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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **19/09/2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY CHRIS MURPHY

FOR JUDICIAL REVIEW

IN THE MATTER OF A DECISION OF THE MINISTER FOR INFRASTRUCTURE ON 17 AUGUST 2016

Before: Morgan LCJ and Gillen LJ

MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal against the decision of Mrs Justice Keegan on 28 March 2017 when she dismissed the appellant's application to quash the decision contained in a statement issued on 17 August 2016 by the Minister in the Department for Infrastructure ("the Department") to proceed with that part of the Randalstown to Castledawson Road dualling scheme from Toome to Castledawson. The appellant contends that this case gives rise to 3 issues of law which should be referred to the European Court of Justice ("ECJ"):

> (1) Was the decision to proceed contained in the statement issued on 17 August 2016 subject to the requirements of Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive")?

(2) If not, was the decision subject to the requirements of Article 6 (2) of the Habitats Directive and if so, was the scope of the obligation contained in that sub-paragraph the same as that required under Article 6 (3)?

(3) Did some of the measures proposed in order to justify the scheme constitute compensation rather than mitigation so that by virtue of Article 6(4) of the Habitats Directive the scheme could only proceed if it was carried out for imperative reasons of overriding public interest?

[2] The appellant's background in ornithology and conservation was recognised by the learned trial judge. He has co-founded many conservation groups in the past. He has advocated for various areas in the United Kingdom that were under environmental threat. These places are now considered to be important areas not only for wildlife but also for the well-being of people. Between 1984 and 1988 he was employed as a professional ornithologist and at that time he was the RSPB's only full-time executive officer in Northern Ireland. Since 1988 he has maintained a keen and active interest in many branches of natural history and nature conservation largely in a voluntary capacity and has been employed in tourism, both general and wildlife. This has involved him travelling throughout Great Britain and Ireland as well as over five continents researching, designing and leading birdwatching holidays. Since he came to Northern Ireland over 30 years ago, he has been interested in wetlands, bogs and the habitat surrounding those places. We are grateful for the helpful and thorough manner in which the appellant presented his papers and written and oral submissions. We also acknowledge the assistance we obtained from the oral and written submissions by Mr McLaughlin representing the Department.

The site

[3] Lough Neagh is the largest freshwater body in the United Kingdom with a surface area of approximately 41,188 hectares. It was designated as a Ramsar site on 5 January 1976 and confirmed as an area of special scientific interest on 18 June 1993. A Ramsar site is a wetland site of international importance designated by the Convention on Wetlands known as the Ramsar Convention, which was signed in 1971 and came into force in 1975. Council Directive 79/409/EEC identified species to be the subject of special conservation measures and in particular referred to the need to take similar measures for regularly occurring migratory species and to pay particular attention to the protection of wetlands and particularly to wetlands of international importance. These obligations are now contained in Directive 2009/147/EC ("the Birds Directive") which consolidates the original directive and various amendments but otherwise does not affect the issues in this case.

[4] Member States were required by Article 4 of the Birds Directive to classify the most suitable territories as special protection areas ("SPA"). On foot of that obligation an SPA was classified comprising the water mass in Lough Neagh, Lough Beg and Portman Lough but also including a surrounding area of swamp, fen, wet grassland and swamp woodland. There are a number of qualifying interests associated with the SPA comprising wintering and breeding bird species. This is the second largest SPA in the United Kingdom. Article 3 of the Habitats Directive provided for a network of special areas of conservation ("SAC") set up under the title Natura 2000. The Natura 2000 network includes SPAs and accordingly the Habitats Directive applies to the site.

[5] The Northern Ireland Environment Agency ("NIEA") issued its most recent version of the conservation objectives for the site on 1 April 2015. It noted 22 species of birds as SPA selection features. At paragraph 7 it noted that the conservation objectives for the site were to maintain each feature in favourable condition. Favourable condition was defined as the target condition for an interest feature in terms of the abundance, distribution and/or quality of that feature within the site. That largely corresponded with the previous conservation objectives. There were, however, additional feature objectives set out. The first was to maintain or enhance the population of the qualifying species. This also was largely in accordance with the previous draft. There were then additional features in relation to the maintenance or enhancement of the range of habitats used by the qualifying species, the integrity of the site being maintained, protection from significant disturbance of the species and maintenance in the long-term.

The Habitats Directive

[6] Article 6 of the Habitats Directive establishes a process of strict protection for Natura 2000 sites. These are essentially contained in the following paragraphs:

> "6(2) Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.
>
> 6(3) 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 of its implications for the site in view of the site's conservation objectives. In the light of the conclusions 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.
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> 6(4) If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted."

These provisions were implemented in Northern Ireland by the Conservation (Natural Habitats etc) Regulations (NI) 1995. Since there is no issue on transposition it is unnecessary to set out the relevant regulations.

[7] The Supreme Court gave guidance on the interpretation of Article 6(3) of the Habitats Directive, taking into account the ECJ's jurisprudence, in R (Champion) v North Norfolk District Council and another [2015] 1WLR 3710.

> "12 Authoritative guidance on the interpretation of article 6(3) has been given by the Court of Justice of the European Union ("CJEU") in *Landelijke Vereniging tot Behoud van de Waddenzee v Staatsscretaris van Lanbouw (Coöperatieve Producentenorganisatie van de Nedelandse Kokkelvisserji UA intervening) (Case C-127/02) [2005] All ER (EC) 353* (relating to a proposal for mechanical cockle-fishing in the Waddenzee Special Protection Area). There is an elaborate analysis of the concept of appropriate assessment, taking account of the different language versions, in the opinion of Advocate General Kokott: paras 95-111. In its judgment the court made

clear, at para 41, that the article set a low threshold for likely significant effects:

> "the triggering of the environmental protection mechanism provided for in article 6(3) of the Habitats Directive does not presume—as is, moreover, clear from the guidelines for interpreting that article drawn up by the Commission of the European Communities, entitled 'Managing Natura 2000 Sites: The provisions of article 6 of the "Habitats" Directive (92/43/EEC)'—that the plan or project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project."

The court noted that article 6(3) adopts a test "essentially similar" to the corresponding test under the EIA Directive (para 42), and that it "subordinates" the requirement for an appropriate assessment of a project to the condition that there be "a probability or a risk that the latter will have significant effects on the site concerned": para 43. The Habitats Directive had to be interpreted in accordance with the precautionary principle which is one of the foundations of Community policy on the environment: para 44. It concluded, at para 45:

> "In the light of the foregoing, the answer to question 3(a) must be that the first sentence of article 6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects."

13 As to the content of such appropriate assessment, the court said, at paras 52, 53, 54 and 56:

> "52. As regards the concept of 'appropriate assessment' within the meaning of article 6(3) of the Habitats Directive , it must be pointed out that the provision does not define any particular method for carrying out such an assessment.
>
> "53. None the less, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives.
>
> "54. Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field. Those objectives may, as is clear from articles 3 and 4 of the Habitats Directive, in particular article 4(4), be established on the basis, inter alia, of the importance of the sites for the maintenance or restoration at a favourable conservation status of a natural habitat type in annex I to that Directive or a species in annex II thereto and for the coherence of Natura 2000, and of the threats of degradation or destruction to which they are exposed …"
>
> "56. It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned."

14 More recently in *Sweetman v An Bord Pleanála (Galway County Council intervening) (Case C-258/11) [2014] PTSR 1092* the court spoke of the two stages envisaged by article 6(3) :

> "29. That provision thus prescribes two stages. The first, envisaged in the provision's first sentence, requires the member states to carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on that site [citing Waddenzee (above) paras 41, 43]."
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> "31. The second stage, which is envisaged in the second sentence of article 6(3) of the Habitats Directive and occurs following the aforesaid appropriate assessment, allows such a plan or project to be authorised on condition that it will not adversely affect the integrity of the site concerned, subject to the provisions of article 6(4) ."
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> "40. Authorisation for a plan or project, as referred to in article 6(3) of the Habitats Directive , may therefore be given only on condition that the competent authorities—once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field—are certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects …""

[8] Lord Carnwath also gave guidance on the threshold requirement for the engagement of an appropriate assessment:

"41 The process envisaged by article 6(3) should not be over-complicated. As Richards LJ points out, in cases where it is not obvious, the competent authority will consider whether the "trigger" for appropriate assessment is met (and see paras 41-43 of Waddenzee). But this informal threshold decision is not to be confused with a formal "screening opinion" in the EIA sense. The operative words are those of the Habitats Directive itself. All that is required is that, in a case where the authority has found there to be a risk of significant adverse effects to a protected site, there should be an "appropriate assessment". "Appropriate" is not a technical term. It indicates no more than that the assessment should be appropriate to the task in hand: that task being to satisfy the responsible authority that the project "will not adversely affect the integrity of the site concerned" taking account of the matters set in the article. As the court itself indicated in Waddenzee the context implies a high standard of investigation. However, as Advocate General Kokott said in *Waddenzee [2005] All ER (EC) 353* , para 107:

> "the necessary certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain. Instead, it is clear from the second sentence of article 6(3) of the Habitats Directive that the competent authorities must take a decision having assessed all the relevant information which is set out in particular in the appropriate assessment. The conclusion of this assessment is, of necessity, subjective in nature. Therefore, the competent authorities can, from their point of view, be certain that there will be no adverse effects even though, from an objective point of view, there is no absolute certainty."

In short, no special procedure is prescribed, and, while a high standard of investigation is demanded, the issue ultimately rests on the judgment of the authority."

[9] In this case the land on which the proposed dualling is to occur lies outside the boundary of the SPA but the land outside the SPA provides foraging and roosting locations for some protected species. In Commission v Germany (Case C-142/16) the issue was the assessment of the impact of proposed mitigation measures, fish passes, for a coal-fired power station some 30 km from a Special Area of Conservation where the protected species included lamprey and salmon. The ECJ held:

> "29… the fact that the project to which the environmental assessment being challenged relates is not situated in the Natura 2000 site concerned, but rather a considerable distance from them… in no way precludes the applicability of the requirements laid down in Article 6(3)…
>
> 38… at the time the authorisation was granted, the fish ladder, even though it was intended to reduce direct significant effects on the Natura 2000 areas…. could not guarantee beyond reasonable doubt… that the plant would not adversely affect the integrity of the site within the meaning of Article 6(3)."

[10] It was not in dispute, therefore, that Article 6(3) of the Habitats Directive required the decision maker to take into account any adverse effect on the protected species caused by the construction of the proposed road before authorising it. This also reflects the approach taken by Ouseley J in RSPB v SSCLG [2014] EWHC 1523 (Admin) in examining the significance of the non-statutory status of functionally linked land:

> "27 There is no authority on the significance of the non-statutory status of the FLL. However, the fact that the FLL was not within a protected site does not mean that the effect which a deterioration in its quality or function could have on a protected site is to be ignored. The indirect effect was still protected. Although the question of its legal status was mooted, I am satisfied, as was the case at the Inquiry, that while no particular legal status attaches to FLL, the fact that land is functionally linked to protected land means that the indirectly adverse effects on a protected site, produced by effects on FLL, are scrutinised in the same legal framework just as are the

> direct effects of acts carried out on the protected site itself. That is the only sensible and purposive approach where a species or effect is not confined by a line on a map or boundary fence. This is particularly important where the boundaries of designated sites are drawn tightly as may be the UK practice."

That was also the approach taken by the learned trial judge in this case.

The road proposal

[11] The proposed road dualling scheme is classified as a trunk road. Trunk roads constitute the main system of roads for through traffic in Northern Ireland. The provision of trunk roads is prescribed by Article 14 of the Roads (Northern Ireland) Order 1993 ("the 1993 Order") which provides that where the Department considers it expedient for the purpose of extending, improving or re-organising the trunk system that any road should be designated as a trunk road, the Department may by order direct that any road proposed to be constructed shall become a trunk road.

[12] Schedule 8 of the 1993 Order requires the Department to initiate the process by publishing in the Belfast Gazette and local newspapers a notice stating the general effect of the proposed order and providing a timescale within which objections may be lodged. Where objections are lodged a public enquiry must be held to consider the objections and the Department is required to consider any objections which are not withdrawn together with the report of the person holding the enquiry. The Department may then make the order with or without modifications and is required to publish notice of the making of the order.

[13] There is no suggestion that the Department failed to comply with any of these statutory requirements. In September 2005 the then Minister announced a preference for the route with which this application is concerned, then known as the red route. The underlying contention advanced by the appellant is that alternative routes to the south were available which would not have adversely affected the SPA. Consultants were retained to carry out a test of likely significance for the red route as required by Article 6(3) of the Habitats Directive and the Environmental Heritage Service ("the EHS") advised that it could not be objectively demonstrated that the red route would have no adverse impact on the integrity of the site. The feature of concern was the availability of foraging land outside the SPA for the Whooper Swan.

[14] In light of the outcome of the test of likely significance the consultants proceeded to carry out an appropriate assessment in preparation for the public enquiry which was due to commence in November 2007. RSPB lodged a notice of

objection in June 2007 but subsequently withdrew their objections in a detailed letter dated 30 October 2007 in which they set out the reasons for that course.

[15] A particular issue arose at the hearing of the appeal about proposed mitigation measures. The Appropriate Assessment had identified land management agreements and field size adjustment of residual lands as possible mitigation if required. It was suggested that the withdrawal of the RSPB objection was dependent upon the Department agreeing to carry out both measures. We do not accept that suggestion. At paragraph 3.2 of its letter of objection the RSPB sought as a condition of the withdrawal of its objection confirmation that Road Service would ensure operational mitigation of field amalgamation prior to road construction and the mitigating measures set out in an adjoining table.

[16] The Department agrees that it is required to carry out the field amalgamation mitigating measures. The appellant submitted that the Department had also agreed to secure land management agreements. Although such agreements have been in place for some time with the current landowners there was some evidence that there was resistance to further agreements. In fact the table including the RSPB response attached to the letter of objection makes it clear that the mitigation measures required by RSPB included additional boundary changes but did not include any obligation in relation to land management agreements. Any suggestion that RSPB was misled in the withdrawal of its objection is refuted by the letter of 30 October 2007. The Department accepted, however, that it would be required to take action in the event that new activity on adjoining land constituted a threat to any of the selection features of the SPA.

[17] In April 2008 the inspector concluded that the Environmental Statement summarised the environmental assessment which had been carried out in accordance with national and European regulatory requirements. The gathering of baseline environmental data and subsequent assessment were used to develop appropriate mitigation measures. Many of the mitigation measures were incorporated into the design of the scheme and reduced the impacts of the proposal. Given the strategic nature and scale of the proposed dual carriageway between Toome and Castledawson the proposal integrated well into the existing environment. The inspector concluded that the new dual carriageway should be constructed on the red route, that the trunk road order should be confirmed and the proposal to make a vesting order should be implemented. The inspector proposed some amendments to the junction at Annaghmore Road and Bellshill Road which were the subject of a separate enquiry. Following the inspector's report the consultants revised the Appropriate Assessment but the detail of that revision is not relevant to this appeal.

[18] In September 2009 the Department issued a statement indicating that it had decided to proceed with the scheme as described. The Trunk Road T8 (Toome to Castledawson) Order (Northern Ireland) 2011 was made on 14 March 2011 coming into operation on 7 May 2011. A separate Order was made on the same day in respect of the road from Randalstown to Toome. There has been no legal challenge to those Orders.

[19] The commitment of funding for the pursuit of the project was not immediately available. It appears, however, that there was some prospect of the funding becoming available in 2014 as a result of which in November 2014 the consultants produced a document described as a Statement to Inform the Appropriate Assessment (Draft). The introduction stated that the document updated the previous test of likely significance and Appropriate Assessment of proposals to upgrade the A6 between Toome and Castledawson. The appellant drew particular attention to the passage in which it was stated that the document formed a "shadow" Appropriate Assessment which Transport NI as Competent Authority may adopt as the basis for its conclusions.

[20] The anticipated funding was not made available in 2014 but did become available in 2016. In March 2016 the department established the Whooper Swan Working Group comprising, inter alia, the Department, RSPB, DARD Countryside Management, NIEA Natural Environment Division and landowners. In August 2016 the consultants produced a further document described as a Statement to Inform the Appropriate Assessment (Draft). The document reviewed the findings of the previous report in light of the time that had elapsed since the previous Appropriate Assessment and changes in conditions, development and practice, amendments to the scheme and additional information. It contained the same reference as in the 2014 document to a "shadow" appropriate assessment.

[21] On 17 August 2016 the Minister issued a written statement to the Assembly informing members of his decision to proceed with the £160 million A6 Randalstown to Castledawson dualling scheme and the making of the necessary vesting orders. In the body of the statement he said:

> "Part V of the Roads (Northern Ireland) Order 1993 sets out the statutory requirements for the assessment of environmental impacts of road schemes. Having regard to the Environmental Statement, the Statement to Inform the Appropriate Assessment and the consultation responses to it, I am satisfied that the likely significant environmental effects of the planned scheme have been

> properly assessed and have been sufficient to inform judgements on the scheme. Accordingly, in light of the assessment undertaken and information presented within the Statement to Inform the Appropriate Assessment and the Environmental Statement, I accept the Department's conclusion (as the Competent Authority) that construction and operation of the A6 Randalstown to Castledawson dualling scheme would not by itself, or in combination with other known plans or projects, adversely affect the integrity of the Lough Neagh and Lough Beg Special Protection Area and Ramsar site, or any other Natura 2000 site."

[22] On 15 September 2016 the appellant sent a pre-action protocol letter contending that the Minister's decision was unlawful as it was in breach of the precautionary principle and in particular no appropriate assessment was carried out in accordance with the requirements of Article 6(3) of the Habitats Directive. The Departmental Solicitors Office responded on 7 October 2016. The appellant noted that in the first page of that letter the writer stated that the announcement of 17 August 2016 also included the Minister's Appropriate Assessment decision. At page 3 it was said that following a commitment of funding and the resolution of the Annaghmore Bellshill junction alignment, three vesting orders for the entirety of the scheme and the Minister's Appropriate Assessment were published on 17 August 2016. Page 5 of the letter refers to the Appropriate Assessment decision of 17 August 2016 being taken by the Minister and page 8 of the response to the pre-action protocol letter repeats that assertion. The appellant relies upon these statements to indicate first that an Appropriate Assessment was required and secondly, that the Minister believed that he was making an Appropriate Assessment.

[23] Mr McLaughlin referred to various other passages within the response to the pre-action protocol. In particular he noted that at page 3 the writer stated that the Appropriate Assessment issued for consultation in January 2007 concluded that there would be no significant effects on the integrity of any Natura 2000 sites. At page 5 the writer said that the Appropriate Assessment was revised and updated in November 2014 and again in August 2016. At page 6 the writer stated that the Department considered that the Environmental Statement and associated Notice to Proceed published in 14 March 2011 fully complied with all the statutory requirements. The Department also relied upon the passage confirming that the Statement to Inform the Appropriate Assessment was part of the Habitat Regulations Assessment process that the Department had carried out to prove

through scientific assessment that there would be no adverse effect on the integrity of the SPA.

The issues in the appeal

[24] The appellant accepted that he was now too late to challenge the Trunk Road Order issued in March 2011. He submitted, however:

> (i) Even if there was an Appropriate Assessment as required by Article 6(3) of the Habitats Directive prior to the making of the Order in 2011 the passage of time and changes on the ground now required a further Appropriate Assessment before the project was implemented.
>
> (ii) If he was wrong on the first point he submitted that Article 6(2) of the Habitats Directive provided the same level of protection as Article 6(3) and that accordingly an Appropriate Assessment was required.
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> (iii) In any event any review was quite inadequate because there was no consultation with NIEA, the Whooper Swan Management Group was inadequate and the RSPB were misled.
>
> (iv) The purported mitigation by way of field amalgamation and/or land management was in fact compensation which fell under Article 6(4) of the Habitats Directive.

[25] The 1993 Order is the statutory mechanism for the authorisation of the construction of a trunk road. Neither the Minister nor the Department has any authority to provide for the construction of such a road without a relevant Trunk Roads Order. The making of such an Order requires a process of public consultation and, where there are objections, public hearings before an appropriately qualified inspector. Like the learned trial judge, therefore, we are satisfied that the requirements of Article 6(3) of the Habitats Directive have to be complied with before such a Trunk Roads Order can be made. The evidence indicates that a test of likely significance and an appropriate assessment was made in 2008 and that the said appropriate assessment was taken into account before the Department responded to the inspector's recommendation in 2009 and subsequently made the relevant Orders in March 2011.

[26] The appellant argued that in light of the passage of time a further appropriate assessment under Article 6(3) was required. We do not accept that submission. The Trunk Road Order for this section of road constituted the authorisation for the carrying out of the proposed roadworks until it was either successfully challenged under the relevant appeal provisions or alternatively was revoked. It is common case

that there was no challenge to the March 2011 Order and it has not been revoked. The decision of the Minister to allocate funding for the project did not constitute a fresh authorisation. By virtue of the statutory scheme he had no power to do that. The Habitats Directive imposes no time constraint on the duration of an appropriate assessment and in the case of major infrastructural projects there is often a likelihood of some time lag between authorization and implementation of the project.

[27] The learned trial judge had some conceptual difficulty in seeing that Article 6(2) of the Habitats Directive applied to this case. We do not share that difficulty. In Waddenzee the court recognised at paragraph [37] that:

> "… It cannot be precluded that such a plan or project subsequently proves likely to give rise to such deterioration or disturbance, even where the competent national authorities cannot be held responsible for any error. Under those conditions, application of article 6(2) of the Habitats Directive makes it possible to satisfy the essential objective of the preservation and protection of the quality of the environment, including the conservation of natural habitats…."

In paragraph [38] the court stated that Article 6(2) of the Habitats Directive establishes an obligation of general protection consisting in avoiding deterioration and disturbances which could have significant effects in the light of the Directive's objectives.

[28] The ECJ revisited the obligations contained in Article 6(2) in Grune Liga Sachsen v Freistaat Sachsen (C-399/14). The case concerned a road bridge which had been approved prior to the certification of the area subject to the Habitats Directive. The court accepted that Article 6(3) could not, therefore, apply but stated that an obligation to carry out a subsequent review of the implications of existing plans or projects for the site in question may be based on Article 6(2). The court reiterated at paragraph [53] that where Article 6(2) of the Habitats Directive lays down an obligation to carry out a subsequent review of the implications for the site concerned of the plan or project, such a review must enable the competent authority to guarantee that the implementation of the plan or project referred to will not cause deterioration or disturbance which could be significant in relation to the objectives of the directive. In that case because there had been no Article 6(3) assessment prior to authorisation it was concluded in those cases that the Article 6(2) procedure required the carrying out of an appropriate assessment.

[29] In this case Article 6(3) has been complied with. The 2016 "Statement to inform the Appropriate Assessment" ("the Statement") indicated that its purpose was to review the findings of the previous report in light of the time that had elapsed since the previous appropriate assessment, associated changes in background conditions, developments in practice and understanding of the process, amendments to the scheme and additional information about qualifying interests. It did not purport to be a new appropriate assessment but it was intended to review the 2008 assessment in the light of up-to-date information and practices in order to address the possibility of deterioration or disturbance which could be significant in relation to the objectives of the directive.

[30] The 2016 Statement addressed the impacts on each of the significant features. Likely significant effects were excluded in relation to all except the Whooper Swan either on the basis that the birds were mobile and had alternative foraging areas or that the birds were associated with open water areas or shoreline that were some distance from the scheme. Likely significant effects had been identified in relation to the Whooper Swan and mitigating effects in relation to the design were incorporated to address many of those. The report then went on to consider the consequences of land take for the road resulting in a loss of grazing habitat for the Whooper Swan and other aspects of disturbance. In this case not only had some 8 years passed since the appropriate assessment under Article 6(3) but there had been an annual count of migratory birds which provided fresh information to take into account. Although the appellant submitted that the counts for the last two years had not been noted it is clear from the body of the text that they had been taken into account.

[31] We have previously referred to the guidance from the Supreme Court in relation to challenges concerning Article 6(3) of the Habitats Directive. We consider that there are some aspects of that guidance which clearly also apply to Article 6(2) of the directive. First, it is clear that a high standard of investigation is required; secondly, there is no prescribed form for the conduct of such an investigation and thirdly, the issue ultimately rests on the judgement of the authority.

[32] The appellant contended that the assessment was insufficient first because the RSPB were misled. We have already dealt with that issue at paragraph [16] above. Secondly, it was submitted that the NIEA had not been involved in the consultation process. This was an unsurprising conclusion for the appellant to reach since the evidence indicated a limited amount of documentary evidence from NIEA together with some confusion in the correspondence about the particular projects which were the subject of consultation. It is, however, common case that the NIEA were involved with the Whooper Swan Management Group and that representatives of the NIEA attended the meeting in July 2014 when the methodology for assessing

disturbance and the lack of any adverse effect were agreed. We are satisfied that the affidavit evidence has dealt with the confusion over reference to various projects and indeed the files were made available for inspection by the appellant to reassure him on that score. We are satisfied that NIEA were properly involved in the consultation process.

[33] The appellant also challenged the use of the assessment of total swan days lost for foraging and the calculation of replacement swan days as a result of mitigation. This methodology was agreed by the RSPB, the NIEA and all of the statutory agencies involved. We accept that it is possible that a different approach might have been taken to the assessment of impact but there is nothing in our view which suggests that the judgement of the Whooper Swan Management Group was erroneous or that it failed to identify any relevant disturbance or deterioration. This was a matter of judgement for the competent authority and there is no reason to disturb it.

[34] The appellant sought to rely on material obtained from Scotland where consequent upon the implementation of a building project there had been a considerable diminution in the use of a protected area by Whooper Swans. It is clear, however, from the background material provided that there were issues around human activity apparently contributing to the problem and the situations were not comparable. The appellant also referred to evidence of shift in the use by Whooper Swans of foraging areas. That, if anything, tended to confirm the evidence of the Department that the Swans were mobile in terms of their foraging areas.

[35] The appellant placed considerable emphasis upon the contents of the pre-action protocol letter indicating that an appropriate assessment had been carried out. We agree that the Statement was not and did not purport to be an appropriate assessment under Article 6(3) of the Habitats Directive. Those passages suggesting otherwise in the pre-action protocol letter were wrong. We accept, however, that the exercise conducted was directed towards establishing the risk of disturbance or deterioration to protected species and that the exercise was an appropriate investigation targeted at the impact on the only affected selection feature which complied with Article 6(2) of the directive. The appellant correctly referred to the absence of the amended conservation objectives in the Statement but the affidavit evidence of Mr Coughlan deals with that point. The Minister's decision was made on the basis of no adverse impact and any error in the pre-action protocol letter does not undermine the validity of that decision.

[36] The final issue concerns whether the field amalgamation measures which the Department accepts that it agreed to put in place are mitigation or compensatory

measures. The importance of this matter lies in the fact that if these are compensatory rather than mitigating measures they can only be justified if the stringent test set in Article 6(4) of the Habitats Directive is satisfied.

[37] The appellant relies on the case of Briels v Minister van Infrastructuur (Case C-521/12). In that case the Netherlands Minister for the Environment made an order authorising a project to widen a motorway that would have potentially permanent adverse effects on the Natura 2000 site. The selection features included purple moor grass and the plan involved the destruction of an area containing the selection feature with a proposal to create an area of equal or greater size of the habitat type in another part of the site. The court repeated its statement in Sweetman v An Bord Pleanala (Case C-258/11) that the competent national authorities cannot authorise interventions where there is a risk of lasting harm to the ecological characteristics of sites which host priority natural habitat types.

[38] In paragraph [28] of Briels the court concluded that a mitigation or protective measure is one which lessens the negative effects of a plan or project with the aim of ensuring that the integrity of the site is not adversely affected. A compensatory measure, by contrast, is one which does not achieve that goal within the narrower framework of the plan or project but seeks to counterbalance the failure to do so through different, positive effects in order to avoid a net negative effect.

[39] That analysis requires one, therefore, to identify the selection feature at risk. In Briels the selection feature was purple moor grass. That feature was to be a direct casualty of the project. The suggestion that a net overall benefit could be achieved by the creation of a new habitat could not be guaranteed and that offended the precautionary principle.

[40] In this case the protected feature is the Whooper Swan. There is no direct impact on the protected feature. The foraging lands are not themselves a protected feature. The appropriate assessment and the Statement indicate that with the field amalgamation measures there will be no adverse impact on the protected feature. The measures in this case are aimed at avoiding or reducing any significant adverse effects on the protected feature. They are plainly mitigating measures.

Conclusion

[41] For reasons which essentially mirror those of the learned trial judge we dismiss the appeal. We are satisfied that there is no requirement to refer any of the matters raised by the appellant to the ECJ.