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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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2016 No. 90365/01

IN THE MATTER OF AN APPLICATION BY MR CHRIS MURPHY TO APPLY FOR JUDICIAL REVIEW

IN THE MATTER OF A DECISION BY THE DEPARTMENT OF INFRASTRUCTURE ON 17 AUGUST 2016 TO PROCEED WITH THE CASTLEDAWSON TO TOOME DUALLING SCHEME

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KEEGAN J

Introduction

[1] This is an application for judicial review of a decision of the Department of Infrastructure announced by the Minister Chris Hazzard MLA on 17 August 2016 to proceed with the Castledawson to Toome dualling scheme. This roads project is part of the wider A6 scheme. The announcement on 17 August 2016 also comprised a decision to make vesting orders in relation to lands surrounding the road project but that is not part of this challenge.

[2] Leave was granted to the applicant by Maguire J to proceed with one ground of challenge only namely that the impugned decision is in breach of Article 6 of the Habitats Directive. It is important to state that the applicant's original case was much wider and represented a substantial challenge to many other aspects of the road scheme including the proposed route. The applicant appeared as a litigant in person with his wife as a McKenzie Friend. Mr McLaughlin BL appeared for the respondent. I am grateful to both representatives for the professional way in which this case was conducted.

[3] I explain the principal abbreviations used throughout this judgment as follows;

RSPB-Royal Society for the Protection of Birds

NIEA-Northern Ireland Environment Agency

SPA-Special Protection Area
SAC-Special Area of Conservation

EIA-Environmental Impact Assessment
SEA-Strategic Environmental Assessment

AA-Appropriate Assessment
HRA-Habitats Regulation Assessment
SIAA-Statement to Inform an Appropriate Assessment

Factual background

[4] The applicant comes before the court as an interested party in this road project. In his affidavit he sets out his background in conservation and ornithology. The applicant states in his affidavit that 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. He states that 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 the applicant was employed as a professional ornithologist and at the time he was the RSPB's only full-time executive officer in Northern Ireland. He avers that since 1988 he has maintained a keen and active interest in many branches of natural history and nature conservation largely in a voluntary capacity. Since 1988 he 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.

[5] The applicant has through his interest in birdwatching and wildlife in general gained an intimate knowledge of the British Isles and important wildlife sites. The affidavit evidence sets out the wide scope of the applicant's interests in this field. In particular, since the applicant came to Northern Ireland over 30 years ago, he has been interested in wetlands, bogs and the habitat surrounding those places. This case centred on the issue of the protection of the breed *Cygnus cygnus* known as the Whooper swan.

[6] The applicant explained the characteristics of this migratory bird which lands in the Lough Neagh area each year. In his papers the applicant produced a RSPB information leaflet which includes the following information:

> "The Whooper swan is a large white swan, bigger than a Bewick's swan. It has a long thin neck, which it usually holds erect and black legs. Its black bill has a large triangular patch of yellow on it. It is mainly a winter visitor to the UK from Iceland, although a couple of pairs nest in the north. The estuaries and

> wetlands it visits on migration and for winter roosts need protection. Its winter population and small breeding numbers make it an Amber List species."

This information leaflet refers to the areas where the birds are seen in Scotland, Northern Ireland, Northern England and parts of East Anglia. It refers to October–March as the time when the birds come to our shores as part of their migration. The material also refers to there being 9-14 wild pairs in the UK breeding and 15,000 birds in the UK wintering. In his submission the applicant referred to his fear for this species particularly given what he said was a drop in numbers last winter which may have been related to issues of flooding. The applicant referred to the fact that this bird has been represented in natural history and folklore. He also referenced the importance of the general area around Lough Neagh as a wildlife sanctuary and as an area close to the home place of the poet Seamus Heaney.

[7] This case relates to what is called the 'dualling scheme.' This is the A6 scheme which it is an important part of the north western key transport corridor connecting Belfast and Londonderry via Toome, Magherafelt and Dungiven. The respondent has averred on affidavit that the corridor is of strategic and economic importance within Northern Ireland, providing an essential road link between the Belfast Metropolitan area and the northwest. The details of this scheme have been in the public domain for some time and it is known to be a project aimed at delivering improved road safety and consistent journey times for strategic and local road users to facilitate a further expansion of local industry in the area. The A6 is identified as a key transport corridor in the regional development strategy 2035 which has been approved by the Executive.

[8] The new scheme consists of a dual carriageway from the western end of the M2 motorway at Randalstown to the Castledawson roundabout. Delivery has now been secured by way of capital funding from the Northern Ireland Executive as part of what is called the "flagship projects" detailed in the December 2015 budget statement. This commitment has facilitated the proposed start of construction of the scheme in 2016/2017.

[9] This judicial review centres on one discrete part of the road scheme which is an approximate five mile stretch of the road from Castledawson to Toome. The A6 dual carriageway scheme is a proposal for a new trunk road and as such it is governed by certain legislative provisions to which I will return. The design and route for the new A6 dual carriageway was selected during the period between 2003 and 2006 after the Department conducted consultation, community information events and stakeholder events. It appears clear that a number of routes were muted however the current route was decided upon after considerable period of consultation.

[10] The scheme includes two main elements which involve the creation of a new dual carriageway and associated junctions between the M22 at Randalstown and the

Toome bypass and between the Toome bypass and Castledawson. These elements have been examined at a public inquiry and are being progressed as a single scheme.

The environmental context

[11] A distinguishing characteristic of this roads project is that the scheme runs close to but not through what is called a Single European Special Protected Area or SPA. Lough Neagh is the largest freshwater body in the United Kingdom with a surface area of approximately 41,188 hectares. The Lough was designated a Ramsar site on 5 January 1976 and it was 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 which came into force in 1975. The Lough area is a SPA due to its particular characteristics. Lough Neagh, Lough Beg and Portmore Lough comprise the water mass but there is also a surrounding area which includes swamp, fen, wet grassland and swamp woodland. There are a number of qualifying interests associated with the SPA comprising wintering and breeding bird species. Additional bird species have been considered for inclusion as qualifying interests of the SPA. As a result of the proximity of the road scheme to the SPA and Ramsar site and the protected birds and habitats in the area, issues of conservation and environmental protection arise.

[12] The chosen route does not result in any loss of land within the SPA. However, the stretch of road at issue involves the loss or reduction of some fields which are known to be areas where the Whooper swans forage. There are a small number of affected fields which would be reduced in size. This localised loss of grazing habitat results in the swans potentially having to use other adjoining fields in the area.

[13] As a result of this conservation imperative the Department had to comply with various European Directives in progressing with the road scheme. These are broadly known as the Birds Directive which is Directive 2009/147/EC and also the Habitats Directive 92/43/EEC. These directives were transposed into our law by virtue of the Conservation (Natural Habitats etc) Regulations (Northern Ireland) 1995.

[14] The primary aim of the Habitats Directive is to promote the maintenance and biodiversity within the EU by requiring Member States to take steps to protect natural habitats and species listed in the annex to the directive. The Whooper swan is a designated species. The directive set up a network of protected sites. Under the Birds Directive these are known as SPAs. Under the Habitats Directive these are Special Areas of Conservation known as SAC's and they comprise areas of wetlands, grassland and forests. Together SPA's and SAC's form the Natura 2000 network.

[15] Environmental issues remain high on the EU agenda. In 2010 the Heads of State and Governments set a target 'to halt the loss of biodiversity and the

degradation of ecosystem services in the EU by 2020, restore them in so far as feasible, while stepping up the EU contribution to averting global biodiversity loss'.

[16] This road project also came within the Environmental Impact Assessment Directive given its size and scope. That involves completion of an environmental assessment. This is a distinct process however there is a cross over with the other environmental assessments. The Habitats Directive requires an additional obligation to carry out an appropriate assessment in certain circumstances. In the EU Commission Guidance it is clear that when implementing Article 6(3) of the Habitats Directive, an appropriate assessment may be conducted as part of an EIA or SEA process however it should be clearly distinguishable and identified within an environmental statement or reported separately. Of course, the conduct of an appropriate assessment within the EIA structure means that there is mandatory public participation whereas this is discretionary under the Habitats regime. A key difference between these regulatory schemes is that the Article 6(3) assessment is determinative of the competent authority's legal power to authorise a plan or project whereas the EIA and SEA processes are intended to inform and do not dictate a particular outcome.

History of the road project

[17] The Department published formal proposals for the road project in March 2007 for the purposes of public consultation. This followed an assessment that was prepared by consultants on behalf of the Department. In January 2007 the assessment was also the subject of comment by the Environment and Heritage Service of the Department of the Environment. All of this informed what is called an appropriate assessment or AA. The respondent avers on affidavit that the conclusion of the appropriate assessment was that the project would not give rise to significant effects upon the integrity of the selection features protected within the Lough Neagh and Lough Beg SPA. This was on the basis of certain measures being put in place.

[18] In March 2007 an environmental statement was published which included reference to an appropriate assessment in the following terms:

> "Due to the proximity of the proposed scheme to the existing SPA boundary, and the fact that several of the potentially affected fields are regularly used by grazing swans, a Test of Likely Significance and an Appropriate Assessment was undertaken in accordance with the requirements of Article 6, paragraphs 3 and 4 of the Habitats Directive 92/43/EEC…"

The report concluded that there could be direct and indirect impacts on the swan feeding areas, through direct loss of swan feeding habitat, disturbance from

pedestrian/cyclist activity along the new route, proximity of field accesses, and potential effect on field hydrology. The report also concluded that there could be direct and indirect impacts on the swans nearest roost site (McGrogan's hole) through potential noise disturbance, headlight glare and road lighting associated with the proposed Creagh Junction. Lastly, the report concluded that there could be direct and indirect impacts during the construction phase, through disturbance (depending on the timing of the works in the vicinity of the Toome complex), habitat loss within the Toome complex, and water contamination of the overall Lough Beg complex. All of the aforementioned potential impacts were considered, and a set of prescriptive mitigation measures was drawn up to offset any such impact, as outlined in a table. The appropriate assessment concluded that residual adverse impacts on the integrity of the Natura 2000 site with schemes implementation will not remain.

[19] I summarise the likely significant effects regarding the swans as follows:

- land take from the road resulting in a loss of grazing habitat
- disturbance arising from construction activities
- disturbance from vehicles
- disturbance at an important roost site
- changes to the feeding quality of fields arising from hydrological changes

[20] A letter has been provided in the papers dated 14 June 2007 from the RSPB. This states *inter alia* that the "RSPB objects to this proposal as it stands, as insufficient information has been provided to support the conclusion that the road proposal will not have an adverse effect upon the Whooper swans." The RSPB does however say that "we would review our position on receipt of the information requested below." The information requested broadly refers to the fact that the mitigation measures must be guaranteed and monitored.

[21] A revised Article 6 assessment incorporating a test of likely significance and appropriate assessment was completed in October 2007. This refers to the loss of habitat as 2.59 hectares out of a regular grazing habitat of 163 hectares and the total area of the SPA of 41,188 hectares. The report refers to two fields being directly affected and one indirectly. The assessment then sets out the mitigation measures of monitoring, landscaping and reduction of disruption during construction. The assessment was informed by Whooper Swan surveys. The report sets out a consideration of a range of other species but the only likely significant effects relate to Whooper swans.

[22] In a letter of 30 October 2007 the RSPB refers to the revised assessment and states that "subject to the operational mitigation measures being undertaken, we withdraw our objection." This letter is detailed and instructive. In particular, it contains the following statements in various paragraphs based on survey information:

- (2.3) The swans appear not to be disturbed by passing road traffic, and indeed a higher proportion than would be expected utilise the fields adjacent to the new Toome bypass

- (2.5) The prediction is that 3572 Total Swan Days (TSD) could be lost i.e. the birds would either have to relocate within other fields or could leave the Toome complex altogether. This equates to 5.5-5.7 per cent.

- (2.6) The same analysis was used to calculate additional TSD capacity that could be created by joining neighbouring fields, where possible given land ownership restrictions. The calculated potential gain is 5321 TSD, greater than the predicted loss.

- (3.1) The predicted loss of TSD, while over the 1 per cent threshold, is predicted to be entirely cancelled by gains due to operational mitigation. The RSPB is therefore of the opinion, that provided the operational mitigation is carried out prior to road construction, the project can proceed without undue predicted effect on the wintering Whooper swan population.

The RSPB then sought confirmation regarding field amalgamation and mitigation measures-in a substantial Table numbered Table 28.

[23] The project proceeded and the proposal issued by the Department consisted of a draft direction order, draft vesting order and an environmental statement. As part of the environmental statement the conclusions of the appropriate assessment were published for consultation. All of these matters were therefore placed within the public domain.

[24] In response to public representations to the proposal the Department convened a public inquiry in relation to the draft direction order, the draft vesting order and the environmental statement. This took place in the form of a public inquiry and it progressed for a number of days from 5 to 7 November 2007. The Department avers on affidavit that in response to representations which had been received to the proposals the appropriate assessment was updated in October 2007, prior to the inquiry and was available to participants on request. The assessment conclusions remained unchanged stating that there would be no significant effects on the integrity of any Natura 2000 sites.

[25] After the public inquiry process the Department again updated the appropriate assessment in July 2008. The assessment's conclusions remained unchanged in that it stated that there would be no significant effects on the integrity of a Natura 2000 site. The mitigation measures were repeated. The report refers to potential effects upon the Whooper swan and then sets out the mitigation measures.

[26] The report from the public inquiry comprised in the inspector's report of 2008 recommended that construction of the road in accordance with the published proposals should proceed. However there was a recommendation that one of the junctions at Annaghmore Road/Bell's Hill Road be revisited. This was redesigned and the project proceeded on that basis. Having considered the inspector's report and all other representations made the Department accepted the recommendations and decided that it should proceed with the proposed A6 Toome to Castledawson dualling scheme.

[27] On 8 September 2009 the Department published a formal statement setting out its response to the inspector's report in relation to the revised junction. Following consideration of the junction arrangement the Department published an updated statement in March 2011. On 14 March 2011 the then Minister for Regional Development issued the directions order authorising construction of the road. This was published in the Belfast Gazette on 25 March 2011. This notification complied with statutory requirements under Article 67A (8) of the Roads (Northern Ireland) Order 1993("the Order"). The advertisement advised the public of the right to challenge the decision under Article 67B (a) of that Order. The notices were required as part of the obligations under community law and pursuant to the Order. This was a notice to proceed which effectively informed the public that a decision to authorise the new trunk road had been taken. No statutory appeal was lodged from this decision.

[28] The scheme did not proceed at this time due to a funding issue. In relation to the Annaghmore/Bell's Hill junction a planning application was lodged in 2010. This was not considered to be a major planning application for the purposes of Article 31 of the Planning (Northern Ireland) Order 1991 and so a public inquiry was not strictly required. However, there were objections to the proposed vesting order and a public inquiry was conducted for that purpose. Following recommendations there were further revisions to the junction layout and a further planning application was submitted in June 2013 accompanied by an environmental statement. In May 2013 a stage one screening assessment for the purposes of the Habitats Directive and the Conservation (Natural Habitat etc) Northern Ireland Regulations 1995 was conducted in relation to the revised junction project. The conclusion was that the revised junction would have no significant adverse effects upon the Lough Neagh and Lough Beg SPA. Again there was no requirement for a public inquiry. Planning permission was granted on 3 December 2014. That decision has not been challenged.

[29] A draft vesting order for the revised junction was published in January 2015 and this was the subject of a public inquiry in September 2015. The inspector

reported in December 2015 and recommended that the vesting order should be made. In May 2016 the Department published a statement responding to the inspector's report and accepting the recommendations. The vesting order was made on 17 August 2016 along with the vesting orders for the trunk road. These have all become operative as of 26 September 2016.

[30] The respondent avers that in the environmental statement for the Toome to Castledawson section of the road the Department gave a commitment that if direction orders were made it would carry out further surveys every year prior to construction and that it would consult with the Environment and Heritage Service of the Department of the Environment. These surveys related to the presence of nesting birds and other protected species along the entire length of the route. This case has focused in particular on the issue of Whooper swans. In relation to Whooper swans the Department commissioned annual independent reports of the swan population in Lough Beg. These reports were based upon monitoring carried out by various organisations with specialist knowledge.

[31] The Department avers that updates were therefore undertaken in relation to the appropriate assessment in 2008, 2014 and in 2016. A considerable amount of evidence was provided in terms of updated environmental surveys. Consultation has also taken place with the RSPB and NIEA. In July 2014 an issue arose about the possibility that curlews may be nesting the vicinity of the road line. These birds are not listed in the Birds Directive however they are a red listed bird of conservation concern due to declining numbers in the UK and they are listed as vulnerable at European level. The Department's environmental consultants undertook curlew surveys during the appropriate season and these highlighted the issue. As a result of this mitigation measures were put into place.

[32] In relation to the RSPB's position the Department agreed to undertake additional analysis and incorporate additional mitigation measures to assuage their concerns. It appears clear that this involved including the removal of specific field boundaries to create suitable habitat prior to construction. These measures are described as mitigation measures to mitigate any adverse effect on the road upon the Whooper swan population.

[33] An additional ecological survey was conducted in 2008 post consent. It appears that a more sophisticated method was employed in 2014 and 2016. This was by way of a statement to inform the appropriate assessment (SIAA). In 2014 the statement was described as draft. The respondent's affidavit states:

> "I am advised by the Department's consultants that the word draft was used because it was considered that the process of assessment was an on-going one in which further update and modification of the proposed mitigation measures may be required prior to the construction."

[34] This statement is useful in referring back to the issue of likely significant effects which relate to the Whooper swan. It states that other qualifying species (lapwing, golden plover, greylag goose, wigeon and teal) have also been present in fields close to the scheme however the likely significant effect is found in relation to the Whooper Swan. Further survey information is referred to and in particular 4 fields were identified in this report as being used with a resultant loss of 2.84 hectares. The report says that the remaining portions of these fields are anticipated to remain attractive to swans.

[35] The 2016 review was again commissioned by the Department for consultants to carry out a further update of the 2008 appropriate assessment taking into account the 2014 update and the further swan surveys which had been undertaken during the interim years. This document is also entitled draft and specifically it is referred to as 2016 statement to inform the appropriate assessment (draft). The respondent at paragraph 67 of the second affidavit of Deirdre Mackle avers that a copy of the 2016 report was provided to the NIEA for consultation and again it did not raise any objection to its contents and conclusions of the proposed mitigation measures.

[36] It is of note that the response by the NIEA is comprised in a letter of 6 December 2016, after the decision-making process and the announcement by the Minister. The Department also refers to the fact that at regular meetings of the Whooper Swan Working Group no issues were raised. So the argument is that from all of the assessments carried out since 2007, the consistent conclusion has been that the construction and operation of the road scheme would not, by itself, or in combination with other known plans or projects, adversely affect the integrity of Lough Neagh and Lough Beg SPA or indeed any other Natura 2000 site. I have also been provided with records of meetings between the Department and groups such as the RSPB and the Irish Whooper Swan Study Group along with swan surveys and material from the Swan Working Group. The letter of 6 December 2016 sets out the position of the NIEA. This states that in the opinion of the NIEA the HRA remains fit for purpose.

The Ministerial Decision 17 August 2016

[37] The operative part of the Ministerial statement reads as follows:

> "Part V of the Roads (Northern Ireland) Order 1993 sets out the statutory requirements for the assessment of environmental impact of road schemes. Having regard to the environment 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 judgments on the scheme.

> Accordingly in light of the assessment undertaken and information presented within the statement to inform the appropriate assessment and the environment 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 are, the Ramsar site, or any other Natura 2000 site. Having decided to proceed with the scheme I commit my Department to carrying out the necessary actions to facilitate the inspector's recommendations and mitigation measures described in the Department's statement and the environmental statement."

[38] The context of this ministerial decision is set out in the second affidavit of Deirdre Mackle. She states that following the Department's 2016 review of the readiness of the scheme the matter was brought to the attention of the Minister. She states that the Minister was sent a written briefing from the Director of Engineering, Transport Northern Ireland on 26 June 2016. However the meeting arranged with officials for 23 June 2016 had to be rescheduled. At paragraph 69 of her second affidavit Ms Mackle avers that the Minister was further advised that the Department, having had regard to the environmental statement and the statement to inform the appropriate assessment, was satisfied that the scheme could proceed and that it would not give rise to adverse effects upon the integrity of Lough Neagh and Lough Beg SPA, either itself or in combination with other schemes and that he would be invited to agree with those conclusions. The purpose of this briefing was to advise the Minister on the status and detail of the A6 scheme in advance of meeting officials.

[39] It appears that a further meeting was arranged on 25 July 2016 and this is stated to be a meeting to make a final decision to progress the scheme to construction. A briefing paper dated 19 July 2016 was prepared and approved by Ms Mackle. She avers that that meeting had to be rescheduled and took place on 1 August 2016. At paragraph 70 of her second affidavit she avers that having been provided with a written briefing on the development of the scheme the key points were summarised to the Minister in order to progress the making of the vesting order, consideration of the Department's conclusions and progress to scheme construction. The conclusions reached by officials were highlighted and the Minister confirmed that the scheme should proceed.

[40] It then appears that arrangements were made to make the statement which occurred on 17 August 2016. I have seen some of the briefing documents which begin with a document which is dated 21 June 2016. This is a background note for

the briefing with officials on 23 June 2016. It states that subject to ministerial approval, the Department proposes to proceed with the scheme and make the necessary vesting orders. Paragraph 15 of this document is important and it reads as follows:

> "Having regard to the environmental statement, the statement to inform the appropriate assessment, and the consultation responses to the assessment, the Department is satisfied that the likely significant environmental effects of the proposed scheme have been assessed and have been sufficient to inform judgments to be reached with regard to this scheme. Accordingly, the Department (as the competent authority is content that the 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 Lough Neagh and Lough Beg SPA and Ramsar site, or indeed any other Natura 2000 site. Having caused an appropriate assessment to be carried out you will be asked to accept the Department's conclusions."

[41] The next document is dated 19 July 2016 and it replicates the previous document. There is then a document which is an office meeting note of 1 August 2016 which again refers to the previous documents. An internal memo dated 10 August 2016 clarifies that the issue is as follows:

> "Arrangements for the issue of your written ministerial statement and proceeding with the A6 Randalstown to Castledawson dualling scheme and the making of the necessary vesting orders. This will also include your appropriate assessment decision for the scheme."

[42] This theme is taken up in the document at paragraph 1 which states that at the meeting with officials on 1 August 2016 the Minister indicated his approval to proceed with the above scheme in the making of the necessary vesting orders. Paragraph 2 states "announcement of your decision is by way of written ministerial decision." The document then states that "this will also include your appropriate assessment decision. Arrangements are being made for you to issue your statement at 10.00 am on 17 August 2016".

[43] Following from the Minister making his statement, the applicant lodged his judicial review challenge. He made clear in his papers that he was not challenging the legally separate Randalstown to Toome section but a discrete stretch from Toome

to Castledawson announced by the Minister as part of the statement on 17 August 2016. The applicant asserted that this announcement is a decision to proceed and a notice of vesting order. The applicant relied upon his pre-action protocol letter and the response to it in which it was indicated that this was a decision on the appropriate assessment under the Habitats Directive.

Legal context

[44] The first relevant statutory provision is the Roads (Northern Ireland) Order 1993 as amended. Article 14(1) (c) of the Order provides that where the Department considers it to be expedient "it may by order direct that … (c) any road proposed to be constructed shall become a trunk road and the trunk road system shall be modified accordingly". An order under this provision is referred to as a direction order. The road in question in this case the A6 dual carriageway scheme is a trunk road.

[45] The procedure is set out in Schedule 8 of the Order and includes as follows:

(1) Publication of a draft direction order for consultation.

(2) Conduct of a public inquiry to consider objections to the proposal.

(3) Consideration of the objections and recommendations of the inspector.

(4) Making of the order, with or without modifications.

(5) Publication of notice of making the order.

[46] An adoption statement has been provided which was constructed by the Department and is dated 8 September 2009. The direction order was also made .This has been provided to me and it is entitled The Trunk Road T8 (Toome to Castledawson) Order (Northern Ireland) 2011.

[47] There is a further separate procedural obligation in this case in relation to the Environmental Impact Assessment Directive. This must be followed and the requirements are contained in Part V of the Roads (Northern Ireland) Order 1993. The process is particularly comprised in Article 67. Broadly, this involves a screening decision to determine if the project is EIA development publication and consultation in relation to that. It highlights the question of whether a public inquiry should be held allowing interested parties to appear and make representations. Article 67 also provides for a report of an inspector to be provided taking into account the consultation responses. In particular under Article 67(a) sub-paragraphs (8) and (9) if the Department decides to proceed it must publish a notice informing the public of its decision.

[48] This is an important provision because pursuant to Article 67B(a), a person aggrieved by the decision of the Department to proceed with the construction of the road for which an environmental statement was published may challenge it in the High Court within six weeks of the date on which notice of the decision is first published. There was no statutory challenge brought in this case. That is unlike the case of Re Alternative A5 Alliance [2013] NIQB 30 whereby a statutory challenge was brought within time and determined by the court.

[49] I then turn to the European environment and conservation protections. These are comprised in domestic legislation in the Conservation (Natural Habitats etc) (Northern Ireland) Regulations 1995. The Regulations consolidate the two directives which are relevant.

[50] There was no dispute in this case that land lying outside a protected site may be functionally linked in that the effect upon that land could have an effect on the site in question, RSPB-v- SSCLG [2014] EWHC 1523.

[51] There are important principles outlined in both directives which I can summarise as follows. In the Birds Directive in Article 2 it states:

> "Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level."

Article 3 states:

> "1. In the light of the requirements referred to in Article 2, Member States shall take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in Article 1.
>
> 2. The preservation, maintenance and re-establishment of biotopes and habitats shall include primarily the following measures:
>
> (a) creation of protected areas;
>
> (b) upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones;

(c) re-establishment of destroyed biotopes;

(d) creation of biotopes."

Article 4:

> "1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.
>
> 2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance."

[52] Article 3 of The Habitats Directive states as follows:

> "A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, comprised of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range. The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC."

[53] Once the list submitted by a Member State is approved by the Commission Article 6(2), (3) and (4) applies to the site. Article 6(2) is a general provision designed to prevent deterioration and disturbance. Article 6(3) specifically refers to plans or projects. Article 6(4) applies if Article 6(3) produces a negative assessment and it imports a test of imperative reasons of public interest before proceeding with such a plan or project.

The terms of Article 6 are as follows:

> 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.
>
> 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."

[54] The relevant parts of the directive have been transposed in the Habitats Regulation 1995 at Regulation 43 which reads as follows:

> "(1) A competent authority, before deciding to undertake or give any consent, permission or other authorisation for, a plan or project which:
>
> (a) Is likely to have significant effect on a European site in Northern Ireland (either alone or in combination with other plans or projects); and

(b) Is not directly connected with or necessary to the management of the site, shall make an appropriate assessment of the implications for the site's conservation objectives.

(2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment.

(3) The competent authority shall for the purposes of the assessment consult the Department and have regard to any representations made by it within such reasonable time as the authority specify."

[55] A further important principle is what is known as the "precautionary principle" which reflects the policy of the European Union. This transposes itself across all of the directives I have mentioned. Article 191(2) of the Treaty on the Functioning of the EU ("TFEU") dealing with union policy on the environment states:

> "Union policy on the environment shall aim at high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken that environmental damage should as a priority be rectified at source and that the polluter should pay."

Whilst there is no precise definition of what this precautionary principle means there is a clear message given in this quotation of the importance of environmental protection and conservation.

[56] Article 6 of the Directive does not describe how the appropriate assessment should be carried out however EU Guidance anticipates the sequencing as follows:

(i) A screening stage in which the authority identifies whether the project is likely to give rise to significant environmental effects upon the site. This has been described as a relatively low threshold.

(ii) If such effects are likely, the competent authority must assess those effects and ensure that the plan or project will not give rise to any adverse effects. In carrying out that assessment the competent authority may take account of proposed measures to mitigate the likely effects. Pursuant to Article 6 (3) the competent authority shall agree to

the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned.

(iii) If any adverse effects are likely to arise, the authorities should consider alternative solutions.

(iv) In the event that adverse impact remains, the Member State may only grant consent if there are overriding reasons of public importance. This stage involves engagement with the Commission.

[57] In relation to Article 6 a number of decisions from both domestic and European jurisprudence have been referred to. I summarise those which are most relevant to the arguments that have been made. The first case is a decision of the Court of Justice of the European Communities Grand Chamber known as Waddenzee reported at [2005] 2 CMLR 31. This was a reference for a preliminary ruling from the Netherlands in relation to the grant of authorisations for the mechanical fishing of cockles in the Netherlands Wadden Sea. This is a protected area for birds under the Birds Directive. The reference was to ascertain whether the annual authorisation of cockle fishing was to be regarded as an agreement to a plan or project which would mean that Article 6(3) of the Habitats Directive would be applicable. Further the State saw clarification on the relationship between Article 6(3) of the Habitats Directive and Article 6(2) which imposes on Member States the general obligation to avoid deterioration and significant disturbance of Natura 2000 sites. Other matters were raised but for the purposes of this decision those are the areas that are most applicable. This decision is important particularly in relation to the interplay between Article 6(3) and Article 6(2).

[58] Paragraphs [37] and [38] of the judgment read as follows:

> "37. Nevertheless, 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 and of wild fauna and flora, as stated in the first recital in the preamble to that directive.
>
> 38. The answer to the second question must therefore be that Article 6(3) of the Habitats Directive establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to

> the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site, while 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, and cannot be applicable concomitantly with Article 6(3) ."

[59] The Waddenzee case at paragraph 54 also states as follows:

> "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."

[60] Two cases were referred to where Article 6(2) obligations did require an assessment to Article 6(3) standards by way of an appropriate assessment. These were Grune Liga Sachsen –v- Freistaat Sachsen C-399/14 and Commission –v- Bulgaria C-141/14. These cases involved consents granted where no appropriate assessment had been carried out and where projects would cause adverse effects upon the site.

[61] The next case is Sweetman and Others v Pleanala (Galway County Council and Another Intervening). This is a decision of the Court of Justice of the European Union reported at [2014] PTSR 1092. This case involved the decision to grant development consent for the M6 Galway City Outer Bypass Road Scheme in the Republic of Ireland. The Supreme Court of Ireland referred to the Court of Justice at the European Union for a preliminary ruling regarding the interpretation of Article 6 of the Habitats Directive. In particular the question was in what circumstances such a project which would result in the loss of only a small proportion of a priority habitat would adversely affect the integrity of that site pursuant to Article 6(3) and whether the precautionary principle, which applied where there was uncertainty as to the existence or extent of risks, was applicable.

[62] On the reference it was held that Article 6(3) of the Habitats Directive established an assessment procedure intended to ensure by means of prior examination that a plan or project not directly connected with or part of the management of the site concerned but likely to have a significant effect on it was authorised only to the extent that it would not adversely affect the integrity of the site concerned. In relation to this case there was further consideration of Article 6(4) of the Directive and in the conclusion section the court stated:

> "In those circumstances, the creation of the new area may be regarded as a compensatory measure within the meaning of Article 6(4) of the same directive, provided that it is specifically linked to the project in question and would not otherwise have been implemented in the context of the ordinary management of the site as required by Article 6(1) or 6(2). Where that is so the project may be carried out provided that all the conditions and requirements laid down in 6(4) are fulfilled or observed."

[63] The CJEU at paragraph [48] set out its conclusions as follows:

> "It follows from the foregoing considerations that the answer to the questions referred is that Article 6(3) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that side if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority national habitat whose conservation was the object justifying the designation of the site in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal."

[64] A further case that was referred to is that of Briels and others v Minister van Infrastructuur en Milieu [2014] PTSR 1120. This case was in relation to the approval of a bridge over the Elbe river in the city of Dresden. It had been authorised before there was site approval for the particular area. On a subsequent review it was found that there was an on-going obligation to comply with the relevant Environmental Regulations pursuant to Article 6(2) of the Habitats Directive. In particular it was determined that any assessment should not have lacuna and also that any subsequent review should be in accordance with Article 6(3).

[65] Also in the case of Orleans and Others v Vlaams Gewest C-387/15 and C-388/15 the court considered a project for the development of Antwerp port. The project involved a direct loss and destruction of protected habitats. The issue was proposed mitigation in a different location. The court found that these were in substance compensation measures and in any event there was sufficient uncertainty about their success that it could not be concluded that they would provide the intended benefits. This case reiterated the distinction between mitigation and compensatory measures.

[66] The same issue was dealt with in the case of R (Hargreaves) v Secretary of State for Communities [2011] EWHC 1999. This case was in relation to a wind farm development and the potential to affect a population of geese. The judge in that case held that at paragraph [48] that the proposed steps were mitigation measures. He said:

> "Whichever way the ameliorating elements of the scheme are understood they are in substance mitigatory in nature applying the Managing Natura 2000 Sites definitions because the adverse effect being addressed is the possible reduction of the total number of pink-footed geese over-wintering at the SPA."

[67] Reference was also made to the Commission guidance on Article 6 which notes the distinction between compensation and mitigation at paragraph 5.4.1. It states as follows:

> "Mitigation measures… aimed to minimise or even cancel the negative impacts on the site itself. Compensation measures sensu stricto: independent of the project, they are intended to compensate for the effects on the habitat affected negatively by the plan or project …. They aim to offset the negative impact of a project and to provide compensation for responding to the negative effects on the species or habitat concerned."

[68] At paragraph 4.5.2:

> "In particular, an examination of possible alternative solutions and mitigation measures may make it possible to ascertain that, in light of such solutions or mitigation measures, the plan or project will not adversely affect the integrity of the site. As regards mitigation measures, these are measures aimed at minimising or even cancelling the negative impact of a plan or project, during or after its completion. Mitigation measures are an integral part of the specifications of a plan or project. They may be proposed by the plan or project proponent or they may be required by the competent national authorities ... Mitigation measures are distinguishable from compensatory measures sensu stricto see Section 5.4. Of course, well implemented mitigation measures limit the extent of the necessary compensation

> measures by reducing the damaging effects which require compensation."

[69] I was also referred to a recent Supreme Court decision of R (On the Application of Champion) v North Norfolk District Council and Another [2013] EWCA Civ. 1657 Lord Carnwath reviews the law in this area. In particular he deals with the requirements under an EIA and an AA. In broad summary this case involved a challenge to a development near a protected river area. Assessments in relation to environmental effect were not made at the relevant time. However, the negative assessment was reviewed and during the planning process it was found to be correct. The court found a procedural irregularity in relation to EIA screening and mitigation measures but declined to grant relief.

[70] Lord Carnwath deals with the issue of the Habitats Directive in detail from paragraph [10] to paragraph [14]. In particular at paragraph [10] he says:

> "Council Directive 92/43/EEC (The Habitat Directive) provides for the establishment of a European Network of Special Areas of Conservation under the title Natura 2000. Article 6 imposes duties for the protection of such sites."

[71] He continues at paragraph [13] to quote from Waddenzee:

> "As to the contents of such appropriate assessment the court said:
>
> > 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. Nonetheless, 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 the sites 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 1 to that Directive or a species in Annex 2 thereto and for the coherence of Natura 2000 and of the threats of degradation or destruction to which they are exposed ….
>
> 55. 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'."

[72] At paragraph 39, drawing on Waddenzee, Lord Carnwath refers to the fact that 'the formal procedures prescribed for EIA purposes, including 'screening', preparation of an environmental statements and mandatory public consultation have no counterpart in the Habitats legislation. He then quotes from Sullivan J in R (Hart District Council)-v- Secretary of State for Communities and Local Government [2008] EWHC 1201 Admin:

> "Unlike an EIA, which must be in the form prescribed by the EIA Directive, and must include, for example, a non-technical summary, enabling the public to express its opinion on the environmental issues raised(see Berkley – v- the Secretary of State for the Environmental [2001] 2 AC 603 per Lord Hoffman at p 615), an appropriate assessment under article 6(3) and regulation 48(1) does not have to be in any particular form(see para 52 of Waddenzee judgment)and obtaining the opinion of the general public is optional."

[73] In the context of the EIA directive, the applicant referred to R (Mageean) v SSCLG [2010] EWHC 2652 in his written arguments. This deals with a different subject matter however there is a common principle about passage of time and material change. That case refers to the decision of the House of Lords in R (Barker) v London Borough of Bromley [2007] 1 AC 470 which underlines the importance of a relevant change in circumstances being taken into account for the purposes of the Regulations and the Directive.

[74] In the Champion case the fact that an EIA screening did not take place at the proper time, did not result in relief being granted. The court was clear on this issue. I restate the principles Lord Carnwath referred to in paragraph 64 of that ruling drawing from his previous decision in R (Jones) v Mansfield District Council [2003] EWCA Civ 1408;

> "57. The appellant lives near the site, and shares with other local residents a genuine concern to protect her surroundings…With hindsight it might have saved time if there had been an EIA from the outset. However, five years on, it is difficult to see what practical benefit, other than that of delaying the development, will result to her or to anyone else from putting the application through this further procedural hoop.
>
> 58. It needs to be borne in mind that the EIA process is intended to be an aid to efficient and inclusive decision making in special cases, not an obstacle race. Furthermore, it does not detract from the authority's ordinary duty, in the case of any planning application, to inform itself of all relevant matters, and take them properly into account in deciding the case."

Submissions of the parties

[75] The applicant sought an order of certiorari quashing the decision of the Minister to proceed with the road project. He relied on two affidavits which he had filed. He also produced some affidavits from various landowners in the vicinity of the proposed road. These affidavits are dated January 2017 and they all follow the same theme whereby the landowners say they now do not want to co-operate with the land management plan. The applicant also relied on a skeleton argument and a responding submission. I commend Mr Murphy for the quality of the papers he has filed with the court, for his courtesy in court, for his command of the subject matter and for the effective way in which he argued the case. I intend to summarise his arguments as follows. Firstly, the applicant pointed out the importance of this issue. He stressed that the SPA was a very special place. He said that this was most

important wetland area on the island of Ireland. He stressed that the hinterland was also important.

[76] The applicant described the issue of the wildlife as a rich vein running throughout this area which he said should be protected. He referred to the precautionary principle as a guiding light. In particular he stressed that the Whooper swan is a protected species and he said everything should be done to protect it. He referred to the declining numbers of the Whooper swan in Northern Ireland particularly over the last number of years which he said contrasts with other parts of the island of Ireland. He referred to the nature of these animals, their need for space, their pattern of returning to fields and the prerogative of having them come to this area as part of a migratory route.

[77] In his argument the applicant voiced his objection to this discrete part of the road scheme due to what he said were the adverse effects upon the environment. He also referred in particular to the issue of surplus versus deficiency and he made the point that there would be landfill as a result of the new road. The applicant referred to the strength of the European regime in relation to conservation which has remained strong from its roots in Ramsar in 1971 through a series of further conventions which have always been updated and retained as an important focus of European jurisprudence and law.

[78] The applicant submitted that the 17 August 2016 Ministerial Statement is clearly a decision in relation to proceeding with the road. He argued that this means that the decision requires an assessment under Article 6(3) of the Habitats Directive. In support of his argument the applicant referred to the pre-action correspondence reply and the documentation filed by the respondent in terms of briefing documents which refers to an appropriate assessment decision. So the applicant says that an Article 6(3) appropriate assessment is required. He referred to what he called a "phantom assessment" stating that there was no up-to-date appropriate assessment and so he said that community law had been breached.

[79] The applicant also stated that the statement to inform the appropriate assessment draft contained some flaws. He submitted that documentation from 2015 and 2016 in terms of Whooper swan surveys was not fully considered. The applicant also referred to other breeds such as the Greylag goose not being assessed at all along with other species of water bird assemblage. The applicant made some criticisms of the composition of the bodies that were consulted about Whooper swans.

[80] The applicant argued that if Article 6(2) of the Habitats Directive applies that reference should be made to the Grune Liga and Bulgaria cases because the thrust of those cases is that if Article 6(2) applies the obligation is as strong as that under Article 6(3). In other words there is no lesser standard. In his closing submissions the applicant stated that whichever way the court approaches the question of the duty upon the Department under Article 6, the applicant respectfully considers that

a proper and robust appropriate assessment under Article 6(3) was an inescapable requirement immediately prior to the Minister authorising the commencement of the project in August 2016.

[81] A further argument made by the applicant was that the management agreements and the vesting of lands point to the fact that the measures within the appropriate assessment are not mitigation measures but are actually compensation measures. He says that there has been a breach of Article 6(4) of the Directive in that there has been no compliance with it. In support of his argument the applicant referred to the Department of the Environment's assessment when the original appropriate assessment was being compiled in 2007. He referred to documentation which he said he had obtained through freedom of information requests which included an opinion that land management appeared to be compensation rather than mitigation. The applicant referred to the fact that this was then taken out of subsequent appropriate assessments.

[82] The applicant said that he was not at the public inquiry and did not raise objections or make submissions to that because the RSPB had taken on the mantel of this case. He now appears to be disenchanted with the representations made by the RSPB because whilst an objection was raised to the scheme it was subsequently withdrawn. The applicant said he was shocked by the RSPB's current position that they did not consider that they should take a view in relation to the lawfulness or otherwise of the current scheme. The overall thrust of the applicant's submission was that this decision was unlawful. He referred in particular to the declining numbers in the swan population and the environmental imperative to save this habitat for them.

[83] Mr McLaughlin, on behalf of the respondent, began by submitting that the Minister's statement of August 2016 was not a decision to authorise the road scheme. He argued that it was a decision to proceed with construction and also to publish the relevant vesting orders. Mr McLaughlin said that the decision to authorise the scheme was taken in 2011 following public inquiries from 2007 to 2011. Mr McLaughlin reiterated the fact that when granting leave the court stressed that it was not looking at decisions made a long time ago which had not been challenged.

[84] Mr McLaughlin then made a number of preliminary points as follows in relation to the Habitats Directive. He said that the obligation under Article 6(3) of the Directive to carry out an appropriate assessment is one which arises prior to the decision to authorise a plan or project. He said that Article 6(3) does not give rise to post consent obligations and he said that this is plain from the wording of Article 6 (3) itself. Mr McLaughlin therefore argued that once the statutory orders were made in 2011 all obligations under Article 6(3) ceased. He submitted that the two subsequent reviews of the 2008 assessment in 2014 and 2016 did not derive from any obligation under Article 6(3) but they were exercises undertaken by the Department in furtherance of commitments given in the environmental statement and as a result of the public inquiry. If those commitments are enforceable Mr McLaughlin said the

legal basis for enforcement derives from principles of domestic public law not Article 6(3) of the Directive.

[85] Mr McLaughlin then argued that once consent was granted any obligation upon the Department to ensure that action on its part does not result in the significant deterioration of protected habitats or cause significant disturbance of species derived from Article 6(2) of the Directive. In support of this Mr McLaughlin relied on the authority of Waddenzee in submitting that the two provisions are mutually exclusive. Mr McLaughlin said that the two cases of Grune Liga and Bulgaria do point out that when Article 6(2) is engaged a review of the project must be to a standard similar to that under Article 6(3). However he argued that these cases are fact sensitive and that that the facts of this case are very different and as such Article 6(2) does give rise to any obligation to conduct a review of this project or the previous appropriate assessment. As such he stated that the reviews in 2014 and 2016 did not themselves amount to appropriate assessments so they should not be judged by the standards of Article 6(3). Mr McLaughlin stated that the Department had acted fairly. He submitted that the reviews incorporating the annual swan surveys and other relevant information were an appropriate step.

[86] Mr McLaughlin also said that the measures for field management and such like were clearly mitigation measures and not compensatory measures under the legislative scheme. In relation to this Mr Mc Laughlin distinguished some of the European jurisprudence. He argued that the field management went beyond community obligations but reflected commitments made by the Department and through the public inquiry. He said that the Department's course had been to undertake these on a voluntary basis. However it retained vesting powers to facilitate any mitigation measures. Mr McLaughlin pointed out that up until the service of the applicant's second affidavit on 1 February 2017 the Department had never received any indication from any land owners that they would not enter into a management agreement.

[87] Mr McLaughlin referred to the delay in bringing this challenge and the fact that this scheme is very well progressed. He referred to the fact that this part of the road scheme is ready to proceed. He said that the case has gone through a public procurement procedure without any legal challenges. A contractor is ready to begin on the road and the vesting orders having been made. Mr Mc Laughlin also referred to the fact that he Department is liable for compensation to landowners if the scheme does not proceed.

Consideration

[88] I emphasise that the role of this court is related only to the issue of the legality of any decision that is impugned. The court is not concerned with the merits or demerits of various decisions and conclusions reached by the Department provided those decisions are rational and have been arrived at by due legal process. This court is not providing a substantive appeal in respect of planning decisions and has

no function in that regard. I also reiterate the point made at the leave hearing that this court cannot look at decisions made years ago. The purpose of judicial review is to challenge decisions promptly after a decision is made and it would be erroneous of me to take a course which would allow a decision made long ago to be re-opened save in the most exceptional of circumstances. This is particularly significant in a case such as this where much financial and physical effort has been put into the construction of a very important road network.

[89] It is clear to me that the development consent for the road was given in March 2011. It is also clear that it was given after an environmental impact assessment and a habitats assessment. These findings are of great importance in this case because the consent given at that time was not challenged by anyone. That is despite the fact that this scheme had a high public profile and various bodies were interested and engaged such as the RSPB. In particular I note that leave was not granted in relation to the environmental impact assessment because the court concluded that that was a procedural step that had been taken prior to development consent and that it would be inappropriate to have it looked at again. The question in this case is whether the Habitats Directive is different and whether the obligations it imposes have been complied with.

[90] The first question in this determination is to decide whether or not a decision has been made that is justiciable. In looking at this question I bear in mind that this road project by its nature involves various stages. I appreciate that context and I understand that a planning process has different stages. However in relation to this stretch of road there has only ever been one plan or project. I note that in Champion Lord Carnwath raised a reservation about the principle set out in R (Burkett) v Hammersmith & Fulham LBC [2002] UKHL 23 at paragraph 63. However, each case will depend upon its own facts, and despite some hesitation, I accept that the decision in this case is in itself justiciable.

[91] An analysis of the case then requires an examination of what exactly the 17 August 2016 Ministerial Statement referred to. The statement was clearly made for a reason and there was a lead in to it. The wording of it is important because it was not simply a bare assertion that the road project would proceed. The effect of the statement was that the road would proceed. However the statement has different elements. Having looked at the documentation it is clear that this announcement was confirmation of a decision in relation to vesting orders. It was also expressed to be confirmation of a decision in relation to environmental compliance. It also gave a commitment to ongoing mitigation measures. All of the documentation provided by the Department refers to it being an appropriate assessment decision. This decision was taken on 1 August 2016 and the Ministerial Statement was an expression of it. In order to determine the lawfulness of the decision it is important to look at what informed it.

[92] I should also say that in my view the issue in this case is only properly directed towards the Whooper swans. I am not attracted by the arguments the

applicant made about other qualifying species. It is clear to me that other species have been considered however the only substantiated case made by the applicant in relation likely significant effects is that pertaining to the Whooper swans. I am not prepared to allow the applicant to widen the challenge beyond that.

[93] The source material for the appropriate assessment decision is really the statement to inform the appropriate assessment referred to as the SIAA. It is dated August 2016. The executive summary of the document says that it updates the test of significance and appropriate assessment. It says that the previous test of significance and AA concluded that with the inclusion of mitigation measures, the scheme would not have an adverse effect on the integrity of the Lough Neagh and Lough Beg SPA and Ramsar site. It then states:

> "This document reviews the findings of the previous report in light of (1) the time that has elapsed since the previous AA and associated changes in background conditions. (2) Developments in practice and understanding of the AA process. (3) Amendments to the scheme and additional information about qualifying interests of the Lough Neagh and Lough Beg SPA and Ramsar site."

[94] In particular the assessment process is stated to be based on existing data sources and has been reviewed in the context of relevant legislation and current guidance in the Habitats Regulation Assessment (HRA) process. I have seen the relevant guidance which was not available when the initial appropriate assessment was made and I note that this statement to inform the appropriate assessment seems to emanate in its form from that guidance. Reference has been made to The February 2009 Environmental Assessment of Implications of European Sites Design Manual. It sets out the assessment models in Chapter 4 in Figures 4.2 and 4.3. However, having examined that guidance manual the statement to inform an appropriate assessment is only part of the process in the compilation of an appropriate assessment.

[95] In this case the relevant SIAA document is substantial running to 71 pages. It replicates a previous document compiled in 2014. It describes the scheme and then the mitigation measures. Paragraph 2.3 states that it has been prepared following the approach set out in Volume 11, Section 4, Part I of the Design Manual for Roads and Bridges Assessment of Implications of Highways and/or Roads Projects in European Sites including Appropriate Assessment. At paragraph 2.4 of the document there is some guidance given as to what the document was designed to do because at the end of that section reference is made to the fact that "it forms a "shadow" appropriate assessment, which Transport NI as competent authority may adopt as the basis for its conclusions."

[96] I can find no explanation for this description of a "shadow" assessment. What is clear to me is that the document was prepared by a range of specialist consultants.

The statement then goes on to consider in detail the entire Randalstown to Castledawson dualling scheme and it refers at paragraph 10 to the conclusion. In this section the statement refers to the fact that the scheme does not impinge the boundary of the SPA or Ramsar site. The screening exercise identified that the part of the route (between Toome and Castledawson) would give rise to a number of likely significant effects upon one of the qualifying interests of Lough Neagh and Lough Beg SPA (Whooper swans). These effects were identified in respect of (1) loss of grazing habitat used by qualifying interests; (2) disturbance during construction to qualifying interests using grazing habitat; (3) disturbance during operation of the road to qualifying interests using grazing habitat; (4) disturbance during operation of the road to qualifying interests using a roosting site and changes to feeding, quality of fields arising from changes to the hydrological regime. These elements were then subject to an assessment of their effects upon the integrity of Lough Neagh and Lough Beg SPA in respect of the sites conservation objectives.

[97] Whilst various effects were identified the core area of concern raised by the applicant is the loss of grazing habitat used by Whopper swans in this area. I have examined whether this has been properly considered. In particular I note the loss of approximately 2.84 hectares. The SIAA refers to the annual surveys in assessing this as follows:

> "The importance of fields along the route was assessed in four ways. This identified a total of four fields considered important for Whooper swans and which will experience some habitat loss or fragmentation as a result of the scheme. The combined anticipated loss of habitat from these fields is estimated as 2.84 ha. Additional habitat that has been used by swans at least once over the last nine winters will also be lost (approximately 12.48ha) although swans have not been recorded from approximately half of this additional area during the past seven years.
>
> Given the small amount of habitat that is to be lost, the proven ability of Whooper swans to vary use of fields within the Toome complex between years, and that the carrying capacity of the complex has not yet been reached, meaning fields can accommodate displaced swans, it is concluded that the loss of this habitat would not result in the site failing to meet its conservation objectives and hence there would be no adverse effect upon the integrity of Lough Neagh and Lough Beg SPA and Ramsar site."

[98] The report goes on to say that the scheme includes a number of mitigation measures that will avoid or reduce any effect. It refers to the working group in relation to swans and it refers to generic mitigation particularly the positioning of accommodation access routes in the vicinity of fields used by swans, soft landscaping proposals, and noise and light attenuation methods. One of the main factors influencing use of the fields by Whooper swans is the nature and quality of grazing habitat at present. The report states that "this is beyond the influence of the road scheme however the working group is seeking to improve management of the remaining fields to maximise their feeding value for swans. This may include relocation/removal of field boundaries (within the same landownership) to ensure that fields are of the required minimum size".

[99] The report concludes "There are commitments to monitor the swan populations. The minor residual effects of displacement of some swans from fields along the proposed route have been considered in combination with the effects of other projects and plans for the area. Other plans in the project considered include the Magherafelt area plan and Creagh Business Park. In conclusion, having regard to the environmental statement, the SIAA and the consultation responses to this assessment, the likely significant environmental effects of the proposed scheme have been assessed and have been sufficient to inform judgments to be reached with regard to the scheme. Accordingly, the 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 Lough Neagh and Lough Beg SPA or indeed any other Natura 2000 site." The Ministerial Statement borrows this language.

[100] It is clear to me that the intention behind this document must have been to update the appropriate assessment. In particular there was to be ongoing review and monitoring of mitigation measures. The update does not change the view that there are likely significant effects. However, in this case the second stage was reached as mitigation measures were identified to include ongoing monitoring. I can see that such an assessment is dynamic. Indeed the mitigation plans did change over the years in tandem with the ongoing process. The Department had also committed to ongoing monitoring and in my view it makes sense that updates to the appropriate assessment would occur. Such a process must be with a view to assessing if the original assessment should remain in place. But it must also mean that there must be an openness to see if the original assessment should be revised, in other words this process must contemplate not proceeding if the information is unfavourable.

[101] The impugned decision relates to environmental compliance. The language used derives from the Habitats Directive. The process of completing assessments had changed since the original assessment in 2007 no doubt due to a growing knowledge and awareness in the field. Further guidance was produced and this included templates for the assistance of competent authorities. I can therefore see where the SIAA model derived from. The problem in this case is really down to the sequencing. By virtue of the guidance an SIAA leads to an appropriate assessment.

That is the applicant's case when he refers to a 'phantom document.' However, the SIAA is not an assessment made by the competent authority. It is effectively a consultancy report provided to the competent authority. In this case the Department as a competent authority has considered the updating material and the Minister has referenced it. The confusion arises because the updating material is used to validate the original assessment rather than found a new one. The decision made was essentially that the original appropriate assessment remains correct.

[102] I consider that there has been substantial delay in this case which prevents the applicant mounting a challenge in relation to the efficacy of the original appropriate assessment. The question is whether there is a valid challenge to the Minister's decision to confirm that original assessment. The core issue in this case is whether or not the Minister's decision as to the correctness of the appropriate assessment is irrational. I have carefully considered this. There are two competing arguments. The respondent argues that the decision to conduct a review is out with the obligations imposed on the Department by the Habitats Directive as embedded in the Northern Ireland regulatory structure. It says that this is post review monitoring based upon commitments given in the environmental statement and flowing from the public inquires. As such the respondent submits that there is nothing unlawful about it and that the process has been fair and rational.

[103] Against that argument the applicant contends that the process undertaken in August 2016 was dictated by the Habitats Directive, as it involved a statement to inform an appropriate assessment. He says that if so the Directive has not been complied with as there should have been a new appropriate assessment. This divergence involves a consideration of community law. Specifically the issue is whether there has been any breach of the Habitats Directive. The focus of the argument was twofold. Firstly that Article 6(3) applied and by consequence Article 6 (4) had to be considered. Secondly in the alternative that Article 6(2) applied.

[104] In this regard it is important to focus on the wording of the Regulation at issue which is informed by the Directive. An assessment must be 'appropriate'. It does not have to take a particular form. It must be based on scientific knowledge and it should not have gaps. The guidance is important but it is not a rigid legal code. It seems to me that there should be some reflection of the particular circumstances of each case. In this case what the Minister has done is consider whether in the light of updating information, the appropriate assessment was correct. He has relied upon current methods and methodologies in the particular circumstances. The reviews represent a further iteration of the original assessment and lead to a confirmation that it was correct.

[105] In my view it was appropriate to review pursuant to national law obligations. Fundamentally, this illustrates the Department's commitment to the appropriate assessment and it's adherence to promises previously made during the process. Indeed it seems to me that there would be a valid criticism if the Department had reneged upon these commitments. The updating process was not completed in a

vacuum or behind closed doors. There were swan surveys and other updating information and consultation with relevant bodies about the mitigation measures. This included the RSPB and the Irish Whooper Swan Group. It must be remembered that the requirement in Article 6(3) to conduct an assessment in line with the best scientific knowledge can never be absolutely certain. However in this instance the Department has gathered together the best information available.

[106] It is important to note that the issue of likely significant effect to the Whooper swan from the planned road never changed. In other words the environmental impact was identified at an early stage. This complies with the Directive in relation to environmental protection. As such I consider that the original assessment is an appropriate assessment. There was no material change of circumstances regarding the likely significant adverse effect upon Whooper swans. I have already said that it is too late to make any challenge to the original decision and that includes the categorisation of mitigation measures. The ongoing process is really the outworking of mitigation measures but the basis of the assessment has not changed.

[107] I now turn to specifically consider whether there was a community obligation to complete a new assessment under the Habitats Directive. This issue is at the core of the challenge.

[108] In relation to Article 6 (3) of the Habitats Directive, the decision of Waddenzee is clear. The obligation attaches to a plan or project not directly connected with or necessary to the management of the site but likely to have significant effect thereon. Article 6(3) states that the competent authority 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 having obtained the opinion of the general public. The obligation is pre consent. There seem to me to be three stages namely assessment, decision, and then if there is a negative assessment, consideration of Article 6 (4).

[109] The respondent accepts that Article 6(3) applies but it says that it has been complied with long ago and pre consent. There is no obligation post consent to review contained with the Regulation. That is correct. I do not accept a suggestion that there was a second plan or project which would trigger a further obligation. There was one principal road plan affecting this stretch of road. As such I accept Mr McLaughlin's submissions on this point. I cannot see that there is an argument to be made about whether or not the Directive was properly applied pre consent. In other words it seems to me that the argument about compensatory versus mitigation measures is way out of time and is not a challengeable point. So I reject the applicant's arguments regarding an alleged breach of Article 6(3) and 6(4).

[110] The next question is whether Article 6(2) applies and if so whether there has been any breach. There is a valid argument that the fact that a plan or project has been authorised according to Article 6(3) renders the general protection under Article 6(2) superfluous. This follows because if there is compliance with Article 6(3) it is assumed that there are not likely to be adverse effects. I therefore have some

conceptual difficulty in seeing that Article 6(2) applies in this case. However, there has been delay since consent and that might lead to a situation where the Article can be invoked. I will therefore consider Article 6(2) as follows on the basis that it is engaged.

[111] Article 6(2) is less clearly defined that Article 6(3). However, I begin by stating that I do not consider that Article 6(2) requires an appropriate assessment save in the particular circumstances of cases such as Grune Liga C-399/14 and Commission v Bulgaria C-141/14. In both those cases projects were approved prior to the designation of the site and without an appropriate assessment. Those decisions made clear that an appropriate assessment would still be required but only in particular circumstances. That must follow as a matter of logic otherwise there would be a constant need for appropriate assessments notwithstanding the wide nature of the Article 6(2) obligation. So I do not consider that there has been a breach in this respect.

[112] Article 6(2) is rooted in the prevention principle.' Member States shall take appropriate steps to avoid, in the special areas of conservation, deterioration…as well as disturbance.' This is an anticipatory provision. The scope is obviously broader that Article 6(3) as it applies permanently to SACs. It can concern past, present or future activity. There is a spatial limit as it is confined to species and habitats located in the SACs. However it seems to me that it also includes measures which need to be implemented outside the SAC if events outside the SAC have an impact on habitats or species within the SAC. The habitats and species must be designated. In terms of disturbance of species, Article 6(2) specifies that appropriate steps have to be taken to avoid disturbance in so far as such disturbance could be significant in relation to the objectives of the Directive. In terms of deterioration it simply states that this should be avoided.

[113] The main issue in this case is disturbance of a designated species namely Whooper swans. Any event which contributes to population decline may be regarded as significant disturbance. The question is whether there has been any breach of the obligation. I refer to the documentation at issue. In particular the Department has referred to the ongoing review process, the annual swan surveys and such like. The SIAA of August 2016 refers to its use of data collected as part of national surveys and new information about the frequency, distribution and number of Whooper swans that use particular fields collected over the last eleven years winter 2005/06-2015/16 in assessing the effects upon the SPA Ramsar site. This involved consultation with appropriate experts. It seems to me that there is some margin of discretion afforded to the Member State in relation to compliance under this provision.

[114] There is no particular format required for Article 6(2) compliance and I do not consider that this was a case where Article 6(2) necessitated a new appropriate assessment under Article 6(3). The requirements under the EU Directives are extremely important in promoting environmental protection but by the same token

they should not be a hindrance to proper development. It is important to state that the updating process followed from the commitment to review the road plan including the mitigation measures. It does not emanate from community law. In any event, given the steps taken in this case, I consider that any Article 6 (2) obligation has been complied with. Whilst Mr Murphy makes some substantive criticisms of the information gathered and the authors of it I do not find that this renders the process unlawful and I do not consider that the general Article 6(2) obligation has been breached.

[115] I therefore find no breach of Article 6 of the Habitats Directive. I do not consider that the decision making is procedurally flawed given that the Article 6(3) process has been followed preconsent and Article 6(2) if applied has also been complied with post consent. It must be remembered that the obligation under Article 6(3) is to provide an appropriate assessment. That has been provided in this case. I agree with the submissions that the review process is not part of a community obligation but rather that it was based on promises previously made. In any event I consider that it has been properly utilised to validate the appropriate assessment. To my mind the decision is in keeping with the purpose of the Directive. As such the decision reached was rational and lawful.

Conclusion

[116] Accordingly, I dismiss the application. I offer a final word to the applicant. I want to record that he conducted his case impeccably with the assistance of his wife. I know that he will be disappointed by this decision but I commend him for the care and attention he has applied to his case and for raising environmental awareness in relation to this important issue.