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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

**KING'S BENCH DIVISION
(JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY FRIENDS OF THE EARTH LTD
FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF THE FAILURE OF THE DEPARTMENT FOR
INFRASTRUCTURE TO PROPERLY TEST DIESEL EMISSIONS AS PART OF
MOT TESTING**

**AND THE NORTHERN IRELAND COMMISSIONER FOR CHILDREN AND
YOUNG PEOPLE (NICCY) INTERVENING**

**Ms Moyne Anyadike-Danes KC with Mr Aidan McGowan (instructed by PILS)
for the Applicant**

**Mr Philip McAteer (instructed by the Departmental Solicitor's Office)
for the Respondent**

**Mr Ciaran White (instructed by Peter McGettrick, Senior Legal and Investigations Officer
NICCY) for the Intervener**

COLTON J

Introduction

[1] The applicant is Friends of the Earth Ltd, a not-for-profit company limited by guarantee, that undertakes campaigning and other work (including litigation) on environmental issues. By these proceedings it challenges the Department for Infrastructure's ("the Department") failure to properly test diesel emissions as part of Ministry of Transport ("MOT") testing.

[2] I am obliged to all counsel in this case for their detailed written and oral submissions. All counsel have greatly assisted the court in its ongoing consideration of the difficult issues that arise in this application.

[3] In the course of the arguments at hearing, the court has been referred to a vast amount of material, including scientific literature, technical data and reports, ministerial submissions, policy proposals, PFI contracts, a complex network of statutes and regulations and considerable legal authority. The court has read all of this material and taken it into account. It has simply not been possible to refer in detail to all of this material in what is, arguably, too lengthy a judgment. Reference is made to those materials which the court considers most relevant.

The legal obligations relied upon by the applicant

[4] The Department has a duty to conduct diesel emissions tests pursuant to Article 61 of the Road Traffic (Northern Ireland) Order 1995 ("the 1995 Order") and Regulations 3, 5, 12 and Schedule 2 para 3 of the Motor Vehicle Testing Regulations (Northern Ireland) 2003 ("the 2003 Regulations") read with Regulation 74(21) and Schedule 10 paras 8 and 9 of the Motor Vehicles (Construction and Use) Regulations (Northern Ireland) 1999, which came into force on 1 January 2000.

[5] The legislation requires the Department to test the "co-efficient absorption of the exhaust emission from a compression ignition engine" (ie a diesel engine). The method of so testing is referred to in this judgment as "the diesel smoke test." The applicant contends that the Department is in breach of its obligations to carry out this testing.

[6] Whilst the focus of the challenge relates to this obligation, the applicant argues that it is inter-related to other obligations imposed on the Department. These obligations will be discussed later in this judgment.

The respondent's position

[7] The Department has accepted from the pre-action stage and throughout these proceedings that it is in breach of its duty under Regulation 12 of the 2003 Regulations and Article 61 of the Road Traffic Order 1995 ("the 1995 Order") to conduct a diesel smoke test as part of MOT testing for cars or light vehicles under 3,500kg. Although the Department does not consider it necessary to do so, it does not oppose a declaration to that effect.

[8] The Department disputes the other grounds relied upon by the applicant and the request for mandatory relief.

Why is this important?

[9] The applicant referred the court to ample materials demonstrating the potential damage caused by pollutants, and specifically diesel exhausts.

[10] In particular, the applicant relied on an affidavit from a Dr Miller, who is a reader employed by the University of Edinburgh within the Centre for

Cardiovascular Science. He has a BSC in biological sciences; pharmacology and a PHD in cardiovascular science from the University of Edinburgh and has gathered over 20 years of experience in biomedical research. For the past 17 years he has studied the effects of air pollutants on the cardiovascular system of which the actions of diesel exhaust and airborne particles have been a major theme.

[11] His central thesis is that there is a large body of scientific evidence showing that air pollution is linked to substantial adverse health effects, including many major diseases and early deaths. He summarises his conclusions as follows:

- Diesel exhaust contains many air pollutants that have a complex chemistry and reactivity.
- In relation to health, the main pollutants of interest from diesel exhaust are NO₂ and PM. The smallest particles within PM, called ultrafine PM theoretically have a greater potential to cause health defects. (NO₂ is nitrogen dioxide and PM is particulate matter (“airborne particles”).)
- Exposure to NO₂ and PM is linked to effects on the lung and cardiovascular system. These include reduced lung function, exacerbation of asthma, development of chronic obstructive pulmonary disease (COPD), changes in heart rhythm and susceptibility of the heart to damage, blood clotting, vascular disease, heart disease, stroke and premature mortality from cardiorespiratory causes.
- Over the last decade, evidence has emerged that air pollution could have detrimental effects on many organs of the body, including the kidney, liver, bones, the metabolic system, blood cells, the brain, and effects in pregnancy and on birth.
- Laboratory research has demonstrated clear biological mechanisms to account for how emissions from diesel exhaust can change the function of the body to ultimately promote disease and premature death.
- Individuals that are likely to be the most susceptible to the effects of the pollutants within diesel exhaust are the young, the elderly and those with pre-existing disease. However, it should also be noted that diesel exhaust has adverse effects on healthy individuals that, while not apparent, would increase their risk of developing health conditions.
- Traffic, particularly from diesel engines, is a major source of nitrogen dioxide in urban environments.
- Nitrogen dioxide is most consistently associated with conditions of the lung. NO₂, especially long-term exposure has also been linked to health effects

beyond the lung. For effects beyond the lung, the associations tend to be less consistent than for pollutants such as particulate matter.

[12] The applicant also relied on an article entitled “**The pollutant emissions from diesel-engine vehicles and exhaust after treatment systems**” published in June 2014 in the Journal of Clean Technologies and Environmental Policy. The authors contend that diesel engines are “considered as one of the largest contributors to environmental pollution caused by exhaust emissions, and they are responsible for several health problems as well.” The paper reviews the emissions from diesel engines and their control systems. It recognises the harmful effects of NO₂ and refers to control systems which reduce the damage of the pollutant emissions to meet emission standards and requirements and to prevent the harmful effects of pollutant emissions on the environment and human health.

[13] A further document relied upon by the applicant is that produced by the Department of Agriculture Environment and Rural Affairs (“DAERA”) entitled “**Clean air strategy for Northern Ireland, a public discussion document, November 2020**” which includes the following passage:

“Nitrogen oxide (NO_x) is a term used for two oxides of nitrogen-monoxide, NO and nitrogen dioxide NO₂. Nitrogen dioxide is the main species of concern, which can cause health effects, however, most NO, when emitted into the air, rapidly reacts with oxygen from NO₂. NO₂ can exacerbate symptoms of heart and lung conditions, thereby reducing quality of life for affected individuals. NO₂ can also adversely affect plant life and biodiversity in sensitive habitats.”

[14] The document further states:

“... nitrogen dioxide and sulphur dioxide also can play a role in asthma, bronchial symptoms, lung inflammation and reduced lung function.”

[15] Similar conclusions can be found in the web page from the US Environmental Protection Agency, which states that:

“Health effects

Breathing air with a high concentration of NO₂ can irritate airways in the human respiratory system. Such exposures over short periods can aggravate respiratory diseases, particularly asthma, leading to respiratory symptoms (such as coughing, wheezing or difficulty breathing), hospital admissions and visits to emergency rooms.

Longer exposures to elevated concentrations of NO₂ may contribute to the development of asthma and potentially increase susceptibility to respiratory infections. People with asthma, as well as children and the elderly are generally at greater risk for the health effects of NO₂.

NO₂ along with other NO_x reacts with other chemicals in the air to form both particulate matter and ozone. Both of these are also harmful when inhaled due to effects on the respiratory system.

Environmental effects

NO₂ and other NO_x interact with water, oxygen and other chemicals in the atmosphere to form acid rain. Acid rain harms sensitive ecosystems such as lakes and forests.

The nitrate particles that result from NO_x make the air hazy and difficult to see through. This affects the many national parks that we visit for the view. NO_x in the atmosphere contributes to nutrient pollution in coastal waters.”

[16] Finally, Ms Anyadike-Danes draws the court’s attention to the decision of the coroner in the inquest into the death of *Ella Adoo Kissi-Deborah*, in London, who found:

“Air pollution was a significant contributory factor to both the induction and exacerbations of her asthma. During the course of her illness between 2010 and 2013, she was exposed to levels of nitrogen dioxide and particulate matter in excess of World Health 2 Organisation Guidelines. The principal source of her exposure was traffic emissions.

During this period there was a recognised failure to reduce the level of nitrogen dioxide to within the limits set by EU and domestic law which possibly contributed to her death...

There was no dispute at the inquest that atmospheric air pollution is the cause of many thousand premature deaths every year in the UK. Delay in reducing the levels of atmospheric air pollution is the cause of avoidable deaths.”

The Intervener – The Northern Ireland Commissioner for Children and Young People (NICCY)

[17] The application is strongly supported by the NICCY. The Office of Commissioner for Children and Young People was established by the Commissioner for Children and Young People (Northern Ireland) Order 2003 (“the 2003 Order”). The legislation charges NICCY with safeguarding and promoting the rights and best interests of children and young persons.

[18] The 2003 Order sets out various duties and obligations on the Commissioner. Under Article 6(3) of the 2003 Order:

“... In determining whether and, if so, how to exercise his functions under this Order, the Commissioner is to have regard to the United Nations Convention on the Rights of the Child (UNCRC).”

[19] Mr White argues on behalf of the Commissioner that the UNCRC is relevant to this application in several ways, first, under the Children’s Services Co-operation Act (Northern Ireland) 2015 (“the 2015 Act”) and second, as being relevant to the understanding of applicable ECHR Convention rights.

[20] The 2015 Act places a duty on “children’s authorities” in the exercise of its “children’s functions”, to co-operate with other children’s authorities and with other children’s service providers in the exercise of those functions. Such functions are defined as “functions which may contribute to the well-being of children and young persons (section 2(4)) and “well-being” which is defined, inter alia, as relating to children’s (a) physical and mental health; and (e) economic and environmental well-being (section 1(2)(a) and (e)).

[21] Section 1(4) provides that:

“In determining the meaning of well-being for the purposes of this Act, regard is to be had to any relevant provision of the United Nations Convention on the Rights of the Child.”

[22] The 2015 Act also placed an obligation (section (c) on the Northern Ireland Executive to devise a Children and Young Persons Strategy (CYPS) which has resulted in the Children and Young People Strategy (2020-2030).

[23] At page 74 of that strategy, reference is made to environmental well-being which is at the heart of this judicial review. The strategy provides:

“b. Environmental well-being

- 6.99 Our health and well-being are directly affected by the quality of the environment around us. Positive and negative impacts can occur throughout a lifetime from pre-birth, infancy and early childhood, all the way through the adult years to older age. Children can be particularly susceptible to harm from environmental hazards because their bodies are still growing and developing and any harm can last far into the future. For the same reason, any environmental improvements that protect health or encourage more healthy lifestyles will have long-lasting benefits.
- 6.100 The UNCRC says that all children and young people must be provided with a clean environment (Article 24) and the draft Programme for Government identifies key actions aimed at improving and protecting the environment which will benefit everyone in Northern Ireland, including children and young people.
- 6.101 Children and young people often have a greater appreciation and understanding of issues such as pollution, climate change, recycling or waste management than adults. The schoolchildren protests across the world to call for action on climate change, a movement inspired by Greta Thunberg, a 16-year-old Swedish student, highlighted that young people understand that it is their generation that will be most affected by the impacts of climate change. Priorities identified by children and young people during the co-design and consultation processes included green spaces, open spaces, clean and safe environments, liveable and connected communities and reduced traffic.
- 6.102 Other environmental exposures and risks may be less well understood by children and young people and it is the responsibility of the relevant agencies to raise awareness and take action to reduce the likelihood of lasting harm. Air pollution from vehicles and home heating, indoor air pollution, including exposure to second-hand tobacco smoke, noise, lead in drinking water,

home accidents and UV exposure from the sun and from the use of sunbeds, are all outcomes for children and young people. Children and young people experience (a) economic; and (b) environmental well-being examples of environmental factors that can impact disproportionately on the health of children and young people.”

[24] In this context, emphasising the importance of the issues raised, Mairead McCafferty, Chief Executive Officer of the NICCY swore an affidavit providing further detailed published material that touches on issues concerning the impact on children’s health and development of the excessive or raised levels of Nitrogen Dioxide NO₂ and Particulate Matter (PM). The issue of the statutory compliant testing of diesel engine cars and light vehicles has been a matter of concern for the office for some time.

[25] This is further reflected in correspondence between the NICCY and the Department.

[26] I do not propose to set out the detail of the publications referred to by Ms McCafferty, save to say that they support the contention of the applicant that there is evidence which supports a direct connection between children’s health outcomes and the levels NO₂ and PM in the atmosphere.

[27] Since that affidavit was sworn and as matters have progressed, a further affidavit was sworn on behalf of the NICCY by Chris Quinn on 4 March 2026 which referred to UK legal and scientific developments which have underscored the serious harms of air pollution to children.

[28] In particular, reference is made to the government settlement and apology in the *Ella Adoo-Kissi-Debra* case (see para [16] above). Reference is also made to a publication by the Royal College of Paediatricians on Child Health (RCPCH) arguing for a Clean Air Act to establish a legal right to clean air access across the UK and to adopt WHO 2021 guideline values.

[29] Reliance is placed on further publications by the RCPCH; a publication in the Medical Journal of Paediatric Pulmonology in February 2024; analysis in December 2024 by the University of Bristol’s National Child Mortality Database; and a publication in May 2025 by University College London on the increased risk of poor general health at age 17 associated with particulate matter.

[30] Finally, in December 2025, the House of Commons Library published a research briefing, to aid the work of MPs entitled “Air Quality: Policies, proposals and concerns.” It outlines “an overview of the current outdoor air quality legal framework, governance and enforcement mechanisms, forthcoming changes and

ongoing issues and concerns.” In summary it provides that “poor air quality” is considered by the government to be “the largest environmental risk to public health in the UK.”

[31] All of this material underscores the importance of the issues raised in this application.

The Department's approach to testing diesel emissions

[32] The history and background of the Department's approach to the testing of diesel emissions as part of MOT testing and initiatives in relation to transport is set out in lengthy affidavits from Jeremy Logan (Chief Executive of the Driver and Vehicle Agency (DVA)) and Jackie Robinson (Director of Public Transport Policy). The DVA is the agency within the Department which is responsible for conducting diesel smoke tests as part of MOT testing. In Mr Logan's affidavit of 4 April 2023, he points out that since 28 October 2022, no minister had been in post.

The relevant statutory provisions

[33] As previewed above, the DVA has a statutory duty to conduct annual roadworthiness tests pursuant to a combination of statute and regulations:

- (a) The Road Traffic (Northern Ireland) Order 1995;
- (b) Motor Vehicle Testing Regulations (Northern Ireland) 2003;
- (c) Goods Vehicles (Testing) Regulations (Northern Ireland) 2003;
- (d) Motor Vehicles (Construction and Use) Regulations (Northern Ireland) 1999;
- (e) Road Vehicles Lighting Regulations (Northern Ireland) 2000; and
- (f) The Road Vehicles (Display of Registration Marks) Regulations 2001.

[34] Articles 61-65 of the 1995 Order provide the powers for making regulations affecting the testing of cars and light good vehicles respectively.

[35] The Motor Vehicle Testing Regulations (Northern Ireland) 2003 and the Goods Vehicles (Testing) Regulations (Northern Ireland) 2003, provide for the periodic testing of cars and light good vehicles. Schedule 2, para 3, item 32 of the Motor Vehicle Testing Regulations and Schedule 3, Part I, item 16 of the Goods Vehicle Testing Regulations, provide for testing a vehicle's exhaust emissions in compliance with Regulation 74 (the emission of smoke, vapor, gasses, oil substances etc) of the Motor Vehicles (Construction and Use) Regulations (Northern Ireland) 1999. Regulation 74(21) of the Construction and Use Regulations provides for the use of a vehicle propelled by a compression ignition engine (ie a diesel engine),

provided it complies with Part II of Schedule 10 (as amended) of those Regulations; item 8(1)(a)-(d) refers to the diesel emissions tests parameters; item 8(2)(a) provides for the emissions test to be conducted in accordance with item 8.2.2 of Annex 1 of Directive 2014/45/EU.

The provision of vehicle testing services

[36] The DVA currently provides its vehicle testing services through a network of 15 driver and vehicle test centres that were built over 45 years ago. The network of test centres was originally designed to accommodate a capacity of around 500,000 vehicle tests per annum. As a result of increasing demand, the DVA now conducts in excess of one million vehicle tests annually since 2012 (with the exception of 2020 and 2021 because of the Covid-19 pandemic). As a result of some modernisation of the test centres and extended opening hours, it has been possible to meet this demand, but significant capital investment is required to meet the ever-growing demand.

Diesel engine emissions testing

[37] Mr Logan avers that on 1 March 2006 the DVA introduced an emissions test for private cars, light and heavy good vehicles and buses with a diesel engine. During this test a Diesel Smoke Meter is used to determine the density of the smoke from the exhaust whilst the engine is being revved. Whilst this test is designed to measure the density of the smoke emitted from a vehicle, it does not analyse any of the exhaust gases emitted.

[38] After the new tests started, it became apparent that the volume of smoke and fumes being generated was such that it constituted a health risk to staff.

[39] As a consequence, the DVA's health and safety manager delivered a presentation to the Private Finances Initiative (PFI Contractor), ROMAHA, the organisation which conducted the MOT tests.

[40] Ultimately, this resulted in the emission test for diesel cars and light good vehicles being suspended in June 2006. (The DVA did continue to conduct diesel emission tests on all heavy good vehicles, buses and vans over 3500kg as well as a visual check on the fumes being emitted and the condition of exhausts in all diesel vehicles.) In addition, in May 2019, the DVA introduced a new testable item into MOT testing so that if the Malfunction Indicator Lamp is illuminated (indicating a fault in the vehicle emission control systems) this is a major defect resulting in the issuing of a Notification of Refusal. It is noted that since this was introduced over 26,800 vehicles have failed this emissions controlled systems check.

[41] An Emission Test Development (EDT) project team was established with ROMAHA to identify and evaluate options for safely conducting the diesel smoke tests.

[42] On 30 June 2006, the project team produced a report outlining seven options for the safe reintroduction of the diesel smoke test. The EDT team recommended option 6, although ROMAHA preferred option 7.

[43] Ultimately, option 6 was trialled over a period of time at Lisburn and Newtownards Test Centres. Mr Logan avers that:

“However, due to the limitations of the PFI Contract, the impact on productivity, and the constrained infrastructure, these trials had not produced an agreed or satisfactory outcome that was able to address the health and safety concerns. The PFI Contract was subsequently ended in May 2013.”

[44] I pause here to note that there was a seven-year gap between the initial recommendation to trial option 6 and termination of the contract.

[45] In his affidavit, Mr Logan goes on to explain what occurred following termination of the PFI Contract. In short, the DVA initiated its “Business Transformation Programme” which sought to identify and implement infrastructure solutions that would enable the DVA to not only meet its compliance obligations but also provide the capacity, resilience and energy efficiency to meet its current and projected needs for the future.

[46] This programme resulted in the development of proposals for new test centres that would facilitate the safe and effective introduction of emissions testing for all vehicles. These proposals were initially presented to the then DfI minister in November 2015, but no decision had been taken when the Northern Ireland Assembly dissolved ahead of the elections for the new Assembly in May 2016.

[47] Following the elections, the DVA presented the proposals to the new DfI minister in September 2016, but no decision had been made by the time the Northern Ireland Assembly collapsed in January 2017.

[48] In September 2017, in the absence of a DfI minister, the DVA presented its proposals to the DfI Permanent Secretary and requested approval for one new centre to address urgent capacity issues being faced in the greater Belfast area. The Permanent Secretary approved the construction of a new test centre at a site at Hydebank in Belfast. The design of the new centre incorporated a specific area to facilitate the safe and effective introduction of emissions testing for all vehicles.

[49] The new test centre was initially scheduled to open in October 2022. However, the work was affected by the impact of the Covid-19 pandemic, and a revised programme of work was required. When Mr Logan swore his affidavit, it was anticipated that it would be likely to be open in the latter part of 2023.

[50] In February 2021, the new DfI minister was presented with a submission containing two network options - one proposing the building of one new test centre (in addition to Hydebank) to replace an existing test centre and refurbish the remaining existing test centres by installing new vehicle testing equipment and upgrading inspection pits and floor areas; and one proposing the building of a new network of tests centres split across two phases. Due to escalating pressures on capital budgets over the coming financial years, a potential move to biannual testing and the recent decision to ban the sale of new diesel cars from 2030, the minister decided at that time to approve the first option including the construction of one further new test centre at a site in Mallusk, Newtownabbey. Planning approval was obtained for that site in December 2022 and at the time of the swearing of Mr Logan's affidavit, work was ongoing to appoint a contractor. The test centre was scheduled to open in 2025.

[51] Whilst this will significantly improve the situation, Mr Logan concedes that the new centres will not be sufficient to meet the demand for diesel smoke testing for all cars and light goods vehicles which will require further investment in new test centres.

[52] Mr Logan points to a series of factors which have brought a degree of uncertainty to the longer-term demand for vehicle testing services for diesel emissions.

[53] With that said, a submission was presented to the minister during October 2022 outlining proposals for the development of the DVA network to address the immediate issues being faced. A decision was not taken before the minister left office on 20 October 2022.

[54] As a consequence, at the time of the swearing of Mr Logan's affidavit, the DVA was preparing a plan for submission to a minister or Permanent Secretary within six months to detail how it proposed to deliver fully compliant diesel smoke tests alongside the capacity required to meet the projected demand with further sites progressed on the basis of need, priority and available funding.

[55] Mr Logan, proceeds to outline developments in vehicle types and in emissions testing equipment. The effect of the introduction of Euro 5 (January 2011) and Euro 6 (September 2015) diesel engines was such that the DVA's view was that they would be unlikely to fail a diesel smoke test. Euro 5 and Euro 6 engines are the cleanest compression ignition vehicles on the public road. They require the fitting of a Diesel Particulate Filter (DPF) which capture up to 99% of all particulate matter emitted from these new diesel engines.

[56] At this stage in the judgment, I digress to refer to what has become known as the "diesel gate" scandal. In short, car manufacturers in Europe were using "defeat devices" to mask the levels of NOx emissions during official lab tests. The

Department deals with how it proposes to test for such emissions in subsequent affidavit evidence, referred to below.

[57] In addition to monitoring new vehicle types, the DVA has also monitored new roadworthiness testing technology and best practice. In late 2022, it began investigating the latest emerging technology for measuring emissions from Compressed Ignition Engine Vehicles, a particulate number (PN) counter. The latter has been reported to be highly effective in accurately measuring the level of particulate matter produced by vehicles fitted with a DPF and as such is suitable for testing the majority of diesel vehicles fitted with Euro 5 and 6 engines.

[58] In November 2022, the DVA visited sites in Great Britain to discuss and observe live demonstrations of particle counting equipment in operation. In December 2022, the DVA Strategic Management Board approved the purchase of two PN counters to support trials of the equipment. The DVA was currently awaiting delivering of this equipment at the time of Mr Logan's affidavit.

[59] Mr Logan avers that the introduction of a new PN test as part of the annual roadworthiness test would require the Department to conduct a statutory consultation process and, subject to approval, amend the current vehicle testing legislation.

[60] On 20 March 2023, the European Commission published a recommendation for member states intending to move to PN testing.

[61] It is the Department's position that an amendment to the 1999 Regulations to provide for PN testing would provide for a domestic compliant diesel emissions PN test, as an alternative to the current metered smoke test for Euro 5 and 6 vehicles. The amending regulations would be made under the Road Traffic (Northern Ireland) Order 1995 and would be subject to negative resolution procedure. It is estimated that if such a legislative change was made it would take an estimated 6-12 months to complete.

[62] Mr Logan's affidavit refers to the approach to emission testing in GB and European jurisdictions.

[63] Importantly, he described the next steps for the Department in para [50] of his affidavit to:

- “(a) Continue to conduct a fully compliant diesel emissions test on all heavy goods vehicles, buses and vans over 3500kg;
- (b) Continue to conduct a visual inspection of vehicle emissions and exhausts systems as well as a check of the engine Malfunction Indicator Lamp (MIL);

- (c) Complete the construction of new test centres at Hydebank and Mallusk, which will allow fully compliant emissions tests to be conducted in a safer operating environment;
- (d) Continue to review the DVA network and introduce further new test centres as appropriate, on the basis of need, priority and available funding;
- (e) Continue to work with DVA to share experiences and evaluate the suitability and effectiveness of the PN counter equipment in respect of the type of vehicles presented for vehicle testing. If deemed viable, the Department will seek to make the necessary legislative changes to introduce a new PN test, for suitable diesel vehicles, as part of the annual roadworthiness test to be rolled out across all DVA test centres; and
- (f) Develop a plan, within the next six months, detailing how the DVA will deliver fully compliant diesel emission tests."

[64] He refers to diesel smoke test outcomes and points out that out of 580,400 full vehicle tests on diesel cars approximately 7,540 (1.3%) failed on one or more elements related to emissions. The failure rate was 0.8% for those who had a Euro 5B or Euro 6 diesel engine fitted after January 2013. In relation to emission tests on heavy goods vehicles, buses and vans over 3500kg, 2.3% failed on one or more elements related to the emissions. Of the total tests 0.6% failed the diesel smoke test.

[65] Mr Logan provided a further affidavit on 11 August 2023, which was filed to address the applicant's submission that the Department ought to reintroduce diesel emission testing at all current test centres further to the option 7 which had been identified in the EDT report of June 2006, and the related suggestion that diesel smoke testing should have been carried out outdoors over the summer on a trial basis. The affidavit also set out the steps then being taken by the DVA to address the issue of diesel test emissions.

[66] In detailed correspondence the Department set out why it considered that option 7 was not appropriate, in particular, as a result of difficulties highlighted in the 2006 report. The main obstacle related to inclement weather and the requirement to provide PPE equipment.

[67] I have examined the reasoning of the Department in this regard and consider in the context of a judicial review it is not appropriate for this court to say that option 7 would be a better option than option 6. The basis for choosing option 6 and rejecting option 7 was clearly rational and based on multiple factors. There is no legal basis upon which the court could interfere with that decision.

[68] The affidavit also deals with the applicant's criticism of a lack of plans or proposals for testing the levels of NO_x as part of an annual MOT test. In this regard, Mr Logan refers to research which has concluded with respect to NO_x that it is extremely difficult to perform a meaningful metered NO_x test during a vehicle's MOT. This issue has been addressed by the European Commission requiring type approval standards for light duty vehicles and heavy-duty vehicles. These are to be found in Regulation (EC) No.715/2007 and Regulation (EC) No.595/2009. This type approval process has been retained in the United Kingdom subsequent to its exit from the European Union. An interim GB approval scheme was also introduced to enable the UK's type approval authority VCA, to issue provisional UK type approvals to manufacturers producing vehicles (or engines) under an EU vehicle (or engine) type approval issued by an EU appropriate authority. A permanent GB type approval scheme for road vehicles and their trailers and parts was introduced by SI 22/1273. This GB type approval scheme included appropriate transitional periods and is currently entirely based on the EU scheme as set out in retained EU law, with the same processes and technical requirements including EU road safety and environmental standards. Both the interim and permanent GB approval schemes implement the Northern Ireland protocol under which the UK agreed to continue to require EU type approval for vehicles and engines intended to be sold in Northern Ireland. Article 5(4) of the Protocol on Ireland/Northern Ireland, as amended, provides for the provision of Union law listed in Annex 2 to the Protocol to continue to apply in Northern Ireland. Included within the list in Annex 2 is the type approval regulation 2018/858/EU, and the related emissions regulations 715/2007 & 2009/595.

[69] The relevant regulations provide for the current testing for NO_x to include both dynamo metered testing in the lab and PEMS testing on road.

[70] It is asserted by Mr Logan that no other part of the UK, or other EU country, and to the best of his knowledge, any other country in the world carries out NO_x emissions testing as part of an annual MOT type test. He concludes that:

"In short, it is not correct that there is no NO_x emissions testing for vehicle used on Northern Ireland roads. Such testing is carried out by the Type Approval Authorities throughout Europe and beyond, and by the VCA for vehicles subject to the UK's type approval schemes, as an integral part of the vehicles type approval certification process, and prior to the vehicle's entry into service on UK/Ni roads. There is thereafter no such testing as an

annual MOT test for the reasons set out above. Such testing is not required by UK, NI or EU law.”

[71] Ms Robinson has sworn an affidavit setting out the steps taken by the Department addressing the reduction of emissions from transport.

[72] She recognises that the rapid decarbonisation of transport represents the single greatest challenge facing the planning and management of the transport network. It is recognised that doing so will take a concerted effort and will require a fundamental rethink of how resources are invested in the future.

[73] She points to the Environmental Mission Statement published in March 2023 which outlines the Department’s commitment to maintain, restore or enhance the natural environment as part of its co-activities.

[74] In terms of transport, the affidavit refers to a document entitled “**Planning for the future of Transport: Time for Change,**” which was published by the Department in June 2021. She refers to the Department’s input to the Northern Ireland Energy Strategy published in December 2021 which builds on the planning for the future Time for Change document with a commitment to publish a local transport strategy. This will be delivered through a new regional transport strategy. The focus of the strategy will set out the change necessary to deliver against carbon targets linked to the Climate Change Act (Northern Ireland) 2022. Much of the strategy envisaged introducing measures to support modal shift of public transport – walking and cycling. In 2012, the Department published a Regional Development Strategy 2035, published in 2012 which commits the Department to protecting and enhancing the environment for its own sake, taking actions to reduce our carbon footprint and facilitate adaption to climate change, to reducing greenhouse gas emissions from transport and to reducing air pollution.

[75] Representatives of the Department also sit on the Clean Air Strategy Steering Group.

[76] She refers to a series of initiatives designed to address climate change, referring to development of greenways, a cycling network, reorganised traffic management within Belfast City Centre, the development of bus lanes, a £2.4m e-car project, the EV Infrastructure Task Force, the introduction of a zero emission vehicle (ZEV) mandate, park and ride facilities.

[77] She refers to the planning system in Northern Ireland and avers that this plays a positive role in mitigating adapting to climate change. She refers to a strategic planning policy statement (SPPS) and supporting supplementary guidance which provided guiding principles for planning in Northern Ireland which seek to reduce carbon emissions and encourage the need to mitigate and adapt to climate change.

[78] The SPPS identifies several measures that the planning system should consider to reduce carbon emissions and encourage climate change mitigation and adaptation. Policies include transportation, renewables, housing and settlements and town centres and retailing.

[79] In respect of policy for housing the SPPS aims to contribute to more sustainable patterns of residential development. New permitted development rights for the installation of domestic microgeneration equipment including solar panels, ground and water source, heat pumps and biomass, and fuel storage were introduced in April 2011. These development rights were further relaxed in July 2023 to make it easier for energy consumers and providers to utilise renewable energy technologies, such as air source heat pumps, without the need for planning permission.

[80] In December 2020, the Department introduced new permitted development rights for the installation of wall-mounted electric vehicle charging points in off-street parking areas, for the installation of freestanding electric vehicle charging points in off-street parking areas and for the replacement of freestanding electric vehicle charging points in on-street parking areas.

[81] In terms of public transport, the Department and its arm's length body, Translink, have invested in decarbonising the bus fleet following the successful introduction of eight C-battery Electric Vehicles (BEV) and 23 Fuel Served Electric Vehicles (FSEV) to Belfast Metro operations in 2022. Additional vehicles are currently being introduced to Foyle Metro and Causeway routes. A further 100 BEVs have been ordered and it was anticipated that they would be introduced across Belfast Metro and Ulsterbus during 2024.

[82] She avers that there has been significant progress in relation to bus decarbonisation with an investment of circa £233m. The Belfast Metro service will be operated by zero emission vehicles by 2030.

[83] She points out that as a result of the NI Energy Strategy, the Department has undertaken to work on an all-island basis to develop the infrastructure for alternative fuels such as hydrogen and biomethane, working with partners to support vehicle and refuelling technology trials.

[84] Translink has also committed to ensuring the most efficient use of the rail network with the recent introduction of various projects.

[85] In April 2021, the All-island Strategic Rail Review (AISRR) was launched with a view to considering how the rail network across the island could contribute to the decarbonisation of the island's transport systems, promote sustainable connectivity into and between major cities, enhance regional accessibility, and support balanced regional development.

[86] An AISRR report was published alongside the associated strategic environment assessment for the purposes of consultation in July 2023.

[87] It was anticipated that the final report will be published after the consultation period ending on 29 September 2023.

[88] The report makes 30 recommendations which, if implemented, will see the rail fleet across the island of Ireland completely decarbonised and it is hoped that passenger numbers will double.

[89] Finally, Ms Robinson avers that the Department has been working closely with DAERA on matters pertaining to air quality and was a key contributor to the development of elements of the DAERA overarching Clean Air Strategy Discussion Document (CASDD) providing up-to-date references, content and expertise.

[88] As part of the development of a climate action plan for Northern Ireland, the Department will explore the benefits of procuring and commissioning traffic counters at a selected number of air quality monitoring sites, for the purposes of gathering data in relation to traffic volumes and to gauge their suitability for the purposes of noise mapping. Twelve new counters are being considered for co-location.

[89] There can be no doubt that the impact of climate change represents a major challenge to the Northern Ireland Executive. The Northern Ireland Assembly has set very demanding objectives under the Climate Change Act 2022. All Departments have a role to play in achieving those objectives. The matters referred to in Ms Robinson's affidavit are important contributors to those objectives. That said, this case, of necessity, focuses on the specific obligations of the Department in respect of diesel smoke tests. From the affidavit evidence of Mr Logan, it is clear that the Department is alive to its obligations in this regard, and he has set out the plans of the Department as of April 2023 to meet its obligations.

The need for ongoing supervision by the court

[90] At the initial hearing it was abundantly clear that the Department was in breach of its obligations in relation to diesel emission tests. The affidavit evidence to which I have referred set out the steps the Department proposed to take to ensure compliance. Whilst there remained obvious uncertainties as to how matters would progress, as is clear from para [63] of the affidavit referred to above, positive steps were in train. In such circumstances, an obvious dilemma arose in terms of what relief, if any, the court should grant. Rather than rush to judgment, the court, in effect, adopted a "supervisory role" and sought further affidavit evidence to see how matters progressed.

[91] In response to the issues raised at the initial incomplete hearing on 21 September 2023 which resulted in an amended Order 53 Statement of 18 October

2023 the respondent submitted a further affidavit from Mr Logan dated 14 February 2024 “to update the court on progress the Department has made in developing proposals for the reintroduction of a fully compliant diesel emissions test for cars and light vehicles.”

[92] An important feature of the approach of the Department is its ongoing investigation of the latest technology for measuring emissions using PN. The Department has purchased two new PN counters to support trials of the equipment.

[93] Mr Logan points to recent advancements in diesel emissions testing which highlighted PN testing as a more suitable test method, particularly for the younger diesel vehicles. On 20 March 2023, the European Commission published Recommendation C(2023) 1796 on PN testing which recommended PN testing for younger vehicles.

[94] Importantly, in para [9] of his affidavit Mr Logan sets out the way forward on this issue in the following way:

“9. It is now proposed that diesel emissions testing for all cars and light vehicles can be reintroduced by implementing a combination of PN testing for younger vehicles **and diesel smoke testing for older vehicles at newly constructed test centres**, where the facilities would be available to carry out such testing. A submission outlining both parts of this proposal was provided to the Permanent Secretary on 24 January 2024, recommending that he:

- (a) Note the contents of this submission;
- (b) Agree that it is in the public interest to reintroduce a fully compliant diesel emissions test for cars and light vehicles;
- (c) Agree that this matter engages with the Northern Ireland (Executive Formation Etc) Act 2022;
- (d) Note the request for funding for the two proposed new test centres at Campsie and Enniskillen is included as part of the overall capital programmes prioritisation/10-year profiling exercise in the Recovery Plan; and
- (e) As a senior officer of the Department, take a decision under EF Act to:

- (i) develop detailed proposals and conduct a statutory consultation for the introduction of PN testing for newer vehicles across the agency's test centre network as soon as possible;
- (ii) develop detailed designs for new test centres at Campsie and Enniskillen, complete a business case, submit planning applications, and prepare tender documentation to enable the procurement process to commence, subject to a further decision by the appropriate decision-maker."

[95] He identifies the next steps as follows:

"11. The next steps will now include:

- Continuing to PN trials to obtain higher volumes of data, particularly for younger vehicles;
- Testing different types of PN testers and identify an appropriate quality and certification standard;
- Conducting H and S risk assessments and identify/explore/address potential impacts;
- Determining the impact on existing vehicle test times and carry out a more detailed analysis of the potential impact on testing capacity;
- Engaging with existing vehicle test equipment providers regarding software integration and develop alternative recording and reporting processes as necessary;
- Progressing procurement and contractual arrangements including future maintenance and calibration of the equipment;
- Continuing to engage with all jurisdictions including GB; and
- Considering the consultation and legislative processes.

12. Under this plan Schedule 10 to the Motor Vehicles (Construction and Use) Regulations (Northern Ireland) 1999 will require amendment to produce PN testing. It is anticipated that the said amendment, which can be made by way of the negative resolution procedure, could take

up to 12 months to complete, including a consultation on the proposed changes.”

[96] Referring to his previous affidavits and the business transformation programme which sought to identify and implement infrastructure solutions and enable the DVA to meet its compliance obligations he referred to the development of proposals for new test centres. As a result, in September 2017 the DfI Permanent Secretary approved the construction of a new test centre at Hydebank and in February 2021 the DfI Minister approved the construction of a further new test centre in Mallusk.

[97] Whilst it was hoped that the new test centre at Hydebank would open in 2024 the court has been informed via media reports that it would not open until mid-2025 at the earliest. Based on those reports the delay arose from difficulties in relation to the performance of the contract. In any event, Mr Logan averred that once these two new centres were fully operational, they will provide the capacity to test over 200,000 additional vehicles per annum.

[98] He acknowledged that further investment in new test centres would be required to provide sufficient capacity to meet the demand for the diesel smoke test for older vehicles. Preparatory work on two new sites already owned by the DVA at Campsie and Enniskillen had commenced. The Permanent Secretary had approved the development of detailed designs for these two new test centres, the completion of a business case, the submission of planning applications and the preparation of tender documentation to enable the procurement process to commence. It was estimated that this work would take approximately six months to complete.

[99] The cost of these two further test centres was estimated at £30m. A further decision by the minister will be required before the Department could commit to constructing these centres.

[100] It was anticipated that further proposals would be provided within six months.

Further affidavit evidence from Mr Logan

[102] The court remained conscious of the difficulties in making mandatory orders in this application. Mr Logan’s affidavit of 14 February 2024 demonstrated that progress had been made by the Department since 4 April 2023 and that concrete plans were in place. That said, the implementation of those plans remained an open question, not least as they were dependent on approval for significant capital investment and other political decisions. Therefore, the court kept the matter under review and sought further evidence as to the progress of the Department’s plans.

[103] On 8 May 2025, Mr Logan swore a further affidavit to update the court on progress the Department has made in developing proposals for the introduction of a fully compliant diesel emissions test for cars and light vehicles.

[104] He summarised the proposals outlined in his third affidavit of 14 February 2024.

[105] He avers that following the return of ministers after the re-establishment of the Executive, the DVA, with the approval of the Minister for Infrastructure, launched an eight-week public consultation, “Changing the Exhaust Emissions Test for Light Vehicles with a Modern Diesel Engine”, on 24 July 2024.

[106] The affidavit sets out details of the consultation document, particularly focussing on the European Commission’s recommendation for a diesel emissions PN test for younger vehicles as an alternative to the current diesel smoke test. It was pointed out that PN testing had been introduced in Belgium in July 2022, and in the Netherlands, Switzerland and Germany in 2023.

[107] The proposal was set out in detail including confirmation that subject to the outcome of the consultation “we will seek ministerial approval to progress an amendment to the Motor Vehicles (Construction and Use) Regulations 1999.”

[108] A synopsis of the responses was published on 18 November 2024. It was noted that support was expressed for the proposals by the Alliance Party, Logistics UK and the NICCY – the intervener in these proceedings.

[109] It was noted that 82% of individual respondents failed to support the introduction of a new test. This may be because of fears of increased MOT failure rates, associated vehicle repair costs and a concern that new tests would help stifle the illegal practice of bypassing the vehicle’s diesel particulate filter and emissions control system.

[110] After presentations to the minister on 14 January 2025, he agreed to progress the implementation of a PN emissions test for modern light diesel vehicles, subject to an annual MOT testing and provide for light and heavy modern vehicles to undergo similar PN emissions during roadside enforcement checks.

[111] At that stage Mr Logan averred that the DVA was progressing a planned introduction of PN testing which as previously indicated would require an amendment to Schedule 10 of the Motor Vehicles (Construction and Use) Regulations (Northern Ireland) 1999, made under powers contained in the Road Traffic (Northern Ireland) Order 1995. These amendments would be subject to negative resolution, and it was anticipated “may take 6-12 months to complete.”

[112] Up to 8 October 2024, the DVA was in contract with Worldwide Environmental Products Inc (“WEP”) for the provision of new vehicle testing

equipment and new DVA test centres and the future replacement of equipment at existing test centres. Unfortunately, a legal issue arose in relation to the contract resulting in the issuing of legal proceedings which were ultimately disposed of by consent on 11 April 2025 following the parties' agreement to terminate the contract by mutual agreement.

[113] The DVA re-advertised a new Open Procurement Competition for vehicle testing equipment, ID hardware and associated software – “the vehicle testing solution” – 30 April 2025. It was anticipated this contract would include provision of PN testing equipment.

[114] The estimate at that stage was for a 5-6 month procurement and evaluation period with a further 6-9 months to enable new contractors to supply, install and commission vehicle testing equipment. Based on this timeline both Hydebank and a second new test centre at Mallusk, where construction was due for completion in Autumn 2025, could open for vehicle testing in mid-2026.

[115] It was also averred that the DVA continued to work with its external design team to finalise the designs, costs and planning applications for the new test centres in the Campsie Industrial Estate and in Enniskillen.

[116] It was estimated that the cost of these further test centres would be £30M and that DVA will likely be required to borrow capital from the Department's capital budget. Costs and funding arrangements will be further developed as part of the business case process which will then be presented to the minister for consideration of approval.

[117] It will be seen that a familiar pattern emerges. The Department has in place proposals to address the issue, but these have been frustrated by a combination of political inactivity, contractual disputes and requirements for funding.

[118] Unsurprisingly, an affidavit sworn by Laura Neil, a solicitor employed by the applicant, highlights the delays.

[119] She refers to the delay in the timeframe for legislative amendment to introduce PN testing and points out that in his affidavit of 14 February 2024 Mr Logan averred that the proposals at that stage could take up to 12 months to complete.

[120] In the affidavit of May 2025, which was 15 months later and eight months after the completion of the consultation period for the proposed changes, the respondent still anticipated a timeframe of up to 12 months for legislative amendment even though the consultation for the proposed changes had already been completed and the minister had decided in January 2025 to progress implementation.

[121] She also points to the further delay in the timeframe for the new test centres at Hydebank and Mallusk. On 14 February 2024, it was anticipated that Hydebank would open later that year and the new centre at Mallusk in 2025. As of 7 May 2025, it was anticipated that construction would be completed by Autumn of 2025 and could open for vehicle testing in mid-2026. Again, Ms Neil points to the further delay in the timeframe for the new test centres at Campsie and Enniskillen. On 13 February 2024 it was hoped that the test centres could be completed by the end of 2026, something which appears unlikely.

[122] She says that Mr Logan is selective in his quotation from NICCY's response to the consultation process on PN testing. The response indicated that the author would "require reassurance that with both these centres open that they would have the capacity to conduct the diesel emissions test on the 40% of the remaining older vehicles as the proposals for two further new test centres in Campsie and Enniskillen are subject to further consideration and funding availability."

[123] The affidavit also exhibited a report dated June 2024 from the National Centre for Social Research which pointed out that it continues to be the case that there is a higher proportion of diesel car ownership in Northern Ireland than in England, Scotland and Wales. The proportion of diesel car ownership has continued to increase in Northern Ireland with a 2% increase from 53.2% in 2015 to 55.2% in 2023.

[124] To keep the matter under review, the court required the Department to file a further affidavit which was received on 4 February 2026.

[125] Again, Mr Logan provides an update since swearing his previous affidavit. In relation to the submission of tenders for the "vehicle testing solution" he confirms that the procurement process has been completed and a notice of intention to award the contract to NAHA Ireland Ltd was published on 3 December 2025 to which no objections were received during the standstill period. DVA expects the contract to be signed "shortly."

[126] He avers that thereafter "as a priority" the DVA will work with the new contractor to agree "a timeline for the supply, delivery, installation and commissioning of new equipment at Hydebank test centre."

[127] He confirms that construction of a second new test centre at Mallusk was successfully completed in December 2025 and that the DVA expects the new test centres at Hydebank and Mallusk to be open for vehicle testing in 2026. No date or month for 2026 was proffered.

[128] The vehicle testing solution contract will include the provision to supply PN testing equipment. It is averred that the DVA is progressing with its preparations for the introduction of PN testing, including specifying the equipment specifications and calibration requirements, updating associated IT support systems, and assessing the likely impact on customers. A delegation from the DVA visited a vehicle testing

facility in Belgium in November 2025 to view live PN emissions testing, so as to better understand the challenges associated with its implementation.

[129] In relation to legislative amendments, instructions have been passed to the Department's legislation branch, and an initial draft of the amending regulations has been developed. The respondent will release further public communications when the procurement of the PN testing equipment has been completed and the commencement date for the required amending regulations has been confirmed.

[130] On 15 August 2025 DVA presented a submission to the minister to provide an update on work to date and outline proposed next steps to improve compliance, capacity, resilience and environmental performance across its network of test centres.

[131] DVA officials met with the minister on 9 September 2025 to discuss the proposed next steps, which include plans to construct new test centres at Campsie and Enniskillen and purchase additional land and develop detailed proposals for three further new test centres. The minister has requested further details on funding proposals, in particular arrangements to borrow capital from the Department's capital budget.

[132] The designs, costs and planning applications for the proposed new test centres at Campsie and Enniskillen have now been completed. A further submission has been drafted and will be presented to the minister for consideration.

[133] This affidavit resulted in a further affidavit from Laura Neil pointing again to the ongoing delay in relation to promises that have been made on previous occasions. She observes that there remains no commitment in respect of the timeframe for completion, even if all plans suggested are approved and funded by the Department.

[134] It is argued that the evidence indicates that the proposed test centres at Campsie and Enniskillen, even if approved and funding secured, will not be constructed for years into the future and even when they are completed the Department still will not be in compliance with its statutory duties and must rely on three other centres being constructed at Ballymena, Cookstown and Newry with the plans for those proposals being at an even earlier stage.

[135] She avers that in the meantime ongoing harm from diesel emissions will continue. She exhibits an extract from the draft Northern Ireland Climate Action Plan, a report from the Centre for Research on Energy and Clean Air entitled "Health Impacts of Diesel Vehicles Suspected of using Prohibited Defeat Devices in the EU and UK, May 2025", which point to the ongoing concerns re emissions and the requirement for the "immediate intervention" by governments and other manufacturers to include investigating and recalling vehicles suspected to be using

illegal defeat devices. Ms Anyadike-Danes argues that there has been a complete failure by the Department to address the issue of these devices.

[136] She argues that notwithstanding what she describes as the egregious delay to date, the Department's most recent affidavit does not demonstrate how it will secure compliance with its statutory duties. Rather, it puts forward proposals, some of which are at an early stage, as to how it could theoretically secure compliance, if proposals are approved and funding is secured at an unidentified point in the future.

Relief

[137] What is the appropriate order the court should make in relation to the Department's admitted ongoing failure to properly test diesel emissions?

[138] Judicial review is a discretionary jurisdiction. This is entrenched, elementary doctrine.

[139] As Professor Gordon Anthony put it in his authoritative textbook "Judicial Review in Northern Ireland" – 3rd Edition at para 3.74:

"Where an applicant successfully makes an argument of unlawfulness in respect of a public authority's actions/inactions, he or she may be granted the remedy or remedies sought in their Order 53 Statement. The word 'may' is here to be emphasised, as the remedies in judicial review are discretionary."

[140] The Department has argued in its submissions that it is not necessary for the court to intervene in this matter. That is because it has recognised its obligations and is taking steps to comply with those obligations. It is argued that to intervene, the court would be overstepping its constitutional boundaries. The court rejects this submission. What is at issue here is the Department's failure to comply with its legal obligations. In such a scenario, I consider that the court should provide relief. The question remains what that relief should be.

[141] What is being sought in this application is an order of mandamus, that is a coercive remedy which has the effect of requiring the decision-maker to perform a public law duty which, in effect, entails that a failure to comply with it carries with it punitive implications.

[142] Grants of mandamus are rare in the decided cases. Scofield J analysed the legal principles comprehensively in *Napier v First Minister of Northern Ireland and others* [2021] NIQB 120 (cited with approval by the Court of Appeal in *In the Matter of an Application by Bridie Brown for Judicial Review* [2025] NICA 16), in the following way:

“The grant of mandatory orders in judicial review

[56] An order of mandamus has been described by Lord Scarman as ‘the most elusive of the prerogative writs and orders’ (*R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, at 650). To similar effect, McCloskey J in *R (Sultana) v Secretary of State for the Home Department* [2015] UKUT 00226 (IAC) observed that ‘the remedy of a mandatory order is rarely granted.’ Although there is a conceptual distinction to be made between an order of mandamus compelling the carrying out of a public law duty and a mandatory injunction, which may also be granted in judicial review (see section 18(1)(e) of the Judicature (Northern Ireland) Act 1978) and which might be considered a more flexible remedy, the principles on which either of these mandatory orders will be granted in the present context are similar.

[57] There are a number of reasons why mandatory orders are comparatively rare in judicial review. The first is that, where declaratory relief has been granted (as it was in this case), responsible public authorities can generally be expected to comply with their legal obligations as explained by the court. In the landmark case of *M v Home Office* [1994] 1 AC 377 concerning the powers of the court in respect of Ministers and government departments acting on behalf of the Crown, Lord Woolf said this (at 422-423):

‘The fact that, in my view, the court should be regarded as having jurisdiction to grant interim and final injunctions against officers of the Crown does not mean that that jurisdiction should be exercised except in the most limited circumstances. In the majority of situations so far as final relief is concerned, a declaration will continue to be the appropriate remedy on an application for judicial review involving officers of the Crown. As has been the position in the past, the Crown can be relied upon to co-operate fully with such declarations.’

[58] For this reason, as noted in my earlier judgment (see paragraph [36]), courts often prefer to grant a

declaration that a body is under a duty to perform a certain act and then rely upon the authority concerned to carry out its duty: see also Supperstone, Goudie and Walker, *Judicial Review* (6th edition, 2017, LexisNexis) (“Supperstone”), at paras 16.47 and 16.66. However, there are a variety of other principles which operate to limit the grant of mandatory orders – whether by way of mandamus or final injunctions – in judicial review. These are evident from a consideration of some of the leading texts in this field, including Supperstone (supra); Auburn, Moffett and Sharland, *Judicial Review Principles and Procedure* (2013, 17 OUP) (“Auburn”); Fordham, *Judicial Review Handbook* (7th edition, 2020, Hart) (“Fordham”); Woolf, Jowell, Donnelly and Hare, *De Smith’s Judicial Review* (8th edition, 2018, Sweet & Maxwell) (“De Smith”); and Lewis, *Judicial Remedies in Public Law* (6th edition, 2021, Sweet & Maxwell) (“Lewis”), several of which were opened to me at the hearing and all of which I have considered on this issue. The references below to the relevant passages from these texts are obviously not exhaustive.

[59] The following basic principles are evident from the learning on the topic, each of which operates as a guide, subject to the circumstances of the particular case under consideration:

- (1) **Rarity in general:** As noted above, mandatory or coercive orders are rare in judicial review. The just result is more often achieved by the grant of a constitutive remedy such as a quashing order and/or an educative remedy by way of declaration. Nonetheless, mandatory orders remain an important tool within the courts’ toolkit to do justice in an appropriate case and where there is a proper basis for compelling a particular action on the part of the respondent.
- (2) **Need for clarity as to obligation:** Mandatory orders are most appropriate in cases where the relevant public authority has a clear statutory duty to do a certain thing (see Supperstone, para 16.47; and Lewis, para 6-051). This means that, in practice, the situations where the courts are willing and able to order a public authority to do a specific act are limited. A mandatory order is most

suitable where the obligation to act is clear and the act to be performed is also clear. That is not to say, however, that an implied statutory duty may not be enforced by way of mandatory order where the court has identified the relevant obligation.

- (3) Rare where discretion involved: Generally, a mandatory order will not be granted compelling a particular outcome where the public body in question enjoys a discretion – unless (exceptionally) the discretion may only lawfully be exercised in one particular manner in the circumstances of the case – although an order may be granted securing performance of the duty to exercise the discretion (see Supperstone, para 16.47; and Auburn, para 30.73).
- (4) Need for clarity as to act required: A mandatory order will also not normally be granted unless the court can specify precisely what the public body needs to do in order to perform its duties; and such an order should be framed in terms which make it clear what the public body is required to do and also therefore to allow a clear assessment to be made as to whether the order has been complied with (see Lewis, para 8-009; and Auburn, para 30.08). That is not to say that a court may not, for instance, grant an order requiring a particular purpose to be achieved within a particular timescale (where there is a public law obligation to achieve the purpose in question); but the court will be more cautious as the complexity of the result to be achieved or the steps required for that purpose increases.
- (5) Presumption against continuing supervision: In general, a mandatory order will not issue to compel the performance of a continuing series of acts which the court is incapable of superintending (see De Smith, para 18-036). Nor will a mandatory order be granted if it will require close supervision by the court to ensure that it is being observed, or ongoing monitoring of the exercise of the public body's functions (see Lewis, para 8-009; and Auburn, para 30.08).

[60] In summary, the simpler, cleaner and crisper the act to be required on the part of the public authority, the more likely it is that a mandatory order will be granted. This reflects the overarching requirements both of legal certainty and of ensuring that the court remains within the proper constitutional bounds of its own role, namely to enforce the law but generally to leave the substance of decision-making to the body to whom that has been entrusted by Parliament.”

[143] Since that judgment, Lord Reed in the case of *Craig v HM Advocate* [2022] UKSC 6 at para [46] reminded the court of the proper constitutional boundaries when he said:

“[46] The Government’s compliance with court orders, including declaratory orders, is one of the core principles of our constitution, and is vital to the mutual trust which underpins the relationship between the Government and the courts. The courts’ willingness to forbear from making coercive orders against the Government, and to make declaratory orders instead, reflects that trust. But trust depends on the Government’s compliance with declaratory orders in the absence of coercion.”

[144] Applying these principles, is it appropriate to make an order for mandamus in the circumstances of this case?

[145] Recognising the potential difficulties that arise in making an order for mandamus in this case, the court invited the applicant to submit a draft order it says would be appropriate.

[146] In response the applicant provided a “draft final order” seeking various declarations and on the question of mandamus suggested the following:

“5. It is ordered that, no later than [a specified date in the order within 3 months], the respondent must file with the court a plan (“plan”) which complies with the following requirements:

(a) The plan must identify the steps the department will take in order to achieve compliance with its statutory obligations to test diesel emissions as part of MOT testing pursuant to Regulation 12 of the Motor Vehicle Testing Regulations (Northern

Ireland) 2003 and Article 61 of Road Traffic (Northern Ireland) Order 1995.

- (b) The plan must identify a specific date or period by which the department will comply with its statutory obligations to test diesel emissions as referred to at (a) above (“a specified date”).
- (c) In light of the serious harm that diesel emissions cause to the environment and human health, the specific date must be as soon as reasonably practicable and no later than (a date four months from the filing of “plan” with the court)."

[147] This was an attempt to deal with the issues that would arise if making an order in terms of the original Order 53 Statement simply compelling the Department to reintroduce full diesel emission testing “as soon as possible.”

[148] The key authority relied upon by the applicant is *R(Client Earth) v Secretary of State for the Environment, Food and Rural Affairs case C404/13* EU: C2014: 2382 [2015] UKSC 28.

[149] This case had a complicated and lengthy history which is well set out in the headnote in the following terms:

“Parliament and Council Directive 2008/50/EC on ambient air quality and cleaner air for Europe provided, by Article 13(1) and the second sub-paragraph thereof, that the limit values for nitrogen dioxide specified in Annex XI might not be exceeded from 1 January 2010, the date specified in the Annex, within a member state’s designated zones of agglomerations. Article 22 provided a procedure for postponement of the compliant state by a maximum of five years where acute pollution problems existed, on condition that an air quality plan was established in accordance with Article 23 for the zone or agglomeration to which the postponement would apply, which demonstrated how conformity with the limit values would be achieved before the new deadline. Such plans would be published to the European Commission. Article 23 imposed a general duty on member states to prepare air quality plans for areas where the limit values were not met and, by the second sub-paragraph of Article 23(1), in cases where the attainment deadline had already

expired, the plans were required to set out appropriate measures, so that the exceedance period could be kept 'as short as possible.'

In the course of 2010, one or more of the limit values established for nitrogen dioxide was exceeded in 40 of the 43 zones or agglomerations within the United Kingdom. The United Kingdom submitted applications under Article 22 of the Directive to the European Commission for time extensions for some of the zones in question but made no such application in relation to 16 zones, in respect of which the air quality plans projected that the limit values would be complied with after 2015. The claimant, an environmental non-governmental organisation, brought a claim for judicial review seeking, inter alia, an order requiring the Secretary of State to revise the plans to show how the nitrogen dioxide limit values would be achieved as soon as possible, and by 1 January 2015 at the latest, as required by Article 22 of the directive. The judge dismissed the claim and the Court of Appeal upheld that decision. On the claimant's subsequent appeal, the Supreme Court held that, on the basis of concessions made by the Secretary of State, the claimant was entitled to a declaration that the United Kingdom was in breach of its obligation under Article 13 for the 16 zones in issue, but stayed the question of what relief, if any, should be granted, pending a reference to the Court of Justice for a preliminary ruling on questions concerning, inter alia, the interpretation of Articles 13, 22 and 23 of the Directive. By the time of the resumed hearing in the Supreme Court, more than five years had expired since the compliance deadline of 1 January 2010."

[150] The questions referred to by the Supreme Court were as follows:

- "(i) Where, under the Air Quality Directive (2008/50/EC) ('the Directive') in a given zone or agglomeration conformity with the limit values for nitrogen dioxide was not achieved by the deadline of 1 January 2010 specified in Annex XI of the Directive, is a member state obliged pursuant to the Directive and/or Article 4 EU to seek postponement of the deadline in accordance with Article 22 of the Directive?

- (ii) If so, in what circumstances (if any), may a member state be relieved of that obligation?
- (iii) To what extent (if at all) are the obligations on a member state which has failed to comply with Article 13 affected by Article 23 (in particular the second paragraph)?
- (iv) In the event of non-compliance with Articles 13 or 22, what (if any) remedies must the national courts provide as a matter of European law in order to comply with Article 30 of the Directive and/or Article 4 EU or 19 EU?"

[151] In answering the questions, the Supreme Court complained that the CJEU had reformulated questions (i) and (ii) whereby in the words of Lord Carnwath in the judgment of the court it "has introduced a degree of ambiguity which it had been hoped to avoid in the original formulation. This has had the unfortunate effect of enabling each party to claim success on the issue."

[152] That said, for the reasons explained in the judgment, the court felt it unnecessary to make a final ruling on the difference identified or to make a further reference for that purpose.

[153] Importantly, for these purposes the CJEU said in relation to question (iii) that where a member state has failed to comply with the requirements of the second sub-paragraph of Article 13(1) of Directive 2008/50 and has not applied for a postponement of the deadline as provided for by Article 22 of the Directive, it is for the national court having jurisdiction, should a case be brought before it, to take, with regard to the national authority, any necessary measure, such as an order in the appropriate terms, so that the authority establishes the plan required by the Directive in accordance with the conditions laid down by the latter.

[154] By the time the Supreme Court reconsidered the matter in 2015, five years had passed since its original consideration. At that time the latest information, published in July 2014, showed a significant deterioration since the case was last before the court.

[155] The evidence before the court demonstrated that the main reason for this failure and, indeed, that of 17 other member states was the failure to reduce NOx emissions from Euro 5 diesel cars type-approved since 2009.

[156] It was accepted by the Secretary of State that the air quality plans which were before the court in 2011 would need to be revised to take account of new information and of new measures to address the problems.

[157] One of the issues for consideration by the Supreme Court is whether the Secretary of State's proposals should be taken on trust or should be subject to some measure of court enforcement.

[158] The remaining issue therefore for the court was what if any orders it should make in order to compel compliance with the directive.

[159] In light of the CJEU's answer to the reference compliance was not solely a matter for the Commission.

[160] The court determined that the "critical" breach was of Article 13, not Article 22 or 23, which are supplementary in nature. The court was in no doubt as to the seriousness of the breach, which had been continuing for more than five years, nor as to the responsibility of the national court for securing compliance.

[161] The court noted that during the five years of breach the prospects of early compliance have become worse, not better. The Secretary of State accepted that new measures had to be considered, and a new plan prepared for submission to the Commission. The court said at para [30]:

"Further, without doubting the good faith of the Secretary of State's intentions, we would in my view be failing in our duty if we simply accepted her assurances without any legal underpinning."

[162] Since the Secretary of State accepted that new air quality plans had to be prepared but was unable to give an undertaking to that effect given the restrictions imposed on Government business during the election period, a mandatory order would be granted requiring new plans complying with Article 23(1) to be prepared and delivered to the Commission not later than 31 December 2015. The court acknowledged at para [31] that:

"In normal circumstances, where a responsible public authority is in admitted breach of a legal obligation, but is willing to take appropriate steps to comply, the court may think it right to accept a suitable undertaking, rather than impose a mandatory order."

[163] The court was clearly concerned to ensure that the new Government "whatever its political complexion, should be left in no doubt as to the need for immediate action" to address the issue. It was felt that the only realistic way this could be done was by way of a mandatory order.

[164] The court recognised that other issues may arise in connection with the new plans, in particular in relation to the requirement to achieve the relevant values so that the exceedance period could be kept "as short as possible". The interpretation

of these words may call for resolution by the court to avoid further delay. The court determined this was a “further factor which makes it desirable that the new plan should be prepared under a timetable approved by the court, with liberty to apply for the determination of such issues as and when they arose in the course of the production of the plan, without the need for the expense and delay of new proceedings.”

[165] In reliance on this authority the applicant argues that the situation in the *Client Earth* case is analogous to the current situation in this jurisdiction. It is argued that the only realistic way to achieve immediate and effective action to address the issue is an order of mandamus, in the terms set out in amended Order 53 Statement as set out at para [146] above.

[166] The applicant submits that the Department seeks to rely on difficulties with practical implementation to justify a breach of the law. It is argued that the evidence points to a wholly inadequate response to those difficulties.

The court's conclusion

[167] The court starts from the position that it should not be necessary to issue a mandatory order in circumstances where the Department has admitted a breach of its obligation and has set out its proposals to meet those obligations.

[168] The problem that arises is the inability of the Department, over many years, to implement plans to ensure compliance. As can be seen from the affidavit evidence of Mr Logan, set out in detail in this judgment, the officials in the Department have been active in addressing the issue and devising plans to address the admitted failures. Understandably, those plans change as circumstances change, but their essence remains the same. They have been frustrated by a combination of political inactivity, contractual issues with various bodies and uncertainty about capital financing.

[169] All of that said, from the court's perspective it is impossible to avoid the conclusion that there is a lack of political will and urgency to deal with this crucial issue. The court has been deliberately tolerant, recognising that government is difficult and that difficult choices and decisions have to be made to comply with exacting requirements and objectives. The court does, however, recognise that considerable progress has been made. The most recent affidavit sworn by the Department shows that progress has been made in relation to the development of new test centres, the procurement of new testing equipment and the legislative process for amendment of regulations. Full implementation of the Department's proposal and plans are becoming closer.

[170] So what to do? Returning to basic principles, the difficulty encountered by the court is apparent from the order sought by the applicant. The obligation on the Department is clear. The Department has a statutory duty, and it is in breach of that

duty. So, the obligation to act is clear. The problem is that the act to be performed is not clear. It is one thing to say that the Department must produce a plan. The affidavit evidence from Mr Logan points to the Department's plan. The issue that arises is whether it will ever be implemented. In any event, how can the court assess the effectiveness of that plan? All the very detailed material read by the court in this case makes it clear that resolving the problem is complex. Experts differ on what is required. Even if the plan which has been set out in Mr Logan's affidavit is implemented, how can the court determine or make an assessment as to whether the order has been complied with? On what basis could it assess the timetable necessary for implementing the plans, even if they are proven to be effective. It is not clear to me by what legal measure the court could determine whether the steps set out in any plan will be sufficient to meet the Department's obligations. The situation is also evolving in terms of the anticipated phasing out of diesel engines.

[171] The court recognises that the Department does have plans in place. The serious harm that diesel emissions cause to the environment and human health demand that those plans are implemented with urgency and expedition.

[172] The court has no doubt that the advocacy and persistence of the applicant (and the intervener) in this case have ensured this item remains at the forefront of the Department's consideration. These proceedings demonstrate this clearly.

[173] The *R (Client Earth)* case is an example of the Supreme Court using mandamus arising from the government's failure to secure compliance in certain zones with the limits for nitrogen dioxide levels set by European law. However, the factual circumstances considered by the Supreme Court differ from this case. In that case, the central issue was a failure to have any plan at all. The Secretary of State was not in a position to give an undertaking that such a plan would be prepared. The purpose of the mandatory order made by the Supreme Court was to ensure that the new government would be left in no doubt as to the need for immediate action. I do not consider that we have reached that situation in this case.

[174] In light of legal precedent, and having regard to the constitutional boundaries, the court considers that a declaration is sufficient in this case. It does so on the basis and understanding that the plans set out in Mr Logan's affidavit will, in fact, be progressed. Failure to do so will inevitably result in future proceedings and further legal costs which would be better spent on ensuring that the Department carries out its obligations.

[175] The court has given very active consideration to going beyond a declaration and providing a mandatory order but feels unable to do so because of its inability to set out precisely what acts need to be performed by the Department and, importantly, if the order was to be meaningful, the requirement for continuing supervision which ultimately the court is incapable of superintending. Whether any plan adopted by the Department achieves its objective would require close

supervision by the court a task to which it is not easily suited or equipped to perform.

Related environmental obligations

[176] The applicant says that by reason of the Department's failure to comply with its obligation to carry out diesel emissions tests, it is in breach of further obligations under various environmental requirements. Before analysing the further breaches alleged, it is important to remember what this case is about. As appears from the applicant's Order 53 statement (the applicant is challenging the Department for Infrastructure's failure to properly test diesel emissions as part of MOT testing. The grounds relied upon in the Order 53 Statement commence by saying "that, by failing to properly test diesel emissions, the Department has breached;" the regulation referred to above, and the regulations and articles referred to in this section of the judgment. [my underlining]

Air quality standards

[177] Regulation 18(1) and (2) of the Air Quality Standards Regulations (Northern Ireland) 2010 provide:

"18. – (1) Northern Ireland departments shall ensure that levels of sulphur dioxide, nitrogen dioxide, benzene, carbon monoxide, lead and particulate matter do not exceed the limit values set out in Schedule 2.

(2) In zones where levels of the pollutants mentioned in paragraph (1) are below the limit values set out in Schedule 2, Northern Ireland departments shall ensure that levels are maintained below those limit values and shall endeavour to maintain the best ambient air quality compatible with sustainable development."

[178] The limit values for nitrogen dioxide include the requirement that it does not exceed 40ug/m³ over an averaging period of a calendar year pursuant to schedule 2 of the Regulations.

[179] The applicant has referred to annual air quality reports from 2015 to 2021 (published by DAERA pursuant to its duty under Regulation 29 of the 2010 Regulations) which show that the limit values for nitrogen dioxide have been exceeded every year since 2015.

[180] The most recent annual report in 2021 demonstrated an overall decreasing trend in NO₂ observed at "many" monitoring sites over the past decade.

[181] The effects of the Covid-19 restrictions in air quality showed a very significant reduction as a result of the restrictions imposed by the pandemic.

[182] On this issue (as is the case in the other duties referred to below), the Department argues that this is not the type of duty that is intended to give rise to actionable rights and should not be considered “justiciable.” Alternatively, if the matter is reviewable at all, any review should be less intrusive and soft-edged.

[183] It is pointed out that the regulations themselves provide a framework for assessment and monitoring of air quality. In particular, Part 5 of the Regulations provides for the consequences of breach of the duties and Part 6 provides for specific obligations in relation to provision of information to the public.

[184] Specifically, the statutory consequence of nitrogen dioxide levels exceeding the final limit value is not intervention by the court but an obligation on the designated Department - “after consultation with other Northern Ireland Departments, shall draw up and implement an air quality plan so as to achieve that limit value or target value” (Regulation 25).

[185] The matter, of course, is complicated by the fact that the duty relied on is one imposed jointly on all Departments.

[186] I am not persuaded that the obligation under article 38 is a “target duty”, not amenable to judicial review, equivalent to that considered by this court and the Court of Appeal in *Wilson’s Application and Kitchen’s Application* [2023] NIKB 2 and [2023] NICA 54.

[187] Rather, I consider that the approach should be one of review of the “less intrusive” or “soft-edged” variety.

[188] The difficulty the court faces is whether the court can make an explicit finding against the Department rather than all government Departments on the express basis that nitrogen dioxide levels have been exceeded by reason of the Department’s failure to properly test diesel emissions.

[189] I agree with Mr McAteer’s submission that there is simply no evidence to substantiate such a specific conclusion, particularly when one bears in mind the legislation providing for vehicle testing by way of MOT does not require testing for NOx emissions and as per Mr Logan’s affidavit “no other part of the UK, no other EU country, or to the best of my knowledge, no other country in the world carries out NOx emissions testing as part of an annual MOT type test.” It will be remembered that NOx emissions are a major contributing factor to levels of air pollution.

[190] This judicial review is about the failure to test diesel emissions on certain vehicles under the regulations made pursuant to Article 61 of the 1995 Order.

[191] The court notes, in addition, the affidavit evidence of Ms Robinson that there are strategies in place devised to reduce emissions based on a sustainable transport policy.

[192] More importantly, on this issue the court is faced with the same challenge as that set out in considering whether to make a mandatory order in respect of the admitted breaches in relation to MOT testing. The court is not in a position to make a mandatory order in respect of this alleged breach, even if established. There is insufficient evidence to justify such an order.

Article 38 of the Environment (Northern Ireland) Order 2002

[193] Article 38 provides:

“Public bodies: general duty

38.—(1) A public body shall have the duty set out in paragraph (2) in exercising its functions so far as their exercise is likely to affect the flora, fauna or geological, physiographical or other features by reason of which an ASSI is of special scientific interest.

(2) The duty is to take reasonable steps, consistent with the proper exercise of the body’s functions, to further the conservation and enhancement of the flora, fauna or geological, physiographical or other features by reason of which the ASSI is of special scientific interest.

(3) In this Part “public body” means —

(a) a Northern Ireland department.”

[194] An Area of Special Scientific Interest (“ASSI”) is an area of land which DAERA has declared to be of special interest by reason of any of its flora, fauna or geological, physiographical or other features, and that accordingly needs to be especially protected (see Article 28 of the Environment (Northern Ireland) Order 2002).

[195] The applicant draws the court’s attention to the Clean Air Strategy for Northern Ireland, Public Discussion Document, published in November 2020 which states that NO₂ can adversely affect plant life and biodiversity in sensitive habitats.

[196] Reliance is also placed on the Institute of Air Quality Management’s “Guide to the assessment of Air Quality impacts on Designated Nature Conservation Sites, June 2019”, and the report from Dr Miller where he says:

“Experimental studies in cells, animals and human volunteers, specifically highlight that exposure to diesel exhaust (especially the particles) interfere with many processes in the body that would subsequently promote disease.”

[197] The applicant argues, therefore, that the Department has a duty to take reasonable steps, consistent with the proper exercise of its functions, to further the conservation and enhancement of the flora, fauna or geological, physiographical, or other features of an ASSI.

[198] It is submitted that the function of conducting the diesel smoke test is the Department’s effort to comply with its duty to take such steps because pollutants within diesel exhaust which the test seeks to identify, can cause damage to the flora and fauna that are protected as part of ASSI designations.

[199] On this issue the respondent again argues that the matter is not justiciable and, at best, could only be examined by the court based on reviewability.

[200] On this issue, I am not satisfied that the applicant has established a case to the requisite evidential standard.

[201] In order to establish a breach of duty the applicant must identify:

- (a) Which ASSI in particular the allegation concerns.
- (b) Which of that flora or fauna by reason of which that specific ASSI is of special scientific interest or likely to be affected.
- (c) How they are likely to be affected by the particular exercise of functions in question, namely testing for diesel fumes.

[202] In order for the court to intervene on this ground it would require significantly more tangible evidence, rather than generalised hypothetical risks.

[203] I consider that no sustainable case for judicial review is made out on this ground. In any event, even if a breach were to be established, the court would not be in a position to make a meaningful mandatory order.

The Conservation (Natural Habitats, etc) Regulations (Northern Ireland) 1995

[204] The applicant alleges a breach of Regulations 3(1) and 3A(1) read with 3A(3). Regulations 3 and 3A (as amended by Regulation 2 of the Conservation (Natural Habitats, etc) (Amendment) Regulations (Northern Ireland) 2012) provide:

“Duties relating to compliance with the Directives

3. – (1) A Northern Ireland Department and, in relation to the marine area, a competent authority, in the exercise of their functions relative to nature conservation, including marine conservation, shall secure compliance with the requirements of the Directives.

(2) Paragraph (1) applies, in particular but not exclusively, to functions under the following enactments— **(the Regulation then sets out a series of statutory functions, none of which relate to the testing of diesel emissions).**

Duties in relation to wild bird habitat

3A. – (1) Without prejudice to regulation 3(1), a Northern Ireland Department and, in relation to the marine area, a competent authority, shall take such steps in the exercise of their functions as they consider appropriate to secure the objective in paragraph (3).

...

(3) The objective is the preservation, maintenance and re-establishment of a sufficient diversity and area of habitat for wild birds as is appropriate, so as to secure compliance with the requirements of Articles 2 and 3 of the Wild Birds Directive.”

[205] The applicant argues that diesel emissions contain pollutants which are harmful to habitats of flora and fauna and wild birds, referring, again, to the Institute of Air Quality Management’s Guide to the Assessment of Air Quality Impacts on Designated Nature Conservation Sites, June 2019, and also an NIEA presentation entitled “Ammonia Nitrogen and Air Quality” – dated 9 September 2021.

[206] It is submitted that the failure to conduct the diesel smoke tests constitutes a failure to comply with these duties.

[207] As is the case with the other provisions relied upon by the applicant, the Department contends that these duties are general duties of a broad scope not amenable to judicial review. It is argued that they should be seen as target duties rather than duties creating rights for individuals.

[208] If the court disagrees with this, it is argued by the Department that the court should approach the Regulations on the basis of reviewability and that as such any

review should be of the least intrusive nature, particularly in the context of a general challenge of the type contended for by the applicant.

[209] It is important to consider the actual terms of the duty relied upon and the evidence available to the court.

[210] The Regulation 3 duty only applies to a Department “in the exercise of their functions relative to nature conservation, including marine conservation.”

[211] Importantly, the relevant function under consideration in this application is the Department’s vehicle testing function under Regulation 12 of the 2003 Regulations and Article 61 of the 1995 Order.

[212] The making of the Regulations under the 1995 Order which provides for the annual testing of vehicles thereunder is not the exercise of “functions relative to nature conservation.” This is supported by the admittedly non-exhaustive list of such functions which are set out in Regulation 2. It should be seen that the list is extensive and if it was intended to include the function carried out under the Road Traffic Order in relation to diesel emissions then one would have expected it to be included.

[213] With respect to Regulation 3A, the duty is that a Department “shall take such steps in the exercise of their functions as they consider appropriate to secure the objective in paragraph (3).” Self-evidently, the duty is described in broad terms as is apparent from the language “objective” and “as they consider appropriate.” This points to a less intensive review.

[214] Turning to the objective, it is described as the “preservation, maintenance and re-establishment of a sufficient diversity in an area inhabited for wild birds...”

[215] In the court’s view, the exercise of the vehicle testing function is not a matter related to “preservation, maintenance and re-establishment of a sufficient diversity area of habitat for wild birds.” In the court’s view, the duty relied upon is not engaged.

[216] In any event, where is the evidential basis upon which the court could find a breach of this duty? There is nothing to point to the specific impact on the protected features of a specifically protected area arising from the failure to properly test for diesel emissions. The Guide referred to is a guide “to assist its members on the assessment of the air quality impacts of development on designated nature conservation sites.” This is not a case about development.

[217] In short, there is insufficient evidence produced by the applicant to establish any impact on the protected flora, fauna or birds of any specific designated site in Northern Ireland. I consider this is fatal to the applicant’s argument on this ground.

[218] I consider that no case is made out under this ground.

[219] Notwithstanding the court's analysis on these related environmental issues, even if the court accepted that breaches had been established. I do not consider that it would make any difference to the final outcome. That is because the analysis in relation to the appropriateness of a mandatory order in this case applies with even more force to the regulations and articles which have been analysed in this section of the judgment.

[220] Ultimately, the case turns on the obligations of the Department to carry out diesel emission tests in accordance with the regulations made under the 1995 Order. That is the target of this application. The purpose of this judgment and the court's granting of a declaration, is to achieve that objective. It is hoped that achieving that objective will have a positive impact in achieving the objectives of the related articles and regulations referred to in this section of the judgment.

The intervener's legal submissions

[221] The evidence and submissions on behalf of the intervener have been helpful in understanding the context in which this application is brought. I also recognise that the efforts of the NICCY have been instrumental in pressing the Department to comply with its obligations in relation to the testing of emissions from diesel vehicles.

[222] In his submissions, Mr White invokes provisions of the European Convention on Human Rights ("the Convention"). In particular, he argues that Articles 2, 3 and 8 are engaged and says that the evidence points to a breach of these articles.

[223] In short, it is simply not an option for the court to make a declaration that the Department has been in breach of the Convention. The applicant in this case does not rely on any Convention arguments. There is no one before the court with "victim status."

[224] The intervener also relies on the United Nations Convention on the Rights of the Child ("UNCRC") as aides in interpreting Convention rights and also the obligations under the Children Services Co-operation Act (Northern Ireland) 2015.

[225] The Supreme Court in *R (On the application of CB and eight children) v Secretary of State for Work and Pensions and others* [2021] UKSC 26, has made it clear that it is not appropriate for domestic courts to determine whether the United Kingdom has violated obligations under un-incorporated international law.

[226] In any event, the court has determined that the Department is in breach of its obligations to carry out diesel emission tests and will make a declaration to that effect. The considerations in relation to whether a mandatory order is required

equally apply to any of the submissions made by the intervener. It is not necessary to carry out any further legal analysis of the arguments raised in its submissions.

Conclusion

[227] The court therefore makes the following order:

“The court declares that the failure of the Department for Infrastructure to properly test diesel emissions as part of MOT testing is in breach of Regulation 12 of the Motor Vehicle Testing Regulations (Northern Ireland) 2003 and article 61 of the Road Traffic (Northern Ireland) Order 1995.”

[228] The court will hear the parties on the question of costs.