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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY OMAGH DISTRICT COUNCIL FOR JUDICIAL REVIEW

GILLEN J

Application

[1] In this application Omagh District Council ("ODC) sought to challenge the decision of the Minister for the Department for Regional Development (DRD) made 16 March 2006 when he introduced a new planning statement – PPS 14: Sustainable Development in the Countryside" ("PPS 14") with immediate effect.

The Grounds of the Application

[2] These are set out in the applicant's Order 53 statement (as amended) but can be divided, as suggested by Mr Larkin QC who appeared on behalf of the applicant with Mr Scoffield, as follows:

(1) PPS 14 is ultra vires the powers of the DRD.

(2) The attempt to prospectively give determining weight to PPS 14 is unlawful.

(3) DRD failed to properly appraise itself in relation to draft PPS 14 by way of proper consultation or inquiry.

PPS 14

[3] The salient aspects of PPS 14 can be summarised as follows:

[4] It was published on 16 March 2006 and consultation responses were invited by 9 June 2006.

[5] The Preamble declares that it is designed "to assist in the implementation of the Regional Development Strategy (RDS)".

[6] Paragraph 3.1 declares that the overarching aim is to "manage development in the countryside in a manner consistent with achieving the strategic objectives of the (RDS) for Northern Ireland 2025".

[7] The objectives are set out in paragraph 3.2 as being a presumption against development operated throughout the countryside with the exception of a limited number of types of development which are considered in principle to be acceptable. No other development is to be permitted unless there are overriding reasons why that development is essential and could not be located in a settlement, or otherwise located for development in a development plan.

The Ministerial Statement

[8] Mr McCloskey QC, who appeared on behalf of the respondent with Mr McLaughlin, summarised the salient passages from the Ministerial Statement in his initial skeleton argument and I adopt them in the following terms:

> "This is a statement of policy, made by me pursuant to Article 4 of the Strategic Planning (Northern Ireland) Order 1999 … This statement is an expression of Government policy … Today I am publishing draft (PPS 14) that proposes a presumption against development throughout the countryside. In making the present statement I have considered the views put forward by a wide range of bodies and individuals in response to the Issues Paper published for public consultation in June 2004 … I have noted that many rural dwellers are concerned that their way of life should be protected. There is also concern that the high rate of new buildings in the countryside is unsustainable and will produce irreversible and unacceptable impacts on the environment ..
>
> Having given careful consideration to all views and representations expressed during the policy making process to date, I have concluded that in the public interest, actions designed to minimise irreversible damage cannot be delayed. The present statement seeks to address substantial concerns that the policy direction of draft PPS 14

> could be seriously frustrated and undermined by a large influx of planning applications, particularly for single dwellings, during the consultation period and before the final policy is published. At the same time, I am of course aware of my obligation to conscientiously consider all further views and representations expressed during the next phase of the overall consultation exercise initiated today …
>
> In view of this draft PPS `Sustainable Development in the Countryside' proposes a presumption against new development in the countryside outside designated settlement limits with a limited number of exceptions …
>
> This statement expresses my assessments as DRD Minister of the requirements of the public interest at present …
>
> In addition I consider that in the present circumstances where there is evidence of a significant threat to the environment from new development, there is good reason to proceed with a precautionary approach pending the completion of (PPS 14) policy development process. To this end the provisions of draft PPS 14 will immediately take precedence over the existing policies listed in the draft and should be accorded substantial weight in the determination of all planning applications received after today ..
>
> I make this statement with the approval of and having consulted the Minister with responsibility for the Department of the Environment Planning Service *(DOE.)*"

The Statutory Framework

[9] The following legislation played an important role in the consideration of this case.

[10] The Planning (Northern Ireland) Order 1991 (No 1220 (NI 11)) ("the 1991 Order").

[11] Where relevant the Order provides:

> "Part II
> FUNCTIONS OF DEPARTMENT OF THE ENVIRONMENT WITH RESPECT TO DEVELOPMENT OF LAND
>
> 3.-(1) The Department shall formulate and co-ordinate policy (*my underlining)* for securing the orderly and consistent development of land and the planning of that development …
> ……
>
> PART III
> DEVELOPMENT PLANS
>
> Development Plans
>
> 4.-(1) The Department may at any time make a development plan for any area or alter, repeal or replace a development plan adopted by it for any area. …….
>
> Publicity and consultation
>
> 5.-(1) Where the Department proposes to make, alter, repeal or replace a development plan for an area, it shall proceed in accordance with this Article, unless Article 6 (which provides a short procedure for such alterations, etc.) applies.
>
> (*Article 5 goes on to set out a number of steps which have to taken by the Department by way of publicity and consultation)*
>
> …

Publicity and consultation – short procedure for certain alterations etc.

> 6.-(1) Where the Department proposes to alter, repeal or replace a development plan for an area and it appears to the Department that the issues involved are not of sufficient importance to warrant the full procedures set out in Article 5, the

Department may proceed instead in accordance with this Article.

(*Article 6 then goes on to set out various steps that can be taken by way of a short procedure)*

….

Inquiries relating to development plans

7. The Department may cause a public local inquiry to be held by the Planning Appeals Commission for the purpose of considering objections to a development plan or to the alteration, repeal or replacement of a development plan.

Part IV
PLANNING CONTROL
DEVELOPMENT AND REQUIREMENT OF PLANNING PERMISSION

Meaning of `development'

11.-(1) In this Order, subject to paragraphs (2) to (4), `development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land …….

Determination of planning applications

25.—(1) Subject to this Part, where an application is made to the Department for planning permission, the Department, in dealing with the application, shall have regard to the development plan, so far as material to the application, and to any other material considerations, and—

(a) subject to Articles 34 and 35, may grant planning permission, either unconditionally or subject to such conditions as it thinks fit; or

(b) may refuse planning permission.

(2) In determining any application for planning permission for development of any class to which Article 21(1) applies, the Department shall take into account any representations relating to that application which are received by it before the expiration of the period of 14 days from the date on which notice of the application is first published in a newspaper.

(3) Where an application for planning permission is accompanied by such a certificate as is mentioned in Article 22(1)(c) or (d), the Department—

(a) in determining the application, shall take into account any representations relating thereto which are made to it by any person who satisfies it that, in relation to any of the designated land, he is such a person as is described in Article 22(1)(c); and

(b) shall give notice of its decision on the application to every person who made representations which it was required to take into account under sub-paragraph (a). "

[12] The Strategic Planning (Northern Ireland) Order 1999 (No 660) (NI4))

The relevant articles read as follows:

"Interpretation

2.-(2) In this Order `the Department' means the Department for Regional Development.

(3) This Order shall be construed as one with the Planning (Northern Ireland) Order 1991.

Regional development strategy

3.-(1) The Department shall formulate, in consultation with other Northern Ireland departments, a regional development strategy ["*RDS*"] for Northern Ireland, that is to say a strategy for the long-term development of Northern Ireland.

General powers of the department

4. The Department shall –

(a) Provide policy guidance and advice in relation to its regional development strategy and the implementation thereof.

Departments to have regard to regional development strategy

5. In exercising any functions in relation to development in Northern Ireland –

(a) a Northern Ireland department, and

(b) a department of the Government of the United Kingdom

shall have regard to the regional development strategy.

Power to undertake surveys and studies

6.-(1) The Department may undertake, or cause to be undertaken, such surveys or studies as it may consider necessary for the purposes of its functions under this Order, including surveys or studies relating to any of the following matters …….

(2) The Department may, for the purpose of the exercise of any of its functions under this Order –

(a) consult with such persons as it thinks fit, and

(b) where it considers it appropriate to do so, cause a public local inquiry to be held.

(3) Without prejudice to section 23 of the Interpretation Act (Northern Ireland) 1954 the Department may make rules regulating the procedure to be followed in connection

with inquiries held by or on behalf of the Department under this Order.

……..

Schedule

. . .

3. In Article 3(*of the 1991 Order)* after paragraph (1) insert –

"(1A) The Department shall ensure that any such policy is consistent with the regional development strategy (*this therefore amends Article 3 of the 1991 Order)*"

4. In Article 4 after paragraph (1) insert

"(1A) A development plan for an area must be consistent with the regional development strategy."

[13] The Planning (Amendment) (Northern Ireland) Order 2003 ("the 2003 Order") where relevant to this application, this Order provides:

"Regional development strategy

Certain policies, plans and schemes under the principal order to be in general conformity with the regional development strategy

27. In each of the following provisions of the principal order(*i.e the 1991 Order)*

(a) Article 3(1A) (policy under that Article to be consistent with the regional development strategy);

(b) Article 4(1A) (development plan for an area to be consistent with the regional development strategy);

. . .

for the words "consistent with" there is substituted "in general conformity with".

…….

Development plans: statement as to general conformity with the regional development strategy

"28.-(1) The following provisions of this Article apply where the Department of the Environment proposes to make, alter or replace a development plan for an area under Part III of the principal Order; and references in those provisions are to Articles in that Part.

. . . (6) Not later than the beginning of the period of 28 days immediately before it proposes to make an Order under Article 8(1) adopting a plan, alteration or replacement plan, the Department of the Environment shall send to the Department for Regional Development a copy of –

(a) the draft Order; and

(b) the plan, alteration or replacement plan to which the Order relates.

(7) The Department for Regional Development shall consider the documents received by it under paragraph (6) and within the period of 28 days beginning with the day on which it received those documents shall –

(a) determine whether in its opinion the relevant plan is in general conformity with the regional development strategy; and

(b) give the Department of the Environment a statement in writing which –

(i) sets out that opinion; and
(ii) if that opinion is to the effect that the relevant plan is not in general conformity with the regional development strategy, gives the reasons for that opinion.

(8) The Department of the Environment shall consider any statement received under paragraph (7) before making an Order under Article 8(1)

. . .

Miscellaneous

Status of development plans

30. In Article 4 of the principal Order (development plans) after paragraph (2) there is inserted –

"(2A) Where, in making any determination under this Order, regard is to be had to the development plan, the determination shall be made in general conformity with the plan unless material considerations indicate otherwise".

[14] Planning Reform (NI) Order 2006

Article 4 states as follows:

"**Status of development plans**

4.-(1) In Article 4 of the principal Order development plans, after paragraph (2) insert –

"(2A) Where, in making any determination under this Order, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise".

(2) Article 30 of the Planning (Amendment) (Northern Ireland) Order 2003 (NI 8) (status of development plan) ceases to have effect."

[15] The Environmental Assessment of Plans and Programmes Regulations (Northern Ireland) 2004

Regulation 12 states as follows:

"Consultation procedures

12-(1) Every draft plan or programme for which an environmental report has been prepared in accordance with regulation 11 and its accompanying environmental report ("the relevant documents")

shall be made available to the consultation body and to the public in accordance with the following provisions of this regulation.

(2) As soon as reasonably practicable after the preparation, the responsible authority shall send a copy of the relevant documents to the consultation body and invite it to express its opinion on the relevant documents within a specified period.

(3) The responsible authority shall also –

(a) within 14 days of the preparation of the relevant documents, publish in accordance with paragraph (5), or secure the publication of, a notice –

(i) stating the title of the plan, programme or modification;

(ii) Stating the address (which may include a website at which a copy of the relevant documents may be inspected or from which a copy may be obtained);

(iii) Inviting expressions of opinion on the relevant documents;

(iv) Stating the address to which, and the period within which opinions must be sent; and

(b) keep a copy of the relevant documents available at its principal office for inspection by public at all reasonable times and free of charge; and

(c) publish a copy of the relevant documents on the authority's website.

(4) the periods referred to in paragraphs (2) and (3)(a)(iv) must be of such length as will ensure that those to whom the invitation is extended are given an early and effective opportunity to express their opinion on the relevant documents. "

The Applicant's case

[16] In the course of a skilful skeleton argument forcefully augmented in oral submissions, Mr Larkin made the following points:

[17] In the planning law sphere, there is a clear demarcation of competence between the DOE and the DRD. The formulation of general planning policy is the role of the former, whilst advice and guidance and the drawing up of proposals is that of the latter. It was counsel's case that the DRD had usurped the role of the DOE in this matter.

[18] Counsel relied on Article 3 of the 1991 Order as unequivocally defining the role of the DOE "to formulate and coordinate policy for securing the orderly and consistent development of land and the planning of that development". He submitted that the promulgation of planning policy statements is a key component of that role drawing my attention to paragraph 33 of PPS 1 which states:

> "Planning policy statements set out the policies of the Department (of the Environment) on particular aspects of land used planning and applied to the whole of Northern Ireland".

[19] In contrast Article 3 of the 1999 Order unequivocally sets out that the role of the DRD is to "formulate, in consultation with other Northern Ireland departments, a regional development strategy for Northern Ireland" and at Article 4 "to provide policy guidance and advice in relation to its regional development strategy and the implementation thereof and to coordinate the implementation of that strategy". He submitted that a regional development strategy was not general planning policy but it was a more confined area.

[20] Article 5 of the 1999 Order, argued counsel, made clear that the height of the commitment of the DOE to the role of the DRD was to have regard to the regional development strategy. Counsel submitted that on a number of occasions Parliament has revisited and reiterated the differing roles of these two government departments. In paragraph 3 of the Schedule to the 1999 Order, the 1991 Order is amended in terms that "the Department (*the Department of the Environment)* shall ensure that any such policy is consistent with the regional development strategy. In the 2003 legislation Article 27 substitutes the words "consistent with" to "in general conformity with". Article 28 of that Order goes on then to provide a structure for the extent of that conformity in the context of development plans. Where the DOE proposes to make, alter or replace a development plan under Part III of the 1991 Order, a copy of the relevant documents must be sent to the DRD for its consideration and opinion. Counsel asserted that it was significant that

Article 28(8) of the 2003 Order thereafter makes clear that the height of the commitment of the DOE is "to consider any statement received . . .". It was Mr Larkin's argument that the general conformity obligation was therefore to be assessed in the loosest of terms requiring only consideration of the DRD's proposals by the DOE.

[21] Mr Larkin asserted that PPS 14 was unequivocally a planning policy and not a document within the ambit of Articles 3 or 4 of the 1999 Order which confines the DRD's role.

[22] He invoked the following extracts from PPS 14:

In the preamble the second and third paragraphs state as follows:

> "The Department has produced this planning policy statement, PPS 14 "Sustainable Developments in the Countryside" to assist in the implementation of the RDS. Its preparation was informed by the publication of an Issues Paper as a consultation document, the purpose of which was to provide a framework to inform and stimulate debate around issues facing the Northern Ireland countryside.
>
> The PPS sets out planning policies for development in the countryside and embodies the Government's commitment to sustainable development.
>
> . . . The policies of this statement will supersede the following provisions of A Planning Strategy for Rural Northern Ireland (PSRNI) which was a planning strategy for rural Northern Ireland."

Thereafter the preamble goes on to state that:

> "As a consequence the PPS will also withdraw the following designations contained in existing statutory and published draft development plans.

A flow chart on page 9 of PPS 14 records the RDS at the top of a chart feeding into development plans and also a box reading "PPS 14 and other planning policy statements prepared by DRD or DOE".

[23] It was counsel's submission therefore that PPS 14 served to conflate the two roles of DRD and DOE rather than separating them.

[24] Drawing attention to the aims and objectives set out in PPS 14 – at page 19 of the document – Mr Larkin referred to the following:

"3.1 The aim of PPS 14 is:

- to manage, development in the countryside in a manner consistent with achieving the strategic objectives of the regional development strategy for Northern Ireland 2005".

It was counsel's submission that this amounted to a good definition of what was formulating a planning policy.

[25] Mr Larkin went on to rely on the contents of page 21 of the PPS 14 where it unequivocally stated:

> "A presumption against development will be operated throughout the countryside with the exception of a limited number of types of development which were considered in principle to be acceptable and details of which are set out below. No other development will be permitted unless there are overriding reasons why that development is essential and could not be located in a settlement or as otherwise allocated for development in a development plan".

[26] Mr Larkin relied strongly on the contents of paragraph 53 of the affidavit of Mr Michael Thompson the Director of the Regional Planning and Transportation Division within the DRD which, for ease of further reference, I will now set out in full:

> "53. The proposals contained within draft PPS 14 include the replacement of a number of existing planning policies such as GBCPA1 relating to the designation of Green Belts and Countryside Protection Areas. It also proposes the withdrawal of certain designations contained in existing statutory and published draft development plans including Dispersed Rural Communities, Green Belts and Countryside Policy Areas (with some exceptions). In their place Draft PPS 14 proposes an entirely new and uniform set of planning policies which would apply across the entire (sic) of Northern Ireland outside of designated settlement limits. Even if the effect of the proposals within Draft PPS 14 would be the alteration of repeal of certain aspects of planning area plans,

> DRD contends that it is entitled to introduce new planning policy in this fashion, by reason of its powers under Article 4 1999 Order. The obligation set out in Articles 4-7 of the 1991 Order are imposed upon the DOE in relation to its power to make, alter, repeal or replace any particular area plan in respect of which it has exercised its powers under Article 4 of the 1991 Order. It is contended that there is nothing within the provisions of the 1991 Order, as amended, which represents a repeal or limitation of the power of DRD under the 1999 Order to make planning policy in furtherance of the implementation of the RDS".

[27] As a discrete argument Mr Larkin submitted that PPS 14 had attempted to unlawfully respectively give determining weight to PPS 14. Whilst he acknowledged that development plans (DPs) do not have the primacy afforded to them in planning legislation in England and Wales, he submitted that they must be looked at in the context of Article 30 of 2003 Order which gave a presumption in favour of what the development plan prescribed in the absence of good reason and Article 4 of the 2006 legislation. It was his submission that whilst these provisions had not been commenced in either instance at all times material to this application there was in place a legislative provision which gave priority to the development plan in the determination of planning applications. Invoking the authority of R v. Secretary of State for the Home Department ex parte Fire Brigades Union and Others [1995] 2 AER 244("the Fire Brigade Union case ") he submitted that whilst the courts can not intervene to compel a Minister to bring prospective provisions into effect it would constitute an abuse or excess of power for a Minister to exercise prerogative power in a manner inconsistent with the duty to bring those provisions into effect. Submitting that this matter was relevant to the weight to be given to development plans, it was unlawful for PPS 14 to attempt to put in place a planning policy which would trump or be inconsistent with the development plan to which the legislator has assigned priority.

[28] Additionally counsel submitted that the development plan process had been circumvented and the development plans effectively amended otherwise than by the procedure established by Articles 5 and 6 of the 1991 Order. It was these provisions which laid down the publicity and consultation procedures imposed on the DOE where the Department proposes to make, alter, repeal or replace a development plan. Whilst such Articles impose no duty on the DRD, counsel submitted that Parliament can never have intended that the DRD, confined as it is under Articles 3 and 4 of the 1991 legislation, could have power to take a route specifically prohibited to the DOE by altering a development plan in a planning policy. This served

to underline the consequence of the DRD usurping the functions of the DOE in this instance.

[29] Relying on the authority of Tesco Stores v. Secretary of State [1995] 2 AER 636 Mr Larkin submitted that the weight to be given to a material consideration is a matter for the planning authority having regard to the particular circumstance of the individual case. In this instance the Minister was seeking to prescribe the weight (a determining weight) to PPS 14 in planning decisions indicating that it should take "precedence over existing policies". Mr Thompson at paragraph 45 in his first affidavit had acknowledged that the Ministerial statement goes further than "the usual approach to draft plans (which is set out in paragraph 50 of PPS 1) in so far as it indicates that draft PPS 14 should be given precedence over a number of existing planning policies".

[30] On the issue of consultation Mr Larkin submitted that the respondent had failed to properly appraise itself of relevant considerations in formulating PPS 14. He submitted that the applicant enjoyed a legitimate expectation that there would be consultation in relation to draft PPS 14, basing this on the proposition that it was standard practice for such consultation to occur, a point underlined by the Ministerial announcement that consultation in any event was to occur in the future.

[31] Counsel submitted that where consultation is embarked upon it must be carried out properly (see R v. North and East Devon Authority, ex parte Coghlan [2001] QB 2 13 at para 108.

[32] He reminded me of the well known Sedley requirements (set out in R v. Brent London Borough Council, ex parte Gunning [1985] 84 LGR 168). These are, first, that consultation must be at a time when proposals are still at a formative stage. Secondly that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Thirdly adequate time must be given for consideration and response. Fourthly the produce of consultation must be conscientiously taken into account in finalising any proposals. Counsel submitted breaches of all of these grounds. In particular the proposal providing for its immediate implementation indicated a pre judging of the situation.

[33] Mr Larkin drew attention to the requirements of Regulation 8 and/or Regulation 13 of the 2004 Regulations which he said imposed a statutory obligation to consult. It is a transposition of a European requirement. Even if the limited scope for discretionary relief which might be open is more circumscribed in a European context. No early or effective opportunity for consultation pursuant to Regulation 12 had been afforded.

The Respondent's case

[34] In the course of an equally comprehensive and skilfully produced skeleton and oral arguments Mr McCloskey submitted that it is necessary to focus on the advent of the DRD in the 1999 Order into the domain of statutory control of development in Northern Ireland. It was his submission that since 1999 DOE and DRD have had co-existing functions and responsibilities. The regional strategy which lies within the domain of DRD and is the main subject matter of the 1999 Order is directly concerned with development as defined within the planning control provisions of the 1991 Order. Consequently counsel submitted that there is no material distinction between the land use policy set out in Article 3(1) of the 1991 Order whereby the DOE were to "formulate and coordinate policy", and the land use strategy set out in Article 3(1) of the 1999 Order whereby the DRD is to formulate "a strategy for the long term development of Northern Ireland". Counsel reminded me that policy is not to be accorded a narrow technical or artificial meaning. In Re Lisburn Development Consortium's application (2000) NIJB 91 at 95c-e("the Lisburn Development case") the Lord Chief Justice said at paragraph 6:-

> "The nature of a planning policy is to give guidance to planners as to the general approach to be taken to regularly encountered planning problems. . . I should not parse too closely the wording of a particular paragraph of a planning policy statement in an effort to discover whether a planning decision falls four square within it. The purpose of such a statement is to provide general guidance; it is not designed to provide a set of immutable rules."

[35] As a consequence of this, Mr McCloskey boldly asserted that there is no material difference between the word "policy" and the words "policy guidance and advice" which are essentially two competing statutory terms in this litigation. Guidance and advice could be couched in the form of a policy. In his submission guidance and advice was tantamount to policy. A planning policy was an instrument of guidance and advice. It was his submission that PPS 14 was the provision of guidance and advice in the form of a policy document. (See also Re Belfast Chamber of Trade's application (2001) NICA 6 and Re Wellworths' application (1996) NI 506 at 537).

[36] Counsel argued that the DRD has a free standing and exclusive role under the 1999 Order and is invested with a statutory responsibility and function with relation to regional development strategy. This permits it to make a planning policy statement. The DRD were empowered to formulate

policy under the terms of the 1999 Order in relation to a regional development strategy.

[37] Counsel submitted that Article 4(a) of the 1999 Order did not confine policy guidance and advice to strategy by virtue of the use of the words "in relation to" and "the implementation of". He urged on the court that this was not merely an ad hoc role but rather an overarching strategic task given to the DRD. As part of this strategical development, in this instance DOE, the Department of Agriculture, and DRD had all contributed towards PPS 14. Consequently Mr McCloskey accepted that PPS 14 was a promulgation of an individual policy which the DRD was entitled to promulgate. A number of other policy documents had been already promulgated by the DRD and if PPS 14 was ultra vires then this would strike at previous similar documents. He drew my attention to paragraph 16 of the first affidavit of Mr Thompson where he states:-

> "DRD has already published some of the other planning policy statements mandated by the RDS namely PPS 12: Housing in Settlements and PPS 13: Transportation and Land Use, which were published in July 2005 and February 2005 respectively.
>
> 17. DRD is satisfied that it had statutory authority under Article 4 of the 1999 Order, to bring forward Draft PPS 14. It constitutes policy guidance and advice and/or a proposal in relation to the implementation of the RDS. DRD does not accept that Article 4 of the 1999 Order is advisory only but contends that it provides the necessary statutory authority in this respect".

[38] Counsel went on to assert that the preamble of PPS 14 indicates that it is designed to assist in the implementing of the RDS and at paragraph 3.1 it indicates that its purpose is to manage development consistent with the objects of the RDS.

[39] He urged that close attention should be paid to the Parliamentary purpose of the planning legislation as a whole. Its historical context in setting out to repair a mischief should be to the fore in considering this legislation.

[40] The crucial question in Mr McCloskey's submission was whether or not PPS 14 had the character of policy, guidance and advice – was it a policy guide and advice in relation to the RDS and the implementation thereof?

[41] Invoking the authority of Gransden v. Secretary of State for the Environment [1985] 54 BCR 869 ("Gransden's case") counsel argued that it was lawful for a policy to indicate the weight which should be given to

relevant considerations provided the outcome is not being dictated to the decision maker. In the sphere of regional development draft PPS 14 should normally be accorded substantial weight in the exercise of evaluating material considerations and other material considerations should properly be accorded less weight.

[42] On the issue of inadequate consultation, counsel invoked the principle that a clear unambiguous and unqualified representation is required to establish a legitimate expectation of consultation. There was no practice that constituted a promise of future consultation conduct in this instance. In the absence of a statutory duty to consult, an unequivocal promise to consult or an established practice of consultation Mr McCloskey submitted that there was no obligation on the Minister to consult in respect of either the Ministerial statement or the contents of draft PPS 14.

[43] In the event that the court rejected that submission, he drew attention to the fact that in any event consultation was announced along with the publication of draft PPS 14, it being a draft policy document.

[44] Counsel acknowledged that interim effect had been given to draft PPS 14 until such time as a final version of the policy had been formulated. In that context the Minister was entitled to take account of the risk of large numbers of pre-emptive planning applications during a period of public consultation, the anticipated duration of that process, the likelihood that many of the applications would be granted and the effect of such development upon the implementation of the RDS and the irreversible environmental consequences. Moreover any procedural requirement of consultation is never absolute and may be subject to exception in cases of urgency or for the protection of competing public interests (see De Smith Principles of Judicial Review chapter 9 and R v Lord Chancellor ex parte Law Society (1994) 6 Admin LR 833).

[45] Dealing with the 2004 Regulations, Mr McCloskey submitted that the Regulations and the European Directive upon which it is based are concerned with the final product ie the eventual outcome. There is no prohibition against a stop gap measure taken in the public interest especially where it involves environmental protection.

Conclusions

[46] I have come to the conclusion that PPS 14 is ultra vires the powers of the DRD. My reasoning for coming to this conclusion is as follows:

[47] The planning legislation under scrutiny in this application must be seen as part of the overall planning legislation in Northern Ireland. Article

2(3) of the 1999 Order specifically states this in relation to the 1991 and 1999 Orders.

[48] In determining whether the Executive is acting within its lawful province, it is necessary to work out the extent of the power that Parliament has conferred upon it by the words its draftsman has used. The canons of statutory construction have recently been revisited in R (Haw) v Secretary of State for the Home Department and Anor (2006) 3 WLR 40 where at paragraph 17 Sir Anthony Clark MR said:

> "Like all questions of construction, this question must be answered by considering the statutory language in its context, which of course includes the purpose of the Act. The search is for the meaning intended by Parliament. The language used by Parliament is of central importance but that does not mean that it must always be construed literally. The meaning of language always depends upon its particular context."

[49] The court's task therefore, within the permissible bounds of interpretation, is to give effect to Parliament's purpose by considering the language used in this legislation in its statutory planning context . (see also Padfield v Minister of Agriculture, Fisheries and Food (968) AC 997, and Regina (Quintavalle) v Secretary of State for Health (2003) 2 AC 687.

[50] A key canon of construction is that it is presumed that a word or a phrase is not be taken as having a different meaning within the same instrument unless this fact is made clear. Similarly it is presumed that the drafter did not "indulge in elegant variation but kept to a particular term when wishing to convey a particular meaning". Accordingly a variation in the term used is taken to denote a different meaning (see Bennion on Statutory Interpretation 4th Edition at p. 995).

[51] In my view there is a clear distinction in meaning and purpose between the wording of Article 3(1) of the 1991 legislation enjoining the DOE to "formulate and coordinate policy for securing the orderly and consistent development of land and the planning of that development" on the one hand and on the other hand the wording of Article 3(1) of the 1999 legislation which enjoins the DRD to "formulate, in consultation with other Northern Ireland departments, a regional development strategy for Northern Ireland … for the long term development of Northern Ireland". Moreover the 1991 wording is manifestly different from that of Article 4 of the 1999 legislation which enjoins that the DRD shall "provide policy guidance and advice in relation to its regional development strategy and the implementation therefore and coordinate the implementation of that strategy". The

Parliamentary draftsman in 1999 must have been well aware of the wording in the 1991 legislation. In those circumstances I find unattractive the argument of Mr McCloskey that there is no material distinction between the use of the noun "policy" in the 1991 legislation and the noun "strategy" in the 1999 legislation when the former is used in the context of development as defined in Article 11 of the 1991 legislation and the latter is used in the context of a regional development strategy (RDS) in the long term development of Northern Ireland. If there is no material difference in the concepts, why then did the Parliamentary draftsman chose to use such different wording?

[52] Similarly I do not accept that the meaning of the verbs "formulate and coordinate" (policy) in the 1991 legislation are synonymous with the verb to "provide" (guidance or advice) in the 1999 legislation. The latter is in my view a means of contribution to the former but no more. I find there is clear conceptual difference between the meaning of the two statutes. The role of the DRD is to provide strategic thinking, guidance and advice properly formulated so that it can be implemented Thereafter it is the role of the DOE, having considered the views of the DRD, to translate that into a policy which I assume may also embrace additional considerations. It is the scarcely veiled attempt to conflate the two different functions of the two departments – DOE and DRD – and to blur the draftsman's division that has led DRD to fall into error in this case. I find that the DRD in PPS 14 has attempted to usurp the function given to the DOE under Article 3(1) of the 1991 legislation namely to formulate a policy. The DRD has sought to use the powers given to that Department under Article 4 of the 1999 legislation to enter forbidden territory. It has failed to confine its role to that of formulating strategy and giving advice and guidance in relation to the RDS relevant to this matter. In terms PPS 14 is a clear formulation of planning policy for land development issued by the DRD instead of the DOE.

[53] It is a further elementary canon of construction that words in a statute must not be interpreted out of their context. The principle of noscatur a sociis should apply. Thus, each section in a statute must be read subject to every other section, which may explain or modify it. This doctrine presupposes precision drafting rather than disorganised composition. Perusal of the spectrum of relevant legislation under scrutiny in this case serves to underline the quite clear division of functions that Parliament has intended for the DRD and the DOE. The complementary but quite separate roles of the two Departments have been regularly revisited by the draftsman. Some illustrations will suffice.

[54] Article 3(1)A of the 1991 Order, an amendment provided by paragraph 3 of the 1999 schedule, obliges the DOE to ensure that any policy is consistent with the RDS. If the DRD could simply make the policy itself why would there be no similar constraint on it and in any event why would Parliament

not have simply left policy about RDS entirely to the DRD? I do not consider that Parliament envisaged a situation where both DOE and DRD could formulate separate policies about a regional development strategy with the only constraint on the DOE being to ensure that its policy was consistent with the RDS without Parliament expressly stating that the DRD could make such policies. In my view it is implausible that the words "give advice and guidance" could be interpreted to afford to the DRD precisely the same role as that accorded to the DOE in formulating policy under the 1991 legislation in the absence of express statement. What if the policies were different albeit both conformed with the RDS?

[55] Article 27 of the 2003 legislation revisited the obligation cast on the DOE substituting the words "consistent" with "in general conformity with" in the 1991 Order when considering policy and RDS. Both pieces of legislation illustrate that the concepts of planning policy on the one hand and regional development strategy on the other are far from being synonymous as claimed by Mr McCloskey .The separate reference in the two statutes clearly underlines that they are regarded as conceptually different. The purpose of the two Articles mentioned in this paragraph is to ensure that whilst the functions of the departments are different, once the regional development strategy has been formulated, the policy thereafter enacted by the DOE should be in conformity with that strategy. They occur at different stages and are carried out by different departments. Hence the need to ensure conformity.

[56] In Part III of the 1991 legislation at Articles 5 and 6, Parliament has set out a detailed, and in some respects a complex method, by which the DOE must act if it proposes to make, alter, repeal or replace a development plan for an area in terms of publicity and consultation. Thus if the DOE intends to effect a policy which eg alters or repeals a development plan for an area statutory steps have to be taken in compliance with these provisions couched as they are in mandatory terms. It seems tolerably clear that the purpose is to avoid arbitrary changes of policy re development plans without proper consultation.

[57] In paragraph 53 of Mr Thompson's affidavit (referred to in paragraph 26 of this judgment) Mr Thompson boldly asserts that the obligations set out in Articles 4-7 of the 1991 Order are imposed upon the DOE but not upon the DRD. It would be curious if Parliament had decided that DOE must follow mandatory procedures involving detailed and perhaps even lengthy consultation to amend development plans but that the DRD, empowered only to provide policy guidance and advice under Article 4 of the 1999 legislation, could effect such a change without any similar consultation or publicity by virtue of the right to make a planning policy in furtherance of the implementation of the RDS. Rhetorically it would have to be asked why Parliament would have placed such a burden on DOE re general policy whilst

imposing no such similar restriction whatsoever on DRD despite the wording of Articles 3 and 4 of the 1991 legislation. I am satisfied that the 1999 legislation did not envisage such an outcome because it was never intended to permit DRD to have such a policy formulating role. Had that been the intention, then it strikes me as deeply improbable that a similar restriction would not have been placed upon the DRD as has been placed on DOE so as to protect the purpose behind Articles 5 and 6.

[58] Article 5 of the 1999 legislation enacts that Departments must have regard to the regional development strategy. Article 5 therefore makes no reference to the contents of the preceding Article 4 which refers to the obligation on the DRD to provide policy guidance and advice and to coordinate the implementation of the regional development strategy. If the draftsman had intended that Article 4 empowered the DRD to make planning policy in furtherance of the implementation of the RDS, it would have been a puzzling omission not to have enacted that regard must be also be given to the policy made as part of that policy guidance and advice. Mr McCloskey, in a somewhat Delphic aside, described Article 5 as "simply a reflection of legislative choice". I consider that the draftsman unequivocally was confining the obligation on other Departments to a consideration of the regional development strategy formulated under Article 3(1) of the 1999 legislation and was excluding any obligation to have regard to the advice and guidance set out in Article 4 albeit common prudence would suggest that they will normally be considered in any event. That serves to underline the more general or strategic role which is held by DRD but which is confined to the provision of guidance and advice after a formulation of the regional development strategy. Had it been intended that Article 4 of the 1999 legislation empowered the DRD to formulate a policy that would have been expressly referred in Article 5. I consider that Mr Larkin justifiably argued that the principle of experssio unius est exculsio alterius operates in this aspect.

[59] Article 28 of the 2003 legislation again revisits this theme of division between the departments. It makes further provision for the complementary but separate roles of those departments. Article 28 provides that where the DOE intends to alter or replace a development plan under Article III of the 1991 Order, it must make such plans available to the DRD who in turn must then give an opinion together with a determination as to whether the relevant plan is in general conformity with the regional development strategy. Thereafter under Article 28(8) the DOE shall consider any statement received before making an appropriate order. This in my view illustrates the symmetry of the planning legislation with reference to these two departments. It underscores the advice and guidance role of the DRD in relation to the confines of a regional development strategy but by its very nature makes clear that the policy making role is that of DOE.

[60] Planning policies are not conceptual straight jackets. Mr McCloskey was right to remind me of their general purpose as outlined by the LCJ in the Lisburn Development case (see paragraph 34 of this judgment). However planning policies are not so unstructured as to be devoid of precise meaning. The Oxford dictionary definition of policy is "the course of action adopted by the Government". That is precisely the role that the 1991 legislation has given to the DOE. Before setting out that course of action in its policy, the DOE should take advice and guidance from the DRD and acting in conformity with the regional development strategy formulated by the DRD. In my view PPS 14 has usurped the role of the DOE and has moved to the stage of formulating a course of action to be adopted, in certain circumstances with immediate effect, by the Government.

[61] I consider that the illustrations given by Mr Larkin in this matter and set out by me in paragraphs 21-26 of this judgment illustrate that. The preamble unequivocally sets out the planning policies for development of the countryside and asserts the withdrawal of a number of designations in existing statutory and published draft development plans. The body of the document goes on to create a presumption against development in the countryside with some exceptions and expressly overrides existing area development plans. This approach is underlined in the Ministerial statement. Mr Thompson's own interpretation of PPS 14, at paragraph 53 of his affidavit, recognises that this proposes an entirely new and uniform set of planning policies across Northern Ireland. Unsurprisingly this is recognised as not being the usual approach. I consider this to be the case because it all amounts to a classic policy formulation which is in the province of the DOE. PPS14 does not bear the character of guidance and advice or coordination of the implementation of a regional development strategy.

[62] In coming to this conclusion I do not underestimate the importance of the role of DRD acting in conformity with its powers under Article 4 of the 1999 legislation. I specifically reject the suggestion of Mr Larkin that the 1999 legislation somehow relegates DRD to a role of incidental importance or that it has "a merely ancillary role" to that of the DOE. Formulation of strategy, detailed and informed advice and guidance by experts are amongst the most important and pivotal roles in the planning sphere and a vital part of the collective endeavour by Government departments which I discern to be the legislature's adjuration. The mistake in this case has been to confuse that vital role with the function of the DOE as defined in Article 3(1) of the 1991 legislation.

[63] I recognise only too well that the line between what is the formulation of policy on the one hand and the formulation of strategy and provision of advice and guidance on that policy on the other hand may at times be a fine one. In some instances it may even be difficult to distinguish. The courts should not be used in the planning context as a vehicle for making fine

technical judgments unless there is clear and unassailable evidence that the line has been crossed in a particular instance.
This court will not go into the question whether the contents of PPS 14 represent good planning policy or not. That is not the role of the court. Subject to his responsibility to Parliament, Ministers will be the final arbiter of what is good planning policy Nonetheless a Minister must act within a legal framework. He must not exceed the powers given to him by the planning legislation and he must have due regard to the substantive and procedural statutory norms .If there is a lack of structure in the approach to the planning legislation it can result in an absence of clear channels within which fairness can be seen to operate.

[64] I pause to observe that had PPS 14 been issued by the DOE the contents might well have been unobjectionable. In this context I can readily dispose of the other issues raised by Mr Larkin in this case.

[65] I found no substance in the applicant's submission that the policy statement had sought prospectively to bind the hands of the development control authorities by providing for the weight to be given to PPS 14. This proposition misconceives the nature of planning policies. They provide guidance for planning authorities, applicants and interested members of the public. However they are not mandatory requirements which must be construed like legislation. Nor must every single item in such a statement be observed like a statutory condition (see Belfast Chamber of Trade's Application (2001) NICA 6). Whilst it is important that the policy be understood by the determining body in question, the fact that a body has to have regard to the policy does not mean that it needs necessarily to slavishly follow the policy albeit that if it is going to depart from the policy, it must give clear reasons for so doing (see Gransden and Co Ltd and Anor v Secretary of State for the Environment and Anor 54 P&Cr 86 at page 94)("Gransden"). There is thus a wide spectrum of material considerations which the planning decision-maker may be obliged to take into account. Nevertheless there is no reason in my view why a land use policy cannot legitimately direct the decision-maker to attribute weight to certain material considerations or to ascribe greater weight to others.

[66] In these circumstances I adopt what Woolf J (as he then was) said in Gransden at page 94:

> "… if the policy is a lawful policy, that is to say, if it not a policy which is defective because it goes beyond the proper role of a policy by seeking to do more than indicate the weight which should be given to relevant considerations, then the body determining an application must have regard to the policy."

In my view had the DOE been responsible for PPS14, I would have found nothing objectionable about the fact that it stated that the provisions of PPS14 would immediately take precedence over the existing policies listed in the draft and was to be accorded substantial weight in the determination of all planning applications received thereafter.

[67] In the context of the issue of the weight to be given to PPS14, Mr Larkin sought to invoke Article 4 of the 2006 Order and Article 30 of the 2003 Order. Article 4 of the 2006 Order inserts a new Article 4(2A) into the 1991 Order to provide that "where, in making any determination under this order, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise". This had substituted the words "in accordance with" for the words "in general conformity with" in the otherwise identical provision in the 2003 legislation which had amended the Article 4 of the 1991 Order. Mr Larkin submitted that whilst neither of these provisions had been commenced, the fact that they give priority to the development plan in the determination of planning applications created a similarity to the circumstances set out in the Fire Brigade Union's case referred to paragraph 27 of this judgment. These provisions did not operate as an instruction to the DRD but rather to the DOE under the 1991 legislation. I consider that there is great strength in Mr McCloskey's submission that had this proposition arisen in the context of the DOE in this case the Fire Brigade Union's case did not materially assist the assertion made by Mr Larkin. In the first instance, that case does not compel the Minister to act. Rather his duty is to keep under periodic review the question of exercising his commencement powers. Secondly, that case concerned a plan to pre-empt the unimplemented statutory scheme by installing a wholly different regime (see Lord Mustill at page 261). I consider that given that neither of the articles contained in the 2003 or 2006 legislation has yet been commenced, it would be too great a jump to apply the principles in the Fire Brigade Union's case to the much more limited context of PPS14.

I therefore dismiss the relief sought at paragraph 2(2) of this judgment

[68] I am currently unconvinced by Mr Larkin that the purported adoption of draft PPS 14(had it been done by the DOE) is contrary to Articles 4,6 and/or 7 of the 1991 Order in that its adoption unlawfully evades the development plan process provided for in detail in Part III of the 1991 Order. Whilst it is unnecessary for me to determine this issue in light of my findings that the DRD have acted ultra vires in any event in formulating this policy, I pause to comment that a plausible argument might be made that Article 3(1) of the 1991 Order does permit the DOE to "formulate" a land use policy which would modify, amend or supersede another freestanding land use policy outlined in an area development plan. On the other hand that might not meet the thrust of the argument that under Part III of the 1991 Order,

proposals by the DOE to replace a development plan for an area require the Department to observe the steps set out in Articles 5 and 6 before altering the existing plan save in the emergency circumstances mentioned later in this judgment. For the reasons already mentioned in paragraph 28 of this judgment, no such duty is imposed on the DRD. In the circumstances of the finding I have made in this case, I therefore refrain from making a conclusion on this issue in the absence of further argument.

[69] I find no basis for Mr Larkin's argument that the applicant enjoyed a legitimate expectation that there would be consultation in relation to draft PPS14 or that DRD failed to properly appraise itself in relation to PPS14 by way of proper consultation or enquiry. The conventional approach to the doctrine of legitimate expectation is that in order to invoke the principle, it is necessary to establish an express promise given on behalf of the public authority or show the existence of a regular practice which a claimant can reasonably expect to continue (see Lord Frazer in Council of Civil Service Unions v Minister for the Civil Service (1985) AC 374 at 401B). I can find no evidence of either promise or practice in this instance that a draft planning policy statement requires consultation. Clearly there is no statutory right expressly enacted. There is no implied right to be consulted about the legislation. In R (Vapio Action Limited) v Secretary of State for the Home Department (2007) EW8C 199 Burnton J said at paragraphs 46 and 47:

> "46. The judgment of Megarry J in Bates v Lord Hailsham (1972) 1 WLR 1373 is authority for the proposition that where delegated legislation is concerned, the court cannot impose an obligation to consult where Parliament has refrained from doing so ….
>
> 47. In the field of administrative law, the nearly 35 years since that judgment are a very long time indeed. It appears that the judgment has not been expressly followed. However no case has been cited to me in which delegated legislation or any other statutory measure subject to Parliamentary scrutiny which was not subject of an express statutory duty to consent has been struck down or otherwise successfully impugned on the ground of a failure to consult."

[70] In any event I accept the substance of Mr McCloskey's argument that where there is an element of urgency this may be sufficient to rebut any legitimate expectation of consultation. Prior to the introduction of draft PPS14, Mr Thompson draws attention at paragraphs 38-43 of his first affidavit to the risk of large numbers of pre-emptive planning applications during a period of public consultation, the anticipated duration of that

process, the likelihood that many of the applications would be granted and the effect of such development upon the implementation of the regional development scheme and the irreversible environmental consequences. I consider that this provides a basis for a Minister concluding that there is good reason to proceed with a precautionary approach pending completion of the policy development process.

[71] Authority for the proposition that the context of urgency may well be invoked to rebut any legitimate expectation of consultation is to be found in R v The Lord Chancellor ex p The Law Society (1994) 6 Admin L R 833 where at page 18 of his judgment Neill LJ said:

> "As Lord Diplock explained in CCSU v Minister for the Civil Service (1985) 1 AC 374, however, the question of procedural propriety has to be looked at in light of the particular circumstances in which the relevant decision was made … I have come to the conclusion that the correct inference to be drawn from the evidence is that these proposals were put forward in order to meet a situation which has become much more urgent and critical than had been envisaged only a short time before … Accordingly I have come to the conclusion that the announcement of the proposals on 12 November did not involve any procedural impropriety nor did it deny the Law Society an opportunity which it *could legitimately expect in the circumstances existing last Autumn*. (My emphasis)."

[72] Further I was not persuaded that the respondent could have relied upon a breach of regulation 12 of the 2004 Regulation had the DOE formulated PPS14. The relevant Regulation and Directive are concerned with the final product. I find that there is no prohibition against what can only be termed as a stop gap measure taken in the public interest to prevent a policy, which is still unfolding, being effective. I see no reason why the principle of summary action in urgent circumstances to which I have already adverted should not also apply to Article 12(4). This would apply with particular force in this instance since the underlying philosophy of PPS14 is to protect the environment I see no basis for such interim measures, in the absence of total repugnancy to the Regulation, being prohibited. There will be further consultation on PPS14 and I would assume that during this further consultation period the applicant, if it has not already done so, will have a full opportunity to make further representations.

I therefore dismiss the relief sought at paragraph 2(3) of this judgment

[73] I observe at this stage that irrespective of the nomenclature given to PPS14, I have decided this case on the basis of the substance of PPS14 and the accompanying Ministerial statement. It is the character of PPS14 that I have scrutinised. Had the contents of PPS14 come within the ambit of Article 4 of the 1999 Order as policy guidance and advice, the title itself would have been unlikely to have inhibited my approval. Hence in the absence of an analysis in each particular instance, I make no comment whatsoever on the validity or otherwise of those other planning policy statements eg PPS12 and PPS13 mentioned in the course of this hearing.

[74] In the circumstances of this case therefore I make an order of certiorari quashing the decision of the Minister with the responsibility for Regional Development made on or about 16 March 2006 whereby he purported to introduce a new planning policy statement PPS14 and secondly, I make a declaration that the said decision and the said Planning Policy Statement 14 are unlawful and ultra vires.

Addendum

[75] Subsequent to the above judgment (paragraphs 1-74) in this case being handed down, the respondent requested, and I acceded to the request, a remedies hearing to review the proposed orders that I had set out in paragraph [74]. I commence by stating that a judgment takes effect from the time when the judge pronounces it, but it is within the powers of judge to alter his judgment at any time before it is entered and perfected (see Re Suffield and Wattsex p. Brown (1882) 20 QBD 693). I had indicated upon giving the judgment that the order in this matter was not to be made up until I had considered any submissions to be made on remedies. Both Mr Larkin and Mr McCloskey acknowledged that until the order was perfected I could reconsider my view on the remedies to be granted in this issue.

[76] Essentially in judicial review, the court has two functions. First, to assess the legality of the action of the decision-maker and secondly, if it finds unlawfulness, to decide what remedy to give. The discretion to grant a remedy in judicial review is a wide one. In Neill v North Antrim Magistrates' Court (1992) 1 WLR 1220 at 1231F Lord Mustill said:

> "It is … one thing to hold that … a decision .. must in principle be reviewable, and quite another to say that the grant of (a remedy) should follow as a matter of course."

[77] In the matter of an application by Brenda Downes for Judicial Review (2007) NIQB1 Girvan J said at paragraph [17]:

> "While I accept that Mr Treacy is correct in arguing that the normal and proper remedy in order to deprive an unlawfully reached decision of legal effect is for an order of certiorari to be made quashing the decision, that principle is not an overriding one and the public interest may on occasions point in favour of the granting of declaratory relief rather than the making of a quashing order."

In that case, the judge determined that it would not be in the interests of victims to stop the work of the Interim Victims Commissioner by refusing to allow her to conclude her work.

[78] There is thus a lengthy history of instances where the court has relied on adverse public consequences as a ground for refusing relief in judicial review (see Flint v Att-Gen (1918) 1 Ch. 216; R v Brentwood Superintendent Registrar of Marriages, ex p. Arias (1968) 2 QB 956; Coney v Choyce (1975) 1 WLR 422; R v Monoplies and Mergers Commission, Ex p. Argyll Group Plc (1986) 1 WLR 763 and Re In the Matter of an Application by David Wright for Judicial Review of a Decision by the Secretary of State for Northern Ireland (2007) NIQB 6).

[79] In a lecture delivered to the Administrative Law Bar Association on 17 October 1990 Lord Bingham said of these circumstances:

> "One must face up to a choice between the high ground of purist principle and the more pragmatic, utilitarian approach which our law in practice tends to adopt."

I respectfully adopt that approach and I have applied the principles set out in the authorities mentioned above in this case.

[80] Mr McCloskey's first submission was that it was a sufficient remedy to allow the judgment to stand without further order. I reject that argument as an inadequate remedy in the circumstances of this case

[81]Next counsel reminded me of the distinction between the effect of declaratory and certiorari relief. The former is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is not capable of being coercibly enforced. It states the existing legal position and opens the way to the use of other remedies for giving effect to it if that should be necessary. It is particularly appropriate where it is undesirable for a decision to be rendered a nullity for all purposes. In contrast certiorari is a quashing order in the sense that it destroys the legal validity of the action which is quashed by the order.

[82] I have already concluded in this case that PPS 14 is ultra vires the powers of the DRD and that accordingly the decision of the Minister for the DRD made 16 March 2006 is itself ultra vires. That remains my unequivocal conclusion .I pause to observe that I consider that Mr McCloskey is correct to have described this issue as a question of jurisdictional validity where, according to my finding, the DRD and the Minister have exceeded their jurisdictions.

[83] However Mr McCloskey has properly reminded me that draft PPS 14 was a draft land use policy which had been produced in the aftermath of a four year gestation period during which the time of public officials, the involvement of the public at large and the expenditure of large sums of public money have been part of the process. Thus there has been for example, a full public consultation exercise, a report on the consultation exercise, the publication of an Issues Paper to invite comment from a wide range of interested parties , organisations and the public, detailed submissions emanating from local councils, an equality impact assessment and an environmental assessment. No legal challenge to any of these measures was mounted as they progressed over the last four years by this Applicant or any other party. Whilst the maxim *fiat justitia ruat coelum* must normally apply, I have been persuaded that any order by this court which might serve to immediately nullify or render useless those earlier steps prior to the ministerial announcement and the introduction of PPS 14 might amount to the adverse public consequences which the authorities have cautioned against. Arguably those steps and the expenditure of public money thereby engendered might not necessarily fall foul of a quashing order. Nonetheless to ensure that some degree of measured reflection is introduced before any precipitous action is taken in regard to these earlier steps, I consider that declaratory relief is preferable to an order of certiorari. Moreover I have come to the conclusion that a declaration to the effect that the decision of the Minister with responsibility for regional development made on 16 March 2006 whereby he purported to introduce a new planning policy statement PPS 14 was ultra vires, coupled with a declaration that the planning policy statement PPS14 was also ultra vires are sufficient remedies for the Applicant in this case. This will clearly state the law as I find it and open the door to such other consequential remedies to give effect to these declarations as are deemed appropriate in individual circumstances without necessarily contributing to the problems of the potential waste of public time and money to which I have earlier adverted. I invite counsel to submit draft forms of the terms of such a declaration on the occasion of this judgment being handed down before finalising the order, including whether it is necessary to add a declaration of unlawfulness in addition to that of a declaration that the impugned steps are ultra vires .

[84] I also invite counsel to address me on the issue of costs.