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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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44050/01

Gibson's (Christine) Application [2016] NIQB 82

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

AND IN THE MATTER OF A DECISION OF NEWRY MOURNE AND DOWN DISTRICT COUNCIL MADE ON 25 FEBRUARY 2016 AND ALSO ON 10 JUNE 2016

80258/01

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

AND IN THE MATTER OF A DECISION OF DAERA (MARINE AND FISHERIES DIVISION) MADE ON 3 JUNE 2016

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COLTON J

[1] The applicant in this case is a litigant in person. She challenges a number of decisions made by Newry Mourne and Down District Council (hereinafter referred to as "the Council"), DAERA (Marine and Fisheries Division) (hereinafter referred to as "the Department") whereby the Council granted planning permission for the construction of ferry terminal facilities adjacent to 80 Greencastle Pier Road, Greencastle in County Down to allow the operation of a vehicular ferry access across the mouth of Carlingford Lough. The Department granted a marine licence in respect of the project. The permission and licence respectively were granted to Frazer Ferries Limited who are a notice party to these applications.

[2] At the end of her reply to submissions made on behalf of the Council, Department and notice party the applicant made an impassioned, articulate and

impressive case against the proposed pier and ferry route. In particular she focused on the potential impact of the ferry on the natural environment in an area which is of undoubted scenic beauty. Ms Gibson lives close to the site of the proposed pier which is to be located in Greencastle which is situated on a small, rural peninsula at the northern side of Carlingford Lough. The lough itself is a border between Northern Ireland and the Republic of Ireland. The two coastlines and surrounding islands on either side of the peninsula contain a wide range of wild life including birds, seals, eels, flora and fauna. There can be no doubt that Ms Gibson is a committed environmentalist with a great love for and knowledge of the Greencastle shore. This was well illustrated by the reference in an expert report she obtained in relation to this matter when it was revealed that she had rescued an injured pup seal which she transported to her own house for a successful recuperation. In making her submission she was expressing her strong opinions which would be well known to all of those involved in this entire process since her initial objection to the Council in January 2014.

[3] The task of this court is not to adjudicate on the merits of the proposal but to exercise a supervisory role on the public bodies who made the decisions to which Ms Gibson objects. In support of her application she has referred to a vast amount of material including an array of statutes, regulations and directives which she says have been broken by the proposed respondents. In approaching this issue it has been necessary to focus on the actual decisions challenged, to identify the relevant law which applies to the decisions and analyse whether the applicant has established a case for granting leave to challenge the decisions.

[4] Unsurprisingly given the potential complexity of the matter Ms Gibson as a personal litigant has had some difficulty in providing structure and focus to her wide-ranging application, but she has been diligent and determined in bringing what she considers all relevant material to the attention of the court. I am obliged to the assistance of counsel in this case for their able and focused written and oral submissions which went beyond what might be expected in a normal leave application. Ms Denise Kiley appeared for the council, Mr Paul McLaughlin appeared for the Department and Mr Scott Lyness appeared for the notice party.

The applications and the decisions challenged

[5] The first judicial review application (44050/01) was lodged on 18 May 2016. It sought leave to challenge two decisions namely:

- **Decision 1 –** The Council's decision to grant planning permission on 10 June 2015 – P/2013/0434/F.

- **Decision 2** – Modification to planning conditions 15, 22 and 24 of the above permission – LA07/2015/1032/F – decision made on 25 February 2016.

[6] The second judicial review was lodged on 2 September 2016 challenging.

- **Decision 3** – The decision by the Department to grant a marine licence to the notice party – NL33/12 – decision made on 3 June 2016.

[7] I directed that these applications be heard together.

Decision 1

[8] **Decision 1** relates to permission ref P/2013/0434/F which was granted by the Council on 29 June 2015. In short it granted planning permission for the construction of ferry terminal facilities adjacent to 80 Greencastle Pier Road, Greencastle, Co Down, to allow the operation of a vehicular ferry across the mouth of Carlingford Lough.

[9] The application for leave to challenge this decision was lodged on 18 May 2016 almost 11 months post the decision.

[10] RCJ Order 53, Rule 4(1) requires that applications for leave are "*made promptly*" and in any event within three months from the date when the grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made.

[11] Self-evidently the application in this case falls foul of both the requirements of promptitude and the three month limitation period.

[12] Counsel for the council and the notice party argue that leave should be refused in respect of the challenge to **Decision 1** by reason of this delay.

[13] In considering this matter I bear in mind that the applicant's case is based on a combination of domestic law grounds and EU law grounds. Case law in Northern Ireland has long emphasised that an application for judicial review should be made promptly once time starts to run and that applications made within the three month period may still be deemed out of time for lack of promptitude. The rationale for the strict application of the time limit is in support of the interests of good administration. The public interest requires that challenges to the legality of public law decision making should occur promptly to encourage certainty and finality in public decision making. A further justification is that of the need for protection of the interests of third parties who may have benefitted from an original decision but who may suffer a detriment if the decision is later deemed unlawful.

[14] In areas such as the grant of planning permission the need for early certainty is well recognised. This was expressed in clear terms in the Court of Appeal in Northern Ireland in Re: Hills Application [2007] NICA 1 by Kerr LCJ when he said at paragraph [32]-[33] that there was "*need for great expedition in the presentation of applications for leave to apply for judicial review in planning cases*".

[15] The same approach has been taken by the courts in England and Wales – see Gerber v Wiltshire Council and others [2016] EWCA Civ 84 where Sales LJ in the Court of Appeal for England and Wales said at paragraph 46:

> "*The basic position regarding the need for an objector to a grant of planning permission to take speedy action to challenge such grant in the courts is not in doubt. This is clearly set out in the relevant authorities. Once the planning permission is granted the owner of the land to which it relates is entitled to rely upon it and there is a substantial risk that he will begin investing effort and money to do so without waiting any lengthy period before he does. Also, planning permission will have been granted because the grantor is satisfied that it is in the overall public interests for the development to occur, without any further delay. The basic rules regarding notification of applications for planning permission set out in the 2010 order are designed to afford potential objectors a fair opportunity to learn about and object to an application for planning permission before it is granted. The courts approach in relation to an application to extend time for judicial review has to strike a fair balance between the interests of the objector, the interests of the developer and the public interest. In light of the risk of detrimental reliance by a developer on the grant of permission and possible prejudice to the public interest, it is incumbent on an objector to proceed with the "greatest possible celerity" so as to minimise a risk of prejudice to those other interests.*"

[16] In terms of EU grounds of challenge it is now well settled that the promptitude requirement does not apply. This arises as a result of the European Court of Justice ruling in the case of Uniplex (UK) Ltd v NH Business Services Authority (C 406/08) [2010] PTSR 1377. In that case the European Court held that an analogous "promptly" requirement in public procurement rules was not consistent with the general principles of EU law. Maguire J considered this matter in the case of Musgrave Retail Partners (NI) Ltd in which judgment was delivered on 21 December 2012 when he indicated that this reasoning has now been applied to the test of promptitude in the context of judicial review in the planning context where EU grounds of challenge are at issue. He said that:

> "*The court considers that the distinction is now well established and that accordingly it should accept it. … authorities which demonstrate its operation in the planning context include R(Buglife) v Medway Council [2011] EWHC 746 at paragraph [63]; R(U and Partners, East Anglia) v Broads Authority [2011] EWHC 1824 Admin at*

paragraphs [37] and [38] and R(Berky) v Newport City Council [2012] EWCA Civ 378 at [34], [49] and [63]."

[17] The effect of recognising the existence of the distinction between the time requirements for judicial review as between the domestic grounds of challenge and the EU grounds is that in the latter case the applicant has three months from the starting time in which to seek judicial review on those grounds. In this case as is clear from what I have set out below the starting time is the time of the decision, namely 29 June 2015. Insofar as the applicant's grounds relate to EU law grounds of challenge then that application should have been brought within 3 months of that date.

[18] In my view it is clear that this application has not been made promptly nor has it been made within 3 months from the date when the grounds for the application first arose. Should I extend the time limit on the grounds that there is "good reason" for doing so? In coming to a decision on this issue I take account of the following matters:

(a) The delay in this case is extensive – almost 11 months.

(b) The applicant was fully aware of the decision when it was made. Indeed, she has been involved as an individual and as part of a group campaigning against the permission both prior to and subsequent to the decision. By way of example she submitted a detailed objection letter to the planning permission sought on 29 January 2014. She has been both public relations officer and chairperson of the Greencastle Area Residents' Group who also submitted letters of objection to this application. On 22 July 2015 approximately 3 weeks post the granting of permission the local newspaper published a letter from the Greencastle: Keep it Green Group protesting about the granting of permission. It is clear from a Facebook entry dated October 2014 that the applicant was heavily involved in this Group and gives her email address as the contact for the Group.

Furthermore, on 24 March 2016 the applicant instigated judicial review proceedings challenging a modification to **Decision 1** and which clearly referenced but did not challenge that decision. Those proceedings were disposed of on 15 April 2016.

Thus it is clear that the applicant was someone who was intimately involved with this entire process and who in fact engaged in a judicial review challenge to a modification to **Decision 1**. Indeed, the vast majority of the points giving rise to the judicial review challenge have been rehearsed by the applicant with the Council and the Department prior and subsequent to the grant of the planning permission.

(c) The granting of leave will result in significant prejudice to the Notice Party who has the benefit of the planning permission and the marine licence. Following the grant of **Decision 1** the Notice Party entered into a Memorandum of Agreement on 28 September 2015 with Loughfoyle Ferry Company Ltd to purchase the ferry vessel required for the project for the sum of €975,000.00 even though this agreement was entered into within 3 months of **Decision 1** the Notice Party acted prudently and insisted on the insertion of a clause in the document which made the Memorandum of Agreement subject to no third party appeal or legal challenge taking place during the challenge period before completion of this contract.

After the 3 month period had elapsed completion of the purchase took place on 30 October 2015 and a Bill of Sale was completed on 2 November 2015.

(d) Since that date the Notice Party has spent a significant sum on the project following the expiration of a 3 month period and in the course of the hearing I received an affidavit from Mr Paul O'Sullivan, the Managing Director of the Ferry Company, indicating that it has expended a total of €1,580,404 on this project.

(e) Mr O'Sullivan avers in his affidavit as follows:

> "I had understood that an important purpose of the 3 month period was to provide sufficient certainty to allow those who benefit from planning permission to proceed with their development. We would certainly not have proceeded with the vast majority of the public expenditure if proceedings had been lodged within the 3 months of the grant of the 2015 permission."

[19] Bearing these matters in mind in determining whether there is "*good reason*" I have considered whether there is reasonable and objective justification for the late application; whether permission to proceed would be prejudicial to third party interests or the interests of good administration and whether the public interest requires that the application should be allowed to proceed.

[20] In relation to the first matter in her original application Ms Gibson explained any delay after 15 April 2016 on the grounds that she sought an "open file appointment" in relation to the planning application. The first date made available was on 3 May 2016. In the meantime a pre-action protocol letter was sent on 19 April 2016. She also arranged for a further open file appointment on 9 May 2016. She therefore argues that this documentation was necessary before it was possible to

lodge these proceedings and this is her explanation for the delay between 15 April 2016 and 18 May 2016. In this regard I was told by counsel and I do not believe that it was in dispute that on 15 April 2006 Ms Gibson was warned by the judicial review judge that delay would clearly be an issue in any further judicial review proceedings relating to the matter. I granted leave to Ms Gibson to submit a further affidavit to deal with the question of delay in which she referred to a medical operation she had in April 2015 which required her admission as an inpatient for 4 days. She referred to some medical notes in relation to this matter which indicated that "*her post-operative recovery was uneventful*". A subsequent letter of 4 December 2015 confirmed that she was still suffering "*a bit of discomfort*" arising from the operation. I note that during this period Ms Gibson remained active in her opposition to the project - see for example the activities of "*Greencastle: Keep it Green Group*". She also indicated that she had attempted to secure a pro-bono lawyer and indicated that she only learned of the opportunity of being a litigant in person in January 2015. Of course it should be remembered that at all times Ms Gibson was part of a group of people who were objecting to this planning permission and that if she herself was unable for personal reasons to bring an application then she could certainly have sought the assistance of other members of the group. In terms of the public interest **Decision 1** was made by a public body of elected representatives after full consultation in which the applicant fully participated.

[21] In view of what I have set out above it seems to me abundantly clear that permission to proceed would be prejudicial to the interests of the ferry company in this matter and would not therefore be in the interests of good administration. The obvious prejudice to the ferry company in this case weighs heavily with me in coming to my conclusion on this point.

Conclusion

[22] I have concluded that taking account of all the points for and against an extension of time that this is not a case where the court should extend time pursuant to Rule 4 both in relation to domestic grounds and EU grounds.

[23] Accordingly, I refuse leave in respect of the application to challenge **Decision 1**.

Decision 2

[24] **Decision 2** was made on 25 February 2016 by the Council and refers to three variations to the original planning permission (**Decision 1**) which I have already upheld in this judgment. The variations relate to the original condition 15, the original condition 22 and the original planning condition 24. Ms Gibson conveniently refers to these conditions respectively as the "*water conditions*", the "*propeller conditions*" and the "*HGV condition*".

Original Condition 15

> *"No development shall take place on site until method of sewage disposal has been agreed in writing with Northern Ireland Water or a consent to discharge to demonstrate a waste water treatment solution that ensures <230 E.Coli colony farming units (CFU) per 100 mls of water over the shellfish harvesting area for <75% of the time prior to commencement of development on site has been granted. This must be submitted to and agreed in writing by the Planning Authority."*

[25] Under Decision 2 Condition 15 was amended to read:

> *"No development of the welfare facilities hereby approved shall take place until either a relevant consent has been issued under the Water (Northern Ireland) Order or a method of sewage disposal has been submitted to and agreed in writing of a planning authority to demonstrate a waste water treatment solution that ensures <230 E.Coli colony farming units (CFU) per 100 mls of water over the shellfish harvesting area for >75% of the time."*

Original Condition 22

> *"Any vessel that is intended to be used on this very route shall not be fitted with ducted/shrouded propellers.*
>
> *Reason: to minimise impact to seal population".*

The effect of **Decision 2** was to remove this condition.

Original Planning Condition 24

> *"No vehicle over 3.5 tonnes which has three axles or more shall be permitted to use the ferry and the proposed car parking facilities following the proposal becoming operational.*
> *Reason: to protect residential amenity."*

[26] Under **Decision 2** Condition 24 was amended to:

> *"No category 2 other goods vehicles (OGV2) as defined in the design manual for roads and bridges (DMRB) shall be permitted to use the ferry or associated approved car parking facilities following the proposal becoming operational."*

[27] It is difficult to separate the grounds upon which the applicant challenges **Decision 2** from those upon which she relies on in relation to the challenge to **Decision 1**. Doing the best I can I would summarise the criticisms made by the applicant under the following headings:

Failure to carry out a proper environment assessment and in particular to require a new environmental statement; a lack of proper consultation; bias and irrationality in the Wednesbury sense.

[28] In her persuasive and clear submissions in response on behalf of the Council Ms Kiley originally made the point that the majority of the grounds relied upon should be dismissed for lack of promptitude in so far as they relate to domestic challenges. It is difficult to separate the EU challenges from the domestic challenges in this case but certainly it could be argued that the consultation, bias and irrationality points are clearly domestic law challenges and could be dismissed in accordance with the decision in the Musgrave case to which I have already referred. The challenge in this case was only lodged on 18 May 2006 a mere 7 days before the three month backstop period elapsed. It is clear that the applicant herself was fully involved in the consultation process in relation to **Decision 2** and indeed brought judicial review proceedings in relation to a different variation prior to submitting the application in this matter. Obviously the question of dismissal by reason of lack of promptitude is a discretionary matter and having looked at the substance of the challenge I do not consider it necessary to rule on the question of promptness even though I accept there is considerable force in Ms Kiley's submission in this regard.

[29] I propose to look at the process/procedure by which **Decision 2** was made, together with the reasons, rationale and substance behind each of the variations.

[30] This has to be seen in the context of a planning application which I have already upheld and the applicant should not be permitted to use the challenge to the variations as a means of reopening issues concerning the original application.

[31] The first relevant document concerning the variations can be found in a letter from the DOE Marine Division to the Council's Planning Manager dated 16 September 2015. The letter brings to the attention of the Planning Manager two conditions "which are incorrect". In relation to condition 15 the letter points out that "*the limit for E.coli should apply over the shellfish harvesting area for <75% of the time*"; this restriction should read "*for (>)75%.*"

[32] In relation to Condition 22 it points out the advice in relation to vessels not being fitted with deducted/shrouded propellers has been rescinded due to research carried out by the Sea Mammal Research Unit which means that there are no longer any restrictive conditions required regarding the type of propellers to be used. The letter requested that these two conditions be amended in the planning approval.

Subsequent to this letter the developer/notice party submitted a planning application seeking a variation of the three conditions on 13 October 2015.

[33] This triggered a further consultation process in which the Council sought expert advice from the DOE Marine Division and Transport NI. The response from Marine Division was received on 30 October 2015. It was this document that set out the new Condition 15.

[34] In relation to Condition 22 the DOE repeated its previous advices and indicated that "given the new advice on ducted propellers Marine Environment Division is content that Condition 22 is removed as it is no longer applicable. In relation to Condition 24 the Marine Environment Division indicated that it "*has no comment to make on the amendment to condition 24*".

[35] As a result of the new consultation process the Council received 39 objections to the proposed variations including an objection from the applicant Ms Gibson.

[36] As part of the consultation process the Council received a further comment from the DOE Marine Division on 18 December 2015 in response to the objection letters. It maintained its advice indicating that the NIEA would provide comment on the SPA implications for Condition 15. In relation to Condition 22 the DOE advised that the original condition was added in response to interim advice dated April 2012. Since then the relevant guidance from Statutory Nature Conservation Bodies (SNCB) released revised advice in early February 2015 which concluded that "*it is very likely that the use of vessels with ducted propellers may not pose any increased risk to seals over and above normal shipping activities. Instead the evidence pointed to grey seal predation as the cause of a proportion of corkscrew injuries observed in the UK*". The report indicated that "*we are not aware of any direct evidence for seals being killed by ducted propellers*".

[37] It was the expert advice of Marine Division that ducted propellers "do not pose a greater risk than non-ducted propellers to seals". Thus the advice was that Condition 22 could be removed.

[38] In addition to seeking the expert advice referred to above the Council also conducted a screening exercise both under the Habitat Regulations and under EIA screening re the proposed variations. This document was received on 21 December 2015. I will refer further to the basis for such assessment in the judgment (see para 100) in relation to **Decision 3** but suffice it to say at this stage that the assessment recognised that the site in question was within or immediately adjacent to a designated European site. The conclusion of the assessment was that "the potential impact of this proposal on SPA and Ramsar site and nearby SAC has been assessed. It is not considered to have a likely significant effect on these sites and other European sites. Any potential effect has been mitigated against within ES of P/13/0434/F and associated HRAs provided by NIEA.

[39] Thus the test of likely significance has not been met.

[40] In relying on this assessment the planning authority took a decision it was entitled to take. It was a matter of judgment for the authority and all relevant material was considered.

[41] A particular criticism of the applicant is that as part of this new consultation process the Council failed to require the developer to prepare a new ES. This was specifically considered by the authority and is set out in a detailed EA determination sheet dated 7 January 2016. Specifically the document states:

> *"The previous application P/T013/0434/F was accompanied by an environment statement which is still relevant. Under Regulation 12(2) of the EIA Regulations 2015 the Council are of the opinion that the recent ES together with some additional information supplied by the agent on submission of this application can be utilised to assess any potential impact this application may have. It is not thought that the changes within this variation of condition application represented any significant likely effects other than that previously assessed and mitigated against. In answer to a specific question are 'the environmental effects likely to be significant' – the answer is 'no'."*

The determination goes on then to set out detailed reasons for the recommendation that no further ES needed to be submitted.

[42] I do not set out the detailed reasoning of that determination in this judgment but it is clear that the decision not to require a new ES was taken under the wide discretion afforded to the authority under Regulation 12 of the EIA Regulations and was based on a determination with substantive reasoning setting out the detail of the entire process up to the relevant date.

[43] It is convincingly argued by Ms Kiley that this was a reasonable approach well within the discretion and judgment of the planning authority based on the advice from expert consultees. She says that the Council were entitled to take that advice and she points out that no expert advice has been produced to even mount a challenge to that advice.

[44] In relation to advice received I finally refer to the advice from Transport NI which was relevant to the change in condition number 24 which relates to the vehicles to be carried on the ferry service and parked on private land. On 27 January 2016 Transport NI indicated that it "*would have no comment to make on the variation of condition number 24*". So no issues were raised by the experts in this regard.

[45] I turn now to the substance and merit of each of the variations. It seems to me the variation to condition 15 is entirely straightforward. The main purpose of the variation was to change the requirement for less than 230 e-coli colony forming units (CFU) per 100 mls of water over the shellfish harvesting area to be greater rather than less than 75% of the time prior to the commencement of development on site. This clearly was an error in the original draft and only increases rather than reduces the environmental protection provided. The remainder of the change by way of specific reference to welfare facilities is entirely sensible as the requirement only arises when the welfare facilities are constructed. So on no account could there be any challenge to the merits of this change which was based on expert advice and in no way could it be considered irrational.

[46] In relation to the removal of condition 22 this was changed on the basis of up-to-date expert advice as set out above and again it is difficult to see how this could even arguably be considered irrational. Of course the whole issue of protection of seal life in this area has to be seen in the context of the many conditions attached to the planning permission and marine licence which are fully discussed in relation to the **Decision 3** below.

[47] I now turn to the modification to condition 24.

[48] The significance of the original planning condition 24 is that it would in effect confine the use of the ferry to cars and motorbikes. Specifically it would exclude commercial/vans, caravans and trailers and coaches. This was contrary to the understanding of the notice party who had anticipated that the latter category of vehicles would be permitted to use the ferry. This is clear from the further environmental information (FEI) provided on behalf of the developer in the course of the application process. It provided a breakdown of total flows by sector as part of this information indicating that it was expected that 84% of vehicles would be cars, 5% motorbikes, 5% commercial/vans, 4% caravans and trailers and 2% coaches. It was the developer's understanding that all of these categories of vehicles would be permitted. When alerted to the difficulty the developer raised this matter with the Council and made the application to vary along with the other two variations. As part of the consideration by the Council the planning officer provided a "*case officer report*" for the Council on 25 January 2016. This report summarised the issues in relation to the proposed variations and supported and recommended the variations sought. In support of the reasoning it indicated that "*at present the road is not restricted to the types or weights of vehicles which utilise the road which is essential public infrastructure. The application of this condition relates solely to the use of the car park and the ferry. Larger vehicles being parked within the car park and using the ferry will not have any more detrimental impact than other types of vehicles, which can at present drive along the Greencastle Pier Road unrestricted*".

[49] The effect of the change is to permit commercial/vans, caravans and trailers and coaches which are CV category PSV and OGV1. The exclusion of OGV2 vehicles means that vehicles from three axle articulated upwards will not be permitted to use

the ferry. Indeed it is exactly this type of vehicle about which the applicant expressed a concern. Again it seems to me that there is no arguable case in terms of irrationality to make about this particular variation. This was entirely a matter of judgment for the planning authority. It was clear that commercial/vans, caravans and trailers and coaches were part of the environmental assessment and the change simply reflects this.

[50] In relation to this particular matter the applicant raises another challenge based on bias. This relates to an alleged breach of the Councillors Code of Conduct with regard to planning matters. In particular the code indicates that councillors must not "act as an agent for people pursuing planning matters within your Council". The applicant refers to e-mails from a Councillor J Tinnelly who ultimately chaired the meeting that had decided to approve the planning application. In short it is alleged that the councillor was acting as an advocate for the developer and had in effect pre-judged any decision regarding the variation of condition 24.

[51] I have considered the relevant e-mails carefully. It is clear that he was simply responding to a call from the notice party to the effect that the wording of condition 24 did not accord with what was agreed at a previous Planning Committee meeting. The councillor passes this request on to officers at the Council and indicates that "*my recollection of the meeting was that the wording of the restrictive condition was to be agreed after discussions between the officers*". This e-mail is dated 6 July 2015. On 7 July 2015 he sends a further e-mail to an officer in the Council where he refers to the recollection of Planning Committee members regarding what was previously agreed. He confirms that everyone he had spoken to was under the impression "*that only articulated vehicles would be prohibited*". He invites the officer to contact the notice party "*to allay any fears he has or clear up any confusion regarding what is and is not allowed*".

[52] Having considered the e-mail chain I do not consider that there is anything objectionable contained therein or anything which is indicative of bias. It seemed to me that this was a legitimate query by a councillor in response to a query by the developer that was raised about what was originally agreed in relation to the planning permission. Insofar as this resulted in a variation which reflected what was part of the environmental assessment and what had been understood by the Planning Committee I do not see that it can be argued that this particular variation has been infected by bias either actual or apparent.

[53] For all these reasons I have come to the conclusion that the challenge to **Decision 2** is unarguable and leave should not be granted.

Decision 3

[54] This relates to marine licence ML33/13 granted by the Department on 3 June 2016. The licence was subsequently varied on 30 June 2016 by the inclusion of two

additional conditions to which I shall refer later. The licence permits the following works, namely:

- Construction of a reinforced concrete suspended pier supported by vertical tubular piles and a reinforced concrete slipway to allow vehicular access to the ferry and 12 berthing piles with fenders and steel gangway to facilitate berthing and tying up of the vessels overnight.

- Floating navigational marks anchored to the bed of the lough and laid at the edges of the navigable channel to delineate appropriate channel boundaries or to mark shallow rock outcrops and provide safety of navigation.

[55] Although the thrust of the challenge to this decision is couched in similar terms to the substance of the challenge to **Decision 1** it is important to understand the distinction between this permission and the granting of planning permission in respect of this project.

[56] The marine licence is granted under the regime contained in Part 4 of the Marine and Costal Access Act 2009. The licence itself relates to that portion of a ferry terminal facility, which is constructed below mean high water spring tide level of Carlingford Lough at Greencastle. The planning permission contained in **Decision 1** relates to the development above mean low water.

[57] The judicial review application was lodged on 2 September 2016 a mere one day before the 3 month limitation period expired but in light of the case law in respect of challenges based on EU law I consider that the leave application should not be dismissed on grounds of delay. The Order 53 Statement and the accompanying affidavits and statements are drafted in the broadest of terms and it has been difficult to marshall or structure the public law issues which properly arise in the application.

[58] In the Order 53 Statement the applicant seeks the following relief:

> *"(a) An order of certiorari to require DAERA (Marine and Fisheries Division) (to be referred to as the "Department") to quash the decision at issue.*
>
> *(b) A declaration that the Department made an unlawful decision.*
>
> *(c) This being an application for judicial review of a decision, acts and omissions all or part of which are subject to the provisions of the Aarhus Convention, and therefore an Aarhus Convention, case within the meaning of the costs protection (Aarhus Convention) Regulations (Northern Ireland) 2013, or that any costs*

recovered from the applicant shall not exceed £5,000 plus any VAT."

So clearly the applicant is seeking to quash what I have described as **Decision 3** on the grounds that it was unlawful.

[59] In relation to the grounds upon which the said relief is sought the applicant alleges that the Department has failed to comply with a series of articles and legislation, 14 in number. The grounds do not specify which specific aspects or sections of the relevant articles are alleged to have been breached and going through the applicant's affidavit it is difficult to relate the alleged breaches to the legislation set out in the grounds. At my request the applicant did provide a sheet summarising the grounds relied upon by her in challenging **Decision 3** and provided a spreadsheet in which various regulations are linked to the "key themes" of the application.

[60] When considering the evidence and submissions of the applicant it is clear that the grounds challenging the Department's decision are substantially the same as those relied upon in challenging the decision of the council in granting the original planning permission although there are some challenges specific to the Department which I will deal with in this judgment.

[61] Doing the best I can I summarise the applicant's case in relation to **Decision 3** in the following paragraphs.

[62] The applicant points out that parts of the coast lines of Carlingford Lough and the surrounding islands on either side of the peninsula are afforded various protections under the Ramsar and Ospar Conventions and hold various designations including SPA, LPA, ASSI, SSSI and Natura 2000 designations. She accepts that SAC designations were not afforded in this area. She refers to marine mammals that breed, moult and haul out on the islands as including harbour and grey seals which are listed under Annex II of the EC Habitats Directive 1992 as species whose conservation requires the designation of special areas of conservation (SAC). However, as indicated above she accepts that no such designation applies to this area and in Northern Ireland there are 2 SACs where harbour seals are qualifying features, namely Strangford Lough SAC and Murlough SAC. Notwithstanding this she argues that as a species of community interest (SCI) the seals do enjoy protection.

[63] She points out also that the proposed route runs across the narrow route followed by salmonids during their out and in migration seasons and that Atlantic salmon are Annex II species. Another relevant species in the area are sand eels which are a source of diet for terns, seals and Atlantic salmon and she points out that the site of the construction of the pier and the berth ferry are coincidental with sand eel activity. Sand eels are a priority species in Northern Ireland. They eat zooplankton that are dependent upon phytoplankton for their diet. They are also

alleged to be the main source of food for shellfish in the lough during the summer months. The latter are dependent on the abundance of sunlight and she argues that the extent of the coverage of this pier together with a berth ferry in situ could have potential to affect the abundance of this "critical stage of the ECO system". She says that this feature has not been addressed within the various environmental impact assessments carried out in relation to this project. She argues further that the decision has inadequate regard to the presence of an oyster farm nearby. Another complaint relates to the failure to consider the impact of the mud flats to the west of Greencastle which provide feeding grounds for other protected species including various migrating birds including Pale Bellied Brent Geese which are an Annex II species.

[64] As a general proposition she is critical of the environmental assessment that has taken place in granting this licence and the matters to which I have referred are specific examples of how various species, who have specific protections, will be adversely affected by the development.

[65] In her application she sets out a chronology relating to the decisions she challenges with specific reference to the various assessments that were carried out.

Chronology as set out in the applicant's case

[66] The chronology is as follows:

- In **October 2011** the agent for the planning applicant submitted a letter to Planning NI (DOE) with accompanying plans and information requesting an opinion as to the contents required by law for an **environmental statement with regard to the proposal**.

- In **November 2011** Planning NI (DOE) provided a list of consultees and also determined the proposal to be **an environmental impact assessment development**.

- On **10 February 2012** Planning NI (DOE) wrote again to the agent with a further list of consultees with additional advice on the areas to be covered within the **environmental statement**.

- In **December 2012** the Department (Marine Division) under the Department (DOE) received a letter from the agent requesting a scoping opinion which was referenced under the Marine Licence ML33/12.

- In **February 2013** the Department (Marine Division) responded to the request providing a recommended structure of content upon which to provide an environmental statement to determine Marine Application ML3/12. The letter also included a summary of consultees' initial responses.

The Notice Party in this matter then applied for planning permission in **June 2013**. As the ferry project is a cross border project between Greencastle in Northern Ireland and Greenore in the Republic of Ireland the respective applications were submitted with the same **environment statement** to both councils in the respective jurisdictions.

- A **Habitats Regulation Assessment** was also prepared by the applicant's agent and submitted as part of the Environmental Statement. She refers to this as HRA1.

- In **December 2013** the applicant provided a further environmental information and outline construction environmental management plan to the planning authority.

  The application for a marine licence was submitted in **June 2014** and relied on the same various environmental assessments as were used in the planning application.

- In **August 2014** the application in the Republic of Ireland was approved.

  Planning decisions were devolved to local councils on **1 April 2015** and a decision in relation to the matter was deferred on 13 May 2015 because the Department highlighted issues in relation to compliance with the legal requirements for water discharge.

  As a result a new **Habitats Regulations Assessment (HRA2)** was undertaken by the Department between March to May 2015. This assessment highlighted two **likely significant effects (LSEs)** which triggered **appropriate assessment (AA)** which was also submitted as part of **HRA2**.

- On **26 May 2015** the Department, as part of the consultation process, confirmed with the planning authority that they were "content with the proposal".

- On **10 June 2015** the local planning committee for the council approved the application with 25 conditions attached (my underlining).

- On **23 June 2015** the Marine Licence application was submitted to the Department.

- On **3 June 2016** the marine licence was issued with 23 conditions attached (my underlining).

The challenge to the Department's decision making process

[67] The applicant criticises the various environmental assessments carried out which she describes as deficient. In particular when I analyse the details of the challenges the fundamental point made by the applicant is that the assessments were such that they did not comply with the seminal case of C-127/OT *WADDENZEE* in which the CJEU has held that when considering an application for development consent the authorities must adopt the "precautionary principle" – that the risk to the environment will exist if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned.

[68] This undoubtedly places a high burden on any application insofar as it is covered by the Habitats Directive.

[69] When one analyses the details supporting this suggestion the grounds are replete with references to the applicant's "opinion". The more I heard Ms Gibson's submissions and the more I considered the content of her affidavit it seemed to me that the challenge amounted to a rehearsal of the applicant's disagreement with the assessments. I will return to this point later in the judgment.

[70] She is also critical of the consultation process. She further makes the point that the Department failed to publish information pertaining to the application in newspapers for two consecutive weeks and also that within the consultation process consultees were not given a minimum of 42 days for responding post receipt of the further environmental information sent to the consultees on 14 January 2014 but rather were only offered 15 days from the date of that letter.

[71] In addition to deficiencies in the environmental assessment and flaws in the consultation process she also argues that the granting of the licence was in contravention of the Department's own policies and procedures. Again this focuses on an alleged failure to carry out a Habitats Regulation Assessment taking into account any advice given by the DOE. She further repeats the failures in relation to the publicising of the application and alleges that there has been a failure to resolve representations from the public.

[72] She concludes her application in the following way which I set out in full:

> "*Conclusion*
>
> *90. The process as followed (and not followed) in the making of the decision of ML33/12 from the information that is available publicly, I believe to be unlawful for the reasons within these proceedings. I seek relief for the quashing of this latest approval and for it to be declared unlawful under inter alia Marine Works (EIA) Regulations 2007 as national legislation and under the Aarhus Convention.*

91. The evidence that I bring demonstrates the failure of the Department to carry out their duty as they have fettered their discretion as a competent authority by demonstrating that they do not have the independence and file competence to discharge their duties in adequately assessing and providing appropriate environmental information for the effective lawful issuing of licence ML 33/12 and for their role as non-statutory consultee for P/2013/0434/F.

92. These proceedings, in my opinion, highlight the endemic unlawfulness of the working methods within the whole planning system as the Department as competent authority, has the authority to manage, direct, co-ordinate and make decisions on the process in a lawful manner with the Aarhus Convention, for its omissions, lack of transparency and actions in the course of their decision making process.

93. With regards to the average changing environment features globally and locally it would be reasonable and appropriate for the Department as competent authority to undertake or commission an up to date environmental assessment of all flora, fauna and habitats listed within the SPA and Ramsar site, being afforded the "highest form of protection" in Northern Ireland. This together with the Department's demonstration of integrity will ensure that inter alia, Atlantic salmon, terns and both species of seals as well as the sand eels as food source in the Natura 2000 site are protected for the future beyond reasonable doubt."

[73] Whilst I have set out a summary only of the applicant's case I will return to the specific points she makes in considering the proposed respondent's argument that leave should not be granted in respect of **Decision 3**. It was argued on behalf of the notice party that the application should also be dismissed by reason of delay as in effect a successful challenge to **Decision 3** would in effect be a challenge to **Decision 1**. I rejected this application as the consideration by the Department was a separate one even if they did rely on much of the same material as led to the decision by the Council.

The proposed respondent's case re Decision 3

[74] Mr McLaughlin on behalf of the Council makes two fundamental objections to the granting of leave.

[75] Firstly, he says that the proposed grounds of challenge within the Order 53 statement are not arguable on the merits. On analysis they are premised upon

unsustainable propositions of law and conflate the legal principles governing three separate regimes for environmental assessment.

[76] Secondly, even if any of the proposed grounds could be argued the applicant has simply not adduced evidence which could support them or which would be necessary to decide them. In short the court does not have the material upon which it could make a reasoned conclusion on arguability.

[77] Before considering the specific facts of this case it is important to set out the relevant regimes of environmental assessment so far as they impact on planning decisions. In essence there are three separate regimes which are hierarchical in nature.

[78] The highest protection of cover is provided by what is known as the Habitats Directive – Directive 92/43/EEC. Article 3 of the Directive requires Member States to identify areas within its territory which contain certain priority habitats (listed in Annex I) or species (listed in Annex II). These are known as Special Areas of Conservation (**SACs**) and are designated in relation to the habitat or species in question. Article 3 also includes Special Protection Areas (SPAs) which are designated under Article 5 of the 2009 World Wild Birds Directive. This network of SAC and SPA sites across Europe is known as Natura 2000 Network. The key provision of the Directive in terms of planning applications is Article 6(3) which states as follows:

> "*Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment for the site in view of the sites conservation objectives. In light of the conclusion of the assessment of the implications for the site and subject to the provisions of paragraph 4 the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate after having obtained the opinion of the general public.*"

[79] This provides the highest level of protection to certain areas designated within the Natura 2000 network. In the circumstances set out in the article the authorities must convene an appropriate assessment. In this application this has also been referred to as HRA. Obviously in considering the matter the authority is entitled to take into account any mitigation measures which will avoid any conclusion that the development "*will adversely affect the integrity of the site*". This provision has been considered in the leading authority of C-127/02 *Waddenzee (*see paragraph [67] above*)* in which the CJEU has held that, when considering an application for development consent, the authorities must adopt the "precautionary principle" to determining whether a risk of adverse effects exists i.e. it will exist if it

cannot be excluded based on objective information. In particular paragraph 44 of the judgment states:

> "*In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by community policy on the environment, in accordance with the first sub-paragraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists, if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned …*"

[80] So if after carrying out an appropriate assessment or HRA if the relevant authority is in doubt based on objective information it is obliged to refuse the application.

[81] It must be emphasised that this protection and this principle only applies to areas designated as SACs or SPAs under Annex I and II and for which purpose the SAC/SPA has been designated.

[82] The next level of protection provided is contained in Article 12 of the Habitats Directive which relates to the protection of species. Under Article 12(1):

> "*Member States shall take the requisite measures to establish a system of strict protection for the animals species listed in Annex IV*
>
> *(a) in their natural range prohibiting;*
> *…*
>
> *(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;*"

So the obligation on the State is to "*take measures to protect*". The Directive does not describe what those measures should be and in Northern Ireland the State has decided to implement this obligation by way of regulations which make it a criminal offence to do any of the things prohibited in Article 12 - See Part III of the Conservation (Natural Habitats etc) (NI) Regulations 1995. Annex IV species are not protected by means of SAC designations and fall outside the obligation to conduct appropriate assessment/HRA.

[83] The inter relationship between the obligation to prohibit "*the disturbance*" of Annex IV species and the planning regime was considered by the Supreme Court recently in *R (Morge) v Hampshire County Council* [2011] UKSC 2. In substance, the court held that where a proposed development might give rise to disturbance of an

Annex IV species, this was a material consideration to be taken into account by the planning authority, along with the extent of the likely impact upon the local population and also the possibility that a licence may be granted. Planning did not amount to a licence to disturb and any prohibited activity should be prosecuted separately by the relevant authority. In the judgment Lord Browne said:

> *"20. … I cannot see why a planning permission (and, indeed, a full planning permission save only as to conditions necessary to secure any required mitigating measures) should not ordinarily be granted save only in cases where the Planning Committee conclude that the proposed development would both (a) be likely to offend Article 12(1) and (b) be unlikely to be licensed pursuant to the derogation powers. After all, even if development permission is given, the criminal sanction against any offending (and unlicensed) activity remains available and it seems to me wrong in principle, when natural England have the primary responsibility for ensuring compliance with the Directive, also to place a substantial burden on the planning authority in effect to police the fulfilment of natural England's own duty."*

[84] The extent of the obligation from the planning point of view is that this becomes a material consideration in determining whether permission should be granted. The regime involves consultation with the relevant agencies, the consideration of all responses including an assessment of identified disturbances. There is no requirement to refuse permission as would be the case if Article 6 applied.

[85] The third relevant regime for environmental assessment relates to the obligation to carry out an Environmental Impact Assessment which derives from Directive 2011/92/EU which in the context of marine licences has been transposed in the UK by the Marine Works (Environmental Impact Assessment) Regulations 2007. Precisely the same obligations require the conduct of EIA prior to granting planning permission, but had been transposed in separate regulations which are specific to the planning system namely Planning (EIA) (NI) Regulations 2015.

[86] Article 4 provides the obligation to make assessments in accordance with Articles 5 to 10. Article 5 sets out the requirement of a developer seeking permission to provide an Environmental Statement (ES) which contains a description of the likely significant effects upon the environment. This is the developer's view of the likely significant environmental effects. Article 6 requires that the ES is published for public consultation and also requires that it is sent to the relevant public authorities for consultation.

[87] It is open to the authority to require the developer to submit Further Environmental Information ("FEI") on any issues which are addressed (or

inadequately addressed) in the ES. Again any FEI must also be the subject of consultation with the public on the relevant authorities.

[88] It should be noted there is no statutory obligation to publish the consultation responses. There is therefore no formal process of "*counter objectives*". However, members of the public may make representations which they consider appropriate. The key provision is Article 8 which provides that "*the results of consultation and the information gathered pursuant to Articles 5, 6 and 7 shall be taken into consideration in the development consent procedure*".

[89] Thus the obligation is to "*take account of*" **all** of the "*environment information*" (i.e. the ES, FEI and consultation responses) prior to making the decision of whether or not to grant the relevant consent. It does not contain the prohibition provided in the Habitats Directive. Thus is it clearly a lower form of protection. It does not require or trigger an appropriate assessment or HRA. It is important to recognise that the ES is not "*the environmental assessment*" but rather the developer's view about the likely significant effects and is only the first step of an iterative process of assessment. The final decision will be informed by all of the other information received and also by the authorities own expertise, experience and judgment. Mr McLaughlin describes the purpose of the EIA processes as a means "*to ensure (so far as possible) that the public and the authority are informed about the possibility of adverse effects, to enable mitigation measures to be considered and for the public to make an informed contribution to the decision-making process*".

[90] In the course of his detailed and skilful submission Mr McLaughlin referred me to a series of cases in which the requirements of this Regulation were considered namely **R (Blewett) v Derbyshire CC** [2004] ENVLR, **R (Edwards) v Environment Agency** [2008] UKHL 22, **R (Jones) v Mansfield DC** [2004] ENV L. R. 21, **R (Buglife) v Thurrock Thames Gateway DC** [2009] 2 P and CR 8 and **R (Millen) v Rochdale Metropolitan BC** [2001] ENV. LR 22 from which the following principles emerge.

[91]

(a) It is a matter for the authority to decide if an ES is an ES as a matter of law.

(b) An ES does not cease to be lawful if it does not mention every possible scrap of environmental information. <u>It is the developer's view</u>.

(c) The EA <u>process</u> that follows the ES fills any potential gaps in the ES. Members of the public have an opportunity to express their views, the authorities can take advice from the appropriate experts and can add more to the ES process including the requirement to produce an FEI.

(d) Perhaps this is best encapsulated when the Court of Appeal in R (Buglife) approved the following comments which had been made by Sullivan J in the case of R (Millen).

> *"108. It is for the local planning authority to decide whether it has sufficient information in respect of the material considerations. Its decision is subject to review by the courts, but the courts will defer to the local planning authorities judgment in that matter in all but the most extreme cases. Regulation 4(2) reinforces this general obligation to have regard to all material considerations in the case of a particularly material consideration; 'environment information' which has been provided pursuant to the Assessment Regulations.*
>
> *109. There is no reason why the adequacy of this information, which includes the sufficiency of information about the site, design, size and scale of development should not be determined by the local planning authority …*
>
> *110. The question whether such information does provide a sufficient description of the development proposed for the purposes of the Assessment Regulations is, in any event, not a question of primary fact, which the court would be well equipped to answer. It is pre-eminently a question of planning judgment, highly dependent on a detailed knowledge of the locality, of local planning."*

[92] This approach found favour in this jurisdiction in the judgment of Weatherup J in the case of **Re National Trust for Places of Historic Interests or Natural Beauty** [2013] NIQB 60 where he said as follows:

> *"The general approach to Environmental Statements is set out in **R On the Application of Blewett v Derbyshire County Council** [2004] Env LR where Sullivan J at paragraph 68 stated that there is a tendency on the part of claimants opposed to the grant of planning permission to focus upon deficiencies in Environmental Statements as revealed by the consultation process prescribed by the Regulations and to contend that because the document did not contain all the information required it was therefore not an Environmental Statement and thus that the local planning authority had no power to grant planning*

> *permission. However Sullivan J continued that unless it could be said that the deficiencies were so serious that a document could not be described as in substance an Environmental Statement for the purposes of the Regulations such an approach was misconceived. It was stated to be important that the decisions on EIA applications were made on the basis of full information but the Regulations were not based on the premise that the Environmental Statement will necessarily contain the full information. The Environmental Statement is but a part of the environmental information that the decision maker must take into account.*"

[93] The judgment goes on to make it clear that the "*environmental information*" gathered by the Department from the developer, the consultees and others will be wider than the environmental statement provided by the developer. Ultimately it is for the Department to decide whether there is sufficient information obtained for the purposes of making its decision.

[94] How then did the Department apply these regimes to this project?

[95] At the outset it should be pointed out that the application for the marine licence was made on 23 June 2014 by which stage the application for planning was already under consideration and subject to the environmental assessment process. In considering the marine licence application the Department relied on the same material as was considered in the planning application.

[96] In relation to environmental information a number of matters may be noted. First of all, as set out above, the environmental information gathered by the Department from the developer the consultees and others will be wider than the "*environmental statement*" that was provided by the developer. The environmental statement must contain the information required by the schedule to the Regulations and will fail if it cannot be regarded as in substance an environmental statement. As well as the environmental statement and further information from the developer the Department will also be able to rely on the environmental information obtained from consultees and others. For this purpose the representatives of the Northern Ireland Environmental Agency are consultees. Secondly, it is for the Department to decide if there are likely significant effects, that is, if there is an effect, if it is significant and if it is likely. Thirdly, the Department can take into account mitigation measures, thus concluding that what would otherwise be a likely significant effect will by reason of mitigation not be so. In order to so conclude the mitigation measures should be clearly established and easily achievable. Fourthly, the Department cannot postpone the decision on likely significant effects or whether mitigation measures will mean that there is no significant effect. Fifthly, there must be sufficient information for the Department to decide on the likely significant effects of mitigation. It is for the Department to decide if there is sufficient information and the Department may require further information from an applying

applicant, with the required publicity for such further information, and may obtain additional information from consultees or from members of the general public.

[97] It is necessary to consider the relevant designations which apply to Carlingford Lough. There are three in total:

(a) Carlingford Lough SPA-UK. On the northern side of the lough, UK has designated an area of Carlingford as an SPA under the Wild Birds Directive, as it supports populations of Sandwich Terns and Common Terns during the breeding season and populations of Pale Bellied Brent Geese during the wintering season. These are all birds listed in the Wild Birds Directive and are caught by the Habitats Directive by reason of Article 3.

(b) Carlingford Lough SPA-Republic of Ireland. On the southern side of the lough Ireland has designated parts of the shoreline as an SPA which support population of Pale Bellied Brent Geese. The SPA excludes Greenore Port – which is the site of the proposed terminal on the southern shore.

(c) Carlingford SPA-Republic of Ireland. Ireland has also designated areas of vegetation along the southern shore where the lough has an SPC. This area supports two habitat types which are protected under Annex I of the Habitats Directive.

[98] Having regard to these designations the Department carried out an appropriate assessment or HRA.

[99] In this regard it should also be noted that the developer also provided a HRA. It was not obliged to do so. It has been described as a "*shadow HRA*" and simply provided useful information which was included in the EIA. It does not constitute the appropriate assessment under the Habitats Directive which was carried out by the Department.

[100] There are four stages involved in an appropriate assessment/HRA. First, a screening stage in which the authority identifies whether it is likely that there will be significant environmental effects upon the site. Second, if such effects are likely, the authorities must conduct an appropriate assessment in which it identifies and assesses impacts, taking account of mitigation measures. Third, if there are adverse effects it considers alternative solutions. Fourth, in the event that adverse impacts remain, the Member State may only grant consent if there are overriding reasons of public importance. In the course of her arguments the applicant referred to both the developer's HRA and the Department's HRA. It is the Department's HRA which is relevant in the consideration of the permission. I have given careful consideration to the final HRA which is dated 11 May 2015. (I did consider previous iterations of this document and the changes in the assessment clearly demonstrate the Department

responding to concerns). The document is prepared by the Northern Ireland Environment Agency. It identifies two areas which could have adverse effects namely loss or degradation of foraging habitat of the SPA features as a result of pollution incidents during construction and operation and emissions from both foul and surface water soak ways. Both these features identified the adverse effects as being "*significant*". That being the case an appropriate assessment is triggered and that assessment identified the means by which mitigation measures would address those concerns. In essence they involved the preparation of a final construction environmental plan by the developer (CEMP) and a requirement that soak ways were to be located to the northern section of the redline boundary which was to be demonstrated on an amended drainage plan as submitted for Department approval prior to works commencing.

[101] In considering this matter it is important to note that Carlingford Lough has not been designated to be a SAC for those purposes of conserving habitat of any Annex II species. This does not mean that such species do not visit the lough for example, seals, porpoises etc. Indeed, the appropriate assessment took into account the fact that the Murlough Bay SAC to the north of the site is designated for the purposes of the common seal or harbor seal because it is known to support breeding populations of that species. The fact of the Murlough Bay SAC was taken into account when determining the marine licence. Based on the assessment provided by the NIEA the Council took the view that permission could be granted and it was not necessary to proceed to either stages 3 or 4 of the process. Based on the contents of that report there is no way in which this decision could be considered other than a rational assessment of the potential impact on the SPA and SAC at this location.

[102] The primary focus of the applicant's challenge was an attack on the adequacy of the environmental statements and ultimately the HRA to which I have referred. The Council applied the EIA process to the entire application and having taken into account all the information provided to it granted the licence subject to a series of conditions to which I will refer later.

[103] I turn now to the applicant's challenge. The fundamental point made by Mr McLaughlin is that in essence the applicant wrongly attempts to apply the principles applicable to the Habitats Directive namely the "*precautionary principle*" to areas where they simply do not apply. Returning again to the designations in Carlingford Lough it is important that it has <u>not</u> been designated to be an SAC for the purposes of conserving the habitat of any Annex II species e.g. seals, porpoises etc. The appropriate assessment/HRA carried out in respect of the licence considered the likely significant effects of the development upon all of those protected interests applicable to Carlingford Lough including Murlough Bay SAC.

[104] The potential effects of the development upon Annex II or Annex IV protected species did <u>not</u> require an appropriate assessment, did <u>not</u> attract the application of the precautionary principles and did <u>not</u> require consent to be refused unless adverse effects can be excluded. To the extent therefore that the applicant

relies upon a failure to carry out such an exercise then clearly such a challenge is misplaced as a matter of law. Indeed, as a result of this it seems to me that the vast majority of the challenges can be dismissed on this ground.

[105] This is evident from the Order 53 statement itself. Thus the applicant's states:

> "*The EIA carried out was not an assessment of the likely environmental impact of the project in the light of the best scientific knowledge, as the Court of Justice outlined in case C-127/02 due to ….*"

She then sets out the grounds to justify this assertion. The difficulty is that the relevant case does not relate to EIA. The obligation under case C-127/02 relates solely to those areas where an appropriate assessment is required and as has been set out above this was done in an entirely lawful manner. It seems to me this is a fatal legal flaw in this application. When one looks at the affidavit supporting the Order 53 application this error is repeated. By way of example at paragraph [47] in alleging that the appropriate assessment was inadequate in this case the applicant refers to a failure to identify risk to Atlantic salmon and lesser sand eels. However, these are not included in the SAC or SPA. A similar error is made in paragraph [48] in relation to mussel and oyster beds. She repeats this error in paragraph [59] when she is critical of the ES (which as indicated is merely the developer's view) when it asserts that the effects on salmonid migrations were of negligible significance. Again this is not a matter that requires an appropriate assessment.

[106] In any assessment of the written submissions and oral submissions of Ms Gibson it is clear that she seeks to impose the requirements of the precautionary principle in relation to matters that are not covered by the relevant directive or principle.

[107] I recognise that the applicant is a personal litigant and it is therefore important to ensure that the court also considers the environmental assessment process that was carried out to ensure that the issues raised by the applicant have been properly assessed. It is difficult to "*drill down*" into the applicant's case to distinguish between AA and EIA issues but insofar as it is possible to do so from the papers I have attempted to carry out this exercise. The first point in relation to this is that it is clear that this entire process was subject to a lengthy consultation process with appropriate environmental statements, FEIs and EIAs. The Department had regard to submissions from all relevant consultees.

[108] This is self-evident from the final product namely the licence itself which contains very significant conditions which are clearly directed at mitigating any environment issues which were identified throughout the process. Thus condition 4 requires the developer to provide a final CEMP with associated method statements and finalised layout design to be agreed by the Department prior to any works commencing on site. This must reflect all mitigation and avoidance measures to be

employed as outlined in the construction environmental management plan, the environmental statement dated June 2013 and all additional environmental information submitted.

[109] The applicant is critical of the fact that no final plan has been produced but self-evidently this will only arise when the developer is ready to commence construction.

[110] Condition 5 provides that an Environmental Clerk of Works must be assigned for this scheme (my underlining). Contact details for the designated environmental manager must be submitted to the Department at least eight weeks prior to the commencement of pre-construction development or construction works on site.

[111] Condition 6 requires the Department to be notified one week in advance of the commencement of any impact piling or blasting. The developer must provide a noise risk impact assessment for approval before impact piling can begin to prevent disturbance to sensitive receptors such as seals or cetacens.

[112] Under Condition 7 the developer is obliged to maintain a record of beginning and end times, duration of noise levels of all impact piling or blasting. Records must be submitted to the Department within eight weeks of completion of the licence works.

[113] Under Condition 8 the developer must appoint an independent qualified and experienced marine mammal observer (MMO) to monitor for marine mammals. The condition provides detail as to the obligations of the MMO who is obliged to carry out all works in accordance with the JNCC Guidelines "The Protection of Marine Protective Species from Injury and Disturbance October 2010". Conditions 9, 10, 11 and 12 provide further detail in relation to the protection of marine mammals. This includes a power for the Department to require cessation of all work if there is reason to believe that a marine mammal has been injured or killed. Significantly conditions 11 and 12 were added between 3 June and 30 June 2016 which demonstrates the on-going iterative process in relation to this project. It is also important to note that under the marine licence the Department itself has power to vary the conditions without the requirement for any application. Clearly the Department has given extensive consideration to the question of the protection of marine mammals and has put in place very significant conditions to deal with any concerns arising.

[114] Condition 13 restricts pile driving works between the months of April and October.

[115] Condition 14 provides that the ferry route shall maintain a minimum distance of 230 metres from all haul out sites identified with any environment statement.

[116] Condition 15 requires the developer to carry out monthly seal counts at haul out sites.

[117] Condition 16 provides for the protection of the water as discussed in relation to planning permission in **Decision 2** above.

[118] Condition 17 requires turbidity monitoring to be carried out at an area close to the adjacent shellfish beds during the operation of the ferry, to ensure suspended solid levels do not impact on shellfish health. Details of the monitoring must be included in the CEMP.

[119] Condition 18 provides that the developer shall provide access at all reasonable times to any archaeologist nominated by the Department to monitor the implementation of archaeological requirements.

[120] Having regard to these conditions which have been imposed at the end of the environmental assessment process it is simply not credible to contend that potential adverse effects on the environment had not been taken into account by the Department and appropriately addressed.

[121] There are a number of separate points which were made in the course of the applicant's submissions which I will deal with at this stage.

[122] Firstly she is critical of the fact that the Department relied on out of date data in relation to bird counts which were at the latest 2000.

[123] She does not explain how or why this would have affected the outcome. Mr McLaughlin argued that this did not prevent a lawful assessment being carried out on the potential effect of the birds in this area given their known patterns of behaviour. Indeed if anything he submitted that recent bird counts would suggest that there were fewer birds. The Department proceeded on the basis that the birds were present at the site and that the assessment was carried out on that basis. He referred me to the National Trust case in this jurisdiction in which this very issue was dealt with by Weatherup J in relation to alleged outdated figures in relation to lizards. In any event unlike the National Trust case there is absolutely no expert evidence to indicate that more recent surveys would have any impact on the decision that was made.

[124] She is critical of the failure to take into account the presence of seals and porpoises at this site but this has clearly been dealt with through EIA process and the appointment of an MMO.

[125] The applicant also complained about the period of advertisement of environmental information which required consultation responses within 15 days instead of 42 days. The requirement of 42 days is contained in Regulation 16(2)(e) of the Marine Works (EIA) Regulations 2007. However, this obligation relates to

advertisement of the Environmental Statement. The request for consultation response within 15 days was made in relation to the further environmental information. In any event it is clear that this document related to a time before the application for the marine licence was made i.e. 14 January 2014 and clearly had no impact on any consultation response.

[126] The applicant also referred to the obligation under Regulation 16(1)(a)(i) that the ES should be advertised on two successive weeks. It appears that it was only advertised for one week and in this regard the applicant's complaint is valid. However, it cannot sensibily be argued that she or any other person was prejudiced by this or that she was unable to make a consultation response. Indeed, it is plain from the evidence that the applicant was highly informed about the content of the ES and participated fully in responding to it. If any defect is to be relied upon as a ground for judicial review an applicant must demonstrate that she has suffered actual or real unfairness. Mr McLaughlin also referred me to recent Supreme Court authorities which have made clear that even if there may be procedural irregularities in the EIA process these will not result in a permission being quashed if the error is small and no substantial prejudice occurs (see e.g. Walton v Scottish Minister [2012] UKSC 44 at [103], [129] and [155]; and R (Champion) v North Norfolk DC [2015] 1 WLR 3710 (54)-(62)). Mr McLaughlin further points out that in *Champion* the Supreme Court saw no reason why in the exercise of its overall discretion whether at the permission stage or in relation to the grant of relief the court should be precluded from taking account of delay in challenging a procedural irregularity such as this. Thus while he accepted that so far as EU grounds were concerned he was not relying on delay insofar as this particular defect is challengeable he says that delay is a relevant factor which can be taken into account. I agree with his submissions in relation to this issue and that it does not constitute a valid ground for leave to challenge the decision.

[127] The applicant has also made complaints about failure to answer FOI responses. I asked the applicant to provide a schedule of these requests and which remain outstanding and having considered these I do not see how these explain any prejudice to her in these proceedings. In any event statutory remedies exist if there has been a failure to respond to an FOI request either on time or at all. I take the view these are not grounds for judicial review of the licence decision, in particular having regard to the fact that the authority maintains an open file policy which has been inspected and interrogated by the applicant.

[128] In her closing submissions the applicant also alleged that the licence had the potential to breach her Article 2 rights because she expressed a concern with risks associated with sea levels generally and her concerns as to the viability of sea defences in the vicinity. I simply do not have any or sufficient evidence to suggest that Article 2 is remotely engaged in this case and I could not consider this as a ground for granting judicial review.

[129] Therefore, it seems to me that the submission on behalf of the Council is made out to the effect that the proposed grounds of challenge are not arguable on the merits and indeed are fatally flawed in a legal sense.

[130] Even if any of the proposed grounds could be argued Mr McLaughlin says that the applicant simply has not adduced evidence which could support them or which would be necessary to decide them.

[131] As a general point it is clear that in the course of her affidavit the applicant is merely setting out her opinions and her assertions which date back to her original objections to the planning application. In reality the substance of the applicant's challenge is a merits one. She is implacably opposed to the project and will remain so. There is simply no expert evidence which begins to challenge the conclusions of the various environmental impact assessments which were carried out throughout the entire process. Even if there was this is not terrain the court should enter barring clear evidence of irrationality. At the eleventh hour Ms Gibson did provide an expert report from Dr Susan Wilson in relation to the seal population on Greenisland, Greencastle, Carlingford Lough. Relying on seal counts which were actually commissioned by the Department Dr Wilson points out that the Co Down population of harbour seals is unevenly distributed along the Co Down coast from outer Belfast Lough to Carlingford Lough. At its height the report seeks to argue that the seal population in Carlingford Lough is sufficient to justify it being designated as a SAC site. Insofar as it is argued it <u>should be</u> such a site this is a different legal point from a challenge to the planning permission which has been granted. The fact of the matter is that it is not such a site for the purposes of protecting seals. Mr McLaughlin pointed out in response that the procedure whereby member states are obliged to designate SAC sites is such that they do not have to protect every area where relevant species exist. He tells me that the Commission accept a ratio within the United Kingdom of approving within 25-40% of such areas. In this jurisdiction Murlough Bay and Belfast Lough have been designated as SACs. The mere fact that seals are breeding in this area does not mean that it must be designated as an SAC. So the expert report does not advance the case on behalf of the applicant.

[132] I agree with the submissions made on behalf of the Department and for the reasons set out above I have concluded that the grounds of challenge in relation to **Decision 3** are simply not arguable.

[133] Accordingly the applications for leave to apply for judicial review are dismissed.