the Lady Chief Justice in para [101] of *No Gas Caverns Ltd and Another* [2024] NICA 50 where she stated that given that the climate change commitments were now enshrined in the law of Northern Ireland:

> "decision makers on large scale projects will have to consider and rationalise any convergence or divergence with those standards set in law."

[168] In summary, the applicants' case is that the DfI cannot point to any evidence which demonstrates that the proposed road can be constructed and operated within the parameters of the emissions cuts needed for Northern Ireland to achieve the 2030, 2040 and 2050 targets and to remain within the first three carbon budgets that have now been set. In these circumstances, the DfI decision to proceed with the scheme

clearly breaches its section 52 duties and clearly crosses the threshold of irrational decision making. There was, in essence, no or wholly insufficient evidence to conclude that the mandatory targets would in fact be met if the proposed scheme proceeded.

[169] In relation to the intensity of the scrutiny that should be applied by the court when examining the DfI's justification for its decision making, the applicants' rely on the comments of Fordham J in *R (Fighting Dirty Ltd) v Environment Agency and Secretary of State for the Environment, Food and Rural Affairs* [2024] EWHC 2029 (Admin) at para [34] to argue for a higher intensity of scrutiny in environmental/climate change cases.

Respondent's submissions re breach of section 52(1) of the Climate Change (Northern Ireland) Act 2022 and/or irrationality

[170] The respondent is keen to emphasise that the proposed road is an infrastructure project which has the support of the entire Northern Ireland Executive. Following receipt of the 2023 PAC report by the DfI, its officials met with the Minister and his Special Advisor on a number of occasions and provided submissions in respect of the proposed scheme. The Minister determined that any decision in respect of the proposed scheme was likely to require the agreement of the Executive Committee and the Minister provided the Executive with briefing papers in respect of the proposed scheme. The Minister's papers on the A5WTC scheme were tabled for discussion at the meeting of the Executive on 2 October 2024, during which the Minister received the agreement of the Executive to proceed with the relevant part of the scheme. The Minister then provided a written Ministerial Statement dated 2 October 2024 in which he confirmed his intention to proceed with approximately 55km of new dual carriageway from the proposed junction just south of Strabane to be known as Junction 8 to the proposed junction close to Ballygawley to be known as Junction 15, and to include a short westward extension of the existing A4 dual carriageway to meet up with the new road, amounting to nearly two thirds of the scheme's full length.

[171] The respondent is also keen to emphasise that the applicants' challenge is a challenge to a decision to authorise a road scheme. It is not a challenge to climate policy generally and it is not a challenge to the Northern Ireland Executive's progress (or lack of it) in relation to the development of a CAP for any carbon budgetary period. The respondent asserts that the 2022 Act does not impose a prohibition on major infrastructure projects which may give rise to net carbon emissions. It is further asserted that the 2022 Act does not impose a moratorium on the authorisation of such developments pending the finalisation and approval of a Northern Ireland CAP. It is argued that the duties imposed by section 52(1)(a) and (b) of the 2022 Act on individual Northern Ireland government departments is to exercise its functions in a manner "consistent with" net zero targets "so far as it is possible to do so" and to co-operate with other departments "so far as is consistent with the proper exercise of its own functions." The duty is neither prohibitory in nature nor is it a duty to ensure a defined outcome. Pending the consultation on, finalisation and approval of the CAP, all the duty requires is that the DfI, in this instance, has sufficient information (whether through consultation and/or internal analysis) to satisfy itself that

authorisation of the scheme is "consistent with" net zero targets.

[172] On behalf of the respondent, it is argued that the absence of a finalised CAP or sectoral plan, at the point of decision making, does not mean that the authorisation decision was not consistent with the achievement of climate obligations. Emissions arising from the operation of the A5WTC form part of the "transport sector" for the purposes the 2022 Act. It is asserted that the information available to the DfI is that the road transport sector can be decarbonised by 2050, with a range of interventions, including electrification of vehicles. This projection remains the same irrespective of whether the A5WTC is constructed. The preferred policy pathway will form part of the transport Sectoral Plan, once published. It is argued that the DfI has also developed a bespoke and original transport emissions tool to monitor progress with transport emissions targets. This can inform future policy development to ensure the achievement of emissions targets. The emissions associated with the proposed road were assessed by reference to the draft carbon budgets which were subject to consultation. Since authorisation of the scheme, those budgets have been enacted, without modification. It is further asserted that detailed consultation has taken place with DAERA and the Department for the Economy. A5WTC related emissions have been factored into the DfI's submissions to DAERA for the purposes of preparing the NI CAP (now published in draft form), which will ultimately be decided by the Executive. The Executive was fully briefed upon climate aspects of the A5WTC and has agreed to the DfI's authorisation decision.

[173] The respondent places particular emphasis on the fact that the Bill that became the 2022 Act was introduced into the Assembly on 6 June 2022, over 2 years after the conclusion of the 2020 public inquiry and 21 months after the 2020 PAC report. The passage of the Bill through the Assembly overlapped with public consultation on the ES Addendum 2022 (ESA 2022). The Committee Stage report occurred on 20 January 2022, with the Final Stage on 9 March 2022 and Royal Assent on 6 June 2022. It is highlighted by the respondent that the Act came into force after the final round of environmental information had been published but prior to the 2023 public inquiry which clearly was at the very end of the preparation and assessment process for the A5WTC. At the time of Royal Assent, the Executive had not been functioning since February 2022. While Ministers (with the exception of First Minister and deputy First Minister) remained in post until October 2022, a new Executive was not formed until February 2024.

[174] Dealing with the GHG emissions assessments carried out by the DfI, the respondent latches onto a portion of the PAC Recommendation 16 where the PAC recommended that the GHG assessment should be updated and that the results should be published at the same time as any decision to proceed. It is submitted that this part of Recommendation 16 was accepted and that the updated assessment was published as Annex A of the Departmental Statement. The respondent seeks to emphasise the fact that the estimated GHG emissions resulting from the construction and operation of the scheme are expected to contribute minimally to the first three Northern Ireland Carbon Budgets which have now been set (0.4621% to CB1, 0.1019%

to CB2 and 0.1163% to CB3). It is asserted that the results of the updated GHG emissions estimates were shared with DAERA (the department with responsibility for preparing the CAP) and with other departments including the DfE, the department with responsibility for the Business and Industrial Process (BIP) Sector, which includes construction. It is asserted that the Executive was fully briefed on the size of the estimated GHG emissions resulting from the scheme and the Executive's unanimous approval of the scheme was given on a fully informed basis.

[175] The two affidavits from Mr Richard Hume, the Head of the Business and Industrial Process Team within the Business, Gas, Minerals and Renewable Electricity Directorate of the DfE which were sworn on 27 March 2025 and 3 April 2025 and which were submitted to the court during the oral hearing of this challenge confirm that the GHG emissions resulting from the construction of the proposed road will be accounted for in the BIP sector which falls within the responsibility of DfE. Mr Hume deposes to the engagement between DfI officials and DfE officials during the summer of 2024 in order to ensure a co-ordinated approach to the development of this major infrastructure project. Mr Hume deposes that his team produced advice for the Economy Minister on the implications of the proposed scheme for DfE and its obligations under the 2022 Act to develop plans and policies for the CAP relating to the BIP sector. The approach adopted was to identify policies that will reduce carbon emissions within the BIP sector rather than to concentrate on specific projects contributing to emissions in the sector. This approach, it is averred, follows the guidance and advice of the CCC. It is clear from the evidence produced to the court that following receipt of this advice, the Economy Minister clearly expressed his support for the proposed scheme and communicated his support to the DfI Minister.

[176] Mr Hume's affidavit evidence indicates that GHG emissions from the BIP sector accounted for 11.9% of the total GHG emissions in Northern Ireland in 2022, with manufacturing and construction accounting for 8.51% of total GHG emissions in Northern Ireland in that year. Emissions from the BIP sector have fallen from 5.6 $MtCO_2e$ in 1990 to 2.5 $MtCO_2e$ in 2022, representing a 54.9% reduction against the 1990 baseline which has been set in the 2022 Act. This reduction, it is averred, has been achieved by adopting a policy-based approach across the sector rather than concentrating on the potential emissions from individual projects. It is averred that the latest modelling produced by DAERA, using its GHG Emissions Projection Tool (EPT) which quantifies the impact of UK-wide and NI-specific policies relating to the NI BIP sector, indicates that the BIP sector will produce lower GHG emissions than those recommended by the CCC in its pathway for the carbon budget period 2023-2027 for the BIP sector.

[177] Turing to the proposed road scheme, it is averred that the DfE has shared with the DfI some of the policy initiatives which are contemplated within the DfE's CAP proposals and these policy initiatives have been taken into account by the DfI when developing some of its carbon mitigation proposals for the scheme and the proposed contractual conditions that will govern the construction of the road. This, it is argued, is clear evidence of collaboration and co-ordination between departments as

contemplated by section 52 of the 2022 Act. Given that the estimated total of GHG emissions due to the construction of the proposed road is in the region of 267 $ktCO_{2e}$ spread over the entire construction phase, it is averred that this is but a small fraction of the 11,000 $ktCO_{2e}$ which the CCC has estimated to be the BIP share of the first carbon budget (2023-2027). The construction phase may stretch into the second carbon budget period and, as a result, the construction related GHG emissions may may not have to be solely accounted for in the first carbon budget period. The key point of Mr Hume's affidavit evidence which was introduced for the first time during the hearing of this challenge is that the BIP sector is on target to meet its sectoral 2022 Act goals and targets even factoring in the GHG emissions resulting from the construction of the proposed road and that this position was made known to the DfI and the Executive. The Executive gave the green light for the scheme in light of this information and the DfI similarly made its decision to proceed with the scheme with the benefit of this information. It is argued on behalf of the DfI that at the time when the decision to proceed with the road was taken, the DfI had very clear and reliable information about the quantification of the potential increase in GHG emissions resulting from the construction and operation of the road and how these increases related to the proposed (at that stage) carbon budgets. It is argued that the DfI also had very clear information about the policy pathway to achieving the 2022 Act goals and targets.

[178] It is argued on behalf of the respondent that when the decision to proceed with the road was taken, the DfI, even in the absence of a published and agreed CAP, had more than sufficient information to enable it to state with confidence that the construction and operation of the new road would not be incompatible with the DfI fulfilling its 2022 Act obligations. This is the central assertion contained in the Departmental Statement, in response to the PAC's Recommendations 14–16 at paras 5.3.16 to 5.3.18 of the Statement. It is encapsulated in the following section relating to Recommendation 14:

> "…In considering and approving the decision to proceed with this part of the scheme the Executive was fully informed of the predicted additional GHG emissions associated with the construction and operation of the road. The emissions generated from the construction and operation of the scheme will therefore be included within the Executive's plans to deliver the emissions reduction targets specified in sections 1, 3, 4 of the Act, and as required by section 24 of the Act to ensure that any carbon budget set under the Act is not exceeded.
>
> When compared to the anticipated Northern Ireland Carbon Budgets the scheme is expected to contribute 0.4621% to CB1, 0.1019% to CB2, and 0.1163% to CB3.

> DfI has provided draft policies to DAERA relating to its duties in respect of the transport sector. Through the development of a Transport Emissions Model the Department can demonstrate how the sector will almost fully decarbonise by 2050. DfI is therefore confident that it will still be possible to achieve its transport sector obligations and that the transport emissions from the scheme will not be incompatible with achieving the objectives of the Act.
>
> Considering the emissions from the scheme in the context of the carbon budgets, the Department is confident that, given the priority afforded to the scheme, it will not prevent the emissions targets specified in Sections 1, 3, 4 and 24 of the Climate Change Act (Northern Ireland) 2022 from being met."

[179] The respondent argues that it is very clear from the broader scheme of the 2022 Act that there was always likely to be a period of time following its coming into force when the CAP would not be in place. Section 51 requires that the CAP should be laid before the Assembly and approved within 24 months of Royal Assent. It is argued on behalf of the respondent that by allowing for this interval between Royal Assent and the approval of the first CAP, the legislature clearly intended that powers and functions could continue to be exercised by departments during the interim period, even if those decisions had implications for future carbon budgets. All departmental decision making which involved the potential for significant GHG emissions did not have to be put on hold until a CAP was in place. There is obviously clear merit in this argument but the decision we are dealing with in this instance is clearly not just any departmental decision. This is a decision in respect of the single most extensive infrastructure project in the history of Northern Ireland and it is a decision taken well after the period of grace provided to DAERA for the approval of a CAP had long since expired.

[180] It is argued on behalf of the DfI that the requirement to act in a manner "consistent with" the reduction targets and to do so "in so far as possible", imposes on Northern Ireland government departments a form of *Tameside* duty of inquiry, both to ensure that the department takes account of climate targets but also acquires sufficient information to be able to satisfy itself about the consistency of the proposed decision with climate obligations. The duty is also informed by the broader scheme of the 2022 Act, which requires that the policy pathway to net zero is ultimately developed over time, through sequential carbon budgets in the years ahead. The precise pathway will be decided by Ministers and informed by the results of mandatory ongoing monitoring and reporting on progress with a carbon budget (see sections 39 and 40 of the 2022 Act). Where targets have not been met for one carbon budget period, there is a duty upon DAERA to lay a report before the Assembly within three months, laying out the policies and proposals which will compensate for the

previous excesses in the next budget period (see section 41 of the 2022 Act). It is argued on behalf of the respondent that the clear overall scheme of 2022 Act is that it obliges progressive development of policies to achieve the overall emission reduction targets. However, pending determination of the initial policy pathway, the legal significance of those climate obligations within the planning regime is as a material consideration in the decision-making process, with an obligation upon the relevant department to satisfy itself "insofar as possible" that a development will be "consistent with" the achievement of the reductions.

[181] Placing reliance on the decisions of the English Court of Appeal in *Packham v SOS Transport* [2020] EWCA Civ 1004 at para [84] and the UK Supreme Court case of *R (Friends of the Earth) v SOS Transport* [2021] 2 All ER 967 at para [125], it is argued on behalf of the respondent that, in the absence of a defined emissions policy pathway by means of a CAP, the duty on the DfI to satisfy itself that the scheme was "consistent with" reduction targets was a *Tameside* duty. The DfI was required to ensure that it had sufficient information about the emissions levels resulting from the proposed road and the potential future policy options which were available to it in order for it to determine whether the emissions from the scheme would preclude achievement of the statutory targets.

[182] It is argued on behalf of the respondent that it is clear from the Departmental Statement that the DfI gave very careful and close consideration to the interaction between the additional emissions which are likely to be generated by the proposed road and the extent to which its authorisation might impair the achievement of those targets or to narrow impermissibly the available policy options. In particular, the DfI considered and had the benefit of:

(i) The GHG emissions assessment to quantify the predicted emission levels;

(ii) Detailed consultation within the DfI and with DAERA to understand the DfI's proposed policy pathway options for the transport sector which were being considered as part of the overall CAP preparation;

(iii) The bespoke Transport Emissions Tool;

(iv) Draft carbon budgets against which to measure the proposed impact of the potential policy pathway; and

(v) Executive agreement on the scheme.

[183] Relying on the decision of *R (Plantagenet Alliance) v Secretary of State for Justice* [2014] EWHC 1662 (Admin), [2015] 3 All ER 261, at para [100] it is argued that:

> "1. The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.

> 2. Subject to a *Wednesbury* challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken.
>
> 3. The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision.
>
> 4. The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient.
>
> 5. The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion.
>
> 6. The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it."

[184] Reliance is also placed on two recent UK Supreme Court cases originating from Northern Ireland: *Re McAleenon's Application* [2024] UKSC 31 and *CAO v SSHD* [2024] UKSC 32. In the former case, Lord Sales and Lord Stephens commented at para [40]:

> "…it is for the public authority to determine on the information available to it the facts which are relevant to the existence and exercise of its powers, subject to review by a court according to the usual rationality standard. The court has a supervisory role only."

In the latter case, Lord Sales and Dame Siobhan Keegan stated at para [48]:

> "Since in a human rights appeal the FTT is the new primary decision-maker, whose decision supersedes that of the Secretary of State, it is subject to a form of the usual public law duty on a decision-maker to make such inquiries as it

> may consider to be necessary to inform itself about relevant matters…and will commit an error of law if, being on notice of a vital gap in the evidence, it irrationally fails to make relevant inquiries to address that."

[185] The respondent argues that the applicants are seeking to elevate the obligation under section 52 of the 2022 Act into a duty to ensure compliance with future GHG targets as part of the planning system. It is argued that section 52 imposes no such elevated duty. It is argued that when the DfI took the decision to proceed with the road, it had more than enough information about both the scheme and the transport sector policy pathways to be confident that this scheme would not undermine compliance with reduction obligations under the 2022 Act.

[186] In relation to the applicants' submission that the authorisation decision could not be lawfully taken in the absence of a quantified policy pathway in the form of a CAP, it is argued on behalf of the DfI that this submission fails to take account of the true nature of the duty imposed under section 52(1) of the 2022 Act and ignores the fact that the 2022 Act contains no prohibition upon development decisions pending preparation of the CAP. It is further argued that the 2022 Act expressly anticipates such decision making insofar as it provides for an interim period pending preparation of the CAP during which departmental decision making can continue and it fails to take any account of the flexibility built into the broader scheme of the 2022 Act which allows ministers to both make and adjust policy proposals in the future, even if reduction targets are missed during a relevant budget period.

[187] In relation to the applicants' argument that in order for the DfI to fully comply with the duties imposed upon it by the 2022 Act, the climate impact of the proposed scheme must be firmly situated within the quantitative projections and analysis of the effects of the strategies, plans and policies for reducing GHG emissions, the respondent submits that the case of *R (Friends of the Earth) v SOS BEIS [2022]* EWHC 1841 does not support the applicants' proposition. The case concerned the exercise of the power under section 13 of Climate Change Act 2008 to prepare policy proposals for meeting carbon budgets (similar to the power under section 29 of the 2022 Act). It was not a challenge to an infrastructure authorisation decision. The court held at para [177] that although it may be necessary for the Secretary of State to have an understanding of quantitative effects of policy proposals which are devised to meet the carbon budgets that have been set, there is:

> "no basis in the statutory scheme to justify the court holding that the obligation in section 13(1) requires the Secretary of State to be satisfied by quantitative analysis that measures with quantifiable effects will enable at least 100% of the emissions reductions required by the carbon budgets to be achieved."

[188] It is argued on behalf of the respondent that the applicants' submissions are focused upon the obligations which might arise when the Executive approves the CAP or what may happen in the future if the policy proposals are either not effective or implemented. The respondent's case is that the answer to these possible scenarios lies in the regime for reporting, monitoring and adapting plans, which are contained within the 2022 Act itself at sections 40 and 41. In summary the relevant PAC Recommendations are but recommendations, they are not statements of the law.

Court's conclusions re breach of section 52(1) of the Climate Change (Northern Ireland) Act 2022 and/or irrationality

[189] I refer to my general observations made in respect of the PAC's Recommendation 14 which are set out in paras [107] to [110] above. I too, share the respondent's stated concern that the applicants are seeking to elevate the obligation under section 52 of the 2022 Act into a formal duty to ensure compliance with future GHG targets as part of the planning system. I do not consider that section 51 can legitimately be interpreted as giving rise to such an elevated duty.

[190] What is clear is that section 52 is inextricably linked to sections 1, 3 to 5 and 24 of the 2022 Act and it should be interpreted in a manner which best supports the achievement of the goals that are at the heart of those other provisions, ie the requirement for Northern Ireland not to exceed the carbon budgets that have been set and the requirement for Northern Ireland to achieve the reduction targets set for 2030, 2040 and 2050.

[191] Section 52 is a provision which exhorts each individual Northern Ireland government department to do its bit in the achievement of those goals and it does so by placing a duty on each individual Northern Ireland department, when exercising its functions, to do so in a way that facilitates the achievement of these goals, insofar as it is possible for each individual department to do so. All the Northern Ireland government departments must co-operate with each other to assist each other in the achievement of these goals. Such co-operation must be consistent with the proper exercise of each department's own functions. In other words, when engaging in such co-operation, one department cannot take on the functional responsibilities of another department and each department must not shy away from exercising its assigned functions simply because of what appear to be difficult challenges faced by any of the departments in meeting the targets and goals set out in the 2022 Act.

[192] Further, each department has to draw up plans, policies and strategies so as to enable it to do its bit in the achievement of those goals both individually and in co-operation with the other Northern Ireland government departments. Joined up thinking, synchronisation and co-ordination of effort are what section 52 is all about.

[193] Section 52 does not prevent a major infrastructure project which is a source of significant GHG emissions being devised, promoted, constructed and put into operation by the DfI or any other Northern Ireland government department with

responsibility for such activities but what it does clearly rule out is the construction and operation of such a major project in the absence of robust planning, synchronisation and co-ordination between all Northern Ireland government departments to ensure that the project fits into the plans, strategies and policies which map out a realistic and achievable pathway to achieving net zero by 2050, meeting the interval targets on the way and staying within the carbon budgets that have now been set.

[194] I fully accept that the DfI has done its very best to assure itself that the road, when operational, will not prevent it making considerable advances towards the goal of decarbonising the transport sector by 2050 and that by means of information sharing, consultation and meaningful co-operation, it has received realistic and reliable assurances from the DfE that the construction of the road will not prevent the DfE meeting its carbon reduction targets for the BIP sector. DAERA has also been provided with the estimates from DfI and DfE and is in a position to take these into account when formulating the draft CAP (published on 19 June 2025). However, having regard to the interpretation I have placed upon section 52 as outlined above, I do not consider that this is enough to fulfil the duty imposed upon the DfI by that provision and in coming to this conclusion, I rely upon my comments set out in paras [115], [116], [128] and [129] of this judgment.

[195] To recap, the DfI asserts that its modelling indicates that even with the new road having been built and becoming operational, it will still be possible to achieve its transport sector obligations and that the transport emissions from the scheme will not be incompatible with achieving the objectives of the 2022 Act. It is further asserted that when one considers the estimated minor contribution of the scheme to the three published Northern Ireland carbon budgets, one can have confidence that given the priority afforded to the scheme by the Executive, it will not prevent the emissions targets specified in sections 1, 3, 4 and 24 of the 2022 Act from being met. Such confidence, it is argued, is enhanced by the evidence from DfE that even with the construction of the road, the BIP sector reduction targets and goals will be met.

[196] The DfI case is that, given the Executive's approval of and unflinching support for the scheme, it can be assumed that DAERA, in publishing the draft CAP, will have factored the GHG emissions resulting from the scheme into the plan to meet the Northern Ireland carbon budgets and the targets set out in the 2022 Act. In essence, the DfI asserts that it is doing all that is required of it to decarbonise transport and it is confident that all the other departments are doing likewise in respect of their various spheres of responsibility, including the construction sector, and, bearing in mind that this scheme is an Executive Flagship project, the draft CAP which at the time this case was heard had not been published but was subsequently published on 19 June 2025 will factor in the impact of the construction and operation of the road in setting out proposals and policies indicating how it is intended that the 2022 Act targets will be met, and, in such circumstances, it is unnecessary for the DfI to await the publication of a finalised CAP in order to commence construction work on the road.

[197] However, as noted above, the DfI has had to admit that "there is not a clear picture at a Northern Ireland level of all the other schemes and emitting activities which will happen between now and the 2050 Net Zero Target." Further, there is unlikely to be full clarity in respect of these issues in the short term but it is asserted that any decisions taken now will need to be factored into: "how the Act's net emissions reduction targets will ultimately be met." It is further stated that: "(w)hilst the scheme will result in an increase in emissions, the A5WTC is a priority investment for the Northern Ireland Executive, and therefore the emissions generated from the construction and operation will need to be factored into the Executive's plans to meet the emissions reduction targets specified in sections 1, 3 and 4 of the Act and as required by section 24 of the Act to ensure that any carbon budget set under the Act is not exceeded."

[198] I accept the bona fides of the DfI when it asserts that in respect of the transport sector, it will do its bit to ensure that the transport sector is almost fully decarbonised by 2050, and that the TEM gives it confidence that this ultimate goal can largely be achieved. However, there is a complete absence of evidence as to the overall Northern Ireland position in the DfI statement. In the absence of evidence in relation to the overall Northern Ireland position, the DfI's fallback position is that having regard to the fact that the proposed road is an important project which is a priority of the Executive, it can safely be assumed that DAERA will formulate a CAP which will be accepted by the Executive, including the other departments, and the Assembly, which both allows for the construction and operation of this road and puts Northern Ireland on a trajectory to reach the 2030, 2040 and 2050 targets and keeps Northern Ireland within its set carbon budgets. Other infrastructure projects may have to go by the wayside and other sectors may have to be squeezed further to achieve these goals but that will happen because it must if the road is to be built and the targets are to be met and the budgets are not to be exceeded.

[199] I have to stress at this point that I am not interpreting the duty imposed upon the DfI by section 52 as requiring it to await the finalisation of a CAP before making a decision authorising the scheme to proceed. That would be much too prescriptive. My considered view is that in order to comply with its section 52 duty when making a decision such as this, the DfI needs to be able to produce cogent evidence that its decision has been made following careful planning, synchronisation and co-ordination between all Northern Ireland government departments, the result of which demonstrates that the project fits into plans, strategies and policies which map out a realistic and achievable pathway for Northern Ireland to achieve net zero by 2050, meeting the interval targets on the way and staying within the carbon budgets that have now been set. This evidence is the sufficient information which is required in the *Tameside* sense.

[200] A finalised, agreed and approved CAP would be one obvious source of such cogent evidence. In the absence of a finalised, agreed and approved CAP, the necessary cogent evidence would have to be garnered from another source or sources and, bearing in mind the nature and extent of the responsibilities assigned to DAERA

by the 2022 Act, it is reasonable to conclude that DAERA would be the first port of call in this regard. The DfI statement does not detail or contain any reference to any such evidence being provided by DAERA and, in contrast with the evidence provided by DfE at the hearing of this matter, nothing was forthcoming from DAERA to indicate that prior to the DfI making its decision, it had provided the DfI with any form of evidence or evidence-based assurance that, even in the absence of a finalised CAP, it was formulating and co-ordinating plans, strategies and policies that would accommodate the construction and operation of the road and at the same time would map out a realistic and achievable pathway for Northern Ireland to achieve net zero by 2050, meeting the interval targets on the way and staying within the then proposed carbon budgets.

[202] This evidential lacuna renders the DfI decision non-compliant with the duty imposed by section 52 and it renders the decision irrational as it is a decision which was taken in the absence of an adequate evidential base. Rather than basing its decision on evidence or evidence-based assurances from DAERA, it based its decision on the aspirational assumption that as the Executive regarded this as a priority project, accommodation would be made to ensure that the DfI could proceed with the project and at the same time the Climate Act (Northern Ireland) 2022 targets would be achieved and the budgetary allowances would not be exceeded.

[203] As noted above, after the completion of the hearing of this case, DAERA brought forward a draft CAP on 19 June 2025, well outside the statutory time-limit for doing so under the 2022 Act. Having considered the draft CAP and the Quantification Report which appears at Annex A, it would seem that the pessimistic views expressed by the CCC as to the prospects of Northern Ireland meeting the climate targets it has set itself and the difficulties which would be encountered in adopting the stretched pathway which appears to be the only way in which those targets could be met, have been borne out. The CAP as drafted does not make any reference to this major infrastructure project in the context of the process of formulating and co-ordinating plans, strategies and policies that map out a realistic and achievable pathway for Northern Ireland to achieve net zero by 2050, meeting the interval targets on the way and staying within the then proposed carbon budgets. As asserted by the DfI, all the Executive Ministers may have agreed to the progression of this scheme but the delay in the production of the draft CAP and the contents of the draft CAP itself may be indicative of the difficulties getting agreement on what climate change action each department (in relation to its sectoral responsibilities, in particular agriculture) has to take in order for Northern Ireland to meet its statutory targets.

[204] Having come to the conclusion set out in para [202] above in relation to the section 52 based challenge grounded on non-compliance with Recommendation 14, I can swiftly dispose of the applicants' arguments in respect of the non-compliance with Recommendation 15 and Recommendation 17. For the reasons given above, I do not consider that a lawful decision could only be made after a CAP had been finalised. A finalised CAP is one source of the cogent evidence needed but not the only such source. Further, I consider that Recommendation 17 is far too onerous a condition to

attach to a decision in respect of an infrastructure project of this nature. The requirement to show "the expected trajectory of net Northern Ireland greenhouse gas emissions through 2030 to 2050 in the absence of the scheme, and the impact on that trajectory of the greenhouse gas emissions expected to arise from the construction and operation of the part of the scheme being authorised" does not arise out of any duty imposed on the DfI under the provisions of the 2022 Act and it serves no legitimate purpose in the context of the present challenge. If the targets and budgets set by and under the 2022 Act can be met even taking into account the construction and operation of the road, then the question of whether the 2050 target could be reached sooner than 2050 if the scheme did not proceed is irrelevant.

Applicants' submissions re breach of section 30 and section 52(2) of the Climate Change (Northern Ireland) Act 2022 and/or irrationality

[205] It is argued by the applicants that the fact that the proposed road will induce vehicle journeys or trips originating in or terminating in the Republic of Ireland, with such induced trips inevitably contributing to increased GHG emissions, means that sections 30 and 52(2) of the 2022 Act are clearly engaged. It is argued that without a finalised CAP and a sectoral plan, it is impossible for the DfI to show transboundary co-ordination or alignment or compliance with sections 30 and 52(2) of the 2022 Act. It is further argued that the DfI has failed to explain in its report how it has complied with its duties under section 30 and section 52(2) and reliance is placed on paras [90] and [91] of the *No Gas Caverns* [2024] NICA 50 case to support the proposition that such explanations need to be positively set out. It is argued that it cannot be inferred that the DfI has complied with either of these statutory duties simply because it has engaged in some cross-border initiatives. It is argued that the nature and extent of the engagement as outlined in the affidavit evidence of Mr Colin Hutchinson, the departmental official in charge of this project, does not go anywhere near satisfying the duties imposed on the DfI under section 30 and section 52(2) of the 2022 Act.

Respondent's submissions re breach of section 30 and section 52(2) of the Climate Change (Northern Ireland) Act 2022 and/or irrationality

[206] The respondent rightly submits that it is essential to identify the true nature and scope of the duties which arise under these provisions. The respondent reminds the court that section 30 imposes a duty on all Northern Ireland government departments to "have regard to the desirability of co-ordinating" GHG reduction policies and proposals when "deciding its proposals and policies for the purposes of section 29." It is argued that the duty, therefore, applies to each department when preparing its policy proposals within its area of responsibility for the purposes of the CAP. The court is further reminded that this case is not a challenge to the preparation of the CAP or to the manner in which DfI has formulated its proposals for the purposes of section 29 of the 2022 Act.

[207] In relation to section 52(2), it is argued that this provision must be read alongside and in light of section 52(1). The court is reminded that section 52(2) requires

Northern Ireland government departments "as far as reasonably practicable" to align "such plans, policies and strategies to those of the [Republic of Ireland]." It is argued that section 52(2) does not mandate substantive alignment of CAPs in each jurisdiction, nor does it impose an obligation to ensure that an infrastructure project aligns with a quantified policy pathway in Republic of Ireland at the point of deciding whether to authorise the project. The respondent's key submission is that the duties under sections 30 and 52(2) relate to the broader process of GHG reduction policy development for the purposes of achieving reduction targets, rather than impose substantive consultation obligations or substantive obligations for policy alignment. It is argued that neither provision imposes a duty to demonstrate alignment of climate policy with Republic of Ireland policy as a precondition to authorising this project.

[208] It is argued that the respondent has at all times recognised that the emissions generated by the construction and operation of the proposed road will include those resulting from cross-border journeys. It is submitted that an allowance for such emissions has already been built into the traffic model which was used to conduct the environmental assessment. The traffic study area used for the assessment included the road networks on both sides of the border. All projected journeys within that entire area, including expected cross-border journeys, were assessed as part of the environmental assessment and the GHG assessment of the scheme. It is argued that the Irish authorities were consulted upon the model at every stage and also upon the final GHG assessment. The court is urged to take on board the fact that the Irish government has supported the project throughout and is well placed to understand any implications for its own transport policy initiatives of this scheme.

Court's conclusions re breach of section 30 and section 52(2) of the Climate Change (Northern Ireland) Act 2022 and/or irrationality

[209] Having regard to the affidavit evidence submitted by the respondent in this case, I conclude that the respondent has clearly demonstrated that it has engaged in detailed cross-border consultation at every stage of this long and protracted process. The EIA transboundary consultations have been conducted which included details of the GHG emissions assessment. The project is also co-sponsored and co-financed by the Republic of Ireland government. It has been involved at every step of the process. The evidence of Colin Hutchinson makes clear that the Department has engaged in detailed policy co-ordination and co-operation with the Republic of Ireland over many years in a range of areas related to the climate implications of transport policy.

[210] It is important to remember that section 30(1)(a) does not directly mandate the co-ordination of proposals and policies to meet carbon budgets north and south. All section 30(1)(a) requires is that the DfI and other Northern Ireland government departments, when deciding on its proposals and policies for meeting the Northern Ireland carbon budgets, should have regard to the desirability of such co-ordination, recognising that the island of Ireland is a single biogeographic unit. Although there is a duty to consult under section 30(1)(b), this duty is couched in qualified terms in that the duty is to consult with those whom the relevant

Northern Ireland government department considers it appropriate to consult with and these persons/bodies can include public bodies in other jurisdictions that are responsible for giving advice or making recommendations on climate change. The applicants argue that in the absence of any finalised and approved CAP or sectoral plans, the DfI cannot point to any evidence of any relevant consultation and the DfI has not been able to adduce any evidence of giving active consideration to the co-ordination of its proposals and policies. I reject that argument as unfounded.

[211] Section 52(2) is more prescriptive in that it casts a duty upon Northern Ireland government departments, when they are drawing up and implementing plans, policies and strategies to ensure that the statutory GHG emissions reductions targets are met and the carbon budgets are not exceeded, to align such plans, policies and strategies to those of the Republic of Ireland, insofar as it is reasonably practicable to do so. Again, it is argued by the applicants that in the absence of any finalised and approved CAP or sectoral plans, the DfI cannot point to any evidence of any consideration of the issue of alignment of its plans, policies and strategies. It is further argued that the DfI, in the absence of a finalised CAP or any sectoral plans, certainly cannot point to any evidence that it was not reasonably practicable to have done more in these regards. This is an interesting semantic argument but, stepping back a little, I think one has to question how relevant these provisions are to the decision to push ahead with the development of this road.

[212] To a large extent, section 30(1)(a) and (b) and section 52(2) reflect the acknowledgement by the Northern Ireland Executive and its constituent departments that climate change is a problem that knows no boundaries and that the steps that are needed to tackle climate change in geographically proximate jurisdictions with similarly developed economies and societies such as Northern Ireland and the Republic of Ireland are, in essence, the same, and that it makes good sense to proceed in step together towards net zero.

[213] Issues of alignment might arise if, for example, the Republic of Ireland and the other UK jurisdictions were to decide to place a moratorium on major road infrastructure developments or the building of oil, coal or gas-fired power stations. In such circumstances, section 52(2) would place a clear duty on the relevant Northern Ireland government department to align its policies with those adopted in the neighbouring jurisdictions or to set out in detail a compelling justification for not aligning with such policies. Alignment in section 52(2) and co-ordination in section 30(1)(a) must relate to the big picture and the over-arching goal of reaching net zero by 2050. I do not consider that these duties could possibly apply at a detailed operational level. For example, I do not consider that a Northern Ireland government department would be required to demonstrate that the felling of five trees in the townland of Ballydonaghy in County Tyrone for the purpose of facilitating the construction of a new road junction layout which was designed to address significant road safety issues was justified in terms of climate change impact because, as a result of cross-border co-ordination of effort, a new copse of trees was being planted in the adjoining townland of Porthall in County Donegal. I am firmly of the view that any

challenge to the respondent's decision making based on breaches of section 30 or 52(2) of the 2022 Act are unsubstantiated.

Applicants' submissions re failure to comply with the EIA Directive in respect of transboundary impacts

[214] The applicants' central submission on this issue is that emissions from induced trips in the ROI have to be assessed not just modelled for significance in order to fully comply with the EIA Directive 2011/92/EU. This Directive which was transposed into domestic law by Part V of the Roads (Northern Ireland) Order 1993 aims to ensure a high level of environmental protection by mandating that environmental considerations are integrated into the preparation and authorisation of projects. Projects which are likely to have significant effects on the environment are made subject to an assessment, prior to their authorisation. Any such assessment must include an assessment of the impact of the proposed project on climate and any decision to proceed with the proposed project must be made on the basis of full information. See *R v North Yorkshire County Council Ex p Brown* [2000] 1 AC 397 at [404] and *Berkley v Secretary of State for the Environment* [2001] 2 AC 603 at [615].

[215] It is alleged that the DfI decision not to assess emissions from induced trips in ROI on the assumption that they would be "marginal" means that the DfI did not have "full information" at the time the decision under challenge was made. In relation to the need to consider transboundary impacts, reliance is placed on para [93] of *Finch v Surrey County Council* [2024] UKSC 20 in which Lord Leggatt stated:

> "[93] It is worth emphasising that the EIA Directive does not impose any geographical limit on the scope of the environmental effects of a project which must be identified, described and assessed when an EIA is required. In principle, all likely significant effects of the project must be assessed, irrespective of where (or when) those effects will be generated or felt. There is no justification for limiting the scope of the assessment to effects which are expected to occur at or near the site of the project. The fact that an environmental impact will occur or have its immediate source at a location away from the project site is not a reason to exclude it from assessment. There is no principle that, if environmental harm is exported, it may be ignored.

[216] However, the Supreme Court in *Finch* was at pains to point out that GHG emissions, because they have global impact, do not fall within the specific transboundary impact provisions of the Directive (article 7 in particular):

> "[97] Climate change is a global problem precisely because there is no correlation between where GHGs are released and where climate change is felt. Wherever GHG

emissions occur, they contribute to global warming. This is also why the relevance of GHG emissions caused by a project does not depend on where the combustion takes place. If an activity is carried on which will inevitably result in significant GHG emissions, people who carry on the activity cannot be heard to say: "These emissions are not effects of our activity because they are occurring far away among people of whom we know nothing."

[98] On a proper interpretation, the obligations set out in article 7 of the EIA Directive are not triggered by awareness that, as a consequence of a project intended to be carried out in one Member State, GHG emissions are likely to occur in another Member State. To avoid absurdity, the reference in article 7(1) to "effects on the environment in another Member State" must be read as meaning effects on the environment which are specific to that other Member State rather than purely global effects that affect the whole world. Thus, effects on climate of GHG emissions occurring in one state as a consequence of a project undertaken in another state do not fall within article 7.

[99] This conclusion is reinforced by the 1991 UN Convention on Environmental Impact Assessment in a Transboundary Context (known as the "Espoo Convention"), to which - as recital (15) of the EIA Directive confirms - article 7 is intended to give effect. Article 1(8) of the Espoo Convention defines a "transboundary impact" to mean "any impact, not exclusively of a global nature, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party" (emphasis added). The EIA Directive does not itself define a "transboundary impact" or "transboundary effect", but it is reasonable to interpret these terms where they are used in the EIA Directive as having a similar meaning to their meaning in the Espoo Convention.

[100] The fact that the combustion emissions from the oil produced are likely to occur outside the UK therefore does not give rise to any requirement to invoke the article 7 procedure. As the effects of GHG emissions on the environment are exclusively of a global nature, they are not "transboundary effects" which engage obligations of

> consultation between the nation in which the oil is produced and the nation(s) in which its combustion occurs."

[217] It is argued on behalf of the applicants that the DfI's reference to and reliance upon the new and additional modelling of emissions from induced trips at the decision-making stage is irregular and gives rise to material prejudice. Relying on Lord Hoffman's speech in the *Berkeley* case, it is argued that public participation is an integral part of the EIA process:

> "The directly enforceable right of the citizen which is accorded by the Directive is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues. In a later case (*Aannemersbedrijf P.K. Kraaijeveld BV v. Gedeputeerde Staten van Zuid-Holland* (Case C-72/95) [1996] E.C.R. I-5403, 5427, para. 70), Advocate-General Elmer made this point again:
>
> > 'Where a Member State's implementation of the Directive is such that projects which are likely to have significant effects on the environment are not made the subject of an environmental impact assessment, the citizen is prevented from exercising his right to be heard.'"

[218] It is argued on behalf of the applicants that the DfI's only reference to GHG emissions in the ROI is found in an Annex to the DfI's decision letter. As this Annex clearly contains further environmental information, which was relevant to the decision, it ought to have been disclosed to the public in advance of the decision so that the public could have commented and expressed their opinion upon this new environmental information.

Respondent's submissions re failure to comply with the EIA Directive in respect of transboundary impacts

[219] It is argued on behalf of the respondent that the EIA process is essentially a form of regulated consultation, which attempts to ensure that environmental decision making is informed to the greatest degree possible by a detailed understanding of the likely significant environmental effects of a project. The process does not prohibit planning authorities from authorising development which has been assessed as likely to give rise to adverse effects. It simply requires that the effects are identified and

assessed in a manner which facilitates public participation. The respondent reminds the court that the centrepiece of this ground of challenge is that the DfI failed to assess the impacts arising from "induced" cross-border travel, in particular the GHG emissions associated with these journeys. In answer to this, the respondent reiterates its submissions set out in para [208] above.

[220] It is also argued that it is important to distinguish between the content of the ES and the process of carrying out an EIA. It is submitted that the EIA process requires: (i) publication of an ES; (ii) consultation with the public and statutory consultation authorities; (iii) consideration of all of the environmental information and (iv) a decision on whether to authorise the project.

[221] It is further submitted that the difference between the ES and the process of assessment is illustrated by the description of the assessment process set out in the provisions of Article 67A(7) of the 1993 Order which were in force from 10 September 2007 before being superseded on 16 May 2017, which is the version of Article 67A of the 1993 Order that applies to this scheme. These provisions transposed articles 5 to 10 of the then applicable EIA Directive:

> "(7) Before deciding whether to proceed with the construction or improvement in relation to which an environmental impact assessment has been made, the Department must take into consideration—
>
> (a) the environmental statement;
>
> (b) any opinion on that statement or the project which is expressed in writing by—
>
> (i) any of the consultation bodies; or
>
> (ii) any other person;
>
> and is received by the Department within any period specified for the purpose;
>
> (bb) where Article 67B applies, and the EEA State has indicated in accordance with paragraph (4) of that Article that it wishes to participate in the procedure required by this Part, any opinion on that statement or the project which is expressed in writing by—
>
> (i) a member of the public in the EEA State; or
>
> (ii) the EEA State;

(iii) an authority having environmental responsibilities designated by the EEA State to be consulted about the project under Article 6(1) of the Directive;

and is received by the Department within the period specified under sub-paragraph (3A)(i);

(c) where a local inquiry is held, the report of the person who held the inquiry."

[222] It is argued on behalf of the respondent that the ES represents the assessment of environmental impact which has been carried out by the DfI. However, its purpose is to facilitate consultation on the project. Both the public and the expert statutory consultation authorities are entitled to comment upon the ES, along with the person conducting the public inquiry. All of those procedures will generate more environmental information. The assessment process as a whole requires the DfI to take account of all information prior to taking a decision.

[223] It is the respondent's case that it is necessary to distinguish between the minimum requirements of an ES and the conduct of an EIA. It is perfectly possible and lawful for an ES to stimulate the consideration of additional materials or environmental information which did not form part of the original ES. Provided the ES met the minimum requirements and was not so deficient as not to be an ES at all, a decision to authorise a project will be lawful, provided all of the environmental information is considered prior to taking the authorisation decision.

[224] In support of these propositions, the respondent seeks to rely on the judgment of Sullivan J in *R (Blewett) v Derbyshire CC* [2004] Env LR 29 at paras [41], [42] and [68]. The following passage of the judgment was also quoted in extenso by Stephens J at para [158] in the earlier judicial review in this long-running saga:

> "41. Ground 1 in these proceedings is an example of the unduly legalistic approach to the requirements of Schedule 4 to the Regulations that has been adopted on behalf of claimants in a number of applications for judicial review seeking to prevent the implementation of development proposals. The Regulations should be interpreted as a whole and in a common-sense way. The requirement that "an EIA application" (as defined in the Regulations) must be accompanied by an environmental statement is not intended to obstruct such development. As Lord Hoffmann said in *R v North Yorkshire County Council ex parte Brown* [2000] 1 AC 397, at page 404, the purpose is "to ensure that planning decisions which may affect the environment are made on the basis of full information." In

an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the "full information" about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting "environmental information" provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations (*Tew* was an example of such a case), but they are likely to be few and far between.

42. It would be of no advantage to anyone concerned with the development process - applicants, objectors or local authorities - if environmental statements were drafted on a purely "defensive basis", mentioning every possible scrap of environmental information just in case someone might consider it significant at a later stage. Such documents would be a hindrance, not an aid to sound decision-making by the local planning authority, since they would obscure the principal issues with a welter of detail.

…

68. I have dealt with it in some detail because it does illustrate a tendency on the part of claimants opposed to the grant of planning permission to focus upon deficiencies in environmental statements, as revealed by the consultation process prescribed by the Regulations, and to contend that because the document did not contain all the information required by Schedule 4 it was therefore not an environmental statement and the local planning authority had no power to grant planning permission. Unless it can be said that the deficiencies are so serious that the document cannot be described as, in substance, an environmental statement for the purposes of the Regulations, such an approach is in my judgment misconceived. It is important that decisions on EIA applications are made on the basis of "full information", but the Regulations are not based on the premise that the environmental statement will necessarily contain the full

> information. The process is designed to identify any deficiencies in the environmental statement so that the local planning authority has the full picture, so far as it can be ascertained, when it comes to consider the "environmental information" of which the environmental statement will be but a part."

Stephens J stated it pithily at para [158]

> "Accordingly, it is important to distinguish between what is in the environmental statement and the sum total of the information that is available to the Minister following the public inquiry."

[225] The respondent asserts that this reasoning was expressly upheld by the Supreme Court in *R (Friends of the Earth) v SOS Transport (Heathrow Airport)* [2020] UKSC 52 at paras [142] and [143]. Examples of this reasoning being applied in this jurisdiction include the cases of *Re Moreland and Owenvarragh Residents Association* [2022] NIQB 40, at paras [91] to [97] per Humphreys J and *Re Newry Chamber of Commerce* [2015] NIQB 65 at para [76] per Treacy J.

[226] The respondent points out that in the present case, the omission contended for by the applicants relates to an alleged failure to assess the effects (including GHG emissions) arising from "induced demand" cross-border journeys. The phenomenon of "induced demand" refers to journeys which are unlikely to have taken place in the absence of the new road, eg a person who decides to take a trip from Dublin to Donegal because the new road makes it more convenient.

[227] Relying on the affidavit evidence submitted in this case, in particular, the affidavit of Mr Gokuldas Gopalakrishnan, sworn on 13 February 2025, the respondent contends that when carrying out an environmental assessment of the likely effects of a road, there are different methodologies which can be followed. It is asserted that invariably, they involve developing a traffic model of the entire road network which is likely to be affected by the road. Future year demand modelling is then used to predict new traffic flows across the entire network using a huge range of data such as traffic volumes, journey types, demographic predictions etc. Different types of demand modelling can be used for different types of project. There are well established UK wide technical guidelines governing the choice of methodology for future demand modelling for the purposes of conducting an EIA. It is further asserted that there are two broad choices: Fixed Demand Modelling and Variable Demand Modelling. The latter incorporates predictions for induced demand. The former does not.

[228] The respondent's case is that in relation to the proposed road, the traffic model was created using a study area of the road network across a large area of the island of Ireland, on both sides of the border encompassing everywhere north of a line drawn

between the east coast at Dublin city to the west coast at the county town of Sligo. According to the respondent, the model took account of all predicted journeys within the study area, including cross-border journeys. However, the technical thresholds for using variable demand modelling were not reached and the guidance therefore recommended use of fixed demand modelling (see paras [16] to [20] of Mr Gopalakrishnan's affidavit, sworn on 13 February 2025). It is argued that the traffic model used for the proposed road since 2015 was prepared precisely in accordance with the technical guidelines. The model that was used included cross-border journeys, but did not incorporate additional induced cross-border demand because the guidelines did not recommend the use of the form of modelling that takes such matters into account.

[229] The respondent reminds the court that the applicants raised the issue of the choice of model in its objections to the project following the ESA 2022 which contained the GHG emissions assessment. However, the PAC endorsed the choice of a Fixed Demand Model. It found that the use of such modelling was in accordance with technical guidelines and was adequate for EIA purposes (see section 3.80 of the 2023 PAC report and para [44] of this judgment).

[230] The respondent's case is that insofar as the PAC considered or concluded that the traffic model only related to journeys within Northern Ireland, this was incorrect as the model included all journeys within the traffic study area which included the road networks on both sides of the border. It is asserted that the predictions do therefore include consideration of cross border journeys. However, since the use of a Variable Demand Model was not warranted, the modelled predictions did not incorporate a separate calculation based of effects arising from cross-border induced demand journeys. The PAC considered this to be an important omission and recommended that further work should be carried out to understand the possible effects of this induced demand and the GHG emissions associated with these journeys. The respondent's case is that this work was carried out following the 2023 inquiry and it revealed that even allowing an increase in journeys on cross-border links of up to 3%, the resulting increase in traffic volumes was very small and was well within the margin which had already been assessed in the event of a high traffic grown scenario. These potential changes were also incorporated into the updated GHG assessment.

[231] It is asserted by the respondent that there was also no change in the assessment of significance of the environmental effects of the road as a result of the additional assessment work. The adverse effects as a result of an increase in GHG emissions arising from the scheme had already been assessed to be "large adverse" (see the 2023 PAC report at section 3.454). The level of adverse impact was not altered by the emissions related to the potential for relatively low levels of additional cross border induced journeys. In response to the applicants' contention that the fresh reports amounted to environmental information and, therefore, should have been included within a further addendum to the ES for the purposes of EIA, the respondent counters this by asserting that even if any of the material amounted to environmental information, the EIA process does not require that every scrap of information should

be included in the ES. The additional information all flowed from the prior inquiry and consultation process. It, therefore, constituted the outworkings of the EIA process and all of it was considered in any event by the DfI prior to making a decision on whether to proceed.

[232] In summary, the respondent's case is that:

(i) The ES was not deficient. The traffic model and future demand modelling was prepared entirely in accordance with the recognised technical guidelines and was endorsed by the PAC as adequate for EIA purposes.

(ii) Even if the specific assessment of cross-border induced demand was not separately identified within the ES, the likely environmental effects were still included within the overall environmental assessment and were taken into account prior to the authorisation decision. The additional assessment work which was carried out following the 2023 inquiry is simply the process of considering the recommendations of the PAC and taking account of all environmental information generated during the assessment process.

(iii) This is not a deficiency in the ES but is an example of the environmental assessment process in operation. The combination of the applicants' objections, the PAC recommendation and the further work was all part of the environmental assessment.

(iv) In any event, the form of EIA required by the 2011 EIA Directive and the transposing provisions of the Roads (Northern Ireland) Order 1993 at the time of publication of the ES in 2016 did not require the inclusion of an assessment of effects related to climate change and therefore did not require the conduct of a GHG assessment. If a GHG assessment was not required at all within the ES, there cannot have been a breach of EIA obligations by reason of a failure to include cross-border induced demand within the GHG assessment which was carried out on a voluntary basis.

[233] The respondent goes on to argue that even if, contrary to all of the above, the court considers that there has been a breach of an EIA obligation, it does not follow that the court should quash the statutory orders. It is submitted that there are two key aspects of the legal regime which point towards this conclusion. Firstly, although the domestic courts have historically tended to quash planning decisions where it was demonstrated that the EIA process was not followed, this was on the basis that EIA obligations derived from EU law and the principle of supremacy of EU law required domestic courts to give primacy to EU law obligations. This was explained by Lord Bingham in *Berkeley v Secretary of State for Environment* [2001] 2 AC 603, at 608 where he stated:

> "Even in a purely domestic context, the discretion of the court to do other than quash the relevant order or action

> where such excessive exercise of power is shown is very narrow. In the Community context, unless a violation is so negligible as to be truly de minimis and the prescribed procedure has in all essentials been followed, the discretion (if any exists) is narrower still: the duty laid on member states by article 10 of the EC Treaty, the obligation of national courts to ensure that Community rights are fully and effectively enforced, the strict conditions attached by article 2(3) of the Directive to exercise of the power to exempt and the absence of any power in the Secretary of State to waive compliance (otherwise than by way of exemption) with the requirements of the Regulations in the case of any urban development project which in his opinion would be likely to have significant effects on the environment by virtue of the factors mentioned, all point towards an order to quash as the proper response to a contravention such as admittedly occurred in this case…"

[234] The respondent points out that since the *Berkeley* case, the matter has been considered again by the Supreme Court in *R (Champion) v North Norfolk Council* [2015] 1 WLR 3710. It examined the EU caselaw which made clear that national courts do retain a discretion on remedy, even where there has been a breach of EU law, if it was clear that it had no material effect on the ultimate decision and members of the public had in substance enjoyed the rights under the EIA Directive as per Lord Carnwath at para [58]:

> "Allowing for the differences in the issues raised by the national law in that case (including the issue of burden of proof), I find nothing in this passage inconsistent with the approach of this court in the *Walton* case. It leaves it open to the court to take the view, by relying "on the evidence provided by the developer or the competent authorities and, more generally, on the case file documents submitted to that court" that the contested decision "would not have been different without the procedural defect invoked by that applicant." In making that assessment it should take account of "the seriousness of the defect invoked" and the extent to which it has deprived the public concerned of the guarantees designed to allow access to information and participation in decision-making in accordance with the objectives of the EIA Directive."

[235] It is argued by the respondent that in this case, it is clear that the public have had extensive consultation rights and opportunities in relation to the proposed road and that any deficiency in compliance with EIA obligations was *de minimis* since they were based upon a faithful adherence to the technical guidelines governing

preparation of a traffic model. It is also argued that since 1 January 2024, the principle of the supremacy of EU law no longer forms part of the domestic law of the UK, as a result of amendments to the European Union Withdrawal Act 2018, made by the Retained EU Law (Revocation and Reform) Act 2023, in particular, section 3 of the 2023 Act. The 2023 Act also abolishes the continuing application in UK law of directly effective EU law rights (see section 2 of the 2023 Act). An individual may only rely upon the domestic transposing legislation which applies in the same manner as any other piece of domestic legislation. In the recent decision of the Supreme Court in *Lipton v BA Cityflyer* [2025] 1 All ER 657, it has been confirmed at para [66] that the version of the EU Withdrawal Act 2018 which governs the continuing application of EU law is the version which was in force at the time the "material events occur." It is argued that in this case, the material event was the authorisation decision, since it is the time when account must be taken of all of the environmental information prior to making an authorisation decision. The result is that the version of the EU Withdrawal Act which has been in force since January 2024 governs and the principle of the supremacy of EU law does not apply. Accordingly, it is argued that there is no EU law imperative to quash the decisions, and as a result, the court retains a discretion not to do so, exercisable in accordance with ordinary domestic principles of public law.

[236] On this discrete point, the applicants argue that by reason of the provisions of sections 2, 5, 6 of, and Schedule 1 to, the European Union (Withdrawal) Act 2018, the EIA Directive and the Habitats Directive both remain relevant to the interpretation and application of the relevant domestic regulations and this has been recognised in recent cases including *Safestand Ltd v Weston Homes Plc (No 2)* [2024] FSR at para [184] and *CG Fry & Son Ltd v Secretary of State for Levelling up, Housing and Communities* [2024] EWCA Civ 730 at paras [37] to [53]. Further, it is argued on behalf of the applicants that an understanding of the purpose of the relevant Directive is necessary as this will enable to the court to adopt a purposive approach to the interpretation of the relevant regulations and, in this regard, reliance is placed on the decision of *E-Accounting Ltd (t/a Advancetrack) v Global Infosys Ltd (t/a GI Outsourcing)* [2023] EWHC 2038 (Ch) at para [13] per HHJ Tindal:

> "[13] Moreover, only a week before the trial, on 30th June 2023, the Retained EU Law (Revocation and Reform) Act 2023 ('REULA') gained Royal Assent. That goes further than EUWA in several ways. Firstly, whilst the planned 'sunset clause' for all 'retained EU Law' was abandoned, s.1 REULA will scrap a long list of retained EU Law at the end of this year. Secondly, ss.9-16 REULA provide a range of new statutory powers to amend or revoke retained EU Law (which s.5 re-names 'assimilated law') more easily, so the list of abrogated or overhauled provisions may grow exponentially on the 'EU Law Dashboard.' Thirdly, for remaining 'assimilated law', the test in s.6 EUWA for the Court of Appeal and Supreme Court to depart from

> retained case-law is relaxed. Fourthly, ss.6A-C EUWA will now provide a new 'reference' mechanism (which can be instigated by the Government even if not a party) for points to be leapfrogged to higher courts by lower courts which are still so bound. Fifthly, ss.2-4 REULA will fundamentally change the relationship between (now) 'assimilated law' and EU Law: s.2 REULA dispenses with rights and powers originally retained by s.4 EUWA; s.4 REULA amends EUWA to remove 'General Principles of EU Law' completely from domestic law; and likewise, s.3 REULA amends s.5 EUWA to remove the Supremacy of EU Law in respect of domestic enactments whenever passed. (Indeed, it turns it on its head for direct EU Legislation retained in our law, which must now be read compatibly with domestic law). So, come 2024, 'Indirect Effect' will be no longer be part of our law. However, as I discussed in *Dukes" Dukes Bailiffs Ltd v Breckland Council* [2023] EWHC 1569 (TCC) "at para 42 and return to below, this does not mean EU Law becomes irrelevant. If domestic legislation was enacted to implement a directive, that may be relevant context in its statutory interpretation on orthodox principles: see *Brent LBC v Risk Management Partners* [2011] 2 WLR 166 (SC) para 25, (Although of course that is a very different proposition than EU Indirect Effect)."

Court's conclusions re failure to comply with the EIA Directive in respect of transboundary impacts

[237] As Stephens J pointed out: "…it is important to distinguish between what is in the ES and the sum total of the information that is available to the Minister following the public inquiry." Looked at in the round, the respondent argues that the ES did not contain any defects or deficiencies of such a magnitude to prevent a decision maker using it as a proper basis for its decision making, having regard to the further information which became available at and after the public inquiry. The applicants argue that the absence of any reference to GHG emissions from induced trips fundamentally undermines the integrity of the EIA process. Yet, despite forcefully pushing this argument, it is clear that the real gravamen of the applicants' complaint is that following on from Recommendation 16 of the PAC report, the DfI engaged in a further exercise in order to produce estimates of GHG emissions resulting from induced trips originating from or terminating in the Republic of Ireland. It is argued on behalf of the applicants that this exercise resulted in the production of new environmental information which was not available at the public inquiry and which has not been subjected to consultation or scrutiny. In order to comply with the EIA process, this new information should have been put out for public consultation and/or referred back to the PAC for further scrutiny. This is despite the fact that the full text

of Recommendation 16 clearly suggests that the PAC did not consider that this would be necessary. It should be remembered that Recommendation 16 is couched in terms that if the DfI "announces a decision to proceed with any part of the scheme" it should contemporaneously publish:

> "revised estimates of the total greenhouse gas emissions likely to arise from the part of the scheme being authorised, including an estimate of the quantum of emissions arising from induced trips originating or terminating in the Republic of Ireland."

[238] It is submitted on behalf of the applicants that the views of the PAC do not constitute an authoritative statement of the law and it is for the court to determine whether this new environmental information should have been put out for public consultation and/or should have been tested before the PAC.

[239] In addressing this issue, I have carefully considered the affidavit evidence of Mr Gokuldas Gopalakrishnan, in order to see what was actually involved in the preparation of the revised estimates which included an estimate of the quantum of emissions arising from induced trips originating or terminating in the Republic of Ireland.

[240] Paras [32] to [44] of Mr Gopalakrishnan's affidavit reveal that in preparing its revised estimates, the DfI used the English DfT guidance publication "Latest evidence on induced travel demand: an evidence review" published in May 2018 as a tool to quantify the volume of induced traffic likely to be generated by the proposed road. Using this guidance and utilising the outputs of the A5WTC TAG elasticity test (which was originally used to test for the need for a VDM of A5WTC), "a proportionality methodology was developed using an uplift factor on the existing A5WTC traffic model demands to estimate the impacts of induced demand generated by the scheme." As a result, traffic forecasts for passenger vehicles but not goods vehicles in the core demand model outputs were uplifted by 1% and 3% with the higher figure being used to provide the "upper bound for the estimate of GHG emissions arising from induced traffic…" When these increases to the core demand modelling results were compared to the high growth demand model outputs, the increased core figures were still less than the high growth demand figures.

[241] Having given this matter careful consideration, and taking full account of the view expressed by the PAC that it did not consider that it would be necessary for the DfI to do anything other than to publish the revised GHG emissions estimates with the decision, I conclude that the environmental information contained in the revised estimates, is new and is sufficiently important or significant to warrant it being made the subject of further consultation and scrutiny prior to any decision being made. I take on board the respondent's argument that the assessed increase in GHG emissions still does not move the estimated impact of the proposed road into a different category above "large adverse" but if the methodology used to estimate the increase has not

been subjected to independent scrutiny, how much weight can be attached to the respondent's conclusions in this regard.

[242] It is undoubtedly true that given that a VDM was not utilised in relation to this proposed scheme, it must have been immediately obvious that a different methodology would have to be devised in order to assess the volume of induced trips. The applicants ask: what is there to say that the methodology that was adopted in this case was appropriate and/or robust? They argue that the approach adopted in this case means that there was no opportunity whatsoever to address this question. I agree and I conclude this new methodology for estimating greenhouse gas emissions from induced trips should be the subject of consultation and scrutiny. I conclude, therefore, that the protections incorporated in the domestic iteration of the EIA process were not invoked in circumstances where they should have been. I do not consider that this is a case in which this court can conclude that if this new environmental information had been put out for further consultation and scrutiny, the results of this process would not have mandated a different outcome in terms of lawful decision making. The absence of the fruits of further consultation and scrutiny means that there was an inadequacy of information for the purpose of lawful decision making and, therefore, this is yet another reason based in public law for concluding that the decision made in this case cannot stand.

Applicants' submissions re breach of the Habitats Directive – Tully Bog

[243] The applicants challenge the DfI's Report to Inform Appropriate Assessment (RIAA) on the basis that it breaches the Habitats Directive and is legally flawed. They rely on *R (Wyatt) v Fareham Borough Council* [2022] EWCA Civ 983, in particular, paras [9] and [10], *R (Champion) v North Norfolk District Council* [2015] 1 WLR 3710 at para [41], *Waddenzee* (C-127/02) [2005] CMLR31 at para [59], *Sweetman v An Bord Pleanála* (C-258/11) [2014] PTSR 1092 at para [44], *Aitoloakarnanias* (C-43/10) [2013] Env LR 21 at paras [115] and [117], *Holohan v An Bord Pleanála* (C-461/17) [2019] PTSR 1054 at paras [48] to [52], *Sands (Colum) Application v Newry and Mourne District Council* [2018] NIQB 80, *R (Milne) v Rochdale Metropolitan Borough Council* [2001] 81 P & CR 27 at para [122], and *Dutch Nitrogen* (C-293/17) [2019] Env LR 27 at para [101].

[244] In summary, a high standard of investigation (complying with the precautionary principle, using the most up-to-date data and based on the best scientific evidence) is required by the competent authority and the competent authority can only give the green light for the proposed development if it is certain that the project will not affect the integrity of the designated site. In other words, the competent authority must consider that no reasonable scientific doubt remains as to the absence of such effects. There must be no gaps in the assessment and the report must contain complete, precise and definitive findings capable of removing all reasonable scientific doubt as to the effects of the proposed development on the designated site.

[245] The applicants remind the court that Tully Bog has been assessed as currently being in unfavourable and declining condition. They highlight the criticisms levelled

by the PAC in various paragraphs of its report between paras 4.125 and 4.189 in relation to the RIAA carried out by and on behalf of the DfI, as presented to the PAC. The applicants state that the PAC highlighted shortcomings in establishing an environmental baseline and in the assessment of actual damage. Local farming practices were not studied in order to obtain local emissions data and seasonal fluctuations of ammonia emissions were not ascertained and factored in. There was no commentary on the impact of the proposed road on the conservation objectives for Tully Bog which is to restore Tully Bog to a favourable condition and despite the assertion by the DfI that its conclusion, that no adverse effect on the integrity of the SAC would arise from the scheme, was based upon on the professional judgment of the project ecologists, the RIAA did not contain any ecological assessment of the predicted increase in emissions on the selection features of the SAC.

[246] The applicants rely on the view formed by the PAC that the DfI has relied too heavily on modelling involving multiple variables in its air quality impact assessments so that the results are no more than "guesstimates." The PAC also highlighted the fact that the predicted ammonia concentrations and N-dep levels for 2028 as set out in Tables 7.4 and 7.5 of the RIAA that was put before it do not match any of the mitigation scenarios set out in the "Development of Mitigation Options" document and the PAC concluded that this would indicate the adoption of different parameters in circumstances where the changes and the reasons for the changes have not been documented. It is also argued by the applicants that the precautionary approach has not been consistently adopted as is evidenced by the use of central traffic forecasts. It is also highlighted that the use of a 1% threshold was wholly inappropriate as a means of determining whether there would be any adverse effect on site integrity.

[247] It is argued that the updated RIAA published by the DfI along with the decision statement has done nothing to correct the flaws and deficiencies highlighted by the PAC. Despite claiming that it would maximise impacts and minimise mitigation (consistent with the precautionary approach) it is argued that the adoption of a 99% confidence standard runs contrary to the precautionary approach. It is pointed out that one in every hundred years' flooding events have to be guarded against. The applicants ask: why not adopt a similar approach in respect of GMG emissions? It is argued that it is contrary to the precautionary approach to abandon the assumption that agricultural practices which will be stopped on vested land or land which is subject to a land use agreement will simply be displaced to the nearest adjoining land. This assumption was abandoned because it was considered by the DfI that farmers would already have maximised the nitrogen application to those adjacent fields in any event.

[248] It is further argued that the adoption of the Monte Carlo random sampling methodology also veers away from the precautionary approach which in this case would mandate the use of the worst-case scenario approach. The DfI has continued to rely on air quality assessment modelling in its updated RIAA without addressing the flaws and risks in the modelling which were highlighted by the PAC. It is argued that the use by the PAC of the phrase "realistic worst-case scenario" in Recommendation

23 should not be used to water down the precautionary "worst-case" approach to uncertainty. Finally, it is argued that this updated RIAA should have been published and made the subject of further public consultation in advance of the DfI's decision statement so that the public had the opportunity to comment on the updated RIAA. All these persisting flaws, deficiencies and irregularities mean that the DfI has failed to comply with the exacting requirements of the Habitats Directive.

Respondent's submissions re breach of the Habitats Directive – Tully Bog

[249] The respondent acknowledges that pursuant to regulation 43(5) of the Conservation (Natural Habitats etc.) Regulations 1995, a competent authority may only grant consent for a project which is likely to give rise to environmental effects upon the integrity of a SAC, if it has first conducted an appropriate assessment of those effects and has ascertained that, in light of the conclusions of the assessment, the project will not give rise to adverse effects upon the site. This provision transposed into Northern Ireland law the obligations imposed under article 6(3) of the Habitats Directive. The respondent reminds the court that Tully Bog is located to the North-West of Omagh in proximity to the existing A5 road and is a designated SAC by reason of its raised bog habitat. The proposed route of the new road also passes in proximity to the bog but does not traverse it. It is asserted on behalf of the DfI that it has conducted an appropriate assessment of the likely effects of the road upon the bog. It is argued that this assessment has been conducted with the aid of and is based upon the advice of experts in the relevant fields of expertise possessed of and demonstrating sufficient scientific knowledge and that the result of the assessment is that the risk of adverse effects upon the bog can be excluded.

[250] The respondent views the applicants' challenge as being based on the premise that the assessment has not been conducted to the requisite degree of scientific certainty and, therefore, the court should reject the scientific conclusions which are expressed in the assessment. It is argued that one of the flaws in the applicants' challenge is that they invite the court to reject the scientific conclusions expressed in the assessment without adducing any contrary scientific evidence which undermines the assessment's conclusions or which even cast scientific doubt upon the methodology followed.

[251] In light of the lack of contrary scientific evidence, the court is encouraged by the respondent to take at face value the statement of Dr Bethan Tuckett Jones which is set out in para [69] of her affidavit sworn on 22 January 2025:

> "In light of all of the above, my clear and unequivocal professional scientific opinion is that the very detailed modelling and assessment work undertaken by my team and I have ensured that the 2024 RIAA conclusions are based on a realistic worst-case scenario. All assessments of this nature involve some degree of uncertainty simply by virtue of the face that it is a prediction about future events.

> However, the methodology which has been used to conduct the assessment is based upon well recognised and accepted scientific standards. The modelling which has been carried out based upon these principles has also been extremely extensive and is fully in accordance with well recognised statistical and scientific standards. As a result, the possible extent of any scientific uncertainty about the risk of adverse effects of the road upon Tully Bog is so low as to be scientifically insignificant and it does not amount to "reasonable doubt" in the assessment conclusions. I am therefore confident that the best available scientific methods have been used to complete the assessment and that it does not contain any gaps."

[252] It is to be noted that similar assertions were made by the deponent of this affidavit when giving her evidence before the PAC but these assertions were not accepted. On behalf of the respondent, it is argued that there is very clear domestic legal authority to the effect that an applicant cannot maintain a Habitats challenge to the outcome of an appropriate assessment based upon a hypothetical rather than a real risk of adverse effects. For this purpose, supporting scientific evidence is invariably required. The respondent points out that the applicants have adduced no contrary evidence but instead their challenge amounts to an invitation to the Court to adjudicate on the extent of scientific uncertainty.

[253] The respondent relies upon the clear expression of this principle by Sullivan LJ in *R (Boggis) v Natural England* [2010] PTSR 725 at para [37]:

> "In my judgement, a breach of article 6(3) is not established merely because, sometime after the "plan or project" has been authorised, a third party alleges that there was a risk that it would have a significant effect on the site which should have been considered, and since that risk was not considered at all it cannot have been "excluded on the basis of objective information that the plan or project will have significant effects on the site concerned." Whether a breach of article 6(3) is alleged in infraction proceedings before the ECJ by the European Commission (see *Commission of the European Communities v Italian Republic* Case C-179/06, para. 39), or in domestic proceedings before the courts in member states, a claimant who alleges that there was a risk which should have been considered by the authorising authority so that it could decide whether that risk could be "excluded on the basis of objective information", must produce credible evidence that there was a real, rather than a hypothetical, risk which should have been considered."

[254] It is argued that in this jurisdiction, this principle has recently been applied by Humphreys J in *Re MORA (Casement Park)* [2022] NIQB 40 at paras [98] to [101] and previously by Tracey J in *Re Newry Chamber of Commerce* [2015] NIQB 65 at paras [65] to [67]. The absence of evidence, it is submitted is sufficient for the court to dismiss this ground of challenge, without more. I am not sure that the respondent has properly described the applicants' challenge. Rather than arguing that there is a hypothetical risk that has not been taken on board by the appropriate authority, the applicants in this case argue that the risk in this case (damage from NO_2 levels and nitrogen deposition) is not hypothetical, it is established and accepted. What is challenged is the conclusion by the appropriate authority that well planned mitigation measures in place, it has established beyond reasonable scientific doubt that the road will not give rise to any increase in NO_2 levels and nitrogen deposition over the SAC. It is argued on behalf of the applicants that they do not need to adduce scientific evidence to make this challenge and, in any event, because the updated RIAA was only published with the decision, they were not afforded the opportunity to scrutinise the updated RIAA, with the benefit of expert scientific input.

[255] Returning to the respondent's case, it is argued in the alternative that the appropriate assessment has been conducted to appropriate scientific standards. The risk of adverse effects has been excluded based upon an assessment, with no evidential gaps, using the most up to date scientific methods, incorporating a reasonable worst-case scenario and leaving no reasonable scientific doubt about the absence of adverse effects.

[256] On behalf of the respondent, it is argued that the background to the appropriate assessment carried out by the DfI is complex. The respondent seeks to rely on the detailed explanation provided in the affidavit sworn by Dr Bethan Tuckett Jones, who was the lead advisor to the DfI on air quality issues associated with the proposed road. It is noted that Dr Tucket Jones oversaw the development of the mitigation strategy, the preparation of the RIAA and was responsible for conducting the additional survey work which formed the basis of the final mitigation proposals.

[257] Summarising Dr Tucket Jones' evidence, it is asserted that a raised bog habitat can experience damage as a result of exposure to nitrogen compounds (especially ammonia) either from its presence in the atmosphere or through exposure to precipitation containing nitrogen compounds. In common with almost all SACs in Northern Ireland, Tully Bog is experiencing exposure to excessive levels of potentially harmful nitrogen compounds. This is largely as a result of widespread intensive agricultural activities in Northern Ireland. In addition, scientific understanding has developed in recent years, with the result that it is now recognised that tailpipe emissions from vehicles can include small amounts of nitrogen compounds. Tully Bog is situated in the open countryside and is surrounded by land in agricultural use. Its current exposure to excessive levels of nitrogen exists irrespective of whether the proposed road is constructed. It is asserted that the task for the DfI was to develop a mitigation strategy which enabled it to be satisfied that surrounding atmospheric nitrogen levels would be reduced by a sufficient degree to be sure that any additional

"process contribution" from the new road would not increase the overall atmospheric conditions and hence give rise to an adverse effect on the bog.

[258] It is further asserted that the RIAA of Tully Bog which was the subject of public consultation and consideration in the 2023 public inquiry had been prepared using nationwide data about atmospheric conditions, annual average estimates about agricultural emissions and conservative assumptions about the amount and dispersal range of vehicle related nitrogen emissions. It is argued that the PAC accepted the principle behind the DfI's mitigation strategy, save that it requested further work to be undertaken in order to understand seasonal variations in agricultural practices and to obtain more precise data about the contribution to atmospheric conditions made by local farming activities. It is alleged that the PACs recommendations were based upon objections raised by the applicants during the public inquiry.

[259] The respondent observes (rightly in my view) that the new issue of contention raised by the applicants is that the new modelling carried out by the DfI, based upon the further survey work, does not include assessment of a "reasonable worst-case scenario" and hence does not provide sufficient scientific certainty about the conclusions of the assessment.

[260] In response to this argument, the respondent again makes the point that the undisputed scientific evidence is that the DfI has carried out the assessment based upon a reasonable worst-case scenario. The respondent notes that the applicants contend that the updated assessment still leaves gaps and that there is uncertainty about the conclusions. This is robustly rejected by the respondent and it points to the evidence that clearly demonstrates that it has modelled the likelihood of adverse effects by analysing 10,000 possible combinations of possible events, over 99% of which demonstrate that the mitigation strategy (the banning of manure spreading and/or the application of fertiliser on some adjoining fields) will ensure that the road based emissions will not lead to an increase in nitrogen exposure and hence a risk of adverse effects. It is argued that the remaining possibilities are assessed as being so remote as to be scientifically insignificant and do not amount to a reasonable scientific doubt.

[261] On behalf of the respondent, it is argued that the principles governing the conduct of assessments of this nature, (which inevitably require some degree of prediction about future events) where considered recently by the English Court of Appeal in *R (Wyatt) v Fareham Borough Council* [2022] EWCA Civ 983. It is asserted that the EWCA set out a detailed summary of the applicable principles in para [9] of the judgment, which included the following:

> "[9](8) The requirement that there be "no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned" does not mean that the "reasonable worst-case scenario" must always be assessed. In the European Commission guidance document entitled

> "Communication on the precautionary principle" (2000) it is stated in Annex III that "[when] the available data are inadequate or non-conclusive, a prudent and cautious approach to environmental protection, health or safety could be to opt for the worst-case hypothesis." That guidance, however, is not law (see *Heard v Broadland District Council* [2012] Env. L.R. 23, at paragraph 69, and *Prideaux*, at paragraph 112), nor is it in mandatory terms. What is required in law is a sufficient degree of certainty to ensure that there is "no reasonable doubt" on the relevant question. It may sometimes be useful to consider a "reasonable worst-case scenario" when assessing whether the necessary degree of certainty has been achieved. But whether there are grounds for "reasonable doubt" will always be a matter of judgment in the particular case.
>
> [9](10) What is required of the competent authority, therefore, is a case-specific assessment in which the applicable science is brought to bear with sufficient rigour on the implications of the project for the protected site concerned. If an appropriate assessment is to comply with article 6 (3) of the Habitats Directive it "cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned" (see the judgment of the CJEU in *Sweetman v An Bord Pleanála* (Case C-258/11) [2014] PTSR 1092, at paragraph 44, and its judgment in *People Over Wind and Sweetman v Coillte Teoranta* (Case C-323/17) [2018] PTSR 1668, at paragraph 38)."

[262] It is asserted on behalf of the respondent that in the present case, all of these principles have been followed and applied rigorously. What has occurred is that the additional survey work which was recommended by the PAC has demonstrated that the 2023 assessment contained assumptions about the levels of agricultural emissions surrounding the site which have proved to be conservative in the sense that the assumptions underestimated the level of agricultural emissions, even taking into account that the emissions were "seasonal." Consequently, in order to "remove" sufficient levels of atmospheric nitrogen to ensure no adverse effect from the road's contribution, less mitigation land is required. It is argued that there has been no change in scientific principles or methodology, simply a more rigorous and bespoke application of those principles. It is argued that the fact that less mitigation land is required is simply a consequence of the science, not any lack of rigour or certainty in the assessment. The respondent draws the court's attention to the fact that the updated RIAA was the subject of expert independent consultation advice from the

NIEA, which agreed with the DfI's methodology and conclusions. On this last point, I note that the NIEA agreed with the DfI's methodology and conclusions set out in the RIAA which was the subject of significant criticism by the PAC.

[263] The issue of whether the updated RIAA should have been put out for public consultation and scrutiny prior to the decision being announced will be considered separately below.

Court's conclusions re breach of the Habitats Directive – Tully Bog

[264] The real thrust of the applicants' challenge to the RIAA is the introduction of the Monte Carlo methodology and the acceptance by the respondent that the absence of adverse effects (indeed the presence of positive effects) demonstrated in 99% of the 10,000 outcomes, produced using the Monte Carlo methodology from the random sampling of values within the ranges of a wide number of input variables, allows the DfI to conclude that the absence of adverse effects is established to a standard of reasonable scientific certainty.

[265] Having carefully considered the PAC report, the updated RIAA, the affidavit evidence from Dr Tucket Jones and the parties' submissions on this point, I consider that the decision of the respondent to reject the use of only and exclusively the worst-case assumptions as inputs in the modelling in order to achieve the removal of reasonable scientific doubt as such an approach would result in the minimisation of mitigation to "zero mitigation potential" which would be "unreasonable" and would lead to a "significant overestimate in the required land take" is an entirely justifiable, reasonable and rational approach to take and it is an approach which is based on highly respected expert scientific opinion.

[266] The adoption by the DfI of an approach which involves the utilisation of the Monte Carlo statistical method of randomly choosing inputs from across the possible ranges for each input and then setting the level of vesting and land management at the minimum level which will "demonstrate with 99 percent confidence that there will be no increase in ammonia concentrations or nitrogen deposition" over the SAC resulting from the road is also an approach which is entirely justifiable, reasonable and rational and is based on highly respected expert scientific opinion. The modelled result of adopting this approach is that the majority of the SAC will experience significant beneficial impacts "but, in the worst case, the maximum impact anywhere in the SAC will be marginally below zero, ie a very slight, not significant, benefit."

[267] I refer back to the fuller description of the Monte Carlo methodology set out in para [157] and [158] of this judgment. I accept this description as entirely fair and accurate. It constitutes a compelling basis for concluding that there is no proper basis upon which I could conclude that the assessment was irrational or otherwise unlawful on account of a lack of certainty. On the contrary, DfI's assertion that the vesting and management of lands adjacent to the SAC which will prevent the carrying out of nitrogen emitting agricultural practices on those lands will (beyond reasonable

scientific doubt) have a beneficial impact on the annual mean nitrogen deposition and annual and short-term ammonia concentrations over the sensitive habitat is entirely justifiable, reasonable and rational and robustly founded in expert scientific evidence.

[268] Having carefully considered the parties submissions on this point, I am firmly of the opinion that the preliminary views that I expressed in para [159] of this judgment are in fact correct and that Tully Bog has a better chance of ultimately achieving overall favourable status if this proposed road scheme is constructed than if it is not.

Applicants' submissions re the failure of the DfI to assess and give adequate reasons in respect of the impact of the scheme on article 8 rights

[269] The applicants argue that the decision to proceed with the proposed road interferes with their article 8 rights. In Recommendation 3, the PAC recommended that any decision to proceed with the scheme should be time limited. If construction work does not commence before then end of the 2028-2029 financial year, the authorisation should lapse. This recommendation was rejected by the DfI on the basis that it was impracticable. The applicants rely on the decision of Lindblom J in the case of *Secretary of State for Communities and Local Government v Allen* [2016] EWCA Civ 767 at para [19] where he stated that where the Secretary of State disagrees with an inspector:

> "He must explain why he rejects the inspector's view. He must do so fully and clearly. But there is no heightened standard for "proper, adequate and intelligible" reasons in such a case. Whether the reasons given are "proper, adequate and intelligible" will always depend on the circumstances of the case…What he has to do is to make sure that his decision letter shows why the outcome of the appeal was as it was, bearing in mind that the parties to the appeal know well what the issues were."

[270] The applicants allege that the reasons given by the DfI for not following the PAC Recommendation 3 are entirely inadequate. I need not expand on their reasoning for making this allegation because I have addressed this issue above at paras [90] to [99] of this judgment, where I expressed the view that the article 8 impact issue was not addressed at all by the DfI when deciding to reject Recommendation 3. Subject to the submissions of the DfI which will be set out below, it would appear that this aspect of the applicants' challenge is unanswerable and, if that is the case, the court does not need to go on to consider the question of whether the decision to reject Recommendation 3 does constitute an actual breach of the applicants' article 8 rights. It would be for the DfI as decision maker to look again at Recommendation 3 and make a fresh decision which properly addresses the applicants' article 8 arguments.

Respondent's submissions re the failure of the DfI to assess and give adequate reasons in respect of the impact of the scheme on article 8 rights

[271] The applicants contend that the DfI failed to assess the impact of the scheme on Article 8 rights. They further allege that the Department failed to give reasons for its decision not to accept Recommendation 3 within the 2023 PAC Report. The applicants refer to para 2.222 of the 2023 PAC report which states that:

> "it is apparent that many of the authors have had their lives seriously affected by the threat of vesting. Several have suffered from anxiety and depression and have needed medical help. The uncertainty has been going on for about 14 years which is a substantial portion of any person's life. While it is important to consider evidence dispassionately, the human dimension must never be overlooked."

[272] The applicants cite this paragraph as the basis for the making of Recommendation 3 that:

> "any decision to proceed with any part of the scheme is expressly stated to be time limited so that if physical construction of any phase or section so authorised has not begun by the end of the financial year 2028/2029, the authorisation will lapse in respect of that phase or section."

[273] The respondent argues that the 2023 PAC report contained the following justification for this recommendation:

> "the prolongation of blight and uncertainty into a third decade would an excessive and disproportionate effect on the interests and wellbeing of persons whose lands and properties are proposed to be vested. It seems to us that people whose human rights would be or might be infringed by the scheme are entitled to know whether it is going ahead or not. They need reasonable certainty so that they can make plans for their business and their lives."

[274] It is argued that the lands owned or occupied by the applicants, and which were subject to vesting orders for the authorised scheme have now been vested. The effect of the vesting is that the land has transferred into the ownership of the DfI and compensation becomes due to the original landowner in addition to statutory interest as described in paras [68] to [72] of Colin Hutchinson's first affidavit, sworn on 30 January 2025. It is argued that in respect of the decision under challenge, the effect of vesting is to alleviate the uncertainty which appears to have prompted Recommendation 3. It is argued that in so far as the uncertainty relates to lands which

have not been vested or are in the ownership of persons other than the applicants, those are not matters which ought to be considered in this challenge. The ground advanced in the applicants' skeleton argument relies upon section 6 of the Human Rights Act 1998 and article 8 ECHR. In accordance with section 7 of the 1998 Act, a person may only rely on Convention rights if "he is (or would be) a victim of the unlawful act."

[275] It is argued that section 7(7) corresponds the term 'victim' to that used in article 34 ECHR which governs standing before the ECtHR. It is argued that the relevant case law has long been characterised by a restrictive approach to access to the ECtHR and an applicant must have suffered and/or will suffer in some concrete way before they will satisfy the article 34 ECHR standard. The Northern Ireland Court of Appeal, in rejecting an applicant's standing, albeit in a very different setting addressed the matter in *Taylor v Department for Communities* [2022] NICA 8 at paras [38] to [41]:

> "[38] The final issue is that of the appellant's victim status. In *Senator Lines GMBH v Austria and Others* [2006] 21 BHRC 640 the Grand Chamber of the ECtHR, in determining whether the particular application was admissible, reflected on the concept of 'potential victim.' Referring to concrete examples in its jurisprudence, the court recalled one case where an alien's removal had been ordered but not enforced and another where a law prohibiting homosexual acts was capable of being, but had not been, applied to a certain category of the population which included the applicant. The judgment continues, at p 11:
>
> > 'However, for an applicant to be able to claim to be a victim in such a situation **he must produce reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient** ...' [emphasis added]
>
> [39] In *Burden v United Kingdom* (2008) 24 BHRC 709 (App no 13378/05) the applicants were elderly unmarried sisters. They owned a house in their joint names worth £875,000. Each had made a will leaving all her property to the other. By ss 3, 3A and 4 of the Inheritance Tax Act 1984 inheritance tax of 40% would be levied upon the death of each. The government contested the admissibility of the application on the grounds that the applicants could not claim to be 'victims' of any violation (under Art 34 ECHR) as the complaint was prospective and hypothetical, given

that no liability to inheritance tax had actually accrued and might never accrue.

[40] Rejecting his argument, the Grand Chamber reasoned and concluded as follows. In order to be able to lodge a petition in pursuance of Art 34, a person, non-governmental organisation or group of individuals had to be able to claim to be the victim of a violation of the convention rights. In order to claim to be a victim of a violation, a person had to be directly affected by the impugned measure. The ECHR did not, therefore, envisage the bringing of an *actio popularis* for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because they considered, without having been directly affected by it, that it might contravene the convention. It was, however, open to a person to contend that a law violated his rights, in the absence of an individual measure of implementation, if he was required either to modify his conduct or risk being prosecuted or if he was a member of a class of people at 'real risk' of being directly affected by the legislation. Given their age, the wills they had made and the value of the property each owned, the applicants had established that there was a real risk that, in the not too distant future, one of them would be required to pay substantial inheritance tax on the property inherited from her sister. Accordingly, both were directly affected by the impugned legislation and thus had victim status.

[41] Plainly a vague or fanciful possibility of a Convention violation will not suffice. In short, 'risk' in this context denotes real risk. This requires, per Senator Lines, a reasonable and convincing evidential foundation. Having regard to our analysis and conclusion in [22]–[33] above, there has been a manifest failure by the appellant to establish the necessary evidential foundation. We decline to speculate on what the true and actual facts are ..."

[276] On behalf of the respondent it is argued that in so far as the applicants contend that the rejection of the recommendation to impose a time limit on the commencement of the works grounds a breach of their Article 8 rights, it is doubtful that the applicants enjoy sufficient standing given that the effect of the vesting orders has been to transfer the lands to the ownership of the DfI and to crystallise an entitlement to compensation and statutory interest. It is contended that this ought to provide the "reasonable

certainty" referred to within the 2023 PAC report and permit those persons to "make plans for their businesses and lives."

[277] The respondent goes on to assert that even if the applicants can satisfy the court that they fall within the category of persons capable of bringing a challenge on the basis of section 6 of the Human Rights Act 1998, it is the DfI's case that there has been no failure to provide adequate reasons for the decision to reject Recommendation 3. It is argued that the 2024 Departmental Statement reaffirmed the DfI's commitment to commencing construction of the sections of the proposed dual carriageway which have been authorised at the earliest opportunity and by the end of the financial year 2028/2029 and explained its rejection of Recommendation 3 on the following basis:

> "[The DfI] does not consider that this recommendation is appropriate in principle. The A5WTC represents the largest infrastructure project ever undertaken in Northern Ireland and will require a very significant investment of public funds. The size and nature of the project are therefore of an entirely different magnitude to any other development (public or private) which has ever taken place in Northern Ireland, and which might otherwise be authorised through the planning process. The project is promoted by a public authority, which is funded exclusively by and is subject to the constraints and uncertainties of the public expenditure system. The project is therefore funded in an entirely different manner than a private development for which private sector funding might otherwise be more certain. The Department also does not consider that a condition of this nature is appropriate, insofar as it could provide an impediment to the ability of the Department to implement the scheme, in the event of unforeseen delays associated with legal challenges and the possibility of competing spending priorities emerging in the interim period. A condition of this nature may also have undesired impacts upon outstanding commercial negotiations with the designated contractors."

[278] It is argued on behalf of the respondent that it has given adequate and intelligible reasons for the decision not to accept the recommendation of the PAC. It is observed that the applicants' submission refers to *South Bucks District Council and another (Respondents) v. Porter* (FC) [2004] UKHL 33 at [36]:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what

> conclusions were reached on the "principal important controversial issues."

It is argued on behalf of the respondent that the reasons provided comfortably reach that threshold, however, as that judgment recognises, the requirement to provide reasons has limits and depends on the circumstances.

[279] The respondent seeks to place reliance on a further section of para [36] of Lord Brown's judgment which provides as follows:

> "Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

[280] The respondent points to a similar stance having previously been adopted in the case of *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153 concerning the Secretary of State's grant of planning permission on appeal from the local planning authority's refusal of permission. In that case, Lord Bridge observed that:

> "the degree of particularity required will depend entirely on the nature of the issues falling for decision."

In considering the manner in which a court should approach a reasons challenge in the context of the applicable planning legislation in England and Wales, he stated that:

> "the single indivisible question, in my opinion, which the court must ask itself whenever a planning decision is

> challenged on the ground of failure to give reasons is whether the interests of the applicant have been substantially prejudiced by the deficiency of the reasons given."

At page 168B, Lord Bridge pointed out that the burden of proof lies on the applicant "to satisfy the court that he has been substantially prejudiced by the failure to give reasons." It is argued on behalf of the respondent that the applicants have not adduced any evidence which would support an allegation of such prejudice by reason of an alleged failure to provide reasons rather than due to the effects of the Authorised Scheme itself.

Court's conclusions re the failure of the DfI to assess and give adequate reasons in respect of the impact of the scheme on article 8 rights

[281] The respondent's submissions during the hearing of this case are cogent and compelling but the problem is that when the DfI made its decision to reject the PAC's Recommendation 3, the DfI did not make any reference to the human rights issues raised by the PAC. The DfI patently failed to address the human rights concerns that gave rise to Recommendation 3. Having considered the respondent's submissions on this issue, I remain firmly wedded to the views expressed in para [269] of this judgment.

Applicants' submissions re breach of article 8 rights and/or irrationality

[282] The applicants allege that the refusal of the DfI to adopt Recommendation 3 constitutes a breach of their article 8 rights. They allege that the respondent cannot lawfully conclude that any interference with the article 8 rights of the applicants is justified because the respondent has failed to demonstrate that it has performed the proportionality assessment required to enable a public body to argue that the interference with article 8 rights is justified. I have concluded that the respondent has failed to address the human rights issues raised by the PAC when the DfI set out its reasons for rejecting Recommendation 3. I consider that it would be wrong of me to go on to consider the substantive article 8 rights issue because this is not a case in which the decision maker has addressed the article 8 issues and has come to a decision which is under challenge. Instead, this is a case in which the decision maker has failed to address the article 8 issues and has justified the decision to reject Recommendation 3 for reasons utterly unrelated to the article 8 issues raised. It is not for this court to insert itself into the place of the decision maker and conduct the proportionality exercise that the respondent should have engaged in. I, therefore, do not intend to make any finding in respect of the applicants' case that there has been a substantive breach of their article 8 rights and I do not intend to rehearse the respondent's arguments mounted against applicants' claims that their article 8 rights have been breached. The respondent, if it intends to proceed with this project, will have to look at Recommendation 3 again and properly and comprehensively address the applicants' article 8 arguments.

[283] I also note that the applicants raise a rationality argument which can be expressed in the following terms. It is argued that it is irrational for the DfI to refuse to agree to the PAC's proposed time of commencement of construction condition because if such a condition is not imposed, the DfI could delay commencing the work until such times as the EIA and the Habitats assessment were out of date and, therefore, the refusal to agree to Recommendation 3 is irrational. Without expressing a definitive view on this issue, simply because the decision in respect of Recommendation 3 will have to be taken again in order to address the human rights issues, my tentative view is that the rationality challenge does not get off the ground for the simple reason that it is based on a number of contingencies, the occurrence of which would properly be described as speculative. The simple and straight-forward answer to the concerns expressed by the applicants is that if the DfI did delay commencing the construction work until such times as the EIA and/or the Habitats assessment was/were out of date, it would be open to the applicants or anyone else adversely affected to challenge the lawfulness of the commencement of construction at that time.

Applicants' submissions re breach of article 6 ECHR, the EIA Directive and the Habitats Directive

[284] The applicants argue that as their rights of ownership, use and enjoyment of land and their economic interests connected with running businesses including, in some cases, their farms are directly impacted by the DfI's decision to proceed with the road, article 6 ECHR is engaged and the DfI's decision-making process must be article 6 compliant. It is alleged that the DfI, by producing voluminous further evidence and documentation after the PAC 2023 report was published, by publishing this material at the same time as the decision statement was published, by failing to remit the new material back to the PAC for further scrutiny prior to making a decision, and by failing to give the public in general and the applicants in particular an opportunity to be consulted and to comment upon the said material prior to the DfI making a decision, the DfI has adopted a decision-making process which is not complaint with article 6 ECHR.

[285] In the context of article 6, the applicants assert that this new material constitutes environmental information and includes new facts (some of which are disputed), including, but not limited to, the fresh assessment of GHG emissions from the construction and operation of the scheme, which are now estimated to be 8% higher than the estimate provided to the PAC. This, it is argued, necessitates the placing of such new environmental information into the public domain for the purpose of consultation and formal appraisal and scrutiny by the PAC prior to any decision being made by the DfI. It is argued that the EIA Directive mandates such an approach and the DfI has failed to follow this approach. It is further argued that in order to comply article 6 ECHR, the facilitation of further consultation, appraisal and scrutiny is necessary. This issue of whether further consultation and scrutiny are necessary in the context of the EIA framework has been substantively addressed earlier in this

judgment. The issue of whether such further consultation and scrutiny is also mandated by article 6 ECHR will be considered below.

[286] In respect of Tully Bog, the applicants seek to remind the court that the PAC specifically raised the issue of further public consultation and stated that the DfI would have to consider whether to make provision for that to take place (see para 4.91 of the 2023 PAC report). The applicants cry foul and claim that the DfI has given no consideration to any further consultation on the Tully Bog issue or any other issue, for that matter, and, by adopting this approach, the DfI has avoided any merits challenge that any party may have wished to make to the new environmental information and has, in effect, restricted any aggrieved person to an irrationality challenge by way of judicial review, with little or no opportunity to obtain an independent adjudication upon issues of disputed fact.

Respondent's submissions re breach of article 6 ECHR, the EIA Directive and the Habitats Directive

[287] The respondent characterises this aspect of the applicants' challenge in the following terms. The DfI, when taking its decision, has published new information relating to the scheme which was not considered during the public inquiry and the failure to put this new information out for public consultation and scrutiny prior to making its decision amounts to a breach of article 6(1) insofar as the decision to proceed with the road amounts to a determination of the applicants' civil rights in circumstances where the said decision was not taken by an independent and impartial tribunal. It is argued by the respondent that the thrust of the applicants' complaint appears to be that the new material should have been remitted to the PAC for public consideration and scrutiny. In practical terms, the argument appears to be that there should be a further addendum to the ES, a further round of public/statutory consultation, a further public inquiry into the scheme followed by a fully informed decision at some point in the future.

[288] The respondent argues that it is far from clear what civil right has been determined. It is accepted that the vesting decision is likely to amount to the determination of the right to own and enjoy property. However, not all of the applicants own land which will be subject to vesting. Only two applicants are affected by vesting. No alternative civil right has been identified by any of the other applicants. That may be the case but it appears to be conceded by the respondent that the civil right to own and enjoy property has been determined in the case of two of the applicants by the vesting orders made in this case.

[289] The respondent argues that since the decision of the House of Lords in *Alconbury* [2001] UKHL 23, it has been clear that decision making processes conducted by United Kingdom planning authorities on planning matters which determine civil rights will be compatible with article 6 ECHR, provided the opportunity remains for judicial review of the planning decision. In those cases, it is argued that the judicial review court represents an independent and impartial tribunal which ultimately

determines the civil right in question. It is argued that in reaching this decision, the House of Lords applied a long line of ECtHR authority relating to the application of article 6 to administrative decision-making procedures which involved the determination of civil rights. It is further argued that in those cases, the authorities are clear that the court considers the decision-making process as a whole, ie not only the relevant administrative decision-making body, but also the availability of court review of the decision. It is pointed out that the applicants have not identified any decision by any court in the United Kingdom since the decision in *Alconbury*, where a breach of article 6 has been established arising out of the operation of the United Kingdom planning system. It is argued on behalf of the respondent that the statutory decision-making procedure under the Roads (Northern Ireland) Order 1993 makes provision for challenge in the High Court to both the Vesting Order and the Direction/Stopping-Up Orders. The present proceeding before this court are themselves an exercise of the statutory right of challenge.

[290] It is also argued on behalf of the respondent that the applicants appear to accept that much of the information published alongside the decision is irrelevant to the present proceedings. It is argued on behalf of the respondent that the applicants have been unable to precisely identify the new information which they do consider to be relevant which, therefore, has to be referred back to the PAC for scrutiny in order to comply with article 6 ECHR. The respondent points out that the majority of the additional reports published along with the decision are updated versions of the RIAAs containing the latest versions of the appropriate assessments of the effects of the proposed road on a large number of SACs or SPAs along the entire length of the road, including the sections which have not been authorised by this decision. It is argued on behalf of the respondent that previous iterations of all of those reports have previously been published for public/NIEA consultation and have been the subject of consideration in the PAC. It is argued by the respondent that as a result, they are not "new information." The respondent points out that in relation to the RIAAs, there is no statutory right to public consultation for an appropriate assessment.

[291] The court is reminded by the respondent that pursuant to regulation 43(4) Conservation (Natural Habitats etc.) Regulations (Northern Ireland) 1995, the competent authority shall "if it considers it appropriate, take steps as it considers necessary to obtain the opinion of the general public." In the context of this proposed road, it already had received the views of the public and the PAC on three occasions about the likely effects of the road on the protected sites. It is asserted that the DfI decided not to undertake further public consultation, as it was entitled to do. However, it did engage in further consultation with NIEA (and other relevant statutory authorities), on the latest version of the assessments. In each case, there was no change to the assessment that there would be no adverse effects and, in all cases, the NIEA agreed with that assessment. It is argued that fairness did not require further public consultation.

[292] The respondent characterises the applicant's arguments in the following manner. It asserts that the applicants are raising two points of concern which they

characterise as factual matters which should be "remitted to" the PAC. The first is the reduction in land required for mitigation at Tully Bog. The second is the 8% increase in GHG emissions associated with the scheme which was identified in the revised GHG assessment. The respondent submits that there is nothing in article 6 that requires either of these issues to be considered again by the PAC or a further public inquiry. In relation to Tully Bog, the changes to the requirements for mitigation land arose as a result of the Department implementing the previous recommendations of the PAC. The assessment which preceded the 2023 inquiry was based substantially upon conservative assumptions about agricultural emission levels and nationally available data about background atmospheric conditions. On the advice of the PAC (and based upon the applicants' objections) the DfI undertook further emissions testing at the bog to gain a bespoke understanding of the level of emissions related to agriculture. Its work was, therefore, a faithful application of PAC advice.

[293] On behalf of the respondent, it is submitted that the applicants have not raised any contrary scientific evidence or monitoring results to suggest that this work was inaccurate or in any way unreliable. It is not therefore clear precisely what is the "factual conflict" which the PAC should be asked to consider. The principles underpinning the mitigation strategy had been accepted in principle by the PAC and the assessment considered in the inquiry had proceeded on the basis of conservative assumptions about atmospheric conditions, ie a worse case than has proved to be the case. The updated findings are therefore entirely within the scope of those which had been considered by the public.

[294] The respondent also argues that the PAC made clear in its report that a vesting order for mitigation land should extend no further than was necessary for the purposes of mitigating the effects of agricultural related ammonia emissions (see section 5.20 of the report and Recommendation 29). Applying a conservative approach by vesting more land than had been assessed to be necessary for mitigation, would have run the risk of undermining the validity of the vesting order at this location. The respondent argues that the conclusions of the updated RIAA are entirely within the scope of the mitigation proposals which were the subject of public consultation and simply represent the outworking of the PAC advice.

[295] In relation to the updated GHG assessment, it is argued on behalf of the respondent that this also simply represents the outworking of the PAC recommendation to update the assessment. The respondent relies on the fact that while it resulted in an upwards estimate of the amount of GHG emissions, there was no change in the assessment of significance of environmental effects. It had already been acknowledged to be a large adverse effect. The updated assessment was also carried out taking account of the principles recommended by the PAC. It is argued that it is far from clear what "factual conflict" remains which, in order to comply with article 6, mandated the further consideration and review by the PAC rather than by this court.

Court's conclusions re breach of article 6 ECHR, the EIA Directive and the Habitats Directive

[296] In relation to the updated GHG emissions assessment which provides for the first time estimates of emissions resulting from induced trips, the court has already determined that further opportunity for consultation and scrutiny is required in the context of the EIA Directive and, therefore, in one sense the article 6 arguments are rendered redundant. The respondent's contention that the updated GHG assessment simply represents the outworking of the PAC recommendation to update the assessment is not completely accurate. It is correct to say that the PAC recommended that the GHG emissions assessment should be updated to identify the emissions estimated to result from that portion of the scheme which was actually approved. However, the part of the recommendation relating to estimates of GHG emissions produced by induced trips was a recommendation to carry out new work to produce new environmental information which was not included in the existing GHG emissions estimates and which the PAC concluded should have been. Fresh work was required to remedy an omission. The new environmental information resulting from this fresh work needs to be put out for consultation and subjected to scrutiny in order to ascertain whether the methodology adopted is appropriate and robust.

[297] However, if the EIA Directive was not in play, it would appear that the *Alconbury* decision would militate against the imposition of an article 6 ECHR duty to consult. It must be remembered that the applicants have not raised any argument that a common law duty to consult arises in this case either as a result of a procedural legitimate expectation or otherwise.

[298] The *Alconbury* decision also disposes of the applicants' article 6 arguments in relation to the updated RIAA in respect of Tully Bog. Again, no common law duty to consult is raised and the issue is whether the respondent in exercising its discretion vested in it by regulation 43(4) Conservation (Natural Habitats etc.) Regulations (Northern Ireland) 1995, acted in a manner which was unreasonable in the *Wednesbury* sense. As in all such matters, context is everything. The context for Recommendations 22, 23 and 24 was that the PAC raised concerns about significant and important flaws in the RIAA which I have set out in detail above and concluded that the DfI had not demonstrated the absence of adverse impact beyond reasonable scientific doubt. In essence the RIAA did not achieve the result that it was required to achieve. An updated RIAA had to be prepared which involved new rounds of air quality sampling and new interviews with landowners regarding agricultural practices. The seasonal nature of some nitrogen producing agricultural practices had to be factored in. One somewhat surprising result of these fresh investigations and enquiries was that the amount of nitrogen compounds produced by the application of manure and fertiliser on adjacent fields was greater than previously modelled so that less land had to be vested or made the subject of land management agreements in order to remove the same amount of agriculturally produced nitrogen from the atmosphere as had been previously calculated was needed to make up for the increase in nitrogen emitted by traffic using the new road. In addition to this work, an entirely different statistical

model, the Monte Carlo model, was used in order to enable the DfI to be satisfied that the absence of adverse impact was demonstrated beyond reasonable scientific doubt.

[299] Having regard to all these matters, I can readily appreciate why the applicants would argue that the decision not to put the new material out for consultation and scrutiny is irrational in a *Wednesbury* sense but there is one very strong counter argument which leads me to conclude that this decision was not irrational and that is that the updated RIAA patently and convincingly demonstrates that the mitigation measures that will be taken and the conservation measures that will now be funded as a result of this road being built mean that the prospects for improvement in the condition of Tully Bog are realistically improved overall. The PAC recommended that the DfI do certain things to remedy the shortcomings in the RIAA that was before the PAC. The DfI has assiduously attended to those matters and had produced an updated RIAA which to my mind clearly demonstrates that no adverse effects will be visited upon Tully Bog by the construction and operation of this road. It is clear that the DfI has on the basis of this updated RIAA concluded that no reasonable scientific doubt exists as to absence of any adverse impacts and that there is no need to refer this RIAA for further consultation and/or scrutiny and, in the circumstances of this case, there is no basis for concluding that this decision was unreasonable or irrational in a Wednesbury sense.

[300] For the reasons given above, the decision and orders made thereunder must be quashed due to the breach of section 52 of the 2022 Act, the failure to demonstrate any consideration of the human rights issues raised by the PAC when rejecting the recommendation that permission should be time-limited and the failure to comply with the requirements of the domestic iteration of the EIA Directive in respect of placing the new environmental information in the form of the updated GHG emissions estimates out for public consultation and scrutiny. I am acutely aware that this decision will bring significant, fresh anguish to the doors of those who have been injured and maimed and those who have lost loved ones as a result of road traffic accidents on the existing A5 road. One of the primary justifications for the construction of this new road is that it will be much safer than the existing road and that, over time, many lives will be saved and many serious injuries prevented and many families will be spared the utter heartbreak of the sudden and shocking loss of a loved one. It is likely that delays in the progression of this scheme will coincide with the occurrence of further loss of life and serious injury on the existing road. These matters combined with the other benefits identified by the PAC in its 2023 report were considered to constitute overwhelmingly compelling arguments for the progression of this scheme. However, the decision to proceed with the scheme must be taken in accordance with the law and the principle of the rule of law cannot be subverted, even if the motivation for doing so is to achieve what is deemed to constitute a clear societal benefit. The shortcomings and shortcuts in the decision making highlighted in this judgment are capable of being remedied. The relevant Ministers, departments and officials should redouble their efforts to deal with these shortcomings and that may involve the finalisation of a CAP which is long overdue. But irrespective of the difficulties in overcoming these shortcomings, concerted efforts must be made by all

concerned so that sooner, rather than later, a new and safer A5 dual carriageway may come into operation and the long list of names of those who have perished on that road will not be added to.