

Judicial Communications Office

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COURT OF APPEAL ALLOWS APPEAL BY DfI IN A5 WTC PROCEEDINGS

Summary of Judgment

The Court of Appeal¹ today allowed an appeal from a decision of the High Court where it quashed a decision made by the Department for Infrastructure (“DfI”) to proceed with the first phase of the A5 Western Transport Corridor dual carriageway scheme (“A5 WTC”)².

The A5 WTC concerns the upgrading of the existing A5 route linking Derry and Aughnacloy. The scheme is supported by the Northern Ireland Executive and the Government of Ireland and has been promoted on grounds including road safety and regional connectivity. It will be the largest building project ever undertaking in NI. The case was brought by a number of residents opposed to the scheme (“the respondents”). The appellant was the DfI.

Issues on appeal

The court identified four substantive matters for consideration and decision:

- Whether the High Court was correct to quash the decision on the basis of non-compliance with the Environmental Impact Assessment (“EIA”) Directive which was transposed into domestic law by the Roads (NI) Order 1993 (“the 1993 Order”) as it applied at the appropriate time;
- Whether the High Court was wrong to quash the decision on human rights grounds;
- Whether the High Court was wrong to quash the decision for non-compliance with the obligations contained in section 52(1) of the Climate Change Act (NI) 2022 (“the 2022 Act”);
- Whether the High Court was wrong in how it dealt with the evidence in relation to climate change on remittal to uphold the original decision.

Compliance with EIA Directive obligations

The respondents argued before the High Court that the appellant’s environmental statement (“ES”) failed to adequately address greenhouse gas (“GHG”) emissions arising from induced cross-border travel³ and that revised emissions estimates should have been subjected to further public consultation. The High Court accepted that argument. The appellant disagreed and submitted that the High Court erred in concluding that the DfI could not lawfully proceed with its decision in the absence of further consultation. It was

¹ The panel was Keegan LCJ, Treacy LJ and Humphreys J. Keegan LCJ delivered the judgment of the court.

² [2025] NIKB 42 and [2026] NIKB 10

³ Induced demand is the number of journeys that would take place if the road if it was improved as the network had become easier to use.

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submitted that not all information was required to be produced in the form of an ES provided it was considered prior to the decision as more may emerge as a result of further inquiries. The appellant contended that the effects arising from cross-border travel had been appropriately assessed, and that the methodology used was in accordance with the recognised UK wide guidelines. It was further submitted that, at the time of authorisation, the appellant had clear and reliable data on potential increased GHG emissions.

The court considered the Planning Appeals Commission (“PAC”) report on the A5 WTC which was published in 2023. The report said the level of detail provided in the ES was adequate for the purposes of the EIA and the public inquiry, however, it remained concerned about the potential for subsequent changes. The PAC recommended the DfI, if it announced a decision to proceed with any part of the scheme, publish at the same time revised estimates of the total GHG emissions likely to arise including an estimate of emissions at construction stage caused by ground preparation, the emissions from energy use at operational stage, and an estimate of the emissions arising from induced trips.

The court held that the High Court had erred in its analysis of EIA compliance for the following reasons:

- The ES was not itself deficient. The traffic model and future demand modelling was prepared for it in line with technical guidelines and was endorsed by the PAC as adequate.
- The adverse effects of GHG emissions had been assessed and considered before the decision was taken.
- The PAC simply required the publication of further statistics on this, and not consultation, which was complied with.
- There had been considerable public consultation and engagement with the issue of GHG emissions on the A5 so this was not a new issue which was left out of account in the ES.

The court concluded that the High Court erred in effectively requiring a greater analysis of this distinct issue of GHG emissions arising from induced cross-border journeys and effectively requiring a new ES. It said this approach was too exacting and was over and beyond the requirement to have an adequate ES. The methodology and additional expert evidence filed on behalf of the DfI should have satisfied the High Court that the question of transboundary emissions was adequately addressed. The court allowed this ground of appeal and reversed the decision of the High Court.

The human rights challenge

In the High Court, the respondents contended that land acquisition, prolonged uncertainty and the rejection of a PAC recommendation (recommendation 3) imposing a time limit on the authorisation constituted an unlawful interference with their article 8 ECHR rights to private and family life. The PAC report highlighted the severe psychological impacts caused by 14 years of “blight” with land having been vested or uncertainty for landowners about vesting. The report noted that the A5 WTC scheme would affect 314 farms, involve the demolition of eight homes and one traveller site and temporarily affect direct access to over 180 dwellings. The PAC recommended that authorisation be time-limited and that if

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physical construction of any phase or section had not begun by the end of the financial year 2028/29, the authorisation would lapse.

DfI rejected this recommendation. The High Court found there had been a procedural failure by the DfI, namely, that there had been no proportionality analysis before rejecting PAC's recommendation. The court, however, held that the High Court's reasoning to be flawed. It said there was substantial evidence before the PAC on the impact the imposition of the road would make on the respondents' rights. The court considered that the Departmental Statement prepared by the DfI dealt with this matter adequately, provided reasons for departing from the PAC's recommendation, and stated that it was within the discretion of the decision maker to decide that a rigid time limit was unrealistic given the vagaries with large projects such as this and unexpected delays.

On this issue, the court found the High Court had failed to recognise that the uncertainty about which the PAC was concerned would likely be increased by quashing the vesting orders leading to a likely reconsideration of them in the future when circumstances may have changed. It determined that due consideration was given in the Departmental Statement to the respondents' human rights and the evidence filed by them. The court considered that the appellant had carried out a detailed human rights assessment as part of the scheme preparation, and this matter was part of public consultation. A revised assessment was carried out prior to the decision to authorise the scheme:

"The potential interference with article 8 rights was rightly recognised. The potential uncertainty for those affected as to whether the scheme would proceed was also properly acknowledged. This is all within the discretionary remit of the decision maker and the judge impermissibly stepped into the breach and reached a decision which we find was plainly wrong in all the circumstances as it could not feasibly be said that cogent reasons were a failure in terms of the PAC recommendation to provide a time limit on the authority."

The appeal in relation to the human rights challenge was successful.

The climate change challenge

The central issue in this ground was the interpretation and application of section 52(1) of the 2022 Act which requires the Northern Ireland departments to exercise their functions, so far as possible, in a manner consistent with statutory emissions targets and carbon budgets. The PAC had considered the climate change effects of the A5 WTC project in detail, and specifically, it described the 2050 GHG reduction target as "extremely stretching" stating: "In the context of the current Northern Ireland emissions reduction targets, the [A5 WTC] scheme would have a large adverse effect on climate."

The court noted the Department Statement which recognised that, whilst the A5 WTC will result in an increase in emissions, it is a priority investment for the Northern Ireland Executive, and therefore the emissions generated from the construction and operation of the scheme will need to be factored into the Executive's plans to meet the emissions reduction target specified in the 2022 Act.

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The High Court had received affidavit evidence from the DfI and DAERA. The Court of Appeal remitted the case back to the High Court to consider further evidence from DAERA which expanded on the affidavit evidence. The court said the High Court adopted a narrow approach to the remitted hearing by indicating that a new case had been made by DAERA and, as such, the judge reached no view on what section 52 of the 2022 Act should mean. The court distilled the grounds relating to section 52 into two core questions:

- What does section 52 require of a department in making a decision which has climate implications?
- Is there an evidential gap in this particular case which renders the decision irrational?

The court held that section 52 places a mandatory obligation on all Northern Ireland departments to exercise their function so far as is possible to do so in a manner consistent with the achievement of the net Northern Ireland emissions targets. It is for individual departments to select the means of furthering the objective and provided it is within the range of potential decisions, or it is not possible to achieve the desired consistency, the courts will not interfere.

The court noted that when the decision under challenge was made, the NI Climate Action Plan, the sectoral plans and the carbon management plan were not finalised. However, it was satisfied that the legal obligations created by the 2022 Act to achieve net zero by 2050 are not a prohibition upon the authorisation for a new road where it has been assessed, as far as possible, to be consistent with emission reduction obligations. Nor does it require that the precise GHG contribution of every project which may be authorised between now and 2050 should be specified upon a precise and quantified pathway prior to authorisation. The court commented:

“Compliance with section 52 requires the relevant department to reach a rational conclusion, on the basis of adequate inquiry, that the exercise of the function is, so far as possible, consistent with achievement of the statutory targets. ... As such, we find that the obligation under section 52 required the appellant to ensure that it had sufficient information about the emissions levels, the potential future policy options available and determine whether the emissions from the scheme prevented achievement of the statutory targets. When the DfI authorised the decision, it had sufficient information regarding the scheme and the transport sector policy pathways to ensure that it would not undermine compliance with reduction obligations under the 2022 Act. Moreover, there is a cross over with other departments and sectors as this is a Northern Ireland wide obligation which requires a joined-up approach. The appellant is not responsible for all sectors impacted by the project, rather, it is only responsible for the transport and infrastructure sectors, and it ensured that the emissions from the project were captured.”

The court also considered that the approval of specific projects is not dependent on a CAP being in place. It said the 2022 Act does not require project level emissions to be accounted for in advance within a CAP. Neither does the 2022 Act require that the GHG emissions of projects be specified upon a precise and quantified pathway to permit

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authorisation. The court said the PAC's recommendation that a decision on the scheme should await publication of the CAP and a quantified policy pathway ultimately exceeded the requirements of the 2022 Act and was a recommendation the appellant was lawfully entitled to reject.

It followed, therefore that the High Court proceeded on the erroneous understanding that the CAP ought to include an individual assessment of the effect of the A5 WTC project and that it was necessary to have a CAP for each carbon budget before a decision could be made on any project which would impact upon any carbon budget:

"The correct legal position is that when considering whether to approve a project that will lead to increased emissions, a department does not need to account for same at a project level, within the CAP or some similar exercise ... It does, however, need to consider whether the proposed function is being exercised, so far as is possible to do so, in a manner that is consistent with the objective described in section 52. A department can only exercise this function following the discharge of its *Tameside* obligations, if it concludes that the exercise would be consistent so far as possible with that objective."

The court held that the DfI was required to ensure that it had sufficient information about the emissions levels, the potential future policy options which were available and to determine whether the emissions from the scheme would preclude achievement of the statutory targets. The court stated that it is not the function of a judge to look behind uncontradicted evidence or conduct a merits review of it particularly given the highly technical nature of the evidence. The court said that what the High Court should have done was simply analyse whether the evidential lacuna it had previously referred to had been filled in circumstances where it clearly said it could be filled in its first judgment. If the High Court had adopted this approach, the court considered it would have made a judgment which was in favour of the appeal.

The court acknowledged that it may have been better if a CAP had been produced prior to this decision and/or judgment. However, the High Court should not have interpreted the draft CAP without inviting submissions. The court found that it telling that there was actually a consensus among all of the parties that the High Court's conclusion as to what section 52 required was erroneous in part.

The court agreed it would place too high a burden upon departments to ensure that individual projects fit within climate action plans specifically. That would stymie all major development in Northern Ireland.

In addition, the court highlighted that the draft CAP Annex A in the quantification report clearly deals with estimation of overall Northern Ireland emissions for the first carbon budget and the use of the Emissions Projection Tool and the use of the Transport Emissions Model. The court said that it was unfortunate that a full body of evidence was not provided earlier in this case, however, it had no reason to believe that the fresh evidence collated during the litigation process was newly created evidence. Rather, it explained the position already taken by DAERA in more detail and was broadly consistent with the Departmental Statement:

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“This was a realistic and honest assessment in challenging terrain with many variables. The impugned decision should not be read hypercritically. It is also by its nature a forecast for which government is accountable. In this arena questions and queries will naturally arise. However, a supervisory court is not the place to debate the merits. The judge may well have been right that there are some inconsistencies in the evidence, however, that should not have precluded an overarching view of the case. The only function of this court to decide whether the process was lawful. Given the uncontradicted body of evidence which is before this court the irrationality finding cannot stand.”

The court was satisfied that DfI has, in making the decision to proceed with the A5WTC, performed its function in a manner consistent with the obligations set out in the 2022 Act. In addition, there had clearly been no failure of inquiry. The court noted there was no claim of bad faith made against DfI or DAERA in terms of the decision reached and there was also no suggestion that the legislation is unworkable. If that were the case any responsible department should of course raise the matter in the political arena. Therefore, on an overall analysis the court viewed that the impugned decision withstands public law challenge.

Conclusion

The court concluded that the High Court’s finding should not stand. It found that the High Court was wrong to say there was an ‘evidential lacuna’ which rendered the decision irrational or that there had been any failure of inquiry. The fundamental error was the High Court’s failure to consider how the decision fitted within climate targets across Northern Ireland as a whole:

“The judge at first instance quashed the impugned decision for lack of evidence and enjoined the DfI to fix the problem. This was not a wholesale demolition of the climate change justification but rather a call for greater clarity. The evidence relied upon in this appeal served to expand and clarify and to fill the purported evidential gap. We are satisfied that there is sufficient evidence which validates the decision made to proceed with the A5 WTC and to establish that the DfI had complied with section 52. Accordingly, we allow the appeal on all grounds for the reasons we have given. The judge was wrong in his approach and the outcomes he reached in relation to the four issues we identified.”

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available shortly on the Judiciary NI website (<https://www.judiciaryni.uk/>).

ENDS

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